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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. 3348

ORDER DENYING MOTION TO
SET FURTHER BOARD
HEARINGS IN HONOLULU AND
TO EXPEDITE THE
PROCEEDINGS

**ORDER DENYING MOTION TO SET FURTHER BOARD
HEARINGS IN HONOLULU AND TO EXPEDITE THE PROCEEDINGS**

On April 26, 2018, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Motion to Set Further Board Hearings in Honolulu and to Expedite the Proceedings (Motion to Set and Expedite) with the Hawaii Labor Relations Board (Board). UPW has based its Motion on the grounds that: the UPW did not waive the 40-day requirement under Hawaii Revised Statutes (HRS) § 377-9(b);ⁱ in Order No. 3318, the Board disregarded the 40-day requirement to commence the hearings; the statutory requirements of HRS §§ 377-9(b) and 89-5(i)(10)ⁱⁱ are to ensure that the Board proceedings move forward promptly and expeditiously; and to accommodate the Hilo witnesses and expedite the presentation of Complainant's case, the parties agreed to further suspend the direct examination of Jonathan Taum with the understanding that he (Taum) would be called in Honolulu after completion of the other Hilo witnesses[.]” UPW seeks a prompt hearing in Honolulu to conclude the Complainant's presentation of its case. The Board denies the Motion for the following reasons.

This matter arises out of a prohibited practice complaint filed on December 20, 2017, by Complainant JONATHAN TAUM (Complainant or Taum), a resident of Hilo, Hawaii, against the Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD) for an alleged HRS

§ 89-13(a)(8) violation for his December 23, 2016 discharge without just and proper cause from his position as an Adult Corrections Officer IV at the Hawaii Community Correctional Center in Hilo, Hawaii for a June 15, 2015 incident and against the Respondent UPW for alleged HRS§ 89-13(b)(1), (4), and (5) violations for breach of the duty of fair representation regarding his grievance against the PSD.

On December 21, 2017, the Board issued a Notice to Respondents of Prohibited Practice Complaint; Notice of Prehearing Conference and Notice of Hearing on the Merits of the Prohibited Practice Complaint, which, among other things, established a date of January 22, 2018 for the hearing on the merits (HOM) in the Board Hearings Room in Honolulu, Hawaii.

On December 29, 2017, Complainant filed Complainant's Motion to Continue Hearing Scheduled on January 22, 2018 (Motion to Continue) based on a conflict with a previously scheduled deposition of Complainant's counsel. UPW opposed the continuance.

After a January 9, 2018 Prehearing Conference and hearing on the Motion to Continue, on January 10, 2017, the Board issued a Notice of Rescheduled Hearing on the Merits of the Prohibited Practice Complaint; Notice of Hearing to Receive Oral Arugments [sic] on Dispositive Motions; Notice of Deadlines rescheduling the HOM to January 29, 2018 (January 10, 2018 Notice) based on the lack of unanimous agreement to waive the 40-day requirement and rescheduled oral arguments on dispositive motions to January 23, 2018.

On January 5, 2018, the UPW filed Union Respondent's Motion to Dismiss Complaint (Union MTD) for lack of jurisdiction due to untimely filing under HRS § 377-9(l) and Hawaii Administrative Rules (HAR) § 12-42-42; lack of subject matter jurisdiction; failure to state a claim; and lack of standing.

On January 12, 2018, Complainant filed Complainant's Memorandum in Opposition to Union Respondent's Motion to Dismiss Complaint Filed on January 5, 2018.

On January 16, 2018, UPW filed a Motion for Summary Judgment (MSJ) asserting that there is no dispute of material fact regarding the hybrid claim.

On January 16, 2016, PSD filed Respondent State of Hawai'i, Department of Public Safety's Motion to Dismiss Prohibited Practice Complaint Filed on Decemer [sic] 20, 2017 (PSD MTD) based on the Complaint is time-barred by the statute of limitations, Complainant failed to exhaust his administrative remedies, and has failed to show that the Union has breached its duty of fair representation before filing a Complaint against the Employer.

On January 19, 2018, UPW filed Union Respondent's Response to the Employer's Motion to Dismiss Prohibited Practice Complaint Filed 12/20/17.

On January 22, 2018, Complainant filed Complainant's Memorandum in Opposition to Respondent State of Hawai'i Department of Public Safety's Motion to Dismiss Prohibited Practice Complaint filed on January 16, 2018.

On January 23, 2018, Complainant filed Complainant's Memorandum in Opposition to Union Respondent's Motion for Summary Judgment, Filed on January 16, 2018 (Opposition to MSJ), contending, among other things, that due process required the Board to give Complainant sufficient time to conduct discovery from the UPW and PSD. In his declaration attached to the Memorandum in Opposition, Taum's attorney Ted Hong states that Complainant seeks further discovery pursuant to Hawaii Rules of Civil Procedure Rule 56(f) (Rule 56) regarding whether the Employer (a) had finished its investigation at the time of 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. Further, the Complainant also sought under Rule 56, "further discovery on the issue of whether the Union [sic]: (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 [sic] that led to the decision to abandon the Complainant's arbitration; and (d) What evidence did Ms. Companiano [sic] have that led her to persuade the Complainant to resign or abandon the Complainant's arbitration."

On January 23, 2018, the Board held a hearing on the dispositive motions filed by the Respondents, including the UPW MTD, the UPW MSJ, the PSD MTD, and the oppositions and responses to the motions. This hearing was attended by Complainant and his attorney and counsel for UPW and PSD. After hearing oral argument on these motions, the Board took the matters under consideration.

On January 26, 2018, the Board issued Order No. 3318 Continuing UPW's Motion for Summary Judgment and Permitting Complainant's Requested Discovery that, among other things, provided Complainant with an opportunity to conduct certain discovery prior to supplementing his opposition to the UPW's Motion for Summary Judgment and took the HOM off the calendar to be rescheduled pending a hearing on UPW's Motion for Summary Judgment. In finding and concluding under the specific facts of this case that Complainant should be given an opportunity to conduct certain discovery prior to supplementing his opposition to the UPW's MSJ and that the January 29, 2018 HOM should be continued over the UPW's objections based on HRS § 377-9(b), the Board reasoned:

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.”

Taum v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case Nos. 17-CU-10-357, Order No. 3318, at *5-6 (2018).

On January 30, 2018, Complainant filed Complainant Jonathan Taum’s Motion for Leave to Take Depositions Upon Oral Examination of eight witnesses: Alton Nosaka (Nosaka); Danny Paleka (Paleka); Anthony “Ricky” Ho (Ho); Randy Waltjen; Stafford Uemura; Wendy [Campaniano] (Campaniano); Marte Martinez; and Jason Tagaloa regarding the hybrid claim.

On January 31, 2018, the Board issued Order No. 3319 Granting Complainant’s Motion to Issue Subpoena Duces Tecum and Take Depositions on Written Interrogatories and Granting in Part and denying Part Complainant Jonathan Taum’s Motion for Leave to Take Depositions Upon Oral Examination which, among other things, allowed the taking of depositions of Nosaka, Paleka, Jr., Ho, and Campaniano.

Following the taking of discovery, the Board held a hearing on and denied the UPW MSJ on March 15, 2018. On March 21, 2018, the Board issued Order No. 3331 Pretrial Order and Amended Notices: (1) Amended Notice Regarding Protection of Social Security Numbers and Personal Information; (2) Amended Notice of Hearing on the Merits; and (3) Amended Schedule of Hearings, Conferences, and Deadlines rescheduling the HOM for April 11-12, 2018 in Hilo, Hawaii and April 17-18, 2018 in the Board’s Hearings Room in Honolulu, Hawaii.

The Board held the Hilo HOM on April 11-12, 2018 and took testimony from seven witnesses, including the Complainant. At the April 12, 2018 HOM, Board Member J N. Musto sought clarification from the parties regarding the location of Complainant's witnesses, who would be called. Complainant's counsel stated that Nosaka, Ho, Paleka, and Jon Sloan (Sloan) are in Hilo, and Complainant was calling no witnesses from Oahu. Board Member Musto, accordingly, informed the parties that the Board was not going to hold the hearings scheduled on Oahu, but would reschedule a return to the Big Island. Transcript of Hearing, Volume II at 533-35, Taum v. United Public Workers, AFSCME, Local 646, AFL-CIO (4/12/18) (Tr. II at __)

Following this exchange, Complainant's counsel orally offered into evidence the depositions of Nosaka (Exhibit 15), Ho (Exhibit 16), and Paleka (Exhibit 17) and stated, "Now, if the Board accepts that into evidence, then the only person that is still outstanding would be Jon Sloan." Counsel for both UPW and PSD objected to the admission of the depositions. Tr. II at 535-36.

On April 14, 2018,ⁱⁱⁱ the Board issued Order No. 3343 Requiring Complainant to File a Written Motion Requesting the Board to Receive Complainant's Exhibits 15 and 16 in Evidence. Order No. 3343 required Complainant to submit a written motion regarding admission of these exhibits and further provided Respondents with the opportunity to respond.

On April 17, 2018, Complainant filed Complainant's Motion to Admit into Evidence the Depositions Upon Oral Examination of: Alton K. Nosaka Taken on February 15, 2018; (2) Anthony R.K. Ho Taken on February 5, 2018; and Daniel Kapoo Paleka Taken on February 15, 2018. UPW filed its objections to the admissions on April 13, 2018 and PSD joined those objections on April 18, 2018.

On April 26, 2018, the UPW filed this Motion to Set and Expedite.

In April 30, 2018, the Board issued a Notice of Further Hearing on the Merits (April 30, 2018 Notice of Further HOM) that scheduled further hearings at the Aging & Disability Resource Center Training Room, 1055 Kinoole Street, Hilo, Hawaii 96720 on July 18-20, 2018 (April 30, 2018 Notice), after consulting counsel for the parties regarding their availability to attend these Hilo HOMs.

On April 30, 2018, Complainant filed Complainant's Memorandum in Opposition to Union Respondent's Motion to Set Further Board Hearings in Honolulu and to Expedite the Proceedings Filed on April 26, 2018 (Taum's Opposition). In his Opposition, Complainant requests that the Board deny the Motion and set another hearing in Hilo, Hawaii to take the testimonies of Nosaka, Ho, Paleka, and Sloan and complete the Complainant's testimony. In support, Complainant asserts that to require further hearings in Honolulu would require the issuance of subpoenas again and

payment of the transportation costs of Nosaka, Ho, Paleka, and Sloan to testify in Honolulu; there is no evidence or identification of facts to support the Motion to Set and Expedite; and the UPW is unfairly prejudicing the Complainant's case. Alternatively, Taum agrees to hold the remaining hearings in the Board's hearing room in Honolulu provided that all witnesses appear at the UPW's expense, including response to the Complainant's subpoena duces tecum. Finally, Complainant has no objection to shortening the time to hear the case in Honolulu if UPW makes Ms. Campaniano available to testify and respond to the subpoena duces tecum.

On May 4, 2018, the Board issued Order No. 3347 Granting, In Part, and Denying, In Part, Complainant's Motion to Admit Into Evidence the Depositions Upon Oral Examination of: (a) 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. The Board denied the admission into evidence of the depositions of Nosaka, Paleka, and Ho but granted Complainant's request to subpoena and call Nosaka, Paleka, Ho, and Sloan to appear and testify as live witnesses.

HRS § 89-5, governing the Board, provides:

(j) For the purpose of minimizing travel and per diem expenses for parties who are not located on Oahu, the board shall utilize more cost efficient means such as teleconferencing which does not require appearances on Oahu, whenever practicable, to conduct its proceedings. Alternatively, it shall consider conducting its proceedings on another island whenever it is more cost efficient in consideration of the parties and the witnesses involved.

(Emphasis added)

Based on the pleadings, the arguments of the parties, and the record herein, the Board denies UPW's Motion to set further hearings in Honolulu to conclude the Complainant's case for several reasons. First, the Board already informed the parties at the April 12, 2018 HOM that the next HOM would be held in Hilo. The Board confirmed availability of the parties and their attorneys to attend hearings in Hilo from July 18-20, 2018 before issuing the written April 30, 2018 Notice. Second, contrary to UPW's contention, the testimony of the other Hilo witnesses is not completed because as noted in Order No. 3347, Complainant's remaining witnesses, including Nosaka, Paleka, Ho, Sloan, and the Complainant himself reside in Hilo. Third, HRS § 89-5(j) requires the Board to "consider conducting its proceedings on another island whenever it is more cost efficient in consideration of the parties and the witnesses involved." The Board has considered the issue and agrees with Complainant that the balance of equities favor that it is more cost efficient to hold the HOM in Hilo because Complainant and his remaining witnesses all reside there. Finally, Complainant's counsel offered the testimonies of Nosaka, Ho, and Paleka by deposition in lieu of live testimony, which was objected to by the Respondents. In Order No. 3347, the Board

concluded that live testimony is preferable to the admissions of depositions. However, this taking of live testimony from these witnesses, who reside in Hilo, necessitates further HOMs in Hilo. UPW's Motion to Set and Expedite is ambiguous regarding whether the UPW is seeking to have heard in Honolulu only Taum's testimony or that of the remaining Complainant's witnesses' testimony. However, the Board is denying the Motion and clarifies that based on Complainant's counsel's representation that all his remaining witnesses are in Hilo (and no witnesses from Oahu), the Board orders the HOM to continue in Hilo, Hawaii until the conclusion of the Complainant's case.

Finally, there is simply no merit to UPW's position that the Board disregarded the 40-day requirement set forth in HRS § 377-9(b) or has not moved forward promptly and expeditiously in accordance with HRS § 89-5(i)(10). The procedural chronology set forth above and in Order No. 3318 shows that the Board's acute awareness of and respect for the 40-day requirement of HRS §§ 377-9(b) and 89-5(i)(10) in these proceedings. Following the filing of the Complaint on December 20, 2017, the Board scheduled the HOM on January 22, 2018, within the 40-days from the filing of the Complaint. Despite a motion to continue by Complainant, the Board issued the January 10, 2018 Notice rescheduling the HOM to January 29, 2018, and oral arguments on dispositive motions on January 23, 2018, all within the 40-days. However, UPW filed its MSJ on January 16, 2018, asserting that the UPW decision not to arbitrate Complainant's grievance was based on the decision-maker's judgement and not an arbitrary act; was fair and impartial, lacking any evidence of discrimination; and there were no material facts in dispute indicating the decision was in bad faith. On January 23, 2018, Complainant filed his Opposition to MSJ, which, among other things, disagreed with Respondents that there were no genuine disputes of material fact regarding whether there was "just and proper cause" to support Complainant's termination (adequacy of the investigation) and whether the UPW violated the duty of fair representation by abandoning the arbitration ("personal grudge" against Complainant, lying to him, fraud and deceitful conduct); and maintained that he was never given access to exhibits attached to the UPW's MSJ. In his declaration attached to the Opposition to MSJ, Complainant's counsel sought further discovery pursuant to HRCF Rule 56(f). In Order No. 3318, in finding and concluding under the specific facts of this case that Complainant should be given an opportunity to conduct certain discovery prior to supplementing his opposition to the UPW's MSJ, the Board specifically considered whether to continue the January 29, 2018 HOM over the UPW's objections based on HRS § 377-9(b). Ultimately, the Board reasoned that the HOM should be continued beyond the 40-day requirement of HRS § 377-9(b) because the required procedural due process requirements are flexible and call for such procedural protections as the particular situation demands; the balancing of interests of the parties and pleadings in this case result in a finding that Complainant should be allowed to conduct limited discovery to meaningfully respond to the UPW MSJ; and that based on HRS § 377-9(k) providing that "substantial compliance with the procedure of [chapter 377] shall be sufficient to give effect to the decisions and orders of the [B]oard". Taum v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. 17-CU-10-357, Order

No. 3318, at *5-6 (2018). Finally, while the Board was unable to proceed with the HOM on January 29, 2018, as provided in the January 10, 2018 Notice, based on the Complainant's request for discovery in response to the UPW MSJ, the Board did hold the hearing on the dispositive motions within the 40-days on January 23, 2018. While technically a motion hearing is not a hearing on the merits (trial), in this case, the motion hearing was, in part, for the Board to determine whether to issue a summary judgment disposing of the full merits of the case. The Board finds a hearing on the UPW MSJ as a hearing on the merits for purposes of the 40-day requirement because the Board is being requested to consider and weigh the evidence to determine whether to summarily dispose of the full merits of the case. For all these reasons, the Board finds that the 40-day requirement has been met in this case.

