

STATE OF HAWAI‘I

HAWAI‘I 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 Hawai‘i,

Respondents.

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

ORDER NO. 3496

ORDER DENYING RESPONDENT
STATE OF HAWAI‘I, DEPARTMENT
OF PUBLIC SAFETY’S MOTION TO
REVOKE COMPLAINANT’S
SUBPOENAS DUCES TECUM
[WITNESSES: CUSTODIAN OF
RECORDS, DEPARTMENT OF PUBLIC
SAFETY; AND LYNN KAWANO]

ORDER DENYING RESPONDENT STATE OF HAWAI‘I,
DEPARTMENT OF PUBLIC SAFETY’S MOTION TO REVOKE
COMPLAINANT’S SUBPOENAS DUCES TECUM [WITNESSES: CUSTODIAN
OF RECORDS, DEPARTMENT OF PUBLIC SAFETY; AND LYNN KAWANO]

On April 18, 2019, Complainant JONATHAN TAUM (Complainant or Taum) filed Complainant Jonathan Taum’s Application for Issuance of Subpoena (Application for Subpoena) with the Hawai‘i Labor Relations Board (Board) requesting that the Board issue subpoena duces tecums to the Custodian of Records, Department of Public Safety (PSD) and to a witness Lynn Kawano (Kawano) from Hawaii News Now.

The subpoena duces tecum to the Custodian of Records for PSD (PSD records subpoena) required and directed that the witness appear before the Board on May 7, 8, and 9, 2019 at the Board Hearings Room and bring documents regarding, “Any and all investigations conducted by the Department of Public Safety concerning Ms. J. Marte Martinez’s (Martinez) resume, qualifications and credentials that were submitted to anyone in the Legislature in 2019.”

The subpoena duces tecum to Kawano, Chief Investigative Reporter, Hawai‘i News Now (Kawano subpoena), required and directed her to appear before the Board on May 7, 8, and 9, 2019 in the Board Hearings Room and bring documents regarding “All of the documents you obtained

about J. Marte [Martinez's] education, experience and job qualifications concerning her employment with the Department of Public Safety.”

In his Declaration attached to the Application for Subpoena, Complainant's counsel Ted H.S. Hong states very generally regarding the witnesses and information subpoenaed that, “The above-named witnesses have information or personal knowledge regarding the subject matter, or information that is reasonably calculated to lead to discoverable information on the topic of whether there was just and proper cause to terminate the Complainant, and whether or not Respondents complied with all established laws, rules, regulations, policies, procedures and/or practices governing the termination process.”

On April 25, 2019, Respondent DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII (PSD or Respondent) filed Respondent State of Hawai'i, Department of Public Safety's Motion to Revoke Complainant's Subpoenas Duces Tecum [Witnesses Custodian or Records, Department of Public Safety, and Lynn Kawano] (Motion to Revoke) pursuant to Hawai'i Administrative Rules § 12-42-8 and Hawai'i Rules of Civil Procedure (HRCP) Rule 7. In support of the revocation of the PSD records subpoena, PSD argues, among other things, that: the subpoena is an obvious attempt to harass and embarrass the Employer by requesting irrelevant evidence; Complainant has already rested his case-in-chief and should not be allowed to call any further witnesses; the requests for documents are untimely because discovery cutoff is over; the information regarding Martinez's credentials are irrelevant at this point at the hearing; and the subpoena does not relate to any matter under inquiry or to the allegations that PSD committed a violation of HRS § 89-13 by wilfully violating the terms of the Unit 1 Agreement by terminating Complainant; and the subpoena “is merely a tactic to get around the deadline and harass the Employer and waste the time of the Board and the parties” because Martinez has testified and Complainant had ample opportunity to request the documents in a timely fashion and question her credentials and qualifications.

In support of the revocation of the Kawano subpoena, PSD asserts that Complainant has rested his case-in-chief and should not be allowed to call any further witnesses; Kawano's testimony, as a Hawaii News Now reporter who allegedly ran a story on Martinez's credentials, is not relevant to this inquiry because she is not a party or an expert or lay witness, and her testimony would be hearsay and subject to the reporter's privilege; and Kawano's testimony and the documents she produces would not reasonably relate to the HOMs regarding the prohibited practice complaint (Complaint) alleging that Respondents wilfully violated Complainant's rights by terminating his employment and refusing to represent him at arbitration.

