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Transaction ID 58116513
Case No. CE-01-808/CU-01-317

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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

ORDER NO. 3115

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT MICHAEL HIKALEA'S MOTION FOR PERMISSION TO CONDUCT DISCOVERY
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ORDER GRANTING IN PART AND DENYING
IN PART COMPLAINANT MICHAEL HIKALEA'S
MOTION FOR PERMISSION TO CONDUCT DISCOVERY

On September 29, 2015, Complainant MICHAEL HIKALEA (Complainant or Hikalea) filed with the Hawaii Labor Relations Board (Board) Complainant Michael Hikalea's Motion for Permission to Conduct Discovery (Discovery Motion), seeking answers to interrogatories from Respondent DAYTON NAKANELUA, United Public Workers, AFSCME, Local 646, AFL-CIO (Nakanelua); a prehearing subpoena duces tecum for Respondent DEPARTMENT OF ENVIRONMENTAL SERVICES, City and County of Honolulu (City); a deposition of

Respondent HOWARD KAHUE (Kahue); a deposition of Respondent DAVID SHIRAISHI (Shiraishi); a deposition of a "person most knowledgeable from Respondent City and County of Honolulu" (Rule 30(b)(6) Witness); and a deposition of Robert Aona (Aona).

Complainant asserts that the discovery is necessary to establish the "epic shift" in policy from allowing the most senior employees the most overtime opportunities to a policy that favored younger employees. It is argued that (1) the interrogatories are specifically directed at the facts and situation alleged in Complainant's April 2012 grievances; (2) the depositions of Kahue and Shiraishi, and if necessary, a person most knowledgeable on behalf of the City, are persons that attended the meeting which generated the "Clarification of Operating Procedure in 2007" that eliminated overtime opportunities for 4:00 a.m. drivers and allowed 6:00 a.m. drivers to receive overtime opportunities at 4:00 a.m.; (3) the deposition of Aona, who was an employee of the Department of Environmental Services, is necessary as a preservation of testimony device; and (4) the discovery is necessary to establish the length of time that "epic shift" in policy lasted to show Complainant's harm and deprivation of overtime opportunities.

On October 6, 2015, Union Respondents filed Union Respondents' Memorandum in Opposition to Motion for Permission to Conduct Discovery Filed on September 29, 2015 (Union's Memo in Opposition), asserting that Complainant failed to show "good cause" to conduct pre-hearing discovery. They argue that the interrogatories to Nakanelua regarding the facts and situations alleged in Complainant's April 12, 2012, grievances are misdirected since Nakanelua is not the employer; that depositions regarding events occurring in 2007 are immaterial to the claims presented and are time barred under the 90-day statute of limitations; and that allowing pre-hearing discovery will result in unnecessary delays and a postponement of the hearing on the merits, which is currently scheduled to commence on December 14, 2015. Also, Union Respondents assert that Complainant disregards the decision rendered by Arbitrator Ted Tsukiyama in 1994 regarding overtime provisions of the collective bargaining agreement and the 4:00 a.m. shift.

On October 7, 2015, the City filed City Respondents' Joinder in Union Respondents' Memorandum in Opposition to Motion for Permission to Conduct Discovery Filed on September 29, 2015, Filed on October 6, 2015.

On October 12, 2015, Complainant filed Complainant Michael Hikalea's Reply to the Opposition to Complainant Michael Hikalea's Motion for Permission to Conduct Discovery, asserting that the "Master Pool" argument fails, and the Respondents cannot claim that any overtime opportunity for a regularly scheduled crew leader went to a Master Pool crew leader because no Master Pool crew leaders existed during the relevant times; that Respondents' argument show why discovery is needed; that good cause to conduct discovery is shown by the Union Respondents' and City's inability to explain why 4:00 a.m. overtime opportunities were given to 6:00 a.m. employees, that the Union offered three different explanations as to why

Complainant's complaints were without merit; and that the City should answer the same interrogatories as the Union.

On November 3, 2015, the Board heard oral arguments on Complainant's Discovery Motion.

Hawaii Administrative Rules (HAR) § 12-42-8(g)(6) provides:

> Discovery, depositions, and interrogatories:
>
> (A) Upon written application and for good cause shown, the board may permit the parties to take deposition upon oral examination or written interrogatories in the manner prescribed under the Hawaii Rules of Civil Procedure.
>
> (B) A copy of the deposition or interrogatories shall be filed with the board.
>
> (C) Witness fees and mileage shall be paid by the party at whose instance the witness appears and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

HAR § 12-42-8(g)(7) provides in relevant part:

> (A) The board may issue subpoenas to require the attendance of witnesses in this State and the production of books and papers at a hearing held under the provisions of this chapter.
>
> (B) Any party may file a written application for subpoenas with the board before the hearing.