Accordingly, contrary to UPW's assertions, the record in this case shows substantial compliance with the procedure required in this case, including the HRS § 377-9(b) 40-day requirement and the HRS § 89-5(i)(10) requirement, given the circumstances, including the involvement and coordination of multiple parties and witnesses located in Hilo and Honolulu and consideration of the cost efficiency required by HRS § 89-5(j).

For the reasons set forth above, the Board denies the Motion to Set and Expedite and orders the HOM to be held in Hilo, Hawaii until Complainant's case has concluded with the taking of testimony from all of Complainant's witnesses residing in Hilo. Therefore, the HOM will proceed as provided in the April 30, 2018 Notice on July 18-20, 2018 in Hilo, Hawaii.

DATED: Honolulu, Hawaii, May 14, 2018.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



N. MUSTO, Member

Copies sent to:

Ted H.S. Hong, Esq.

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Henry S. Kim, Deputy Attorney General

ⁱ HRS § 377-9(b) provides:

(b) Any party in interest may file with the board a written complaint, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice. The board shall serve or require the complainant to serve a copy of the complaint upon the person charged, hereinafter referred to as the respondent. If the board has reasonable cause to believe that the respondent is a member of or represented by a labor union, then service upon an officer of the union shall be deemed to be service upon the respondent. Service may be by delivery to the person, or by mail or electronic service through a company designated by the board, to the person's last known address. Any other person claiming interest in the dispute or controversy, as an employer, an employee or their representative, shall be made a party upon proof of the interest. The board may bring in additional parties by service of a copy of the complaint. Only one complaint shall issue against a person with respect to a single controversy, but any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon. The respondent may file an answer to the original or amended complaint but the board may find to be true any allegation in the complaint in the event either no answer is filed or the answer neither specifically denies nor explains the allegation nor states that the respondent is without knowledge concerning the allegation. The respondent shall have the right to appear in person or otherwise give testimony at the place and time fixed in the notice of hearing. The hearing on the complaint shall be before either the board or a hearings officer of the board, as the board may determine.

The board shall fix a time for the hearing on the complaint, which shall be not less than ten nor more than forty days after the filing of the complaint or amendment thereof. Notwithstanding section 91-9.5, in any hearing conducted by the board, all parties shall be given written notice of the hearing by first class mail or by electronic service through a company designated by the board at least fifteen days before the scheduled date of the hearing. In case a party in interest is located without the State and has no known address within the State and no known electronic mail address, a copy of the complaint and copies of all notices shall be filed in the office of the lieutenant governor and shall also be sent by first class mail to the last known address of the party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon a party located within the State. The hearing may be adjourned from time to time in the discretion of the board and hearings may be held at such places as the board shall designate.

In all proceedings under this chapter before the board, each member of the board may issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by law. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena on the ground that the testimony or evidence required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture under the laws of the State, but such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the person may testify or produce evidence, documentary or otherwise, in such proceedings. Such person so testifying shall not be exempt, however, from prosecution and punishment for perjury committed in so testifying.

Any person who wilfully and unlawfully fails or neglects to appear or to testify or to produce books, papers, and records as required, shall, upon application to a circuit judge, be ordered to appear before the board, and failure to obey the order may be punished as a contempt of court.

Each witness who appears before the board by subpoena shall receive for the witness' attendance the fees and mileage provided for witnesses in civil cases in courts of record, which

shall be audited and paid by the State in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the board.

ii HRS § 89-5(i)(10) provides in relevant part:

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(10) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

iii Order No. 3343 was e-filed on April 13, 2018 at 4:32 p.m. In accordance with Hawaii Administrative Rules § 12-42-5(c), the Board's office hours are 7:45 a.m. to 4:30 p.m. Under the Board Agreement provision that "a document filed at a time when the Board is not open for business shall be deemed to have been filed on the next day the Board is open for business," Order No. 3343 was filed on April 14, 2018.