



EFiled: Aug 14 2017 02:29PM HAST
Transaction ID 60985458
Case No. CE-01-539

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

PATRICIA HAMAMOTO, Superintendent,
Department of Education, State of Hawaii and
CONNECTIONS, A New Century Public
Charter School,

Respondents.

CASE NO. CE-01-539

ORDER NO.: 3286

ORDER GRANTING UPW'S MOTION TO
STRIKE EXHIBIT A OF RESPONDENTS'
EXCEPTIONS TO THE PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER
FILED MARCH 31, 2017 AND REJECT
THEIR EXCEPTIONS FILED JUNE 13,
2017

**ORDER GRANTING UPW'S MOTION TO STRIKE
EXHIBIT A OF RESPONDENTS' EXCEPTIONS TO THE PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
FILED MARCH 31, 2017 AND REJECT THEIR EXCEPTIONS FILED JUNE 13, 2017**

On March 31, 2017, the Hawaii Labor Relations Board (Board) pursuant to Hawaii Revised Statutes (HRS) § 91-11ⁱ issued PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER (Proposed Findings and Conclusions) including the provision for FILING OF EXCEPTIONS, which stated in relevant part:

Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, Decision and Order may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are being excepted to with citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments will be scheduled should any party file exceptions and the parties will be notified thereof.

The Proposed Findings and Conclusions included, among other things, findings that a December 3, 2003 oral order rendered by the Board deemed the amended Complaint amended to include a claim based on the termination of a rubbish contract with Mr. Ah Sing (Ah Sing) worth approximately \$75 per week in retaliation for the filing of the present prohibited practice complaint in violation of HRS § 89-13(a)(4) (in addition to a previously alleged retaliation claim in violation of HRS § 89-13(a)(1)); and that United Public Workers, AFSCME, Local 646, AFL-CIO (UPW, Union, or Complainant) demonstrated that the filing of the HRS Chapter 89 complaint contributed to Thatcher's termination of Ah Sing's rubbish contract and that Connections failed to submit any evidence into the record or present any argument showing a legitimate, non-discriminatory reason for the cancellation of the rubbish contract. Accordingly, the Board held that by wilfully retaliating against Ah Sing, Connections violated HRS § 89-13(a)(4). However, the Board further concluded that UPW failed to establish how the retaliation was an interference in violation of HRS§ 89-13(a)(1) distinguishable from an HRS § 89-13(a)(4) violation.

By Order No. 3243, filed on April 5, 2017, the Board approved STIPULATION AND ORDER TO RESCHEDULE DEADLINES RELATED TO HLRB'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION, AND ORDER extending the deadlines for the filing of exceptions to May 15, 2017 and a date for a hearing for oral argument on the exceptions to be set by the Board thereafter by agreement of the parties.

By Order No. 3261, filed on May 11, 2017, the Board approved a second Stipulation and Order extending the deadlines for the filing of exceptions to June 13, 2017 and a date for a hearing for oral argument on the exceptions to be set by the Board thereafter by agreement of the parties.

On June 13, 2017, Respondents PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii and CONNECTIONS, A New Century Public Charter School (Connections and collectively Respondents or Employer), filed RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED March 31, 2017 (Respondents' Exceptions). Respondents took exception to the finding on pages 40-42 that Mr. Ah Sing was retaliated against for the filing of the prohibited practice complaint on the basis that the complaint was never properly amended to include the retaliation claim regarding termination of the refuse removal contract. The Employer further asserted that had the Employer been aware of the retaliation claim, the claim would have been addressed during the testimony of John Thatcher (Thatcher) at the hearing [on remand]. Respondents further attached to their Exceptions, Exhibit A, a letter addressed "To Whom It May Concern", dated May 10, 2017 and signed by Thatcher. The letter addressed a proposal from Ah Sing doing business as Jimmy's Quality Service for disposal of Connections PCS daily rubbish and a "Service Agreement" for commercial trash hauling service provided to Connections PCS, and the subsequent events regarding the implementation of the rubbish contract and the termination.

On June 13, 2017, UPW filed UPW'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED MARCH 31, 2017.

On June 13, 2017, the Board issued a NOTICE OF RESCHEDULED ORAL ARGUMENTS ON EXCEPTIONS TO JULY 14, 2017 notifying the parties that oral arguments regarding the exceptions to the Board Findings and Conclusions would be held on July 14, 2017.