On April 30, 2019, Taum filed Complainant's Memorandum in Opposition to Respondent State of Hawai'i, Department of Public Safety's Motion to Revoke Complainant's Subpoenas Duces Tecum [Witnesses Custodian of Record, Department of Public Safety; and Lynn Kawano],

Filed on April 25, 2019 (Complainant's Opposition). Attached to the Opposition, among other things, were excerpts from the transcript of the January 8, 2019 HOM, in which Martinez provided testimony before the Board. In his Opposition, Complainant argues that Martinez committed the crime of perjury and PSD, through the Department of the Attorney General (AG) and PSD Director Espinda (Espinda), appears to have committed fraud upon the Board, by knowingly and intentionally presenting Martinez's perjured testimony; therefore, the Board should bar PSD and the AG from appearing before the Board for one year pursuant to Hawai'i Administrative Rules (HAR) § 12-42-8(g)(9)(A). As facts, Complainant notes that Martinez testified that she went to college at Southern Oregon State College and graduated in criminal justice in 1992; on April 25, 2019, Kawano published an online article about Martinez (Kawano article), in which she reported that a Southern Oregon University enrollment office email states that there is no record of a degree and that a St. Joseph's College email (where Martinez stated she got a degree from the Naval Post Graduate School) also states that there is no J. Marte Martinez in its database. Kawano's article further reports that the Chair of the Hawai'i State Senate Public Safety Committee Clarence Nishihara (Nishihara) was provided with an internal investigation report (PSD report) conducted at the direction of Espinda, and publicly stated on the Senate floor that "Martine Martinez lied on the job application regarding her education"; that in 2013 and 2014, Martinez did not cite any college degrees or certificates when first hired by the State as a firearms training technician; and Espinda promoted Martinez.

In support of his perjury claim, Taum asserts that Martinez represented her fraudulent credentials to get hired and her fraudulent qualifications to get promoted by PSD; that Martinez and the AG used her fraudulent qualifications to support her credibility with the Board; that PSD knowingly promoted Martinez; and Espinda acknowledged submission of the PSD report to Nishihara. Complainant asserts that throughout the process of Complainant's termination, Martinez's qualifications and experience were substantially relied upon by the Employer, and he is entitled to reopen or have the PSD custodian of records and Kawano appear and testify following the conclusion of the Employer's case.

In addition, regarding the alleged fraud committed by PSD and the AG, Complainant argues that the Kawano report and testimony are sought to determine the scope of the fraud; and that the PSD report is sought to show when Espinda and the AG became aware of Martinez's fraudulent qualifications (such as whether Espinda and the AG became aware before or after Martinez's promotion and before or after she was assigned to review the video of the incident). Complainant requests permission to reopen his case or submit rebuttal evidence after PSD's presentation.

Taum submits that the PSD report is relevant, and the request for the report is tailored to information required to determine when the State became aware of Martinez's false reporting of her qualifications and the scope of her misrepresentations. Complainant maintains that if Martinez

lied about her degree, she could have also lied about her other qualifications and experience relied on for her expert witness qualifications and job experience. Accordingly, Taum submits that an opinion regarding use of force and training of use of force, including internal procedures, could have been rendered by some with no education, training, and experience. Therefore, Complainant is being unfairly prejudiced and his due process protections of a meaningful time and opportunity to be heard are violated if denied an opportunity to determine the depth and breadth of Martinez's lies.

Finally, Complainant requests that: he be allowed to call PSD custodian of records and Kawano as a rebuttal to PSD's case or as an immediate follow up to PSD's case; that Martinez's testimony and all exhibits admitted into evidence by the Respondents, oral statements or reports, upon which her name appears should be struck; and that the Board hold an evidentiary hearing pursuant to HAR § 12-42-8(g)(9)(A) to determine whether PSD, Espinda, and the AG should be held in contempt or barred from appearing before the Board for at least one calendar year.

HAR § 12-42-8(g)(7) states:

- (7) Subpoenas:
 - (A) The board may issue subpoenas to require the attendance of witnesses in this State and the production of books and papers at a hearing held under the provisions of this chapter.
 - (B) Any party may file a written application for subpoenas with the board before the hearing.
 - (C) Motion to revoke subpoenas:
 - (i) A motion to revoke a subpoena may be filed with the board not later than five days from the date of service of the subpoena.
 - (ii) The board shall give notice of the filing of a motion to revoke to the applicant for subpoena.
 - (D) Ruling on motion to revoke:
 - (i) The board may revoke a subpoena on the ground that the subpoena does not reasonably relate to any matter under investigation, inquiry, or hearing; that the subpoena does not describe with sufficient particularity the evidence sought or that the evidence sought from the witness is privileged under the law or the provisions of this chapter.
 - (ii) The board shall make a statement as to the basis for its ruling.

