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Case No. CE-10-865, CU-10-337

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

ELIAS PILAGO,

Complainant,

and

HALAWA CORRECTIONAL FACILITY,
Dept. of Public Safety, State of Hawaii;
and UNITED PUBLIC WORKERS,
AFSCME, Local 646, AFL-CIO,

Respondents.

CASE NOS. CE-10-865
CU-10-337

ORDER NO. 3098

ORDER (1) GRANTING
COMPLAINANT'S MOTION TO
WITHDRAW PROHIBITED PRACTICE
COMPLAINT; (2) DENYING UNION'S
MOTION TO DISMISS; (3) DENYING
RESPONDENT DEPARTMENT OF
PUBLIC SAFETY, STATE OF
HAWAII'S MOTION TO DISMISS
COMPLAINT FILED ON AUGUST 17,
2015; AND (4) DENYING UNION'S
MOTION TO DISMISS FOR LACK OF
PROSECUTION AND OTHER
APPROPRIATE RELIEF AGAINST
COMPLAINANT

**ORDER (1) GRANTING COMPLAINANT'S MOTION TO
WITHDRAW PROHIBITED PRACTICE COMPLAINT; (2) DENYING
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DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII'S MOTION
TO DISMISS COMPLAINT FILED ON AUGUST 17, 2015; AND (4)
DENYING UNION'S MOTION TO DISMISS FOR LACK OF PROSECUTION
AND OTHER APPROPRIATE RELIEF AGAINST COMPLAINANT**

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

On August 17, 2015, Complainant ELIAS PILAGO (Complainant) filed with the Hawaii Labor Relations Board (Board) a Prohibited Practice Complaint (Complaint) against Respondents HALAWA CORRECTIONAL FACILITY, Dept. of Public Safety, State of Hawaii (DPS), and the UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (Union). Subsequent to the filing of the Complaint, the following motions were filed by Respondents: (1) the Union's Motion to Dismiss which was filed on August 25, 2015 (Union's Motion to Dismiss), (2) Respondent Department of Public

Safety, State of Hawaii's Motion to Dismiss Complaint filed on August 17, 2015, which was filed on August 27, 2015 (DPS's Motion to Dismiss); and (3) the Union's Motion to Dismiss for Lack of Prosecution and Other Appropriate Relief Against Complaint which was filed on September 11, 2015 (Union's Second Motion to Dismiss).

On September 8, 2015, the Board conducted a Prehearing/Settlement Conference with the parties. Mr. Leon Pasker, Esq., entered his first appearance in this case for Complainant at this conference and the parties agreed to a schedule of further proceedings which was set forth in the Board's Notice of the Hearing on the Motions and the Hearing on the Merits and Deadlines which was filed on August 8, 2015 (Notice). As set forth in the Notice, the Board would conduct on September 15, 2015 a hearing on the Union's Motion to Dismiss and DPS's Motion to Dismiss, and a hearing on the merits of the remaining issues in the Complaint on September 16, 2015.

On September 14, 2015, Complaint's Motion to Withdraw His Prohibited Practice Complaint and Opposition to Supplemental Request to Motions to Dismiss (Motion to Withdraw Complaint) was filed with the Board.

On September 15, 2015, the Board conducted a hearing on the Union's Motion to Dismiss and DPS's Motion to Dismiss. During this hearing, it became apparent that Complainant had filed, through the Union, a Step 1 grievance with DPS regarding the same issues raised in the Complaint. It was represented to the Board by counsel for DPS that DPS accepted the filing of Complainant's grievance and that there is no issue regarding the timeliness of the filing of the grievance.

The first day for the hearing on the merits of the Complaint was scheduled for September 16, 2015, in the Board's hearing room, and opening arguments were to begin at 9:00 a.m. with Complainant's presentation. Although Mr. Pasker explained to the Board at the oral arguments held on September 15, 2015, that he had a conflict in his schedule, he assured the Board that he would be present at the September 16, 2015, hearing scheduled to start at 9:00 a.m. However, on September 16, 2015, Mr. Pasker failed to appear at the hearing. Instead, at 9:18 a.m., Mr. Pasker arrived at the Board's office and filed Complainant's Withdrawal of Motion to Continue and Notice of Non-Appearance (Withdrawal and Notice). In this document, Mr. Pasker stated that "Complainant will not present a case on the merits of an issue now pending among the parties. Therefore, the Complainant respectfully advises the Board he will not appear to prosecute the Complaint on 9/16/15."

II. CONCLUSIONS OF LAW AND ORDER

A. Complainant's Motion to Withdraw

Section 12-42-44 of the Board's Rules states in part:

Section 12-42-44 Withdrawal. Any complaint may be withdrawn at any time prior to the issuance of a final order thereon, upon motion and with the consent of the board. Whenever the board approves withdrawal of such complaint, the case shall be closed.

In order to withdraw a prohibited practice complaint under Section 12-42-44 of the Board's Rules, the Complainant must meet three requirements: (1) Complainant must file a motion to withdraw; (2) the motion must be filed prior to the issuance of a final order; and (3) the consent of the Board must be obtained. Based on the record in this case, Complainant has met the first two of the three requirements of Section 12-42-44, and the sole issue before this Board regarding the Motion to Withdraw Complaint is whether to consent to or reject Complainant's request to withdraw the Complaint.

