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Case No. 2016 DR-00-110

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

ALAN IWASAKI,

Petitioner,

and

DIRECTOR OF LABOR AND INDUSTRIAL
RELATIONS OF THE STATE OF HAWAII;
and RESEARCH CORPORATION OF THE
UNIVERSITY OF HAWAII,

Intervenors.

CASE NO.: 2016-DR-00-110

ORDER NO.: 3279

ORDER DISMISSING PETITION FOR
DECLARATORY RULING

ORDER DISMISSING PETITION FOR DECLARATORY RULING

On December 19, 2016, Petitioner ALAN IWASAKI (Petitioner or Iwasaki) filed a Petition for Declaratory Ruling (Petition for D.R.) with the Hawaii Labor Relations Board (Board), requesting the Board issue a declaratory order “as to the applicability of the timeliness provision” of Hawaii Revised Statutes (HRS) § “396-8(e)(7) regarding HIOSH 16-012.” Petitioner designated the following provisions of HRS, the applicability of which are in question: §§ 396-8(e)(4); 396-8(e)(5); 396-8(e)(6); 396-8(e)(7); and 396-8(e)(8).

Petitioner alleged the following:

The Director was to notify the Petitioner of a final determination within 90 days of receipt of a complaint. The Director received a timely complaint on April 29, 2016, therefore the Director’s final determination was to have been received by the Petitioner on or before July 28, 2016. The Petitioner did not received [sic] the required final determination by the deadline nor was there any notification of an extension, therefore HIOSH 16-012 is untimely.

The Board takes judicial notice (*see* Lalakea v. Baker, 43 Haw. 321 (1959); Rule 201, Hawaii Rules of Evidence) of the pleadings in pending Board Case No. 2016-34, Alan Iwasaki and RCUH and DLIR, and Board Case No. 2017-06, Alan Iwasaki and RCUH and DLIR, which

involve two separate Notices of Contest by Petitioner regarding Hawaii Occupational Safety and Health (HIOSH) investigations into allegations of discrimination committed by the Research Corporation of the University of Hawaii (RCUH). Petitioner's reference to "HIOSH 16-012" refers to HIOSH Case No. 16-012, which involves the HIOSH investigation into Petitioner's discrimination/whistleblower complaint under HRS § 396-8(e).

On December 22, 2016, the Board issued a Notice of Filing of Petition for Declaratory Ruling; Notice of Deadline for Filing a Petition for Intervention; and Notice of Board Conference (Notice of Petition for D.R.). The Notice of Petition for D.R. was sent to Petitioner; the Director of Labor and Industrial Relations, State of Hawaii (Director); HIOSH; and RCUH. The Notice of Petition for D.R. set the deadline for filing a Petition for Intervention on January 20, 2017, and the deadline for opposition to a Petition for Intervention of January 27, 2017.

On January 20, 2017, the Director filed a Petition for Intervention; on January 23, 2017, Petitioner filed a Memorandum in Opposition to Director of Labor and Industrial Relations' Petition to Intervene in Alan Iwasaki's Petition for Declaratory Ruling, Filed December 19, 2016, and supporting documents; and on January 24, 2017, the Board granted the Director's Petition for Intervention in Order No. 864.

Also on January 20, 2017, the RCUH filed a Petition for Intervention, alleging, *inter alia*, that the Petition involves substantive claims against the RCUH, and that RCUH has a right to defend itself in matters relating to that claim. Petitioner did not file an opposition to the RCUH's Petition for Intervention. On January 31, 2017, the Board issued Order No. 872, granting the RCUH's Petition for Intervention.

On February 21, 2017, the Director filed an opposition to the Petition for D.R., asserting, *inter alia*, that the Board has no authority to consider the Petition for D.R. since HRS § 91-8 and Hawaii Administrative Rules (HAR) § 12-57-9 do not authorize an agency to rule on the applicability of another agency's rules, and that issues involving Petitioner's appeal should be addressed through the appeal proceeding. Also on February 21, 2017, the RCUH filed its joinder in the Director's opposition to the Petition for D.R.

On March 2, 2017, the Board heard oral arguments on the Petition for D.R. At the hearing, the Board orally ruled that it was denying the Petition for D.R. because the Board lacked statutory authority to make a declaratory ruling in this matter. And that a written order would be forthcoming.

On March 8, 2017, Petitioner requested that the Board issue a written order, as he had not received one to date.

HRS § 91-8 governs declaratory rulings by agencies, and provides:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order *of the agency*. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

(Emphasis added). Additionally, HAR § 12-42-9, which governs declaratory rulings by the Board, similarly provides that any interested person may petition the Board for a declaratory order as to the applicability of any statutory provision or of any rule or order *of the Board*. HAR § 12-42-9(f) further provides that the Board may refuse to issue a declaratory order where, among other things, is not within the jurisdiction of the Board.

Here, HRS § 396-8 governs employee responsibility and rights regarding occupational safety and health, and provides in relevant part:

- (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;
- (5) Upon receipt of the complaint, the director shall investigate to determine if a discharge or discrimination in violation of this subsection has occurred;
- (6) If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to

the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority;

- (7) Within ninety days of receipt of a complaint filed under this subsection, unless extended by the director, the director shall notify the employee of the final determination and any subsequent action the department will take to resolve the complaint; and
- (8) Nothing in this subsection shall preclude any employee or representative of an employee from simultaneously pursuing a cause of action for injunctive relief or any other remedy provided by law.

However, HRS § 396-4, which governs the powers and duties of the DLIR, provides in relevant part that the DLIR “**shall be responsible for administering** occupational and health standards throughout the State” and that the DLIR “shall prescribe and enforce rules under chapter 91 as may be necessary for carrying out the purposes and provisions of this chapter” (emphasis added). Furthermore, HAR § 12-57-9, a rule that the Director implements in order to administer the whistleblower law, falls under the jurisdiction of the DLIR, not the Board.

Additionally, even assuming for the sake of argument that the Board has the jurisdiction over the legal question posed by the Petition for D.R., the Board nevertheless dismisses the Petition for D.R. because Petitioner requests a ruling that the Director’s final determination in HIOSH 16-012 is untimely and to review 16-012 *de novo* for other defects; however, HRS § 91-8 was not intended to allow review of concrete agency decisions for which other means of review are available. Citizens Against Reckless Dev. v. Zoning Board of Appeals, 114 Hawaii 184, 197, 159 P.3d 143, 156 (2007). Here, Petitioner has a pending appeal involving the Director’s determination in HIOSH 16-012.

For the reasons discussed above, the Board hereby dismissed the Petition for D.R. This case is now closed.

DATED: Honolulu, Hawaii, July 26, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member



J. N. Musto

J N. MUSTO, Member

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Case No. 2016-DR-00-110 – Alan Iwasaki and Director of Labor and Industrial Relations and Research Corporation of the University of Hawaii – Order Dismissing Petition for Declaratory Ruling.

Order No.: