

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

DANIEL EDWARD PARKER,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; DEPARTMENT OF
PUBLIC SAFETY, State of Hawai‘i,

Respondent.

CASE NOS. 18-CU-10-370
19-CE-10-923

ORDER NO. 3545

MINUTE ORDER DENYING MOTION
FOR DISQUALIFICATION; AND
GRANTING, IN PART, MOTION FOR
LEAVE TO AMEND AND FILE THIRD
AMENDED COMPLAINT; NOTICE OF
STATUS CONFERENCE

MINUTE ORDER DENYING MOTION FOR DISQUALIFICATION; AND GRANTING, IN
PART, MOTION FOR LEAVE TO AMEND AND FILE THIRD AMENDED COMPLAINT

On July 23, 2019, the Hawai‘i Labor Relations Board (Board) held a hearing on the merits (HOM) in the above-referenced case, and, among other things, orally granted the Complainant DANIEL EDWARD PARKER (Complainant or Parker) the right to file a Motion to Amend the Second Amended Complaint to conform to the evidence presented in this case to add allegations that Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawai‘i (PSD) applied and unilaterally implemented policies regarding videotaping of strip searches and consensual strip searches without notice to the Union or the Complainant, which constituted an interference and restraint of the Complainant’s ability to exercise his rights under Hawai‘i Revised Statutes (HRS) Chapter 89, thereby violating HRS § 89-13(a)(1) and violating HRS § 89-3 constituting a violation of HRS § 89-13(a)(7). The Board further ordered that the Motion to Amend be filed no later than 4:30 p.m., July 30, 2019, that the Respondents had seven (7) days to respond to the Motion to Amend; and that the Board would make a ruling on the Motion to Amend.

On July 29, 2019, the Complainant filed the Motion to Amend (Motion to Amend). Attached to the Motion to Amend was the proposed THIRD AMENDED PROHIBITED PRACTICE COMPLAINT (Proposed Third PPC), which among other things, added the allegations regarding HRS §§ 89-13(a)(1) and (7) and 89-3 violations against PSD. The Motion to Amend was based on Hawai‘i Administrative Rules (HAR) § 12-42-43 and Hawai‘i Rules of Civil Procedures Rules 5, 7, 15, and 52.

On July 31, 2019, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a Motion for Disqualification (Motion to Disqualify) requesting that the Board be disqualified from considering the Motion to Amend based on “an appearance of impropriety” for causing “Daniel Parker to file the motion and giving him specific directions and instructions on what specific statutory claims to assert against respondents it may not sit with impunity in judgment on the pending motion.” The UPW then further requested the Board to recuse itself from acting on the Motion to Amend and to appoint a hearings officer to conduct a hearing on the Motion and to render an appropriate ruling under HAR § 12-42-8(g)(1).

On August 2, 2019, UPW filed an Errata to Motion for Disqualification, Filed on July 31, 2019.

On August 2, 2019, UPW filed Respondent UPW’s Opposition to Daniel Edward Parker’s Motion to Amend Second Amended Complaint (UPW Opposition). In its Opposition, UPW objected to the Motion to Amend on the grounds that, among other things, Complainant: 1) did not file an affidavit or supporting memorandum as required by HAR § 12-42-8(g)(3)(C) “setting forth the grounds upon which they are based”; 2) caused undue delays and undue prejudice to Respondents by filing multiple defective complaints; 3) there was no express or implied consent to try issues not raised in the Second Amended Complaint; and 4) the scope of the duty to bargain has been limited by [Board] Decision No. 481 and other applicable law.

On August 5, 2019, PSD filed Respondent Employer’s Memorandum in Opposition to Complainant’s Motion to Amend Second Amended Complaint (PSD Opposition). In its Opposition, PSD contends, among other things, that the Motion to Amend should be denied because the proposed amendment would be futile because the claim of videotaping a strip search is hypothetical, time-barred by the ninety-day limitations period for prohibited practices, waived by the Complainant., and manifestly prejudicial. In support of these assertions, PSD argues, among other things, that: 1) PSD consulted with UPW regarding PSD’s Policy and Procedure COR.08.02, Searches of Visitors and Staff, which allowed PSD to videotape vehicles of persons for whom there is a reasonable suspicion of introducing contraband into PSD’s facilities; 2) videotaping of a person submitting to a strip search is not addressed in that policy, and there is no practice or policy upon which notice to the Union or Complainant was required; 3) no strip search of the Complainant was actually conducted; and 4) Complainant lacks standing to complain about a lack of notice to implement a policy that did not exist; and 5) the parties never consented to try this issue.

On August 7, 2019, Complainant filed Complainant Daniel Edward Parker’s Memorandum in Opposition to Union Respondent’s Motion for Disqualification (Opposition to Disqualification). In his Opposition to Disqualification, Parker asserts that there is no basis for the Board to disqualify itself. In support of this assertion, Complainant takes that position, among other things, that: 1) Sussel v. Honolulu Civil Service Commission, 71 Hawai‘i 101, 784 P.2d 867 (1989) relied on by

UPW is distinguishable from this case because there is nothing to suggest that the Board is biased against UPW; 2) the Board clearly has the authority under HAR § 12-42-8(g)(10) to make a ruling instructing the Complainant to amend his complaint to conform to the evidence; 3) UPW's dissatisfaction with the Board's decision is not a valid basis for Board disqualification; 4) the evidence offered by UPW of Board bias "does not involve matters of any personal interest to the [Board]. They concern primarily matters affecting [its] exercise of judicial discretion[;]" and 5) UPW never contends that the Board or any of its members has a personal interest in this matter requiring disqualification, so there is no appearance of impropriety.

Based on the pleadings and full record herein, the Board issues the following rulings, the reasons for which will be fully addressed and incorporated in the final Decision and Order rendered in this case:

1. The UPW's Motion to Disqualify is denied;
2. The Complainant's Motion for Leave to Amend to file a Third Amended Complaint is granted, in part, with a correction to the case number referenced in the Caption of the Third Amended Complaint from "18-CU-10-370 & 19-CE-923" to "18-CU-10-370 & 19-CE-~~10~~-923". Complainant must file his Third Amended Complaint by **August 14, 2019 at 4:30 p.m.**;
3. Respondents have until **August 26, 2019 at 4:30 p.m.** to file their Answers to the Third Amended Complaint;
4. Respondents will be given the opportunity to reopen their case at the HOM to address the additional allegations regarding violations of HRS §§ 89-3, 89-13(a)(1) and (7), and Complainant will be given the opportunity to provide rebuttal evidence; and
5. The full record filed in this case, including but not limited to the Motion for Judgment as a Matter of Law, filed on July 11, 2019, the Employer's Substantive Joinder in Union's Motion for Judgment as a Matter of Law, Filed July 11, 2019, and Complainant Daniel Edward Parker's Memorandum in Opposition to Union Respondent's Motion for Judgment as a Matter of Law, filed on July 18, 2019, will be deemed applicable to the Third Amended Complaint and no refiling of these documents already contained in the record is required.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a conference in the above entitled case on **August 28, 2019 at 10:00 a.m.** in the Board's hearing room, Room 434, 830

Punchbowl Street, Honolulu, Hawai'i. The purpose of the conference is to set, among other things, further hearing dates.

All parties have the right to appear in person and to be represented by counsel or any other authorized person. Any party may appear telephonically by calling the Board and making the necessary arrangements at least five (5) days prior to the Status Conference at the telephone number below.

Auxiliary aids and services are available upon request to parties and representatives with disabilities. For TTY, dial 711; then, ask for (808) 586-8616, the Hawai'i Labor Relations Board. For any other reasonable accommodations or to appear telephonically, call the Board at (808) 586-8616 at least five (5) days prior to the hearing.

DATED: Honolulu, Hawai'i, August 9, 2019.

HAWAI'I LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:

Matthew N. Padgett, Esq.

Herbert R. Takahashi, Esq.

Dennis K. Ferm, Deputy Attorney General