



STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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Transaction ID 57671959
Case No. CE-11-845

In the Matter of

HAWAII FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 1463, AFL-CIO,

Complainant,

and

KIRK CALDWELL, Mayor, City and County
of Honolulu; MANUEL P. NEVES, Fire
Chief, Honolulu Fire Department, City and
County of Honolulu; HONOLULU FIRE
DEPARTMENT, City and County of
Honolulu, and CITY AND COUNTY OF
HONOLULU,

Respondents.

CASE NOS. CE-11-845

ORDER NO. 3083

ORDER DENYING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT;
NOTICE OF SECOND
PREHEARING/SETTLEMENT
CONFERENCE

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

As a preliminary matter, the Hawaii Labor Relations Board (Board) notes that certain exhibits filed with the Board contain confidential information that is not relevant to the Board's determination of the motions before it, such as individuals' social security numbers and home addresses. The Board requests that, in the future, the parties redact all confidential information that is not relevant to the proceedings prior to filing; if a party believes the confidential information is relevant to the proceedings, such party shall move the Board to accept the confidential information under seal or pursuant to a confidentiality agreement between the parties.

I. THE COMPLAINT

On August 27, 2014, Complainant HAWAII FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 1463, AFL-CIO (HFFA) filed with the Board a Prohibited Practice Complaint (Complaint) against Respondents KIRK CALDWELL (Mayor), MANUEL P. NEVES (Chief

Neves), HONOLULU FIRE DEPARTMENT (HFD), and THE CITY AND COUNTY OF HONOLULU (City). The Complaint alleges, *inter alia*, that Respondents denied HFFA and its members their right to access fire stations under Sections 5 and 6 of the Unit 11 collective bargaining agreement which is in effect for the period between July 1, 2011 through June 30, 2017 (Unit 11 CBA).

Section 5 of the Unit 11 CBA sets forth the rights of HFFA and Unit 11 members to access fire stations to conduct investigations of grievances. Section 5 states in part as follows:

The Employer shall grant to any duly certified Union representative the right to go onto the premises of the Employer to investigate grievances and to ascertain whether or not the Agreement is being observed. The Union agrees that its representative shall notify the supervisor in charge of the Company, Station or Bureau of the representative's presence. While on the Employer's premises or job site, the representative will not interfere with essential operations of the department.

Section 6 of the Unit 11 CBA sets forth the rights of HFFA and Unit 11 members to access fire station to conduct informational and educational meetings. Section 6 states in part as follows:

Informational and educational meetings may be held by the Union once every calendar quarter, to be conducted by its duly recognized officers and/or stewards and shall be open to all Employees in the bargaining unit, including members and non-members of the Union. The Employer or its representative shall permit its Employees to attend such meetings held during working hours and such meeting shall be limited to not more than two (2) hours. The Union shall give written notice to the Employer or its representative at least five (5) calendar days prior to the date of the meetings. Such meetings shall be allowed at dates, times and places which do not interfere with the normal operations of the respective Fire Departments. These meetings may include multiple sessions in order to accommodate Employees in the bargaining unit. Matters not appropriate for information and educational meetings are conducting internal Union business, engaging in unlawful political activities or the endorsement of specific candidates and engaging in demonstrations.

The Complaint alleges that in the period between May 29, 2014 and June 13, 2014, a dispute arose between HFFA and Respondents concerning HFFA's intent to conduct informational and educational meetings at HFD fire stations. A series of events occurred during this time that eventually resulted in the issuance of an e-mail on June 17, 2014 from Chief Neves's office (6/17/14 Neves E-Mail) that states, "From the Chief's office: all station visitations from the HFFA shall cease until further notice." The Complaint further alleges that

on or about June 17, 2014, the following instruction from Fire 1 (which apparently is from Chief Neves's office) was posted on the bulletin board of the Hawaii Kai Fire Station:

From Fire 1
if any Union Rep
comes by the station
to talk story/meeting
you are to ask them to leave!

A photograph of this instruction was attached to the Complaint.

Further alleged in the Complaint was the incident that occurred at the Palolo Fire Station on June 18, 2014. HFFA claims that HFFA Board Members Andrew Fukuda and Frank Johnson were attempting to conduct a pre-arranged meeting at the Palolo Fire Station when they were asked to leave by Palolo Fire Captain Blake Takahashi and that Takahashi's actions were pursuant to instructions given to him by Assistant Chief Ronald Rico.

The Complaint alleges a prohibited practice by Respondents for engaging in conduct that violates HRS § 89-13(a)(1), (2), (5), (7) and (8), which provides in part:

It shall be a prohibited practice for a public employer or its designated representative willfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
* * *
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
* * *
- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement[.]

