

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,

Respondent.

CASE NO(S). 17-CU-10-357
17-CE-10-906

ORDER NO. 3566A

AMENDED MINUTE ORDER
MEMORIALIZING THE BOARD'S ORAL
ORDER AT THE OCTOBER 3, 2019
HEARING ON THE MERITS

AMENDED MINUTE ORDER MEMORIALIZING THE BOARD'S
ORAL ORDER AT THE OCTOBER 3, 2019 HEARING ON THE MERITS

On October 7, 2019, the Board issued Order No. 3566, Minute Order Memorializing the Board's Oral Order at the October 3, 2019 Hearing on the Merits. The Board hereby withdraws Order No. 3566 and replaces it, in its entirety, with this Order No. 3566A as follows:

AMENDED MINUTE ORDER MEMORIALIZING THE BOARD'S
ORAL ORDER AT THE OCTOBER 3, 2019 HEARING ON THE MERITS

On December 20, 2017, Complainant JONATHAN TAUM (Complainant or Taum) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) alleging violations of Hawai'i Revised Statutes (HRS) § 89-13(b)(1), (4), and (5) by Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) and violations of HRS § 89-13(a)(8) by Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (PSD).

On January 8-9, 2019, PSD offered J. MARTE MARTINEZ (Ms. Martinez) as a witness to testify regarding the facts and circumstances in this case and the issues raised in the Complaint. Ms. Martinez authored a Use of Force Review for PSD (Martinez Report), based on a video of the inmate takedown that, among other things, led to Complainant's discharge. The letter from PSD discharging Complainant specifically referenced the Martinez Report. Several subsequent PSD witnesses referenced the Martinez Report as a document that they reviewed and relied on in the course of Complainant's disciplinary and grievance proceedings.

Among other things, on January 8, 2019, Ms. Martinez presented her qualifications to perform a Use of Force Review to the Board. These qualifications included, among other things, that Ms. Martinez graduated from Southern Oregon State College in “‘92, criminal justice, criminology”; that Ms. Martinez has been certified as an instructor since 1994 in “three states and the federal government”; and that she “hold[s] 33 certificates as far as an instructor.”

On April 11, 2019, HAWAII NEWS NOW (HNN) issued a story, entitled “Administrator in charge of [PSD] training programs accused of lying on her resume.”ⁱ The story, among other things, raised questions about Ms. Martinez’s education and experience. Those questions raised include questions about qualifications that Ms. Martinez presented to the Board on January 8, 2019.

On April 18, 2019, Complainant requested and the Board issued a subpoena duces tecum to PSD for “[a]ny 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” (Subpoena to PSD). Complainant served the Subpoena on PSD on May 7, 2019.

After an in-camera review of the documents produced by PSD in response to the Subpoena to PSD, Complainant withdrew the Subpoena to PSD on July 2, 2019.

On June 25, 2019, Complainant requested and the Board issued a subpoena to Ms. Martinez.

On July 25, 2019, Complainant filed a Declaration of Process Server, which stated, among other things, that Ms. Martinez could not be served because she was not at her office and would not be back at her office for at least a week.

On September 10, 2019, the Board issued Board Order No. 3557, for Department of Public Safety, State of Hawai‘i to Produce J. Marte Martinez and for United Public Workers, AFSCME, Local 646, AFL-CIO to Produce Dayton Nakanelua at a Hearing on the Merits for the Purpose of Addressing Board Questions. Order No. 3557 also noticed a further hearing on the merits (HOM) for September 25, 2019.

On September 19, 2019, the Board issued Board Order No. 3561, for Department of Public Safety, State of Hawai‘i, to Produce Additional Employment Records for J. Marte Martinez for the Purpose of Addressing Board Questions.

On September 25, 2019, the Board held an HOM. At the HOM, PSD produced documents identified as Board Exhibit 3, which were the same documents previously produced in response to the Subpoena to PSD, and Ms. Martinez did not appearⁱⁱ. UPW produced Dayton Nakanelua (Nakanelua) who testified in response to Order No. 3557. Mr. Nakanelua testified that he became

aware of the allegations regarding Ms. Martinez's qualifications during the 2019 Hawai'i Legislative Session during the confirmation hearing on the appointment of PSD Director Nolan Espinda (Espinda).

The Board scheduled a continued hearing date of October 3, 2019 and ordered PSD to produce additional documents regarding Ms. Martinez, an order memorialized by Board Order No. 3563, Clarifying that Order No. 3561 Ordering the Department of Public Safety, State of Hawai'i, to Produce Additional Employment Records for J. Marte Martinez for the Purpose of Addressing Board Questions Shall Include but is not Limited to the Production of Personnel Records and Training Certification Records.

On September 26, 2019, based on PSD's actions at the HOM on September 25, 2019, Complainant filed Complainant's Motion for Order to Show Cause Why Respondent Department of Public Safety, Hawaii Community Correctional Center, State of Hawaii, Should Not be Held in Contempt of the Board's Order #3557 Filed on September 10, 2019 and Order #3561 Filed on September 19, 2019, and Imposition of Sanctions (Motion for Order to Show Cause). UPW filed an Opposition to the Motion for Order to Show Cause on September 30, 2019, and PSD filed an Opposition to the Motion for Order to Show Cause on October 1, 2019.

On October 1, 2019, PSD filed Respondent State of Hawaii, Department of Public Safety's Motion to Continue Hearing Scheduled for October 3, 2019 Until the Court Issues a Decision on Respondent's Appeal (Motion to Continue).

