STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEROY MAMUAD, Complainant, and DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondent.	CASE NO. CU-10-331 ORDER NO. 3042 ORDER DENYING UPW'S MOTION TO SET ASIDE ENTRY OF DEFAULT FOR FAILURE TO FILE TIMELY ANSWER AND FOR RELIEF FROM A JUDGMENT AND ORDER; AND DENYING UPW'S MOTION TO SET DEADLINE FOR COMPLAINANT'S RESPONSE TO DECEMBER 26, 2014 MOTION AND OTHER APPROPRIATE RELIEF

ORDER DENYING UPW'S MOTION TO SET ASIDE ENTRY OF DEFAULT FOR FAILURE TO FILE TIMELY ANSWER AND FOR RELIEF FROM A JUDGMENT AND ORDER; AND DENYING UPW'S MOTION TO SET DEADLINE FOR COMPLAINANT'S RESPONSE TO DECEMBER 26, 2014 MOTION AND OTHER APPROPRIATE RELIEF

On December 23, 2014, the Board issued Order No. 3037, Order Deferring Hearing and Directing the Parties to File Proposed Conclusions of Law and Legal Arguments in Support of their Positions, pursuant to Hawaii Administrative Rules (HAR) § 12-42-45(a) and (g).[i] The Board also noted that, pursuant to § 12-42-45(g), the failure to file an answer only constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing; however, the rule does not require the Board to make any particular legal conclusion regarding whether a prohibited practice was or was not committed, nor does the rule prohibit the Board from holding a hearing on a complaint in its discretion. Accordingly, the Board deferred the hearing on the Complaint scheduled for December 29, 2014.[ii]

On December 26, 2014, Respondent DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO (Respondent or UPW) filed a Motion to Set Aside Entry of Default for Failure to File Timely Answer and for Relief from a Judgment and Order along with its accompanying documents, and on December 29, 2014, Respondent filed an Errata to the Memorandum in Support of Motion to Set Aside of [sic] Default for Failure to File Timely Answer and for Relief from Judgment and Order Filed on December 26, 2014 (collectively, Motion to Set Aside Entry of Default). On January 5, 2014, Respondent filed a

Motion to Set Deadline for Complainant's Response to December 26, 2014 Motion and Other Appropriate Relief (Motion to Set Deadline).

I. Motion to Set Aside Entry of Default

Respondent asserts that a new UPW employee had never opened mail with a notice of complaint from the Board before, and did not know of the UPW's procedure of faxing the complaint to the UPW's counsel; rather, the new employee filed the notice of complaint in a folder labeled "HLRB – Prohibited Practices Complaint." As a result, the UPW's State Director did not know about the misplaced file until he heard from the UPW's legal counsel on December 17, 2014. The UPW also asserts that the failure to get the notice of the complaint to legal counsel so that an answer could be timely filed was highly unusual for the UPW and an extraordinary event; and, that this incident is the first time since 2003 that a notice of complaint filed against the UPW was not immediately faxed to legal counsel.

As of the time of this Order, Complainant LEROY MAMUAD (Complainant or Mamuad) has not filed a response to Respondent's Motion to Set Aside Entry of Default. Pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii), a response to the motion was due within five days after service of the motion papers, unless the Board directs otherwise. It is unclear to the Board whether Complainant would have intended to file a response to the Motion to Set Aside Entry of Default pursuant to the Board's rules in the absence of Respondent's Motion to Set Deadline. However, for the reasons discussed in more detail below, the Board holds that Respondent, as the moving party, has failed to establish that it is entitled to relief from Order No. 3037, thus rendering the need for Complainant's response moot.

Pursuant to HAR § 12-42-45(a), a respondent "shall file a written answer to the complaint within ten days after service of the complaint." In turn, § 12-42-45(g) provides that if a respondent fails to file an answer, "such failure **shall constitute** an admission of the material facts alleged in the complaint and a waiver of hearing" (emphasis added). However, § 12-42-45(d) provides that "**[i]n extraordinary circumstances** as determined by the board, the board may extend the time within which the answer shall be filed" (emphasis added). Accordingly, the proper standard for Respondent's Motion to Set Aside Entry of Default is "extraordinary circumstances" which would justify an extension of time by the Board for Respondent to have filed its answer.

The Hawaii Supreme Court has defined extraordinary circumstances as "circumstances that are beyond the control of the complainant and make it impossible to file a complaint within the statute of limitations" (Office of Hawaiian Affairs v. State of Hawaii, 110 Hawaii 338, 360, 133 P.3d 767, 789 (2006), *citing* Felter v. Norton, 412 F. Supp. 2d 118, 126 (D.D.C. 2006)). Thus, the Intermediate Court of Appeals did not find "extraordinary circumstances" sufficient to

justify tolling of the statute of limitations where the State of Hawaii said explicitly and repeatedly that it was following the law (Garner v. Dept. of Education, 122 Hawaii 150, 159-60, 223 P.3d 215, 224-25 (App. 2009)). On the other hand, the Hawaii Supreme Court has explained that fraud on the Court by an adverse party may constitute "extraordinary circumstances" (Cvitanovich-Dubie v. Dubie, 125 Hawaii 128, 156-57, 254 P.3d 439, 467-68 (2011), *citing* Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1104 (9th Cir. 2006)).