(Emphasis added)

Based on a review of the arguments set forth in Motion to Revoke it appears that PSD's objections to the subpoenas are directed at the ground that "the subpoena[s] [do] not reasonably relate to any matter under investigation, inquiry, or hearing." PSD does not argue lack of sufficient

particularity. While PSD asserts reporter's privilege, the Board, as more fully discussed below, concludes that this issue is a matter for the HOM, if raised by the reporter witness.

The Board does not agree based on review of the full record, including the Motion to Revoke, the Application for Subpoena, the PSD records subpoena, the Kawano subpoena, and the Complainant Opposition for the following reasons.

Regarding the PSD records subpoena requesting "Any and all investigations conducted by the Department of Public Safety concerning Ms. J. Marte Martinez's resume, qualifications and credentials that were submitted to anyone in the Legislature in 2019," the Board finds and concludes that these investigations "reasonably relate to the matter under investigation, inquiry, or hearing[.]" As stated in Respondent Department of Public Safety State of Hawai'i's Witness and Exhibits Lists, filed on January 17, 2018, Martinez was called by PSD as a witness in this case to "testify regarding the facts and circumstances in this matter and the issues raised in Complainant's Prohibited Practice Complaint ("Complaint"), and whether PSD [wilfully] committed a prohibited practice(s) as alleged in the Complaint." Martinez testified at the HOMs held on January 8 and 9, 2019. At the January 8, 2019 HOM, Martinez was established to be the PSD head public training officer and former training specialist. She was questioned extensively regarding her credentials, experience, qualifications, education and training. Martinez testified, among other things, that she graduated from Southern Oregon State college in criminal justice in 1992. She further stated that in her prior position as a training specialist, she was in charge of all of the use of force programs for PSD and had done use of force reports for a dozen cases and testified as an expert witness in use of force in two cases. Martinez testified that the use of force report is a review done prior to an investigation to determine if the investigation needs to be pursued, and that the investigation was done regarding this case. She then testified regarding her report, which reviewed the videotape of the Chawn Kaili takedown (Kaili incident) within the Waianuenue Complex recreation yard that resulted in Complainant's discharge and evaluated the use of force during the incident.

The Board agrees with Complainant that the PSD investigation regarding Martinez's resume, qualifications, and credential could potentially contain information reasonably related to her credibility and her ability and competency to have conducted an evaluation and review of the use of force during the Kaili incident, which according to Martinez, led to the determination that the incident required investigation. Further, there is no merit to PSD's objections to the subpoena on the ground that the request for documents is untimely because of discovery cutoff because there was no discovery cutoff established in this case. Moreover, even if there was a discovery cutoff, the information requested in the PSD records subpoena would not have been addressed in discovery because this PSD report to the Legislature is newly discovered evidence, which came to light during the 2019 legislative session. Regarding PSD's contention that Martinez's credentials are irrelevant at this point in the hearing, the Board does not agree for the reasons set forth above. Further, as to PSD's objection that Complainant should not be permitted to call any further

witnesses after resting his case-in-chief, the Board determines that Complainant may call the PSD record custodian as a rebuttal witness after PSD rests its case.

For similar reasons to those regarding the PSD record custodian subpoena, the Board finds that the Kawano subpoena requesting all the documents that she obtained “about J. Marte [Martinez’s] education, experience and job qualifications concerning her employment with the Department of Public Safety”, is also “reasonably related to this matter which is under investigation, inquiry, or hearing.” Regarding PSD’s assertion that Kawano’s testimony would be hearsay, the Board finds that this is an objection to be made and ruled on during trial. Regarding PSD’s contention that Kawano’s testimony would be subject to the reporter’s privilege, the Board also finds that this is an issue, if raised, which should be ruled on at trial. However, the Board is compelled to point out that Branzburg v. Hayes, 408 U.S. 665, 695 (1972), the decision relied on by PSD for the reporter’s privilege, took the position that the privilege claimed belongs to the reporter. Therefore, PSD is unable to claim the privilege.

Accordingly, the Board holds that Complainant may call Kawano as a rebuttal witness when PSD rests its case.

ORDER

For the reasons set forth above, the Board denies the PSD’s Motion to Revoke. Complainant may call the PSD custodian of records and Lynn Kawano as rebuttal witnesses after PSD rests its case.

DATED: Honolulu, Hawai‘i, _____ May 3, 2019 _____.

HAWAII LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

N. Musto

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