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DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

STATE OF HAWAII

In the Matter of)	P.C. No. 94-1
CORPORATION "E",)	
a Hawaii Corporation,)	DECLARATORY RULING
)	
Petitioner.)	

DECLARATORY RULING

This declaratory ruling pursuant to Hawaii Revised Statutes ("HRS") § 91-8 and Hawaii Administrative Rules ("HAR") §§ 12-1-5 and 12-506-9 is made in response to a petition for declaratory ruling dated March 4, 1993 [sic] and filed by the petitioner on March 11, 1994. The petitioner has been designated as "Corporation E."

FACTS AS PRESENTED BY THE PETITIONER

In February, 1994, Corporation E's shareholders sold all of the stock in the Corporation to new shareholders. At that time, management of the Corporation was not aware of the new shareholders' desire to make changes. By March, 1994, corporate management learned from the new shareholders that it will be permanently shutting down one of the Corporation's departments and will be terminating the Corporation's employees working in that department by approximately May, 1994.

ISSUE AS PRESENTED BY THE PETITIONER

effective?
changed to 60 days

Under the facts stated above, is more than 45 days' notice required pursuant to HRS § 394B-9 prior to the termination of a corporation's employees resulting from the permanent shutting down of a portion of the corporation's operations, when the permanent shutting down may be due to a sale of the corporation's stock that occurred three or more months before the employees' termination?

DECLARATORY RULING

Under the facts stated above, and assuming that Corporation E is a covered establishment, the Director of Labor and Industrial Relations ("Director") rules that more than 45 days' notice is not required pursuant to HRS § 394B-9 prior to the termination of a corporation's employees resulting from the permanent shutting down of a portion of the corporation's operations, regardless of the fact that the permanent shutting down may be due to a sale of the corporation's stock that occurred three or more months prior to the employees' termination.

The statutory provisions of HRS Chapter 394B (Supp. 1992) are triggered when a "partial closing" occurs as defined in HRS § 394B-2. The statute provides:

"Partial closing" means the permanent shutting down of a portion of operations within a covered establishment due to the sale, transfer, merger, and other business takeover or transaction of business interests and results in or may result in the termination of a portion of the employees of a covered establishment by the employer.

Rules adopted by the Director pursuant to Chapter 394B further define the factual elements which must be established, in order for a "partial closing" to occur and the requirements of Chapter 394B to be effective. As provided in HAR § 12-506-5(a):

In order for there to be a partial closing, there shall be:

- (1) A sale, transfer, merger, and other business takeover or transaction of business interests; and
- (2) A permanent shutting down of a portion of operations within a covered establishment due to paragraph (1); and
- (3) An actual or potential termination of a portion of the employees of a covered establishment by the employer as a result of paragraph (2).

Based on the facts presented by the petitioner, it is assumed that Corporation E is a covered establishment.

- A. A Transfer of all of the Shares of a Corporation to New Shareholders Constitutes a Sale, Transfer, Merger, and Other Business Takeover or Transaction of Business Interests.

The phrase "sale, transfer, merger, and other business takeover or transaction of business interests" is defined in HAR § 12-506-2 and means "any of the various forms of business transactions where there is a change in the controlling interest of a covered establishment" Upon the sale and transfer of all of the shares of a corporation to new shareholders, the controlling interest in the covered establishment is transferred from the previous shareholders to the new shareholders. Therefore, the first element required

for a partial closing has been established. It should be noted, however, that unlike a situation where a transfer of business assets occurs, a sale of only corporate shares does not give rise to a new entity which could, in turn, result in a technical termination and rehiring of corporate employees.

B. A Permanent Shutting Down of a Portion of Operations Within the Covered Establishment Will Occur, Due to the Transfer of all of the Shares of the Corporation.

The facts, as stated by the petitioner, indicate that the new shareholders of Corporation E intend to close down a department of the Corporation and terminate all of the Corporation's employees working in that department. This decision was made by the new shareholders at about the time they purchased the stock of the Corporation, or shortly thereafter, and is considered to be a permanent shutting down of a portion of the operations within the covered establishment which is due to the transfer of the shares of the corporation.

C. An Actual Termination of a Portion of the Employees of a Covered Establishment by the Employer Will Occur Due to the Shutting Down of a Department of the Corporation.

The facts, as stated by the petitioner, indicate that the new shareholders of Corporation E intend to terminate all of the employees working in the department of the Corporation that is to be permanently closed down. Since this termination is a result of the purchase of the shares by the new shareholders and their decision to permanently shut down

the department, the termination of employees in May, 1994 constitutes the third element necessary for a partial closing pursuant to HRS § 394B-2 and HAR §§ 12-506-2 and 12-506-5(a).

- D. The Date on Which Corporation E is Required to Give Notice of the Partial Closing Pursuant to HRS § 394B-9 is a Date at Least 45 Days Prior to the Date on Which the Affected Employees are Terminated.

Employers are required to give notice of a partial closing, pursuant to HRS § 394B-9, which provides that:

An employer in a covered establishment shall provide to each employee and the director written notification of a closing, partial closing, or relocation at least forty-five days prior to its occurrence.

This requirement is elaborated upon in HAR § 12-506-7(a), which provides that:

Any employer subject to the provisions of chapter 394B, HRS, shall provide written notification not less than forty-five calendar days prior to the closing, partial closing, or relocation to each affected employee and to the director.

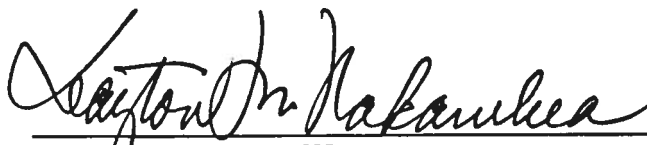
HRS § 394B-2 defines "employer" as "any person who, directly or indirectly, owns, operates or has a controlling interest in a covered establishment, excluding the State or any political subdivision thereof." Although Corporation E's management may not have been informed of the potential closing down of the department at the time of the stock transfer, the new shareholders, as "employers", also have a duty to notify the employees and the Director of the potential shutdown. However, since all three of the conditions required for the

existence of a partial closing are not present until the date employees are terminated in May, 1994, the notice to the employees and the Director pursuant to HRS § 394B-9 and HAR § 12-506-7(a) need not be given until 45 days prior to the date all three requirements are met, the date on which the employees are terminated.

Language in HRS § 394B-9 and HAR § 12-506-7(a) states that notice shall be given "at least" and "not less than" 45 days prior to the date employees are terminated, indicating that the notice to employees and the Director may be given more than 45 days prior to the date on which employees are terminated. The Director rules that the language allowing more than 45 days minimum notice is permissive and that only the minimum of 45 days notice is mandatory under the statute and the rules.

Assuming that the May, 1994 partial closing date has not yet triggered the 45 day notification period, the employer would not be liable for civil penalties imposed under Chapter 394B for violation of the notice requirement.

DATED: Honolulu, Hawaii, April 15, 1994.


DAYTON NAKANELUA
Director of Labor and Industrial
Relations, State of Hawaii