At the motions hearing, DPS did not object to the Motion to Withdraw Complaint. At the time, the Union also did not object, but it asked the Board to not allow the withdrawal without ruling on the issue regarding the payment of the Union's attorney's fees incurred in its Second Motion to Dismiss. The issue regarding the Union's attorney's fees is discussed in section C. below. However, on September 21, 2015, the Union filed Union Respondent's Memorandum in Opposition to Motion to Withdraw Complaint Without Prejudice (Opposition to Motion to Withdraw) which opposed the motion and requested the Board to impose additional sanctions in the form of attorney's fees and costs against Complainant and his counsel for filing an untimely and frivolous motion without the consent of the Board.

Based on a review of the record and consideration of the Motion to Withdraw Complaint, the Board grants the withdrawal of the Complaint, and the case is closed except for the issue regarding the Union's attorney's fees, which are disposed of below.

B. Union's Motion to Dismiss and DPS's Motion to Dismiss

Since the Board has herein granted the Motion to Withdraw Complaint, the Union's Motion to Dismiss is moot and is therefore denied.

Additionally, based upon representations of counsel made at the motions hearing, the factual circumstances in DPS's Motion to Dismiss have changed and the arguments raised by DPS are no longer applicable to this case. In its motion, DPS argued that Complainant failed to exhaust its administrative remedies before he filed this Complaint and that his failure renders the Board without jurisdiction. However, since the Union filed on behalf of the Complainant a Step 1 grievance with DPS, and since DPS does not dispute or challenge the timeliness of the filing of the grievance, DPS can no longer seek dismissal based on Complainant's failure to exhaust his administrative remedies. As such, DPS's Motion to Dismiss must be denied.

C. Union's Second Motion to Dismiss

There are two parts to the Union's Second Motion to Dismiss: (1) the dismissal of the Complaint against the Union on the grounds that Complainant failed to properly prosecute his claim and failed to timely file an opposition to the Union's Motion to Dismiss; and (2) an order for the payment of attorney's fees incurred by the Union in its filing of the Union's Second Motion to Dismiss. Additionally, in its Supplemental Memorandum in Support of Union Respondent's Motion to Dismiss for Lack of Prosecution and Other Appropriate Relief Against Complainant Filed September 11, 2015, filed on September 17, 2015, the Union raises the additional issue of the failure of Complainant's counsel to appear at the hearing on September 16, 2015. Similarly, the Union's Opposition to the Motion to Withdraw requested additional sanctions in the form of attorney's fees and costs against Complaint and his counsel for filing an untimely and frivolous motion without the consent of the Board.


The Union's request to dismiss the Complaint against the Union pursuant to the Union's Second Motion to Dismiss has been rendered moot by the Board's granting of the Motion to Withdraw Complaint, and is therefore denied.

Regarding the issue of attorney's fees, the Board finds the request to be unjustified under the circumstances. At the arguments on September 15, 2015, Mr. Pasker claimed that he only received a copy of the Step 1 grievance that the Union filed for Complainant after the Prehearing/Settlement Conference, and that he attempted to call the office of Mr. Herbert Takahashi, Esq., who is counsel for the Union, on September 10, 2015. Mr. Pasker's telephone call was unsuccessful in reaching Mr. Takahashi; thus, on September 11, 2015, Mr. Pasker sent an e-mail to Mr. Takahashi's office regarding the Motion to

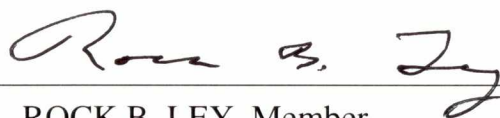
Withdraw Complaint which was in the process of being filed with the Board. It appears that Mr. Pasker made reasonable attempts to reach Mr. Takahashi regarding Complainant's intention to withdraw the Complaint prior to the date that the Union's Second Motion to Dismiss was filed. Although Mr. Pasker did not attend the hearing on September 16, 2015, Complainant had previously gone on record as requesting a withdrawal of the Complaint; Complainant's Motion to Withdraw Complaint was still pending as of September 16, 2015; and the time for opposing parties to file responses to said motion had not yet run. As such, the Union's request for attorney's fees is unwarranted, and the Union's Second Motion to Dismiss is denied in its entirety.

DATED: Honolulu, Hawaii, September 25, 2015.

HAWAII LABOR RELATIONS BOARD



KERRY M. KOMATSUBARA, Chair



ROCK B. LEY, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Miriam P. Loui, Deputy Attorney General
Leon Pasker, Esq.

CE-10-865, CU-10-337 – Pilago and Halawa Correctional Facility, et al. – Order (1) Granting Complainant's Motion to Withdraw Prohibited Practice Complaint; (2) Denying Union Respondent's Motion to Dismiss; (3) Denying Respondent Department of Public Safety, State of Hawaii's Motion to Dismiss Complaint Filed on August 17, 2015; and (4) Denying Union's Motion to Dismiss for Lack of Prosecution and Other Appropriate Relief.

Order No.: 3098