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Case No. 17-CU-10-357, 17-CE-10-906**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JONATHAN TAUM,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; and DEPARTMENT
OF PUBLIC SAFETY, State of Hawaii,

Respondents.

CASE NOS.: 17-CU-10-357
17-CE-10-906

ORDER NO. 318

ORDER CONTINUING UPW'S MOTION
FOR SUMMARY JUDGMENT AND
PERMITTING COMPLAINANT'S
REQUESTED DISCOVERY

ORDER CONTINUING UPW'S MOTION FOR SUMMARY
JUDGMENT AND PERMITTING COMPLAINANT'S REQUESTED DISCOVERY

On December 20, 2017, Complainant JONATHAN TAUM (Taum or Complainant) filed a prohibited practice complaint (Complaint) against Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) and DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or Employer).

On December 21, 2017, the Hawaii Labor Relations Board (Board) issued, and served all parties with, a Notice to Respondent of Prohibited Practice Complaint; Notice of Prehearing Conference and Notice of Hearing on the Merits of the Prohibited Practice Complaint (Notice of Complaint). The Notice of Complaint set January 18, 2018, as the deadline for the filing of dispositive motions, and January 25, 2018, as the deadline for any response to a dispositive motion. The hearing on the merits of the case and oral arguments on dispositive motions, if any, were scheduled for January 22, 2018.

On December 29, 2017, Complainant filed a motion to continue the hearing scheduled for January 22, 2018, due to a conflict in Complainant's counsel's schedule. On January 4, 2018, the UPW filed its opposition to the motion to continue the hearing, asserting the Board is required by Hawaii Revised Statutes (HRS) § 377-9 to conduct a hearing in a prohibited practice complaint not later than forty days from the date a complaint is filed. At the Prehearing Conference

I do hereby certify that this is a full, true and correct copy of the original on file in this office.


Nora A. Edman
Hawaii Labor Relations Board

held on January 9, 2018, the Board heard arguments from counsel on Complainant's motion to continue the hearing. The Board then rescheduled the hearing on the merits to January 29, 2018, which is forty days from the date the Complaint was filed. The Board also rescheduled oral arguments on dispositive motions to January 23, 2018.

On January 16, 2018, the UPW filed Union Respondent's Motion for Summary Judgment and accompanying memorandum, declaration, and exhibits (collectively Motion for Summary Judgment); and on January 17, 2018, filed an errata to the Motion for Summary Judgment to make minor corrections. On January 23, 2018, Complainant filed Complainant's Memorandum in Opposition to Union Respondent's Motion for Summary Judgment Filed on January 16, 2018, and accompanying declarations (collectively Opposition).

For the reasons discussed below, the Board hereby enters this order continuing the UPW's Motion for Summary Judgment and permitting the discovery requested in the declaration of Complainant's counsel attached to Complainant's Opposition. Although there are also currently pending UPW's Motion to Dismiss Complaint, and PSD's Motion to Dismiss Prohibited Practice Complaint Filed on December 20, 2017, those motions to dismiss will be addressed by the Board at a later date.

In summary, the UPW's Motion for Summary Judgment asserts the decision not to arbitrate Complainant's grievance was based on the decision-maker's judgment and was not an arbitrary act; the UPW's decision was fair and impartial, lacking any evidence it was discriminatory; and that there are no material facts in dispute to indicate the UPW's decision to not arbitrate was in bad faith. The Motion for Summary Judgment was 43 pages long, and accompanied by approximately 900 pages of exhibits.

In summary, Complainant's Opposition asserts there are genuine issues of material fact whether there was "just and proper cause" to support Complainant's termination, including the adequacy of the investigation; the UPW abandoned the arbitration, violating the duty of fair representation, due to a "personal grudge" against Complainant, lying to Complainant, fraud and deceitful conduct. Complainant also asserts that he never had access to exhibits attached to the UPW's Motion for Summary Judgment because "the Union and UPW had exclusive possession of them and never produced them to the Complainant"; that the Board's rules require "an abbreviated time (five working days) to respond to a substantive motion unlike the Hawaii Rules

of Civil Procedure”; and that “UPW’s counsel knows that the Complainant is unable to adequately review and respond to several hundreds of pages of documents, without discovery, without prior disclosure and without any opportunity to submit opposing exhibits and declarations.” In his declaration attached to the Opposition, counsel for Complainant made the following request:

3. Pursuant to Rule 56(f), HRCivP, the Complainant seeks further discovery on the issue of whether the Employer: (a) Had finished its investigation at the time of the Complainant’s termination; (b) whether the State wrongfully relied on evidence collected post-termination in support of the Complainant’s termination; and (c) what specific evidence the Complainant [sic] relied on as it related to the Complainant.
4. Pursuant to Rule 56(f), HRCivP, the Complainant seeks further discovery on the issue of whether the Union: (a) the recommendation to Mr. Nakanelua from Ms. Kamakeeaina to file the demand for arbitration on the Complainant’s behalf; (b) Mr. Nakanelua’s prejudice and bias against the Complainant; (c) Discussions between Mr. Nakanelua and Ms. Companiano that led to the decision to abandon the Complainant’s arbitration; and (d) What evidence did Ms. Companiano have that led her to persuade the Complainant to resign or abandon the Complainant’s arbitration.

As a preliminary matter, the Board notes that Complainant asserted in his Opposition that he “objects to the Board’s consideration and use of any and all rules of civil procedure, from any source, including but not limited to the Hawaii Rules of Civil Procedure, without prior notice and rulemaking by the Board. There are no Board rules that permit the filing of a Summary Judgment motion.”

First, the Board notified the parties of the possibility of dispositive motions being filed in its Notice of Complaint issued on December 21, 2017, which included a deadline for the filing of dispositive motions and a deadline for any response to dispositive motions. Other than a motion to continue the hearing date due to a conflict in counsel’s schedule, no party objected to the Board’s scheduling of dispositive motions until after the UPW’s Motion for Summary Judgment was filed.

Second, the Board's administrative rules permit the filing of motions, including motions to dismiss a case, in Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Combined with the Board's Notice of Complaint, the parties were put on notice that motions to dispose of a complaint are permitted.

Third, the Board has historically looked to the Hawaii Rules of Civil Procedure as well as Hawaii case law for guidance on the standards applicable to motions, when its own administrative rules are silent. For example, in In the Matter of United Public Workers and Bernard K. Akana, Case No. CE-01-121, Board Decision No. 337, the Board applied the standard of HRCP Rule 41(b)¹ to a motion to dismiss entertained after the presentation of the complainant's case. Board Decision No. 337 is a published decision, found in 5 H.L.R.B. 177 Dec. 337 (1993). Similarly, Board Decision No. 446 looked to HRCP Rule 6(b) for guidance on a motion for extension of time where its own rules were silent; Decision No. 446 was published in 6 H.L.R.B. 361 Dec. 446 (2004). *See also* Board Decision No. 448 issued in Case No. CE-01-508, which referenced the Board's Order No. 2119 in that matter, and which in turn utilized the summary judgment standards articulated by the Hawaii Supreme Court in SHOPO v. Society of Professional Journalists – University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). Moreover, in State v. Nakanelua, 134 Hawai'i 489, 345 P.3d 155 (2015), the Hawaii Supreme Court upheld an order of the Board (Order No. 2686, issued on February 9, 2010, in Board Case Nos. CU-10-278 and CE-10-726), which had found that both the UPW and the State committed prohibited practices, and which granted in part and denied in part the UPW's Motion to Dismiss or in the alternative for Summary Judgment in Case No. CU-10-278, and granted in part the UPW's Motion for Summary Judgment in Case No. CE-10-726, and which utilized the standards applicable to motions to dismiss and motions for summary judgment before the circuit courts.

¹ The Board quoted Rule 41(b) as is provided at the time:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief.

Accordingly, the Board has historically looked toward the Hawaii courts for standards applicable to motions for summary judgment, and to the Hawaii Rules of Civil Procedure when its own rules are silent. With respect to the UPW's Motion for Summary Judgment, Complainant has requested the opportunity to conduct discovery on certain issues in response to the motion. The Board's own rules are silent as to this specific issue; however, Rule 56(f) of the HRCF provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had *or may make such other order as is just* (emphasis added).

The Board's review of the pleadings in this matter, the arguments by the parties, and the specific facts and arguments asserted in the UPW's Motion to Summary Judgment, leads the Board to find and conclude, in its discretion and under the specific facts of this case, that the Complainant should be given an opportunity to conduct certain discovery prior to supplementing his opposition to the UPW's Motion for Summary Judgment. Additionally, pursuant to HAR § 12-42-8(g)(3)(C)(iii), the Board may direct the due date for a response to a motion beyond the standard five days provided for by that rule. For these reasons, the hearing on the merits previously scheduled for January 29, 2018, is hereby taken off the Board's calendar. The hearing on the merits shall be rescheduled for a future date pending the Board's consideration of the UPW's Motion to Summary Judgment.

The Board notes that the UPW objected to a continuance of the hearing on the merits because HRS § 377-9(b) states that the Board shall fix a date for hearing on the complaint "not more than forty days" after the filing of the complaint. However, prohibited practice complaints are also contested cases that may raise procedural due process considerations. Due process "is flexible and calls for such procedural protections as the particular situation demands"; the "basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Defense Fund v. City Council of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). Here, balancing the interests of the parties and the pleadings in this case, the Board finds that Complainant should be allowed to conduct limited discovery in order to

meaningfully respond to the UPW's Motion for Summary Judgment. As a result, the hearing on the merits of the Complaint will be continued beyond the forty-day deadline provided in HRS § 377-9(b). However, HRS § 377-9(k) provides that "substantial compliance with the procedure of [chapter 377] shall be sufficient to give effect to the decisions and orders of the [B]oard, and they shall not be declared inoperative, illegal, or void for any nonprejudicial irregularity in respect thereof."

For the reasons discussed above, the Board orders the following:

1. The hearing on the merits previously scheduled for January 29, 2018, is taken off the Board's calendar. The hearing on the merits shall be rescheduled for a future date pending the Board's consideration of the UPW's Motion to Summary Judgment. Any subpoenas already served will remain in effect, pending a rescheduled hearing date and time for the witnesses' appearances.
2. Complainant has until **February 7, 2018**, to serve discovery requests.
3. Responses to discovery requests shall be provided no later than **February 23, 2018**.
4. The scope of Complainant's discovery shall be limited to those issues articulated in paragraphs 3 and 4 of the Declaration of Ted H.S. Hong attached to Complainant's Opposition to the UPW's Motion for Summary Judgment.
5. The parties shall retain privileges recognized by law, and may preserve objections to the same extent such objections could be made pursuant to the discovery rules contained in the HRCF.
6. Complainant shall pay the witness fees and mileage for any person Complainant may seek to depose or subpoena.
7. A party may seek protective orders from the Board for annoyance, embarrassment, oppression, or undue burden or expense. However, the party must certify that the movant has in good faith conferred or attempted to confer with the other parties in an effort to resolve the dispute without Board action. The Board may issue a protective order, or deny the motion, or order discovery may be had only on specific

terms and conditions, and may order the losing party to pay reasonable attorney's fees and costs to the prevailing party.

8. Complainant shall have until **March 9, 2018**, to supplement his Opposition to the UPW's Motion for Summary Judgment.
9. The Board will hear oral arguments on the UPW's Motion for Summary Judgment on **March 15, 2018, at 9:00 a.m.**, to be held in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. Parties or representatives of parties not residing on Oahu may appear at the oral argument telephonically. Please contact the Board prior to the date of the oral argument to make the necessary arrangements.

DATED: Honolulu, Hawaii, January 26, 2018.

HAWAII LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J. N. Musto

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