On June 29, 2017, Complainant filed UPW'S MOTION TO STRIKE EXHIBIT A OF RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED MARCH 31, 2017 AND REJECT THEIR EXCEPTIONS FILED JUNE 13, 2017 (Motion to Strike).

Respondents filed no opposition to the Motion to Strike.

At the July 14, 2017 oral argument on the exceptions, attorney Rebecca Covert appeared on behalf of the UPW. Respondents' attorney of record Jim Halvorson (Mr. Halvorson) did not appear. The Board staff called Mr. Halvorson's office, and his staff reported that the oral argument was not scheduled on the calendar, and Mr. Halvorson was sick. Prior to hearing oral argument on the exceptions to the Proposed Findings and Conclusions, the presiding Board Member J N. Musto, after noting Respondents' failure to respond to the Motion to Strike, orally granted the Motion to Strike. Based on the lack of any notice of hearing on the motion,ⁱⁱ the Board relied strictly on the pleadings and did not receive or consider any oral argument or testimony from the UPW on the motion in issuing this order. Board Member Musto confirmed that the Board would issue a separate order on the Respondents' Exceptions in response to a question from Ms. Covert.

While the lack of opposition the Motion to Strike by Respondents could be sufficient to justify the granting of the Motion to Strike, the Board will nevertheless address the merits.

MOTION TO STRIKE EXHIBIT A

In support of the Motion to Strike, the UPW argued in its pleadings that Exhibit A of the Respondents' Exceptions to the proposed Findings and Conclusions should be stricken from the record as lacking a basis in law or fact to reopen and receive evidence, and that Respondents' Exceptions should be rejected. UPW alleged, among other things:

That on August 18, 2003, UPW filed a prohibited practice complaint in this matter alleging that Respondents failed to comply with the terms and provisions of a March 15, 2004 Stipulation and Order constituting unlawful discrimination against Ah Sing, a bargaining unit 1 employee at Connections, in his terms and conditions of employment in violation of HRS § 89-1(a)(3);

That on September 23, 2003, UPW filed a motion to amend the complaint to include a violation of § 12 (layoffs) of the collective bargaining agreement;

That on September 30, 2003, Respondents represented by Deputy Attorney Generals Mr. Halvorson and Jonathan Swanson (Mr. Swanson) filed a motion to dismiss or in the alternative, motion for summary judgment (Respondents' motion to dismiss);

That on or about October 1, 2003, Connections terminated a contract with Ah Sing to dump the school's rubbish;

That in its opposition to the Respondents' motion to dismiss and the attached declaration of Ah Sing (Ah Sing Declaration), UPW raised the contract termination action; the Declaration declared that on October 1, 2003 " John Thatcher told me that he had been advised by his attorney to cut all ties with me because of the prohibited practice complaint which had been filed by the union in connection with termination of my job and in its memorandum[;]" and UPW asserted that "respondents retaliated against James Ah Sing by terminating a contract he had with Connections to dump rubbish for which he was paid \$75 a week[.]" and the clearest incidence of the unlawful interference in violation of HRS § 89-13(a)(1) was the "retaliatory action by John Thatcher on October 1, 2003;"

That at the December 3, 2003 hearing on Respondents' September 30, 2003 motion to dismiss, Respondents' counsel Mr. Swanson argued that the alleged violation of HRS § 89-13(a)(1) should be dismissed or the complaint amended to bring in the October 1st allegation, and a discussion resulted in an amendment to the complaint to include the retaliation;

That UPW attached the Ah Sing Declaration to its March 16, 2004 motion for summary judgment;

That on June 24, 2004, UPW moved to amend the complaint, including a paragraph on the October 1, 2003 termination, without any objection from Respondents to this paragraph;

That the Board entered a June 8, 2007 proposed order granting the Union's motion for summary judgment, which was adopted by Order No. 2457 issued on June 29, 2007;

That the Third Circuit vacated Order No. 2457 and remanded for further proceedings consistent with the court's decision;

That on July 29, 2009, Respondents, represented by Mr. Halvorson, filed Respondents' second motion to dismiss, or in the alternative, motion for summary judgment (Respondents' second motion to dismiss), and UPW filed an opposition supported by the Ah Sing Declaration arguing that Respondent retaliated against Ah Sing by terminating the rubbish contract, which was the "clearest incidence of the unlawful interference is the retaliatory action by John Thatcher on October 1, 2003[;]"

That on July 9, 2014, the Board issued Order No. 3005, which not only denied the Respondents' second motion to dismiss but a motion to amend the complaint as unnecessary and already addressed by the Board's previous December 3, 2003 oral ruling "that the complaint was deemed amended to include a retaliation claim and that no written amendment was required[;]"

That at the October 22, 2014 evidentiary hearing, the Ah Sing Declaration was introduced as Union Exhibit 48 and Ah Sing testified that the termination of the October 3, 2003 refuse contract was because the school "had to cut all ties with me because of this legal thing going on[;]" Thatcher was called by the UPW and Mr. Halvorson's cross examination included no questions regarding Ah Sing's testimony that Thatcher or another Connections staff person told Ah Sing that the contract was canceled because of the prohibited practice complaint;

That post hearing briefs were filed on October 30, 2015 in which UPW argued retaliation but Respondents did not; and

That on March 31, 2017, the Board issued its Proposed Findings and Conclusions finding that Connections violation HRS § 89-13(a)(4) by wilfully retaliating against Ah Sing.

UPW further asserted that Respondents should not be allowed to reopen the record because both parties have rested their case; Exhibit A is an unverified document of low importance and probative value filled with double hearsay of events known to Respondents at the time of trial; and that Thatcher's claim that he was not aware of a retaliation claim and Respondents' claim that the complaint has "never been properly amended to include the retaliation claim" are not valid bases for reopening.

At this point in the proceedings, the parties have already rested and briefed the issues on remand and the Board has issued the Proposed Findings and Order. The Board finds that although Respondents did not request that the Board reopen the case, the Board would be compelled to reopen the record to receive Exhibit A given the procedural posture of this case.ⁱⁱⁱ While the Board's own administrative rules do not provide for motions to reopen, the Board has previously looked to and applied Hawaii Rules of Civil Procedure Rule (HRCP) 60(b), the Hawaii rule providing for motions to reopen. *See, e.g. Hawaii Gov't Emp. Ass'n v. Cayetano*, Board Case No. CE-13-368, Decision No. 416A, 6 HLRB 128, 129 (11/16/00). While HRCP Rule 60(b) sets forth six bases for the granting of such relief (mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or other misconduct of an adverse party; the judgment is void; judgment has been satisfied; any other reason justifying relief from the operation of the judgment), the Board does not find any of these bases applicable in this case. For these reasons, the Board will not reopen the record in this case to admit or consider Exhibit A.

“As a general matter, permitting a party to reopen its case for submission of additional evidence is within the discretion of the trial court and is subject to review under the abuse of discretion standard.” *Pelosi v. Wailea Ranch Estates*, 91 Hawai'i 478, 487, 985 P.2d 1045, 1054 (1999). The granting of a motion to strike is within the discretion of the [Board]. *Messier v. Ass'n. of Apartment Owners*, 6 Haw. App 525, 530, 735 P.2d 939, 944 (1987).

The Board, in its discretion, grants Complainant's Motion to Strike Exhibit A from the record.

RESPONDENTS' EXCEPTIONS

The Board further finds that the record supports UPW's request that the Board reject Respondents' Exceptions.

Respondents rely on two grounds for their Exceptions to the Board's determination that Connections retaliated against Ah Sing for the filing of the prohibited practice complaint. First, that the “complaint has never been properly amended to include the retaliation claim regarding termination of the refuse contract” implying that the December 3, 2003 oral order of the Board was insufficient to amend the amended Complaint. Second, that the Employer's failure to address the retaliation claim was due to being unaware of the retaliation claim.

Hawaii Administrative Rules § 12-42-8(g)(18)(A) provides in relevant part:

§12-42-8 Proceedings before the board.

(g) Hearings:

(18) Decisions and orders of the board:

(A) Every decision and order rendered by the board shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law....

