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Transaction ID 59692279
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,

Respondent.

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

ORDER NO. 3191

ORDER GRANTING COMPLAINANT'S
MOTION TO REVOKE SUBPOENA
ISSUED TO MALIA MAKINO; AND
NOTICE OF STATUS CONFERENCE

**ORDER GRANTING COMPLAINANT'S MOTION
TO REVOKE SUBPOENA ISSUED TO MALIA MAKINO**

On September 29, 2016, Malia Makino (Makino) was served with a subpoena in this matter on behalf of Respondent United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). Ms. Makino is the spouse of Complainant Nathan Makino (Complainant).

On October 3, 2016, counsel for Complaint filed with the Hawaii Labor Relations Board (Board) Complainant's Motion to Revoke Subpoena Issued to Malia Makino, asserting that Ms. Makino's testimony is barred by spousal privilege.

On October 6, 2016, the UPW filed UPW's Memorandum of Points and Authorities in Opposition to Motion to Revoke Subpoena of Malia Makino, asserting the communications between Complainant and Ms. Makino concerning their consent to submit a proposal to the employer, and to withdraw such consent, were not intended to be a private communication between spouses that is not intended for disclosure to any other person; and that even assuming the communications were intended to be confidential, Complainant waived any privilege.

On October 7, 2016, the UPW filed UPW's Notice of Withdrawal of Its Opposition to Complainant's Motion to Revoke Subpoena of Malia Makino, withdrawing its opposition to the motion and its memorandum of points and authorities in its opposition.

Respondent County of Hawaii did not file a written opposition to Complainant's Motion to Revoke Subpoena of Malia Makino.

The Board's administrative rules provide in Hawaii Administrative Rules (HAR) § 12-42-8(g)(7)(C)(i) that "[a] motion to revoke a subpoena may be filed with the board not later than five days from the date of service of the subpoena." Further, § 12-42-8(g)(D)(i) provides that the Board "may revoke a subpoena on the ground that the subpoena does not reasonably relate to any matter under investigation, inquiry or hearing; that the subpoena does not describe with sufficient particularity the evidence sought **or that the evidence sought from the witness is privileged under the law or the provisions of this chapter**" (emphasis added).

Additionally, § 12-42-8(g)(8)(C) provides that the Board "shall give effect to the rules of privilege recognized by law." In turn, Rule 505 of the Hawaii Rules of Evidence provides the following, in relevant part:

Spousal privilege.

* * *

- (b) Confidential marital communications; all proceedings.
 - (1) Definition. A "confidential marital communication" is a private communication between two spouses that is not intended for disclosure to any other person.
 - (2) Either party to a marital communication has a privilege to refuse to disclose and to prevent any other person from disclosing that communication.
- (c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of (A) the other, (B) a child of either, (C) a third person residing in the household of either, or (D) a third person committed in the course of committing a crime against any of these, or (2) as to matters occurring prior to the marriage.

Hawaii Revised Statutes (HRS) chapter 626, Article V, Rule 505.

The Board finds and concludes that Ms. Makino's anticipated testimony is covered by the spousal privilege provided for in Rule 505(b), and that none of the exceptions provided for by Rule

505 apply to her testimony. Accordingly, the Board grants Complainant's Motion to Revoke Subpoena Issued to Malia Makino.

NOTICE OF STATUS CONFERENCE

A hearing on the merits in this matter was held on October 4, 5, and 6, 2016. As of the close of hearing on October 6, 2016, all parties had rested their cases, with the only issue pending being Complainant's Motion to Revoke Subpoena of Malia Makino. As a result of the Board's Order above granting said motion, the evidentiary hearing in this matter is concluded. The Board therefore schedules a Status Conference as noticed below, for the purpose of setting the deadline for the submission of post-hearing memoranda and to address any other procedural issues.

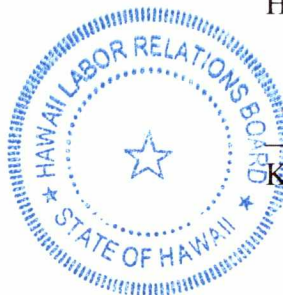
NOTICE IS HEREBY GIVEN that, pursuant to HAR §§ 12-42-5(d)(1), 12-42-8(g)(17)(C), and 12-42-47, the Board will hold a status conference in this matter on **November 7, 2016, at 9:00 a.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii, 96813. A party, counsel, or representative residing on a neighbor island may elect to participate in the Status Conference via telephone; if so, please provide the Board's secretary a contact telephone number by the close of business on November 4, 2016.

Any party may retain counsel if the party so desires and an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata of the Board at (808) 586-8616, (808) 586-8847 (TTY), or (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, October 12, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair



SESNITA A.D. MOEPONO, Member



J N. MUSTO, Member

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Herbert R. Takahashi, Esq.

Case Nos. CE-01-856 and CU-01-332, Makino v. County of Hawaii and UPW – Order Granting Complainant's Motion to Revoke Subpoena Issued to Malia Makino; and Notice of Status Conference.

Order No.: 3191