

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY,

Complainant,

and

BOARD OF REGENTS, University of
Hawaii, State of Hawaii,

Respondent.

CASE NO. CE-07-799

ORDER NO. 2847

ORDER GRANTING
COMPLAINANT'S MOTION FOR
LEAVE TO FILE FIRST AMENDED
COMPLAINT, FILED ON APRIL 24,
2012

ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE
TO FILE FIRST AMENDED COMPLAINT, FILED ON APRIL 24, 2012

On April 24, 2012, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Complainant) filed a Motion for Leave to File First Amended Complaint with the Hawaii Labor Relations Board (Board). Complainant's counsel states in a Declaration, dated April 24, 2012, that the amendment is necessitated by information that was received and confirmed after the filing of the original complaint.

On May 2, 2012, Respondent BOARD OF REGENTS, University of Hawaii (BOR, UH, or Respondent) filed Respondent University of Hawaii's Opposition to Complainant's Motion for Leave to File First Amended Complaint with the Board. Respondent contends that the proposed amendment is futile because Interim University Librarian Gregg Geary (Geary) decided not to fill the instructional position that Michelle Kowalsky (Kowalsky) resigned from on March 8, 2012 and the reason for Geary's decision was the need to commit more resources to areas other than filling instructional positions. Respondent argues that Geary's decision not to fill the instructional position prevents UHPA from making a prima facie case of retaliation. Even if UHPA could make a prima facie case of retaliation, Respondent contends UHPA did not claim that Geary's reason for his decision not to fill the instructional position was pretextual. Accordingly, the Respondent contends that the UHPA's retaliation claim fails, and the Board should deny UHPA's leave to amend the complaint.

On May 4, 2012, Complainant filed a Reply to Respondent University of Hawaii's Opposition to UHPA's Motion for Leave to File First Amended Complaint with the Board. UHPA contends, *inter alia*, that Respondent is incorrect in arguing that

UHPA did not claim that Geary's action of not filling the instructional position was pretextual, since UHPA's counsel repeatedly referred to Respondent's refusal to fill the position David Brier (Brier) applied for as a pretext for discrimination during a hearing on UH's Motion to Dismiss on April 23, 2012; that Respondent became aware of Kowalsky's lack of qualifications on November 11, 2011, but waited until two weeks after Brier filed his prohibited practice complaint to remove her; that Respondent has committed a recent adverse action in not filling the position Brier sought, and that Geary is continuing the discriminatory and illegal decision-making of his predecessor.

After review of the record, the Board finds that Respondent's opposition to the instant motion was not timely filed with the Board. Complainant's motion for leave to amend the complaint was filed with the Board and served on Respondent on April 24, 2012. Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii), provides:

Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

HAR § 12-42-8(c) provides:

In computing any period of time prescribed or allowed by these rules or by order of the board, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is Saturday, a Sunday, or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. As used in this section, "holiday" shall mean any day designated as such pursuant to section 8-1, HRS.

Thus, in computing the deadline for a response to Complainant's motion, the Board finds that five business days after April 24, 2012 is May 1, 2012. However, Respondent's opposition was filed with the Board on May 2, 2012, one day late. Thus, the Board finds that Respondent's opposition is untimely.

Assuming *arguendo*, Respondent's opposition was timely, however, the Board would nevertheless find that the BOR's argument lacks merit and addresses the sufficiency of evidence rather than whether UHPA states a claim under HRS § 89-13.

UHPA seeks to amend its original complaint to, *inter alia*, add allegations that on March 8, 2012, library administrators removed a new hire who allegedly did not meet the minimum years of experience for the position; that Brier was the only other candidate for the position who met the position's qualifications, and was ranked as acceptable by the hiring committee; that UH has refused to place Brier in the position; that Brier is performing the work of the position; that Brier is the spouse of Vickery Lebbin (Lebbin) who recently prevailed in her arbitration against UH Chancellor Virginia Hinshaw and Librarian Paula Mochida for discriminatory and retaliatory conduct, and that Brier and Lebbin also testified for UHPA in its Petition for Unit Clarification. The Board thus finds that UHPA's proposed allegations contain a newly discovered event regarding Brier and concludes that UHPA's motion for leave to amend the original complaint in this matter is not futile.

Accordingly, the Board in its discretion hereby grants the UHPA's Motion for Leave to File First Amended Complaint pursuant to HAR § 12-42-43.¹

Accordingly, Complainant shall immediately file its First Amended Prohibited Practice Complaint with the Board, as attached to its Motion for Leave to File First Amended Complaint, filed on April 24, 2012. The Board will thereupon issue a Notice to Respondents of the First Amended Prohibited Practice Complaint.

DATED: Honolulu, Hawaii, May 9, 2012.

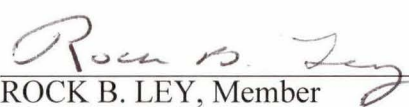
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:
Linda M. Aragon, Esq.
Jeffrey S. Harris, Esq.

¹Hawaii Administrative Rules (HAR) § 12-42-43 provides as follows:

Any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon.