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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

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

JONATHAN TAUM,

ORDER NO. 3347

Complainant,

and

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

ORDER GRANTING, IN PART,
AND DENYING, IN PART,
COMPLAINANT'S MOTION TO
ADMIT INTO EVIDENCE THE
DEPOSITIONS UPON ORAL
EXAMINATION OF: (1) ALTON K.
NOSAKA TAKEN ON FEBRUARY
15, 2018; (2) ANTHONY R.K. HO
TAKEN ON FEBRUARY 15, 2018;
AND (3) DANIEL KAPOO
PALEKA TAKEN ON FEBRUARY
15, 2018

Respondents.

ORDER GRANTING, IN PART, AND DENYING, IN PART,
COMPLAINANT'S MOTION TO ADMIT INTO EVIDENCE
THE DEPOSITIONS UPON ORAL EXAMINATION OF:
(1) ALTON K. NOSAKA TAKEN ON FEBRUARY 15, 2018;
2) ANTHONY R.K. HO TAKEN ON FEBRUARY 15, 2018;
AND (3) DANIEL KAPOO PALEKA TAKEN ON FEBRUARY 15, 2018

On April 13, 2018, the Hawaii Labor Relations Board (Board) issued Order No. 3343 (Order) Requiring COMPLAINANT JONATHAN TAUM (Complainant) to File a Written Motion Requesting the Board to Receive Complainant's Exhibits 15 and 16 in Evidence (Motion).ⁱ The Board ordered that Complainant file his Motion by close of business on Wednesday, April 18, 2018; that Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) and DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (DPS) file any response to the Motion by close of business on Wednesday, April 25, 2018; and Complainant file any reply memorandum in support of the Motion by close of business on May 2, 2018.

On April 13, 2018, however, UPW filed Memorandum in Support of Union's Objection to Admission of Deposition Transcripts (Objection). In the Objection, the Union objects to the admission of the deposition transcripts for any reason other than for contradicting or impeaching the testimony of the deponent as a witness. In support, UPW argues, among other things, that the

Board has relied on the Hawaii Rules of Civil Procedure (HRCP) where its own rules are not inconsistent; there is no Board rule authorizing a party to rely at trial on a deposition when the deponent is available to testify; Order No. 3331 required the exchange of witness lists and did not provide for the receipt of “declarations”ⁱⁱ in lieu of witness testimony; while the Board is not bound by the technical rules of evidence (HAR § 12-42-8(g)(8)), the threshold question of receipt of depositions in lieu of testimony is not an evidentiary rule but decided under HRCP Rule 32 (Rule 32); and Rule 32(a) contains conditions, which must exist before the deposition can be used, and after this threshold condition is met, the court determines whether the matters contained in the deposition are admissible under the rules of evidence.

On April 17, 2018, Complainant filed Complainant’s Motion to Admit into Evidence the Depositions Upon Oral Examination of: (1) Alton K. Nosaka, Taken on February 15, 2018 (Complainant’s Exhibit 15); (2) Anthony R.K. Ho Taken on February 15, 2018 (Complainant’s Exhibit 16); and (3) Daniel Kapoo Paleka Taken on February 15, 2018 (Complainant’s Exhibit 17).ⁱⁱⁱ In support of his Motion, Complainant relies on Hawaii Revised Statutes (HRS) § 91-10(1), which provides in contested cases that, “Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence...”; and Hawaii Administrative Rules (HAR) § 12-42-8(g)(6)(B) providing that “A copy of the deposition...shall be filed with the board[,] and (8)(A) “In any proceeding before the board, the board shall not be bound by technical rules of evidence.” Complainant further argues, among other things, that because all three depositions were attended by Respondents’ legal counsel: Respondents had the opportunity to cross-examine as required by HRS § 91-10(3)^{iv} and HAR § 12-42-8(g)(8)(E);^v the depositions do not constitute hearsay evidence because the depositions were conducted under oath and Respondents’ legal counsel conducted cross-examination; and Respondents are not prejudiced by the admission of the depositions. Alternatively, Complainant requests that the Board allow him to subpoena and call Alton Nosaka (Nosaka), Anthony Ho (Ho), Daniel Kapoo Paleka (Paleka), and UPW Business Agent Jon Sloan (Sloan)^{vi} to testify at the hearing on the merits (HOM).

On April 18, 2018, DPS filed Respondent State of Hawai’i, Department of Public Safety’s Joinder in Respondent United Public Workers’ Memorandum in Support of Union’s Objection to Admission of Deposition Transcripts, Filed April 13, 2018.

On April 25, 2018, the Union filed UPW’s Memorandum in Opposition to Motion to Admit into Evidence the Depositions of (1) Alton K. Nosaka, (2) Anthony R.K. Ho, and (3) Daniel Kapoo Paleka (UPW Opposition). In the Opposition, the Union asserts, among other things, that Complainant failed to establish a proper basis to use depositions because he made no effort to designate deponents as witnesses, provide a summary of their testimony, or attempt to have them appear by subpoena at the hearings scheduled in Hilo; the depositions contain nothing but “hearsay” evidence inadmissible under HRS § 377-9(c); admitting the Nosaka, Ho, and Paleka

depositions infringes on the constitutional right to due process, including a meaningful “hearing” before the Board as set forth under the Hawaii Administrative Procedures Act; and because the Board is not bound by technical rules of evidence, the Board may not preclude the right of cross-examination of all witnesses.

Complainant filed no reply memorandum by the May 2, 2018 deadline.

Based on review of the pleadings, the arguments of the parties, and HRS § 91-10(1) and Rule 32, the Board finds and concludes, in its discretion and under the facts of this case, that the depositions of Alton Nosaka (Nosaka), Anthony Ho (Ho) and Daniel Paleka (Paleka) should not be admitted in evidence in lieu of live testimony for the following reasons.

HAR § 12-42-8(g)(6) and (8) provides, in relevant part:

(6) Discovery, depositions, and interrogatories:

(A) Upon written application and for good cause shown, the board may permit the parties to take deposition upon oral examination...in the manner prescribed under the Hawaii Rules of Civil Procedure.

(B) A copy of the deposition or interrogatories shall be filed with the board.

(8) Rules of evidence:

(A) In any proceeding before the board, the board shall not be bound by technical rules of evidence.

(B) All irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(D) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available, provided that upon request parties shall be given an opportunity to compare the copy with the original.

(E) Each party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts and shall have the right to submit rebuttal evidence.

A review of HAR § 12-42-8(g)(6) shows that while providing for the application to take depositions upon oral examinations, this provision is obviously silent regarding the admission of such depositions into evidence. The Board has long held the position that, “When our rules are silent on such procedural matters, the Board has looked for guidance to analogous provisions of the Rules of our courts[.]” Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-

1(CE), Order No. 1978, at *5 (2001); United Public Workers, AFSCME, Local 646, AFL-CIO v. Cayetano, Board Case No. CE-01-378a, Order No. 2014, at *6 (2001).

Rule 32 is the court rule providing for the use of depositions in court proceedings and stating, in relevant part:

Rule 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS.

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Hawai‘i Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides on an island other than that of the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(b) Pretrial Disclosures. A party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony. Unless otherwise directed by the court, this information must be disclosed at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party, and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of that testimony. Objections not so disclosed, other than objections under Rules 402 and 403 of the Hawai‘i Rules of Evidence, are waived unless excused by the court for good cause. These disclosures must be made in writing, signed, and served.

(c) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (e)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Due to the silence of its own procedural rules, the Board will look to the analogous Rule 32 for guidance. Rule 32(a) provides for the specific circumstances in which a witness’s deposition may be used by a party. Under Rule 32(a)(1), any deposition may be used by any party for contradiction or impeachment, or for any other purpose permitted by the Hawaii Rules of Evidence. Under 32(a)(2), the deposition of a party or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party that is a corporation, partnership, association of governmental agency may be used by the adverse party for any purpose. Under Rule 32(a)(3), a party or non-party witness’s deposition may be used by any party if the witness is dead; resides on an island other than the place of the hearing; is out of the State; is unable to attend or testify because of age, illness, infirmity, or imprisonment, or the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. In applying Rule 32, the party introducing the deposition has the burden to establish that the circumstances exist warranting the use. Allgeier v. United States, 909 F.2d 869, 876 (6th

Cir. 1990); Jauch v. Corley, 830 F.2d 47, 50 (5th Cir. 1987); Forbes v. Villa, 2013 U.S. Dist LEXIS 199481, at *2 (D.Cal. 2013)

Based on the posture of this case, the Board concurs with UPW that Complainant has not shown or even argued that any of the circumstances provided for in Rule 32(a) exist in this case, which would warrant the admission of the depositions at issue. Complainant's argument that Respondents' counsel attended and had the opportunity to cross-examine at the depositions does not fall within any of the circumstances set forth in Rule 32. Therefore, the depositions should not be admitted under this Rule. The admissibility of depositions at trial is subject to the abuse of discretion standard. "A trial court's exercise of discretion in ruling on the admissibility of depositions will be upheld unless an abuse of discretion is manifest." Aga v. Hundahl, 78 Hawai'i 230, 241, 891 P.2d 1022, 1033 (1995).

The Board is also cognizant of the requirements of HRS § 91-10(1), the statutory provision invoked by Complainant. HRS § 91-10(1) states in relevant part:

(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence....

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence[.]

In Chock v., Bitterman, 5 Haw. App. 59, 678 P.2d 576 (1984)) (*citing* Cazimero v. Kohala Sugar Co., 54 Haw. 479, 483, 510 P.2d 89, 92 (1973)), the Hawaii Supreme Court held that in construing HRS § 91-10(1), the legislative history indicates that the statute is intended to direct administrative agencies to admit all evidence presented to them "limited only by considerations of relevancy, materiality and repetition." Accordingly, under HRS § 91-10(1), the Board is permitted to receive any oral or documentary evidence, but is required to exclude any irrelevant, immaterial, or unduly repetitious evidence.

More specifically, HRS § 89-5(i) setting forth, in part, the powers and functions of the Board requires the Board to:

(5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions, and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its duties.

In performing its hearing and inquiry functions, the Board agrees with the line of cases, which adhere to the principle that, “Live testimony over depositions is the favored method of presenting testimony...the antipathy to depositions is due to a large part to the desirability of having the factfinder witness demeanor.” Windsor Shirt Co. v. New Jersey Nat’l Bank, 793 F.Supp. 589, 608 (D. Pa. 1992). Based on the lack of showing that any of the circumstances set forth in Rule 32(a) exist for Nosaka, Paleka, and Ho, and the Board’s favoring of live testimony over the deposition testimony of witnesses, the Board, in its discretion, further finds and concludes that the live testimony from these witnesses should be received in this case and that the wholesale admission of these depositions at issue is unduly repetitious of the oral testimony received. In so ruling, however, the Board does not preclude these depositions from being used during the HOM for contradiction or impeachment purposes.

For the reasons set forth above, the Board grants in part and denies in part the Motion as follows. The Motion is denied regarding the admission into evidence of the depositions of Nosaka, Ho, and Paleka in lieu of live testimony and granted insofar as Complainant requests leave to subpoena and call Nosaka, Paleka, Ho, and Sloan^{vii} to appear and testify as live witnesses at the HOM.

DATED: Honolulu, Hawaii, May 4, 2018.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



IN. MUSTO, Member

JONATHAN TAUM v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
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Copies sent to:

Ted H.S. Hong, Esq.
Herbert R. Takahashi, Esq.
Henry S. Kim, Deputy Attorney General

ⁱ In Order No. 3343, the Board ordered Complainant to file a written motion requesting the Board to receive Complainant’s Exhibits 15 and 16 in evidence based on an oral motion made by Complainant at the April 12, 2018 hearing on the merits. At the time that Order No. 3343 was issued, the Board did not have a copy of the transcript for that hearing. The Board has since received a copy of the April 12, 2018 hearing transcript. Upon receipt and review of the transcript, the Board finds that Complainant orally offered into evidence not only the depositions of Alton Nosaka (Exhibit 15) and Anthony Ho (Exhibit 16), but the deposition of Daniel Paleka (Exhibit 17). Accordingly, the Board accepts the inclusion in the Motion of the deposition of Daniel Paleka (Exhibit 17). Transcript of Hearing, Volume II at 535-36, Taum v. United Public Workers, AFSCME, Local 646, AFL-CIO (4/12/18).

ⁱⁱ The Board is uncertain whether UPW intended to use the term “declarations” or “depositions”.

ⁱⁱⁱ See note 1 above.

^{iv} HRS § 91-10(3) provides that, “Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.”

^v HAR § 12-42-8(g)(8)(E) Each party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts and shall have the right to submit rebuttal evidence.”

^{vi} The Board notes that there is no deposition of Sloan at issue in this Motion. However, Complainant designated Sloan as a witness on the Complainant Jonathan Taum’s Witness List, filed on April 4, 2018. The April 11, 2018 HOM transcript shows that Complainant’s counsel represented and the DECLARATION OF BURTON YAMAGUCHI, RE ATTEMPTED SERVICE OF SUBPOENA UPON WITNESS JONATHAN SLOAN, filed on April 10, 2018, supports that Sloan had not been able to be served with a subpoena. Board Member J N. Musto, who presided over that HOM, suggested at the April 11, 2018 that Complainant’s counsel continue to try to serve Sloan. Transcript of Hearing, Volume I at 15-16, 20, Taum v. United Public Workers, AFSCME, Local 646, AFL-CIO (4/11/18). Accordingly, the Board is entertaining the request for permission to subpoena Sloan in this Motion.

^{vii} See endnote vi, *supra*.