In the present case, the Board finds that a new employee's unfamiliarity with the UPW's usual practice of faxing notices of prohibited practice complaints to the UPW's counsel does not constitute extraordinary circumstances, despite the infrequency in which it occurs. It is a well-settled principle that ignorance of proper procedure or lack of sophistication does not, by itself constitute extraordinary circumstances. See Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (*citing* Allen v. Yukins, 366 F.3d 396, 403 (9th Cir. 2004); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000); and Felder v. Johnson, 204 F.3d 168, 171-72 n.10 (5th Cir. 2000). A garden variety of excusable neglect is distinguishable from extraordinary circumstances. See Avagyan v. Holder, 646 F.3d 672, 678 (9th Cir. 2011) (*citing* Holland v. Florida, 560 U.S. 631, 651-52, 130 S. Ct. 2549 (2010) to distinguish excusable neglect from extraordinary circumstances justifying equitable tolling).

Respondent asserts that defaults and default judgments are not favored, and that the Hawaii Rules of Civil Procedure (HRCP) provide for relief from a default or default judgment or order in Rules 55 and 60. HRCP Rule 55(c) provides, "[f]or good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)" (emphasis added). In turn, Rule 60(b) provides in relevant part, "[o]n a motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect[.]"

However, the Board's own rules are applicable in this issue, and the Board therefore has no need to adopt the provisions or standards of HRCP Rules 55 or 60 in order to rule upon Respondent's motion. In short, it is the Board's rule, and not the HRCP, that controls here.[iii] Further, the Board's administrative rules have the force and effect of law. State v. Kim, 70 Haw. 206, 208, 767 P.2d 1238, 1239-40 (1989).

In summary, the Board finds that the reasons Respondent failed to file a timely answer do not rise to the level of "extraordinary circumstances," and thus the Motion to Set Aside Entry of Default is denied.

II. Motion to Set Deadline

Respondent asserts that a copy of its Motion to Set Aside Entry of Default was served upon Complainant by depositing a copy of the motion and supporting papers in the U.S. Mail on December 26, 2014. Pursuant to HAR § 12-42-8(g)(3)(C)(iii), Complainant's response to the motion was due within five days after service of the motion, unless the Board directs otherwise.[iv] Respondent moves for an order setting a deadline for Complaint, as Complainant is not currently represented by counsel and may not be fully aware of the deadline for filing a response to the pending Motion to Set Aside Entry of Default; Respondent also requests a postponement of the January 26, 2015, deadline for proposed conclusions of law and legal argument as set forth in Board Order No. 3037 until a final disposition of the December 26, 2014, motion filed by Respondent.

As of the time of this Order, Complainant has not filed a response to Respondent's Motion to Set Aside Entry of Default. It is unclear to the Board whether Complainant would have intended to file a response to the Motion to Set Aside Entry of Default pursuant to the Board's rules in the absence of Respondent's Motion to Set Deadline. However, for the reasons discussed above, the Board holds that Respondent, as the moving party, has failed to establish that it is entitled to relief from Order No. 3037, thus rendering moot Complainant's response to the Motion to Set Aside Entry of Default. An issue is moot where the question to be determined is abstract and does not rely on existing facts or rights; the mootness doctrine is properly invoked where the two conditions for justiciability – adverse interest and effective remedy – have been compromised. Okada Trucking Co., Ltd. v. Board of Water Supply, 99 Hawaii 191, 195-96, 53 P.3d 799, 803-04 (2002) (*quoting* CARL Corp. v. Dept. of Education, 93 Hawaii 155, 164, 997 P.2d 567, 576 (2000)).

Accordingly, the Motion to Set Deadline is denied as moot. Pursuant to Board Order No. 3037, the deadline to file proposed conclusions of law and legal argument is January 26, 2015.

Dated: Honolulu, Hawaii January 14, 2015.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

Copies sent to:
Leroy Mamuad, Self-Represented Litigant
Herbert R. Takahashi, Esq.

---

[i] HAR § 12-42-45(a) and (g) provides in relevant part:

> A respondent shall file a written answer to the complaint within ten days after service of the complaint. One copy of the answer shall be served on each party, and the original and five copies, with certificate of service on all parties, shall be filed with the board.
>
> * * *
>
> If the Respondent fails to file and answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

[ii] On December 23, 2014, Complainant notified the Board that he waived the right to a hearing within forty days after filing of the Complaint, as provided by HRS § 377-9(b) and HAR § 12-42-46(b). At the Prehearing/Settlement Conference held on December 18, 2014, Respondent's counsel indicated that Respondent would have no objection to such a waiver.

[iii] In Board Case No. CU-05-305, The Educational Laboratory: A Hawaii New Century Public Charter School ("ULS") Local School Board ("LSB") and Hawaii State Teachers Association, the Board applied the "extraordinary circumstances" standard to an untimely answer (see Board Order No. 2948 at p.19).

[iv] Pursuant to HAR § 12-42-8(c), when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.