



STATE OF HAWAII

EFiled: Apr 10 2015 09:51AM HAST  
Transaction ID 57062278  
Case No. CE-01-808/CU-01-317

HAWAII LABOR RELATIONS BOARD

In the Matter of

MICHAEL HIKALEA,

Complainant,

and

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, City and County of Honolulu;  
DAVID SHIRAISHI, Department of  
Environmental Services, City and County of  
Honolulu; KIRK CALDWELL, Mayor,  
City and County of Honolulu; HOWARD  
KAHUE, United Public Workers,  
AFSCME, Local 646, AFL-CIO;  
BRANDON MCCONNELL, United Public  
Workers, AFSCME, Local 646, AFL-CIO;  
LAURIE SANTIAGO, United Public  
Workers, AFSCME, Local 646, AFL-CIO;  
and DAYTON NAKANELUA, United  
Public Workers, AFSCME, Local 646,  
AFL-CIO,

Respondents.

CASE NOS.: CE-01-808  
CU-01-317

ORDER NO. 3061

ORDER FINDING THE BOARD HAS  
JURISDICTION OVER THE  
COMPLAINT, AND DENYING DUE TO  
MOOTNESS THE UPW'S MOTION TO  
REVOKE SUBPOENA DUCES TECUM  
TO CUSTODIAN OF RECORDS,  
UNITED PUBLIC WORKERS; AND  
NOTICE OF THIRD PREHEARING  
CONFERENCE

ORDER FINDING THE BOARD HAS JURISDICTION OVER THE COMPLAINT;  
AND DENYING DUE TO MOOTNESS THE UPW'S MOTION TO REVOKE SUBPOENA  
DUCES TECUM TO CUSTODIAN OF RECORDS, UNITED PUBLIC WORKERS

On August 13, 2012, Complainant MICHAEL HIKALEA (Complainant or Hikalea) filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board).

On August 22, 2012, Respondents HOWARD KAHUE (Kahue), United Public Workers, AFSCME, Local 646, AFL-CIO; BRANDON MCCONNELL (McConnell), United Public Workers, AFSCME, Local 646, AFL-CIO; LAURIE SANTIAGO (Santiago), United Public Workers, AFSCME, Local 646, AFL-CIO; and DAYTON NAKANELUA (Nakanelua), United Public Workers, AFSCME, Local 646, AFL-CIO (collectively UPW or Union Respondents) filed a Motion to Dismiss and/or for Summary Judgment, asserting lack of jurisdiction, failure to state a hybrid claim for relief for breach of a collective bargaining agreement by the employer and a breach of the duty of fair representation by the union (and its agents and representatives), and lack of standing; and alternatively, that there were no material issues of fact in dispute and the UPW was entitled to judgment as a matter of law.

On August 24, 2012, Respondents DEPARTMENT OF ENVIRONMENTAL SERVICES, City and County of Honolulu; DAVID SHIRAISHI (Shiraishi), Department of Environmental Services, City and County of Honolulu; and KIRK CALDWELL (Caldwell), Mayor, City and County of Honolulu (collectively City Respondents) filed a Substantive Joinder in Union Respondents' Motion to Dismiss and/or for Summary Judgment Filed on August 22, 2012.

On August 29, 2012, Complainant filed his Memorandum in Opposition to Motion to Dismiss and/or for Summary Judgment, Filed August 22, 2012.

On September 10, 2012, the Board conducted a hearing on the UPW's Motion to Dismiss and/or for Summary Judgment.

On November 8, 2013, the Board issued Order No. 2950, granting in part and denying in part the UPW's Motion to Dismiss and/or for Summary Judgment. The Board found, *inter alia*, that the UPW State Director has the sole authority to determine whether a grievance goes forward to arbitration, and the Declaration of Mr. Nakanelua stated that he made the decision not to proceed on Complainant's grievance on May 23, 2012, and sent copies of the letter to Complainant on that date. Thus, the Board concluded that the Complaint was timely filed.

On April 4, 2014, the UPW filed a Motion to Dismiss for Lack of Jurisdiction, which was supported by the initial Declaration of Mr. Nakanelua; a supplemental Declaration of Mr. Nakanelua; and a Declaration of Ms. Santiago. The supplemental

Declaration of Mr. Nakanelua stated, *inter alia*, “I actually decided not to arbitrate the grievance in LS-12-02 on May 9, 2012, and I requested [Ms.] Santiago to notify [Complainant] of that decision promptly on Wednesday, May 9, 2012.” The Declaration of Ms. Santiago stated, *inter alia*, “After completing the investigation I made a recommendation to the state director not to proceed with the grievance. I discussed my findings and conclusions with the state director”; and “The state director agreed with my recommendation, and authorized me to verbally notify [Complainant] promptly of the union’s decision. I notified [Complainant] of the state director’s decision on May 9, 2012.”

On April 7, 2014, City Respondents filed their Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, asserting that overtime is not a right under the UPW Unit 1 Collective Bargaining Agreement (CBA) and under Hawaii law; and additionally, the interpretation of the CBA is not subject to the Board’s jurisdiction.

On April 8, 2014, City Respondents filed their Joinder in Union Respondents’ Motion to Dismiss for Lack of Jurisdiction Dated April 4, 2014.

On April 10, 2014, the UPW filed a Memorandum in Opposition to Employer’s Motion to Dismiss and/or for Summary Judgment Filed April 7, 2014, asserting that “management rights” have been significantly restricted and limited by constitution, statutes, and agreements; the decision by the arbitrator in an HGEA case is inapplicable to a bargaining unit (BU) 1 employee; and that the Complaint should nevertheless be dismissed for other valid and sound reasons.

On April 14, 2014, the UPW filed Union Respondents’ Joinder in City Respondents’ Motion to Dismiss and/or for Summary Judgment for Failure to Exhaust Contractual Remedies – 4/7/14, referencing the City Respondents’ Memorandum in Support of Motion at pages 9-14.

On July 3, 2014, Complainant filed a Notice that He Takes No Position on Employer Respondents’ Motion to Dismiss and/or for Summary Judgment.

Also on July 3, 2014, Complainant filed his Response to Union Respondents’ Motion to Dismiss for Lack of Jurisdiction, asserting that the UPW’s motion was an attempt to re-litigate the issue of timeliness that had already been decided by the Board; that Complainant believed there was “still hope” for his grievance after the telephone call

with Ms. Santiago, and that the first time he knew or should have known that his statutory rights were violated was after he received the letter from Mr. Nakanelua stating the union would not proceed with his grievance. Complainant's attached Declaration stated, *inter alia*, "I was notified in writing on May 23, 2012, by [Mr.] Nakanelua, UPW State Director, that the UPW had decided not pursue [sic] a grievance on my behalf because the claim lacked merit and was not a violation of the bargaining agreements"; and that, "Prior to the date of the aforementioned letter, I spoke twice with [Ms.] Santiago, Oahu Division Director, about the proposed grievance. She informed me that under the bargaining agreements, I had no right to bring the grievance, however, the UPW was looking into the matter further. At the time of these telephone conversations, I had not been informed or advised that the UPW would not pursue the claim on my behalf."

On July 15, 2014, the UPW filed its Reply Brief in Support of Motion to Dismiss for Lack of Jurisdiction Filed April 4, 2014.

On July 17, 2014, City Respondents filed their Joinder in Union Respondents' Reply Brief in Support of Motion to Dismiss for Lack of Jurisdiction Filed April 4, 2014 Filed on July 15, 2014.

On July 21, 2014, the UPW filed its Reply Brief in Support of Union Respondents' Joinder in City and Respondents' Motion to Dismiss and/or for Summary Judgment for Failure to Exhaust Contractual Remedies.

Also on July 21, 2014, City Respondents filed their Reply Memorandum in Support of Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment Filed on April 7, 2014.

On October 3, 2014, the Board issued Order No. 3023, denying the UPW's Motion to Dismiss for Lack of Jurisdiction, and granting in part and denying in part City Respondents' Motion to Dismiss or, in the Alternative, for Summary Judgment. The Board found that material facts were in dispute, namely, the telephone call between Ms. Santiago and Complainant; the date Mr. Nakanelua made his determination not to proceed to arbitration on the grievance, and when Complainant knew or should have known that an alleged prohibited practice had been committed. The Board concluded that it was unable to grant the UPW's Motion to Dismiss for Lack of Jurisdiction at that time, as there remained material facts in dispute to be resolved at hearing.

Following a Status Conference held on November 5, 2014, the Board, on November 6, 2014, issued a Notice of Hearing and Deadlines, informing the parties that the Board would conduct a hearing on the merits of the jurisdictional issue regarding the Complaint on January 14 and 15, 2015. On January 2, 2015, the UPW filed a Motion to Continue First Day of Hearing Noticed for January 14, 2015 In Board's November 6, 2014 Notice of Hearing and Deadlines. On January 12, 2015, the Board issued Order No. 3041, granting the UPW's motion to continue the first day of hearing.

On December 22, 2014, Complainant filed an Application for Issuance of Subpoena(s)/Subpoena(s) Duces Tecum directed to the "Custodian of Records, United Public Workers."

On January 15, 2015, the hearing on the jurisdictional issue regarding the Complaint commenced. The Board heard testimony from Complainant and Ms. Santiago.

On January 20, 2015, the UPW filed a Motion to Revoke Subpoena Duces Tecum to Custodian of Records, United Public Workers (Motion to Revoke Subpoena), asserting the UPW is not a party to the proceeding and that service was inadequate; compliance with the subpoena for purposes of the January 15, 2015, hearing is moot; the subpoena seeks documents that are not relevant or material to the hearing on the jurisdiction of the Board; the subpoena seeks privileged documents; and the subpoena does not describe with sufficient particularity the evidence sought. The Motion to Revoke Subpoena identified Mr. Nakanelua as the UPW's Custodian of Records.

The Board finds that Ms. Santiago investigates and makes recommendations on grievances, but that Mr. Nakanelua, the UPW state director, is the sole decision-maker on whether to proceed to arbitration on a UPW grievance.

The Board further finds that Complainant believed that the UPW would be taking some further action on his grievance that could either have been withdrawing the grievance or proceeding to arbitration, even after his May 9, 2012, telephone conversation with Ms. Santiago. Ms. Santiago testified that during her discussion with Complainant, she "let him know that it was the state director, [Mr.] Nakanelua, who *would* make that final decision "emphasis added" on whether to take a grievance to arbitration. When asked if she recalled any discussions about it being the state director's decision to drop Complainant's present grievance, Ms. Santiago testified, "Yes. That was



conveyed to [Complainant]”; however, her written notes of the May 9, 2012, telephone conversation that were submitted as UPW Exhibit 19 reference the state director’s role in taking a grievance to arbitration as applied to grievances *generally*, and do not state that Complainant was told the state director had made a decision on Complainant’s present grievance.

Furthermore, on May 15, 2012, six days after her telephone call with Complainant, Ms. Santiago submitted to the state director a “Recommendation to DROP Grievance #LS-12-02” (UPW Exh. “VI”) that included the following:

On May 9, 2012, the grievant was contacted to discuss the grievance and his letters complaining about Chief Steward Howard Kahue and BA Brandon McConnell. The grievant asserted that Kahue and McConnell were not proactively enforcing the Uku Pau Agreement. It was shared with the grievant that the grievance was filed to protect the time limits (in the absence of the BA), and that an evaluation of the merits had not been conducted beforehand. It was further shared that, as he has been made aware previously by Kahue and McConnell) [sic], it is the Union’s position that those on the 4 a.m. routes were not entitled to OT on the 6 a.m. routes, and therefore there are no merits to proceed with his grievance. **He was advised that the grievance will be processed through our internal procedures, and that the State Director would be issuing him a letter to that effect.**

His allegations against Kahue and McConnell were addressed. It was made clear that the assertions made by the two were consistent with the Union’s position as to the interpretation and application of the Uku Pau Agreement, and that they were in fact enforcing the terms of the Agreement.

The grievant was also made aware that any future requests for the Union to file grievances in this particular matter would not be met. The grievant asked if he could file a grievance, and was told he could do so. However, he was also advised that the Union still had the statutory obligation to enforce the Agreement and therefore would not permit the Employer to award him any remedy inconsistent with our interpretation and application with the Agreement. He was also advised that at the point

where a decision is to be made about proceeding to arbitration, again the Union has the final say on whether grievances proceed to arbitration even if filed by an employee and not the Union. In the end, the grievant stated that he was not in agreement with the Union's position.

**Based on the above, it is recommended that the grievance be dropped.**

(Emphases added). Accordingly, Complainant's belief following the May 9, 2012, telephone call that the UPW would be taking further action on his grievance is consistent with Ms. Santiago's summary of the call in her May 15, 2012, recommendation to Mr. Nakanelua, as well as Exhibit 19.

The Board finds that it was reasonable for Complainant to believe that some further action by the state director would be taken with respect to the status of his grievance, following his telephone call with Ms. Santiago. The Board finds Complainant's testimony credible that he believed "something else would happen" following his telephone conversation with Ms. Santiago.

The Board finds that the UPW had not clearly communicated to Complainant during the May 9, 2012, telephone call between Ms. Santiago and Complainant that the state director had made a final decision on Complainant's grievance, such that Complainant knew or should have known as of May 9, 2012, that an alleged prohibited practice had been committed. Rather, Complainant knew and should have known upon receipt of Mr. Nakanelua's May 23, 2012, letter to Complainant and the employer that the UPW was withdrawing the grievance in LS-12-02.

Accordingly, the Board finds and concludes that the Complaint was timely, and that the Board has jurisdiction over the Complaint.

With respect to the UPW's Motion to Revoke Subpoena, the Board finds that the motion and the subpoena are moot.<sup>i</sup> The subpoena sought production of certain documents for the hearing on January 15, 2015, and such hearing was limited to the sole issue of the timeliness of the Complaint establishing the Board's jurisdiction. That hearing is over; the Board has ruled on the timeliness issue, and thus finds the subpoena and the Motion to Revoke Subpoena are both moot. Accordingly, the Motion to Revoke Subpoena is denied as moot. The Board clarifies that Mr. Nakanelua, as the UPW's

Custodian of Records, is not currently under subpoena; for future proceedings in this matter, a new subpoena will be required.

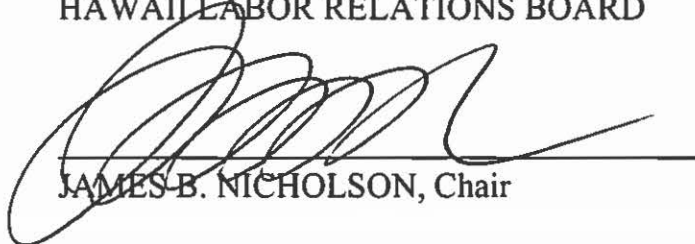
### NOTICE OF THIRD PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to Hawaii Revised Statutes (HRS) §§ 377-9 and 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-47, the Board will conduct a third prehearing conference in this matter on Wednesday, **May 20, 2015, at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to schedule the hearing on the merits of the Complaint; clarify the issues for hearing; to the extent possible, reach an agreement on matters and procedures which will facilitate and expedite the hearing; set deadlines for the issuance of subpoenas; and address any other prehearing matters.

The provisions in the Board's initial Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint, issued in this matter on August 15, 2012, regarding auxiliary aids and services; telephonic appearances; and the right to appear in person and to be represented by counsel or other representative, remain in effect and are applicable to the third prehearing conference.

DATED: Honolulu, Hawaii, April 10, 2015.

HAWAII LABOR RELATIONS BOARD




JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



  
ROCK B. LEY, Member

Copies to:

Richard K. Griffith, Esq.

Jacob M. Merrill, Esq.

John Mukai, Deputy Corporation Counsel

Rebecca Covert, Esq.

---

<sup>i</sup> Mootness occurs when events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. See Lathrop v. Sakatani, 111 Hawai'i 307, 312-13, 141 P.3d 480, 485-86 (2006).