On October 3, 2019, the Board held an HOM in the above-entitled case. PSD did not produce any additional records in response to Board Order Nos. 3557, 3561, or 3563.

At the October 3, 2019 HOM, among other things, the Board took judicial notice of "any video or record from Hawaii News Now and the Hawai'i State Senate public record regarding the issue of Ms. Martinez's educational and training background." The Board took this judicial notice solely as an indication of what information was in the public record at the time. Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016 (9th Cir. 2010).

The Board further issued an oral order at the HOM that touched on several issues. Based upon the pleadings and record in this case, the Board makes the following rulings:

1. ...Although PSD has argued that it acted in good faith when producing documents at the September 25, 2019 hearing on the merits, the Board finds that, while PSD did produce documents, those documents were not responsive to Board Order No. 3561. Further, PSD produced no documents

in response to Board Order No. 3563. The Board finds that **PSD did not act in good faith** because, among other things:

- PSD’s counsel represented to the Board that he “forwarded the order to [his] client, and [he] was told that [Board Exhibit 3] [contains] all the documents in the custody of the Department of Public Safety that the Board has requested.” However, PSD’s counsel did not state that he had reviewed the documents presented by PSD to ensure that they complied with Board Order No. 3561.
- In point of fact, when the Board asked the PSD custodian of records if, after receiving Board Order No. 3561, she went to Ms. Martinez’s personnel file to see if there were materials in that file that were necessary to respond to the order, the PSD custodian of records stated that she did not look in Ms. Martinez’s personnel files. Rather, the PSD custodian of records stated that she “just assumed that [Board Order No. 3561] was requesting the same information that was previously requested [by the Complainant’s subpoena duces tecum issued on April 18, 2019 and served on May 7, 2019].” Therefore, PSD did not make a good faith effort to thoroughly review its files to determine whether there were additional documents that were not contained in Board Exhibit 3.
- The PSD custodian of records further stated in response to questioning by the Board that certain items specifically enumerated in Board Order No. 3561, such as, for example, Ms. Martinez’s application forms to positions within PSD, were in fact within the Department’s possession in Ms. Martinez’s personnel file. These items were not presented to the Board.
- Finally, PSD did not raise any specific Hawai‘i Revised Statutes §§ 92F-13 and 92F-14 issues at the September 25, 2019 hearing. Further, even for those records where an individual has a significant privacy interest, any analysis under HRS §§ 92F-13 and 92F-14 requires a balancing test against the public interest. Additionally, under HRS § 92F-12(b)(4), government records are required to be disclosed “pursuant to an order of a court”; under HRS § 92F-14(b)(5), an individual does not have a significant privacy interest in information that relates to the individual’s “nongovernmental

employment history” if the information is “necessary to demonstrate compliance with requirements for a particular government position”; and under HRS § 92F-19(a)(1), government records may be disclosed to other government agencies if the disclosure is “[n]ecessary for the performance of the requesting agency’s duties and functions” and is “compatible with the purpose for which the information was collected or obtained.” Finally, under HRS § 92F-12(a)(14) an employee’s education and training background are disclosable and under HRS [§ 92F-28], “Nothing in this part shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record: (1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record...in any judicial or administrative proceeding...”

2. The Board **denies** the Motion for Order to Show Cause for reasons that will be addressed in the final decision and order rendered in this case.

3. While the Board recognizes that Ms. Martinez failed to appear at the September 25, 2019 hearing on the merits due to a personal emergency, the Board also recognizes that Ms. Martinez has previously evaded service of a subpoena by the Complainant. Ms. Martinez requested a 60-day continuance on her appearance.

The Board finds that given her past evasion of service, her failure to provide a written explanation for her failure to appear, and her failure to present documents through PSD to the Board as ordered by Board Order 3557, a 60-day continuance is not warranted.

However, based on PSD’s response to Board Order No. 3561, the Board will not require Ms. Martinez’s appearance at a future hearing or that Ms. Martinez produce certified copies of documents pursuant to Order No. 3557.

4. Based on PSD’s refusal to produce documents to qualify their witness Ms. Martinez and Ms. Martinez’s evasion of service and failure to appear or produce requested documents, the Board issues an order disqualifying Ms. Martinez as an expert witness in this case.

The Board will further draw an adverse inference from PSD’s refusal to produce documents to qualify Ms. Martinez as an expert witness.

Accordingly, Ms. Martinez’s testimony, opinions, and analysis will be given the weight that they deserve based on the foregoing and on the Board’s determination regarding Ms. Martinez’s credibility. Further, the Board will weigh any of PSD’s actions in this case that relied on Ms. Martinez’s opinions and analysis in light of the weight given to her testimony, opinions, and analysis.

Based on this Order, PSD is no longer required to produce documents regarding Ms. Martinez’s credentials under Order Nos. 3557, 3561, and 3563. Therefore, the Board believes that the issue regarding PSD’s production of documents is settled. Accordingly, PSD’s Motion to Continue is **denied**.

The findings of fact and conclusions of law related to this denial will be included in the Board’s final decision in this case.

DATED: Honolulu, Hawai‘i, October 7, 2019.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

EXCUSED

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Ted H.S. Hong, Esq.

Herbert R. Takahashi, Esq.

Henry S. Kim, Deputy Attorney General

ⁱ The Board has taken judicial notice of this article solely as an indication of what information was in the public record at the time. Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016 (9th Cir. 2010).

ⁱⁱ PSD’s counsel represented to the Board that Ms. Martinez had a family emergency and thus could not attend the hearing.