(Emphasis added) From the face of this administrative rule, there is no question that Board orders are not required to be in writing but may also be stated in the record. *See also: The Educational Laboratory: A Hawaii New Century Public Charter School (“ULS”) Local School Board (“LSB”) v. Hawaii State Teachers Association*, Board Case No. CU-05-305, Order No. 2948, at *18-19 (11/5/13) (The Board held that its oral order denying a motion to dismiss complaint on the record started the running of the ten days within which an answer is required to be filed.) Further, the record unequivocally supports that at the December 3, 2003 hearing on Respondents’ motion to dismiss, the Board orally ordered that the amended complaint include the allegation of an HRS § 89-13(a)(1) violation for retaliation based on the October 1, 2003 incident involving Thatcher and Ah Sing after Deputy Attorney General Mr. Swanson, in fact suggested and UPW counsel Mr. Takahashi agreed, to orally amend the complaint. For these reasons, there is simply no merit to Respondents’ contention that the amended complaint was not properly amended to include the retaliation claim.

In addition, a review of the record, as thoroughly set forth by the UPW in the Motion to Strike, shows that the Employer was aware or should have been aware of the retaliation claim since October 13, 2003 when the Ah Sing Declaration was filed with UPW’s opposition to Respondents’ September 30, 2003 motion to dismiss. The Ah Sing Declaration became a standard declaration filed in support of several other pleadings and included as Exhibit 48 introduced and admitted at the hearing on remand. More significantly, the Board orders rendered in this case substantiate that the complaint was amended to include the retaliation allegation. As stated, the December 3, 2003 hearing on Respondents’ motion to dismiss resulted in an agreement and order to amend the complaint to include retaliation. In addition, the June 8, 2007 Proposed Order granting Complainant’s motion for summary judgment noted in finding of fact number 10 that Ah Sing performed on contract during August and September 2003 and referenced the October 1, 2003 incident giving rise to the retaliation claim. Further, Order No. 3005 issued on July 9, 2014 prior to the hearing on remand referenced the retaliation claim numerous times in denying a motion to amend the complaint to include the retaliation claim arising out of the October 1, 2003 incident as “unnecessary and already addressed by the Board’s previous ruling [December 3, 2003 oral ruling][.]” Finally, as both the UPW alleged and the Board in its Proposed Findings and Conclusions noted, at the hearing on remand, the UPW established through Ah Sing’s testimony, his Declaration (Exhibit 48), and a copy of the service agreement that Connections through Thatcher signed a service agreement with Ah Sing as the owner of Jimmy’s Quality Service for

commercial trash hauling on January 13, 2002, which was canceled by Connections because of the Union's filing of the prohibited practice complaint in this case.

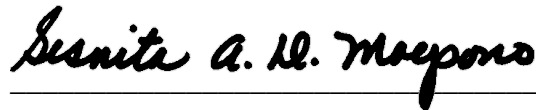
Based on the record, the Board finds that there is substantial evidence from which to conclude that the Employer was or should have been aware of the retaliation claim prior to close of the hearing on remand. Accordingly, the Board rejects the Respondents' Exceptions.

ORDER

For the reasons set forth above, the Board grants the UPW's Motion to Strike Exhibit A of Respondents' Exceptions to the Proposed Findings of Fact and Conclusions of Law, and Decision and Order Filed March 31, 2017 and Reject Their Exceptions Filed June 13, 2017.

DATED: Honolulu, Hawaii, August 14, 2017.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member





J.N. MUSTO, Member

Copies to: Rebecca L. Covert, Esq.
James E. Halvorson, Deputy Attorney General

¹ HRS § 91-11 states:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

ⁱⁱ Under Hawaii Administrative Rules § 12-42-8(g)(3)(iv) governing motions, the Board “may decide to hear oral argument or testimony” on motions but is not required to do so. However, because the Board heard and orally ruled on the Motion to Strike without notice at the hearing on the exceptions, and as stated, Respondents’ counsel was not in attendance, as stated, the Board will resolve this motion on the pleadings alone.

ⁱⁱⁱ Hawaii Public Employment Relations Board Rules of Practice and Procedure, Title 12, Subtitle 7, Chapter 42 do not contain any provisions for reopening of the record for the submission of evidence. However, the Board has looked to and applied the Hawaii Rules of Civil Procedure where its own rules are silent. United Public Workers, AFSCME, Local 646, AFL-CIO v. Akana, Board Case No. CE-01-121, Decision No. 337 at 182 (4/27/93).