I. HFFA'S MOTION FOR SUMMARY JUDGMENT

On September 23, 2014, Complainant filed a Motion for Summary Judgment against Respondents. Complainant asserts, *inter alia*, that on June 17 and 18, 2014, Respondents

deprived Complainant and BU 11 members of their right under Sections 5 and 6 of the Unit 11 CBA to access the HFD fire stations to conduct investigative and informational and educational meetings. It is further alleged that this conduct of Respondents (i) constitutes unilateral modification/amendment of the terms of the Unit 11 CBA, (ii) constitutes a failure of Respondents to recognize Complainant as the certified exclusive representative of the members of BU 11, (iii) constitutes a failure to properly consult and/or negotiate with Complainant, and (iv) violated Sections 1, 5, 6 and 8 of the Unit 11 CBA.

In its Memorandum in Support of Motion for Summary Judgment filed on September 23, 2014 (MSJ Memo in Support), HFFA contends that HFD in the past allowed HFFA to conduct informational and educational meetings at the HFD fire station. (See page 15 of the MSJ Memo in Support, and Paragraph 23 of the Declaration of Robert H. Lee which was attached to the MSJ Memo in Support).

Also argued in the MSJ Memo in Support was that it was undisputed that HFFA informed Chief Neves of HFFA's intention to conduct informational and educational meetings at HFD fire stations between June 16, 2014 and June 15, 2015 and that HFFA published an HFFA e-mail broadcast to its members informing them that HFFA would be conducting informational and educational meetings commencing June 16, 2014. (See page 17 of the MSJ Memo in Support and Exhibit 8 to the Complaint.) HFFA claims that the first sign of resistance to the past practice of allowing the use of HFD fire stations for informational and educational meetings was on June 6, 2014 when Acting Fire Chief Lionel Camara, Jr. requested consultation with HFFA. (See pages 17 and 18 of the MSJ Memo in Support, and Exhibit 9 to the Complaint.) Acting Chief Camara's letter was followed by a back and forth "paper war" of letters between HFFA and HFD, which then led to the 6/17/14 Neves E-Mail and the June 17 and 18 incidents at the Hawaii Kai and Palolo fire stations.

II. RESPONDENTS' OPPOSITION TO HFFA'S MOTION FOR SUMMARY JUDGMENT

On October 8, 2014, Respondents filed its Memorandum in Opposition to HFFA/IAFF's Motion for Summary Judgment filed September 23, 2014 (HFD Memo in Opposition), together with the Declaration of Manual P. Neves, Declaration of Lionel Camara, Jr., Declaration of Ronald Rico and Exhibits A through K. The gravamen of Respondents opposition is that there are genuine issues of material fact which should preclude an award of summary judgment.

Respondents described a different picture of the facts and circumstances surrounding the June 17 and 18 incidences. The Declaration of Chief Neves which was filed with the HFD

Memo in Opposition claims that Chief Neves was not given sufficient assurance from HFFA that the firefighters could attend the informational and educational meetings at the fire stations without interfering with normal operations. (See Exhibit F which is attached to the HFD Memo in Opposition.) Chief Neves requested a list of the dates, times and location of the station visits, but HFFA did not provide a written response to this request. (See Neves Declaration at Paragraph 10.) According to Chief Neves, the June 16, 2014 monthly meeting between HFFA and HFD included a discussion about the informational and educational meeting and the concerns of HFD regarding the impact on the fire station operations, but the issue was not resolved. (See Neves Declaration at Paragraph 11.)

Regarding the incident at the Palolo Fire Station on June 18, 2014, Respondents allege that on June 16 and 17, 2014, Assistant Chief of Fire Operations Ronald Rico respectively informed the 1st and 2nd platoon Battalion Chiefs of Chief Neves' decision to not authorize station visits for informational and educational meetings until the details could be worked out with HFFA, however he failed to inform the 3rd platoon Battalion Chief who was on duty on June 18, 2014. (See page 6 of HFD Memo in Opposition, and Paragraph 9 of the Declaration of Ronald Rico.) It was only on June 18, 2014 that Assistant Chief Rico became aware that HFFA representatives were at the Palolo Fire Station to conduct an informational and educational meeting. Chief Rico then called Captain Blake Takahashi and informed him that the station visits were not being allowed and gave the instructions to ask the HFFA representatives to leave. (See Exhibit H to the HFD Memo in Opposition and Id. at Paragraph 11.)

It is also pointed out in the HFD Memo in Opposition that Chief Neves, after consulting with his Battalion Chiefs and considering their feedback, eventually decided to allow HFFA to conduct informational and educational meetings at the HFD fire stations. On June 19, 2014, Chief Neves called HFFA President Lee and informed him of his decision. (See Neves Declaration at Paragraph 14.) From this point in time, HFFA has been scheduling and conducting informational and educational meetings at the HFD fire stations with verbal notice to the supervising Battalion Chiefs. (See Neves Declaration at Paragraph 18.)

In essence, Respondents claim that the "evidence demonstrates that it was [HFFA] not [Respondents] that refused to even discuss the matter" regarding informational and educational meetings at the HFD fire stations. The evidence shows, as argued by Respondents, that "it was [HFFA] that overreacted to [Respondents] reasonable suggestions to work out a process for scheduling the meetings and insuring that they could be held without interfering with normal operations" as required by Section 6 of the Unit 11 CBA.

Respondents also raises the argument that HFD did not deny access to HFD fire stations for Section 5 purposes, and it was pointed out at page 14 of the HFD Memo in Opposition that HFFA failed to identify any specific incident where a HFFA official was denied access to the fire station in connection with a Section 5 request.

On October 27, 2014, the Board heard oral arguments on Claimant's Motion to Dismiss for Summary Judgment.

III. LEGAL STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT

Under HRCP Rule 56 (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favor[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court has adopted the burden shifting paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 472, 99 P.3d at 1056.

However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCF Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

In Ocwen Fed. Bank v. Russell, 99 Hawaii 173, 53 P.3d 312 (Haw. App. 2002) (Ocwen Case), the Hawaii Intermediate Court of Appeals addressed the legal standards for analyzing a motion for summary judgment where the plaintiff/complainant is the moving party. The following from the ICA's decision in the Ocwen Case is appropriate guidance for this Board's consideration of HFFA's Motion for Summary Judgment in this case:

Where the moving party is the plaintiff, who will ultimately bear the burden of proving [the] plaintiff's claim at trial, the plaintiff has the initial burden of establishing, by the quantum of evidence required by the applicable substantive law, each element of its claim for relief. That is, the plaintiff must establish, as a matter of law, each element of its claim for relief by the proper evidentiary standard applicable to that claim.

Where a plaintiff-moving party has satisfied its obligation of showing, prima facie, that there is no genuine issue of material fact and the plaintiff is entitled to judgment as a matter of law, the burden shifts to the defendant-non-moving party to produce materials regarding any affirmative defenses that have been raised pro forma in the pleadings. If the defense produces material in support of an affirmative defense, the plaintiff is then obligated to disprove an affirmative defense in moving for summary judgment[.]

* * *

Where a plaintiff is the moving party, this involves examining whether the plaintiff has established prima facie the material facts necessary to establish the essential elements of the claim or claims for which summary judgment in the plaintiff's favor is being sought.

When a plaintiff's summary judgment motion prima facie justifies a judgment on the plaintiff's claims, the third and final step is to determine (1) whether the opposition has

demonstrated the existence of a triable, material factual issue on the plaintiff's claims, or (2) if the opposition has adduced evidence of material facts which demonstrate the existence of affirmative defenses that would defeat the plaintiff's claim, whether the plaintiff has demonstrated conclusively the non-existence of such facts.

Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue.

IV. ANALYSIS AND CONCLUSION

In accordance with the legal standards set forth by the Hawaii Supreme Court and the Intermediate Court of Appeals as discussed above in Section III. of this Order, the Board cannot find in favor of HFFA and must deny the HFFA Motion for Summary Judgment. It should be noted that HFFA's burden of establishing "wilful" misconduct by Respondents in order to find a prohibited practice under HRS Section 89-10(a) is extremely difficult in a summary proceeding which is without the benefit of a full presentation of evidence and testimony of witnesses.

HFFA has not sufficiently established that Respondents committed a wilful violation of Section 5 or 6 of the Unit 11 CBA regarding HFFA's attempts to hold informational and educational meetings at HFD fire stations. The evidence submitted in the Respondents' Memo in Opposition has raised sufficient questions of fact regarding the circumstances surrounding the June 17 and 18, 2014 incidences at the Hawaii Kai and Palolo Fire Stations and the events that transpired prior to that time (May 29, 2014 through June 13, 2014) involving the discussions between HFD and HFFA regarding establishing the details of the procedures for the scheduling and conducting of the informational and educational meetings at the HFD fire stations. Based on these disputed facts, HFFA cannot prevail on its claim for summary judgment.

In summary, the Board must view the allegations of the Complaint and the evidence submitted thus far in a light most favorable to Respondents, who are the non-moving party and do not bear the burden of proof at time of trial. Complainant raises sufficient material facts in dispute to avoid summary judgment against them.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-47, the Board will conduct a second prehearing/settlement conference in this matter on **August 12, 2015, at 9:30 a.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 343, Honolulu, Hawaii. All parties have the right to appear in person and to be represented by counsel or a representative.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten days prior to the prehearing/settlement conference.

Auxiliary aids and services are available upon request by calling Ms. Ebata at the above-listed telephone numbers. A request for reasonable accommodations shall be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, August 6, 2015.

HAWAII LABOR RELATIONS BOARD


KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

Copies sent to:

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