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Case No. CE 01-856 / CU 01-332

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

NATHAN MAKINO,

Complainant,

and

COUNTY OF HAWAII; and UNITED
PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Respondents.

CASE NOS: CE-01-856, CU-01-332

ORDER NO. 3189

1. ORDER DENYING RESPONDENT UPW'S MOTION TO RESET HEARINGS IN HONOLULU;
2. ORDER DENYING RESPONDENTS' MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS AND EXHIBITS LISTS;
3. ORDER DENYING RESPONDENTS' MOTION TO STRIKE COMPLAINANT'S WITNESS LIST;
4. ORDER DENYING RESPONDENTS' MOTION TO EXTEND DEADLINE FOR FILING OF WITNESS AND EXHIBIT LISTS BY RESPONDENTS;
and
5. ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT UPW'S MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS LIST AND EXHIBITS LIST FILED ON SEPTEMBER 7, 2016

ORDER DENYING RESPONDENT UPW'S MOTION TO RESET HEARINGS IN HONOLULU; DENYING RESPONDENTS' MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS AND EXHIBITS LISTS; DENYING RESPONDENTS' MOTION TO STRIKE COMPLAINANT'S WITNESS LIST; DENYING RESPONDENTS' MOTION TO EXTEND DEADLINE FOR FILING OF WITNESS AND EXHIBIT LISTS BY RESPONDENTS; AND DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT UPW'S MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS LIST AND EXHIBITS LIST FILED ON SEPTEMBER 7, 2016

On September 1, 2016, the Board issued FIRST AMENDED NOTICE OF HEARINGS AND PREHEARING AND PREHEARING SUBMISSIONS, which stated as follows:

Section 1 is amended by changing the location to read as follows:

“1. Hearing on the Merits

(a) The parties having waived the requirement a hearing on the merits be held no later than forty (40) days from the date of the filing of the complaint in this matter (see, Hawaii Revised Statutes § 377-9(b)), the hearing on the merits shall be held on **October 4, 5, 6 and 7, 2016**, starting at 9:00 a.m. on each day (Evidentiary Hearing) **at the County of Hawaii’s Aging and Disability Resource Center Training Room located at 1055 Kinoole Street, Hilo, Hawaii 96720-3872.”**

Section 2 is amended by changing the September 5, 2016 (Labor Day State Holiday) deadline date to September 6, 2016 to read as follows:

“2. Final Exhibit Lists, Exhibits and Final Witness Lists.

Final exhibit lists, exhibits, and final witness lists shall be filed with the Board and served on the parties (a) by Complainant on or before **4:30 p.m. on September 6, 2016** and (b) by the County and UPW on or before **4:30 p.m. on September 19, 2016.”**

All other remaining provisions remain in effect.

1. **ORDER DENYING RESPONDENT UPW’S MOTION TO RESET HEARINGS IN HONOLULU FILED ON SEPTEMBER 12, 2016**

On September 12, 2016, counsel for UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a motion to reset the hearing in the above referenced cases from Hilo to Honolulu.

Hawaii Revised Statutes (HRS) § 89-5(j) states:

(j) For the purpose of minimizing travel and per diem expenses for parties who are not located on Oahu, the board shall utilize more cost efficient means

such as teleconferencing which does not require appearances on Oahu, whenever practicable, to conduct its proceedings. Alternatively, it shall consider conducting its proceedings on another island whenever it is more cost efficient in consideration of the parties and the witnesses involved. (Emphasis added)

For the reasons stated in HRS § 89-5(j), the Board rescheduled the location of the Hearing on Merits to Hilo, Hawai'i. The Respondent UPW's motion to reschedule the location is denied.

2. ORDER DENYING RESPONDENTS' MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS AND EXHIBITS LISTS; AND ORDER DENYING RESPONDENTS' MOTION TO STRIKE COMPLAINANT'S WITNESS LIST

On September 12, 2016, Respondent UPW filed a motion to dismiss the Complainant's witness list, which was joined by Respondent County of Hawai'i on September 14, 2016, because it was filed after the date set by Board in its June 6, 2016 Notice of Schedule of Hearings and Prehearing Submissions. The Notice stated that the Final Exhibit and Witness Lists should be filed by the Complainant on September 5, 2016 at 4:30 p.m. However, September 5, 2016 was a State holiday, and therefore, the last date would have been September 6, 2016 at 4:30 p.m. The Complainant's witness list was received by the Board on September 7, 2016 at 4:45 .pm. On September 12, 2016, the Respondent UPW filed a motion to strike the Complainant's witness list, which was joined by the Respondent County of Hawai'i on September 14, 2016, because of the untimely filing of Complainant's witness list.

The Board has the discretion to deny a motion to strike, *see* Shanghai Inv. Co. v. Aletka Co., 92 Hawai'i 482, 494, 993 P.2d 516, 528 (2000) (Shanghai Inv.), *overruled in part on other grounds*, Blair v. Ing, 96 Hawai'i 327, 331 n. 6, 31 P.3d 184, 188 n. 6 (2001). In this instance, the Board does not believe that the Respondents were prejudiced in the preparation or presentation of their respective cases by the one day late filing. To dismiss the Complaint based on the late filing of the witness list would be also be an inappropriate and disproportional sanction that does not further the purposes of HRS Chapter 89. The motion to dismiss is denied, and the Complainant will be allowed to retain the submitted Witness list. The motion to strike the Complainant's witness list is also denied.

3. ORDER DENYING RESPONDENTS' MOTION TO EXTEND DEADLINE

On September 12, 2016, the Respondent UPW filed a motion to extend the filing deadline for its witness and exhibit lists, which was joined by the Respondent County of Hawai'i on September 14, 2016 from September 19, 2016 pending the decision of the Board over the motion to dismiss for Complainant's failure to file witness and exhibits lists. However, on September 19, 2016, both the UPW and the County of Hawai'i filed their exhibits and witness lists. Accordingly, the Board finds that Respondents' motion to extend the deadline for their witness and exhibit lists is moot, and therefore, denies the motion.

4. ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT UPW'S MOTION TO DISMISS FOR COMPLAINANT'S FAILURE TO FILE WITNESS LIST AND EXHIBITS LIST FILED ON SEPTEMBER 7, 2016.

On September 12, 2016, the Complainant filed a motion to strike the Respondent UPW's motion to dismiss. On September 19, 2016, UPW filed a memorandum in opposition to the Complainant's motion to strike UPW's motion to dismiss. Based on the Board's Order in the instant case, the Board finds that the Complainant's motion is moot, and therefore, denies the motion.

ORDER

The Board hereby:

1. Denies the Respondent UPW's Motion to reset hearings in Honolulu filed on September 12, 2016;
2. Denies the Respondents' Motion to Dismiss;
3. Denies the Respondents' Motion to Strike Complainant's Witness List;
4. Determines that the Respondents' Motion to Extend Deadline for Filing of Witness and Exhibits Lists is moot and denies the motion; and
5. Determines that the Complainant's Motion to Strike Respondent's Motion is moot and denies the motion.

DATED: Honolulu, Hawaii, September 22, 2016.

HAWAII LABOR RELATIONS BOARD



KERRY M. KOMATSUBARA, Chair



NATHAN MAKINO v. COUNTY OF HAWAII, et al.

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ORDER NO.


SESNITA A.D. MOEPONO, Member


J.N. MUSTO, Member

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