Generally, the Board must conduct a balancing test when determining whether there is "good cause" to allow a party to conduct discovery. "[T]he court must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled." Brende v. Hara, 113 Hawaii 424, 431, 153 P.3d 1109, 1116 (2007). Further, courts should take into consideration the cost of discovery (Complainant cites to Buzzeo v. Board of Education, Hempstead, 178 F.R.D. 390, 393 (E.D.N.Y. 1998).

The Hawaii courts have considered the scope of the "good cause" standard in a variety of contexts. Sate v. Villiarimo, 132, Hawaii 209, 217, 320 P.3d 874, 882 (2014). As a general rule,

"good cause" means "a substantial reason; one that affords a legal excuse." Id., quoting State v. Senteno, 69 Haw. 363, 368, 742 P.2d 369, 373 (1987).

The Board agrees with Respondents' opposition to Complainant's request to take the depositions of Kahue, Shiraishi, Aona and Rule 30(b)(6) Witness. The Board finds that the taking of depositions would not necessarily save the Complainant's costs because absent stipulation by all the parties, depositions will not replace live testimony before the Board. Furthermore, the City and Union Respondents would incur additional expense if it were to send its own counsel to attend the depositions which they may feel necessary to protect its own rights in this proceeding. Lastly, Complainant has submitted no fact to support its claim that Aona's deposition is needed and appropriate as a "preservation" of testimony device.

In balancing Complainant's need for information and the potential cost savings of taking the depositions, and including the additional costs that could be incurred by Complainant as well as the other parties in taking or attending the depositions, and the Board's usual procedure that disfavors the taking of depositions, the Board hereby denies, in part, the Discovery Motion with respect to Complainant's request to take depositions.

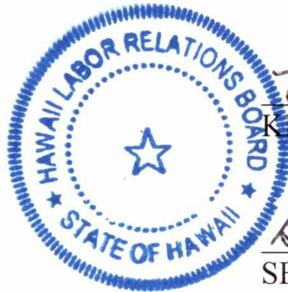
Regarding Complainant's request for answers to interrogatories from Nakanelua regarding the facts and situation alleged in Complainant's April 12, 2012 grievances, the Board agrees with Union Respondents' argument that since Nakanelua is not the employer, his answers are not crucial to the inquiry regarding the City's refuse collection operations. Thus, the Board does not find that Complainant has shown the requisite "good cause" regarding this specific request, and the Board hereby denies, in part, the Discovery Motion with regard to the interrogatories to Nakanelua.

Regarding Complainant's request for a subpoena duces tecum for "all Dispatch books, records, notes, logs, memorandum from April 3, 2012 to April 17, 2012." (*See,* Exhibit "2" which is attached to the Discovery Motion.), the Board takes notice that on July 17, 2015, Complainant served the City with Michael Hikalea's First Request for Production of Documents from the Department of Environmental Services, City and County of Honolulu. (*See,* Exhibit 3 which is attached to the Discovery Motion.) The Board also takes notice that the Union's Memo in Opposition was primarily focused on the discovery sought by Complainant against the Union Respondents. Although Union Respondents broadly objected to all of Complainant's discovery requests, including the documents sought under the subpoena duces tecum, there was no detailed analysis or treatment regarding the question of whether the discovery sought for production under the subpoena duces tecum was without "good cause" and whether the balancing of the needs of the Complainant for such information against the injury to the producing party (which in the situation of the subpoena duces tecum is the City and not the Union) tipped in favor of Complainant. The City merely filed a joinder in the Union's Memo in Opposition and did not submit any information, document or argument regarding the Complainant's request for the

documents sought under the subpoena duces tecum. The Board is also aware that the document information sought by Complainant from the City is probably available to Complainant if he made a Chapter 92F request to the City. As such, since the City has raised no specific fact or reason why Complainant's request for a subpoena duces tecum should be denied, the Board finds that Complainant has established "good cause" for such request. Accordingly, the Board hereby grants, in part, the request that the Board issue a prehearing subpoena duces tecum with respect to the documents sought from the City. The Board will issue a subpoena duces tecum for the requested documents to be produced at the hearing on the merits upon a proper application being filed by the Complainant in compliance with HAR § 12-42-8(g)(7)(A) within the deadlines previously set by the Board in Order No. 3074.

DATED: Honolulu, Hawaii, November 4, 2015.

HAWAII LABOR RELATIONS BOARD



KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

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