STATE OF HAWAIʻI

HAWAIʻI LABOR RELATIONS BOARD

In the Matter of MARIO COOPER, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, and DEPARTMENT OF TAXATION, State of Hawaiʻi, Respondents.	CASE NOS. 17-CU-03-358 17-CE-03-907 ORDER NO. 3531 ORDER DENYING COMPLAINANT MARIO COOPER'S MOTION FOR RECONSIDERATION

ORDER DENYING COMPLAINANT
MARIO COOPER'S MOTION FOR RECONSIDERATION

On December 20, 2017, Complainant MARIO COOPER (Complainant or Cooper) filed a prohibited practice complaint (Complaint) with the Hawaiʻi Labor Relations Board (Board) alleging, among other things, that Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), and DEPARTMENT OF TAXATION, State of Hawaiʻi (DOTAX and collectively Respondents) violated Hawaiʻi Revised Statutes (HRS) §§ 89-13(a)(8) and 377-6(6) by failing to follow the grievance procedures contained in Article 11 of the collective bargaining agreement.

On December 20, 2018, the Board issued Order No. 3434, Granting Department of Taxation, State of Hawaiʻi's Motion to Dismiss Prohibited Practice Complaint and Granting in Part HGEA/AFSCME's Motion to Dismiss Prohibited Practice Complaint Filed on December 20, 2017. Among other things, Order No. 3434 granted DOTAX's Motion to Dismiss Prohibited Practice Complaint (DOTAX's Motion to Dismiss), filed on January 8, 2018, based on Complainant's failure to exhaust contractual remedies, and granted, in part, HGEA's Motion to Dismiss Prohibited Practice Complaint Filed on December 20, 2017, filed on January 18, 2018

(HGEA's Motion to Dismiss), also based on Complainant's failure to exhaust contractual remedies. Order No. 3434 further dismissed all other dispositive motions and claims as moot and closed the case.

On May 16, 2019, Complainant filed a Motion for Reconsideration, arguing, among other things, that Order No. 3434 is manifestly unjust, that he has newly discovered evidence regarding an alleged disclosure of confidential medical information by DOTAX, and misconduct by the Respondents. Complainant based his Motion for Reconsideration on the Hawai‘i Rules of Civil Procedure (HRCP) Rule 60(b)(2), (3), and (5).

Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(3)(iii)[i] permits a party to respond to a motion "within five days after service of the motion papers, unless the board directs otherwise."

On May 21, 2019, DOTAX filed Department of Taxation, State of Hawaii's Memorandum in Opposition to Complainant's Motion for Reconsideration (DOTAX Opposition), arguing that the disclosure of Complainant's confidential medical information was shared with the Complainant's treating physician due to a Workers' Compensation claim filed by Complainant. Further, DOTAX stated that Complainant had still failed to exhaust his contractual remedies, as the arbitration hearing is still pending, and that Complainant could bring up any claims regarding the alleged improper disclosure at arbitration.

That same day, Complainant filed his Reply in Support [of] Motion for Reconsideration, where he stated that, under the relevant collective bargaining agreement for bargaining unit 03, (CBA), the arbitrator could not consider any alleged violations or charges that were not brought up in Step 2, and that Complainant was prevented from bringing these claims under Step 1 or Step 2 of the grievance process in the CBA due to DOTAX's failure to timely provide access to Complainant's personnel file.

HGEA did not file a response to the Motion for Reconsideration within the five days provided for in HAR § 12-42-8(g)(3)(iii)[ii].

While the Board's administrative rules do not explicitly provide for motions for reconsideration, the Board has previously addressed such motions for reconsideration of its final decisions and orders. *See, e.g.*, UPW v. Hannemann, et al., Board Case No. CE-01-647, Order No. 2489 (January 17, 2008); Los Banos v. Dep't. of Public Safety, Board Case No. CU-10-341, Order No. 3172 (June 28, 2016). In considering motions for reconsideration, the Board has adhered to the well-established principles set forth by the Hawai‘i Supreme Court that "the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated [decision]." Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 114, 839 P.2d 10, 26-27 (1992); Omerod v. Heirs of Kainoa Kupuna Keheananui, 116 Hawai‘i 239, 270, 172 P.3d 983, 1014 (2007). Further, reconsideration "is not a device to relitigate old matters or to raise arguments or evidence that

could and should have been brought during the earlier proceeding." Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.3d 924, 930 (2005).

The Board may look for guidance to similar provisions of court rules when its administrative rules are silent. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1 (CE), Order No. 1978 at *5 (January 11, 2001). While the HRCP also does not expressly provide for motions for reconsideration, the Hawai'i appellate courts have ruled that they are permissible under Rule 60, Relief from Judgment or Order. *See*, Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 374 n.1, 984 P.2d 1198, 1200 (1999). It is this section that Complainant relies on for his Motion for Reconsideration

HRCP Rule 60, Relief from Judgment or Order (Rule 60(b)) states in relevant part:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment…

(Emphasis added).

A motion for reconsideration is within the sound discretion of the Board. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). It is the moving party's burden to prove the merits of the Rule 60(b) motion. The moving party has the burden of proving the existence of a justification for Rule 60(b) relief. Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988) (The Ninth Circuit ruling was based on the Federal Rules of Civil Procedure Rule 60(b).).[iii]

In his Motion for Reconsideration, Complainant states that he "was only made aware of this breach around April 2019" and that "complainant could not have made the discovery of the breach even with due diligence because Respondents unlawfully withheld access to his file." Further, Complainant alleges that "it is manifest injustice to allow respondent to benefit from failing to provide timely access" to his personnel file.

When the Board held the Prehearing Conference in this case on January 9, 2018, Complainant was informed that if he wanted to make a request for his personnel file, DOTAX would scan and email the file to him. At the hearing on dispositive motions held by the Board on February 9, 2018, DOTAX stated that it would provide Complainant with a copy of his personnel file and that DOTAX would mail Complainant his personnel file via certified mail/return receipt requested.

The Board notes that Complainant states that he "was only made aware of" the alleged breach in April 2019 "upon inspection of his personnel records." However, Complainant does not allege that he did not receive his file until April 2019. The Board has received no evidence that DOTAX did not comply with their statement of February 9, 2018 or that Complainant did not receive the file until April 2019. The Board, therefore, cannot find that Complainant acted with reasonable diligence in finding this new evidence.

However, even if the Board were to find that Complainant had acted with reasonable diligence, the Board cannot find that this evidence cures the grounds upon which the initial Complaint was dismissed. Complainant argues that his personnel files "reveal that the Respondent's [sic] violated the confidentiality provisions reserved under rights of management pursuant to Article IV" of the CBA. Namely, Complainant points to "correspondence indicating that employer violated the aforementioned provision of the CBA and that violation was the proximate cause of Complainant's discharge. Specifically, employer took Complainant confidential medical information and mailed to Complainant's physician, Dr. Martinez."

The Complaint before the Board alleges that Respondents "did not follow the [applicable] grievance procedures." Order No. 3434 dismissed the case based on Complainant's failure to exhaust contractual remedies as required by Poe v. Hawaii Labor Relations Board, 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) and Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 100-01, 94 P.3d 652, 655-56 (2004).

Complainant argues that "[t]he revelation of the new evidence would have changed the disposition of this case." The Board disagrees. The correspondence that Complainant submitted to the Board with his Motion for Reconsideration does not alter Complainant's failure to exhaust his contractual remedies. Complainant has not provided any evidence showing that he exhausted the grievance process prior to filing the instant Complaint. Moreover, even if Complainant's allegation in his Motion for Reconsideration, that the personnel files revealed that Respondents violated the confidentiality provisions reserved under management rights under Article IV, had been contained in the Complaint, this issue would also have been subject to exhaustion of contractual remedies. Therefore, the Board must still find that it does not have subject matter jurisdiction over the case.

ORDER

For all the reasons set forth above, the Board denies Complainant's Motion for Reconsideration.

DATED: Honolulu, Hawai‘i, June 28, 2019.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Mario Cooper, SRL
Jeffrey A. Keating, Deputy Attorney General
Peter Liholiho Trask, Esq.

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[i] Hawai‘i Administrative Rules § 12-42-8(g)(3)(C)(iii) states in relevant part:

> Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

[ii] On May 31, 2019, ten business days and fifteen calendar days after service of the Motion for Reconsideration, HGEA filed HGEA/AFSCME's Memorandum in Opposition to Complainants' Motion for Reconsideration. Given the untimeliness of this Memorandum, the Board will not consider HGEA's arguments raised therein. *See* Endnote i.

[iii] HRCP Rule 60(b) and Federal Rules of Civil Procedure Rule 60(b) share identical language. "Hawai‘i courts view case authority construing similar provisions of the federal rules as 'highly persuasive' in interpreting our own rules of civil procedure." Moyle v. Y & Y Hyup Shin Corp., 116 Hawai‘i 388, 402-03, 173 P.3d 535, 549-50 (Haw. Ct. App. 2007).