

**Hilo, Hawai`i
Tuesday, October 28, 2008**

The regular meeting of the Merit Appeals Board, County of Hawai`i, was held in the conference room of the Department of Human Resources, 101 Pauahi Street, Suite 2, Hilo, Hawai`i, on Tuesday, October 28, 2008.

Present:

**Mr. G. Rick Robinson, Chair
Mr. Joel Cohen, Member
Mr. Henry "Hank" Silva, Member
Mr. Gary Yoshiyama, Member
Mr. Michael R. Ben, Director of Personnel
Ms. Diane A. Noda, Deputy Corporation Counsel
Ms. Yumi Nakamura, Clerk III
Ms. Velma Y. Menezes, Secretary- Reporter**

Excused:

Ms. Joanne Balberde- Kamalii, Vice Chair

Chair Robinson called the meeting to order at 9:35 a.m.

MINUTES OF JULY 22, 2008

MOTION: Mr. Cohen moved that the minutes of July 22, 2008 be approved as circulated. The motion was seconded by Mr. Yoshiyama and unanimously carried.

COMMUNICATIONS

A) Communication No. 08- 10, petition of appeal, received from Alton Nosaka, UPW, on behalf of James M. Sullivan, regarding

the investigation conducted by Rene G. Dela Cruz, Executive Assistant.

The Board scheduled Mr. Sullivan's appeal hearing for November 18, 2008 at 10:00 a.m.

B) Communication No. 08- 12, petition of appeal, received from Alton Nosaka, UPW, on behalf of Troy DeVera, regarding Mr. DeVera's termination from employment with the County of Hawai`i.

The Board scheduled Mr. DeVera's appeal hearing for December 16, 2008 at 10:00 a.m. Mr. Cohen noted that he will not be able to attend December's meeting.

C) Communication No. 08- 11, dated October 1, 2008, from Joseph K. Kamelamela, Deputy Corporation Counsel, regarding prompt notification of service of complaint.

The above communication was received and filed.

D) Annual Evaluation for Director of Human Resources for Period July 1, 2007 to June 30, 2008.

Chair Robinson noted that in their previous evaluation of Mr. Ben, they had sent out a questionnaire to the departments for a response. This year, they are behind in the evaluation. Chair Robinson asked if anyone had ideas of how they should proceed this year.

Mr. Cohen recommended that Mr. Ben do a self- evaluation based on criteria put before him, and they can then get feedback from the department heads. He noted that there will be a lot of new people coming in, including a new Police Chief. However, the process is what's important for communication. One issue is that it's human resources so the person in that position needs to have good human relations skills, but also some evaluation is needed regarding the functions of the department and how it's running, as it's an important part of the County structure.

Chair Robinson noted that it was a laborious process to get all the responses back last year from the questionnaires that were sent out. What might also be helpful is to do a phone call to the people who had expressed concerns regarding the level of service from Human Resources. They could do it by conference call or designate one Board member to do that on behalf of the Board.

Mr. Ben objected to the Board requiring him to self-evaluate, as it is not provided for in the Board's rules. It's supposed to be the Board's evaluation and not his evaluation. The rules are written a certain way; and, in addition, the criteria the Board would give him to evaluate himself is untimely. This was all supposed to have been done in June, and these issues came up before about telling him what the expectations are.

Chair Robinson requested that Ms. Menezes email the previous evaluation documents to the Board members to review and determine whether they should go forward with phone calling the people who responded the last time. Chair Robinson stated that he can do the phone calling.

After a discussion on including the department heads who will have left service, Chair Robinson stated that he'd just as soon not call them. The Board will do the evaluation with the people still in service.

The above method was acceptable to both the Board and Mr. Ben.

DIRECTOR'S REPORT

Mr. Ben reported the following:

1) The department is currently working on the budget again, and the budget instructions are the same as usual - - status quo, no changes. Any changes would go on a supplemental request

that's taken up individually; it may or may not be granted, but the basic budget is status quo.

Fiscally, the County is in good shape this fiscal year and should be able to weather the anticipated bad economic time primarily through a number of vacancies they have, which will be the biggest cost savings this fiscal year.

2) Regarding the change in administration, the department has arranged meetings for departing personnel to meet with ERS to go over their retirement options and to explain the retirement system to those department heads and secretaries who are retiring. Some may be returning to their old positions, some may be going back to the private sector, but there are issues such as vacation pay and what happens to their sick leave that will be covered in the transition informational memo.

3) The big issue Mr. Ben is working on right now is the recent amendments to the Americans With Disabilities Act (ADA), which in their estimation broadens the scope of coverage. They've uncovered a weak spot in the County's job placement procedures for those who become medically disqualified in that they're not engaging in what they call the interactive process in determining whether or not these employees can do their job with or without reasonable accommodations. The County has been merely accepting the doctor's word that the employee cannot perform the employee's duties, but Mr. Ben's analysis of the ADA requirements is that they're supposed to inquire further because in all likelihood the employee probably qualifies as a qualified individual under the Americans With Disabilities Act, which means they're supposed to engage in this process. They're reworking the job placement procedures to address that issue.

4) The Employees Retirement System just came out with an announcement recently that they're going to be offering employees in the Hybrid Plan an opportunity to buy back non-creditable service that they may have.

5) Mr. Ben had sent a letter to all Kona Hospital employees who were going to be rified (reduction in force) explaining to them the intergovernmental movement process which allows regular civil service employees to move to another jurisdiction without competing with other individuals for positions. Mr. Ben has alerted them to that process and has inviting them to apply for various vacancies that the County has. The County technically doesn't have a freeze on, but it is required that all positions for filling must be approved by the Mayor.

At this time, Chair Robinson congratulated Mr. Ben on his 20 years of service with the County Hawai`i and presented him with a Certificate of Service signed by the Mayor.

NEXT MEETING DATE

The next meeting was scheduled for November 18, 2008 at 9:30 a.m., followed by Mr. James Sullivan's appeal hearing at 10:00 a.m. December's meeting was scheduled for December 16, 2008 at 9:30 a.m., followed by Mr. Troy DeVera's appeal hearing at 10:00 a.m.

The meeting recessed at 9:53 a.m.

**Hilo, Hawai`i
Tuesday, October 28, 2008**

**APPEAL HEARING – DANIEL VARES – WERE ANY CIVIL SERVICE
LAWS, RULES, OR REGULATIONS VIOLATED IN THE APPELLANT’S
TERMINATION FROM A CUSTODIAN/GROUNDSKEEPER II
POSITION?**

Present:

**Mr. G. Rick Robinson, Chair
Mr. Joel Cohen, Member
Mr. Henry “Hank” Silva, Member
Mr. Gary Yoshiyama, Member
Mr. Julian White, Deputy Attorney General
Ms. Yumi Nakamura, Clerk III
Ms. Velma Y. Menezes, Secretary- Reporter**

Others Present:

**Mr. Daniel Vares, Appellant
Mr. Alton Nosaka, Business Agent, UPW
Ms. Diane Noda, Deputy Corporation Counsel**

The following witnesses were sworn in and testified:

**Michael R. Ben, Director of Human Resources
Daniel Vares, Appellant
Jennifer Sakamoto, HR Specialist, Public Works
Duane De Luz, General Services Superintendent
Claude “Keek” Hottendorf, General Services Supervisor
Bruce McClure, Director of Public Works**

The following exhibits were entered into the record:

- Appellant's Exhibit A - Schedule**
- Appellant's Exhibit B - Schedule**
- Appellant's Exhibit C - Schedule**
- Appellant's Exhibit D - Schedule**
- Appellant's Exhibit E - Performance Appraisal System**
- Employer's Exhibit 1 - Position Description**
- Employer's Exhibit 2 - 12-27-07 Letter**
- Employer's Exhibit 3 - Probationary Periods**
- Employer's Exhibit 4 - Chain of Command for General Services Department**
- Employer's Exhibit 5 - 2-6-08 Memo**
- Employer's Exhibit 6 - Risk Reminder: Impact of Driver Inattention**
- Employer's Exhibit 7 - 2-29-08 Memo**
- Employer's Exhibit 8 - Interviews of Duane De Luz, Claude "Keek" Hottendorf, Renee De Ponte**
- Employer's Exhibit 9 - Notice of Termination**
- Employer's Exhibit 10 - Internal Complaint Form**
- Employer's Exhibit 11 - Response to Vares' Written Appeal**
- Employer's Exhibit 12 - Step I Decision Letter (McClure)**
- Employer's Exhibit 13 - Step 2 Decision Letter (Dela Cruz)**

Chair Robinson called the hearing to order at 10:05 a.m.

Chair Robinson stated that the Board would consider the Motion to Dismiss for Lack of Jurisdiction filed by Ms. Noda, noting that a response to the motion had subsequently been filed by Mr. Nosaka.

Ms. Noda stated that beyond her motion, she did want to respond to UPW's objection, dated October 20, 2008, that had been filed. Mr. Nosaka stated that the Board does have jurisdiction to hear Mr. Vares's appeal based on §76-14(1) & (4), HRS. However, subsection 4 only applies to civil service employees who are excluded from collective bargaining, such as in the case the Board had earlier this year from a Fire Battalion Chief who was a civil service employee excluded from the bargaining unit, which appropriately came up before the Board.

In addition, HRS 76- 41, performance appraisal system, pertains to performance evaluations for civil service employees. The County's position is that Mr. Vares was on initial probation and not yet a civil service employee; therefore, 76- 41 does not apply to him.

The County does acknowledge that the probationary period is part of the examination; however, the County's position is that this probation period, as part of the examination process, is the process itself that's used by the department to determine fitness and ability of an employee during the initial probation.

Ms. Noda noted that she does have Mr. Ben available to testify regarding the probationary period.

In response to Ms. Noda's statement, Mr. Nosaka stated that this is a performance appraisal issue. The employer failed to even do the minimum requirement of a performance appraisal. They never provided training. The working supervisor document that the Appellant applied for did not have a supervisory minimum qualification, and they put him in without any training to run a brand- new crew.

As for jurisdiction, their issue is the performance appraisal, violating civil service laws that didn't even give an individual performance appraisal to show that the Appellant was not meeting expectations.

The Board requested to hear Mr. Ben's testimony, and Mr. Ben was called upon to testify on law concerning probationary periods. Mr. Ben was cross- examined by Mr. Nosaka. Refer to recording for testimony.

MOTION: Mr. Yoshiyama moved to convene into an executive session to consult with counsel. The motion was seconded by Mr. Silva and unanimously carried.

The Board convened into an executive session at 10:21 a.m. and reconvened into the hearing at 10:45 a.m.

MOTION: Mr. Yoshiyama moved to deny the Motion to Dismiss for Lack of Jurisdiction. The motion was seconded by Mr. Cohen and carried by a 3- 1 vote with Mr. Silva voting no.

Mr. White stated that it's the Board's belief that 76- 14(1)(a), HRS, does give the Board jurisdiction to hear this matter. It's an examination matter, because it deals with the probationary period of Mr. Vares. Under Act 253, they believe it was the intent of the Legislature to allow individual employees to have a meaningful forum in which to have their cases heard despite the fact that they're probationary employees. For those reasons, the Board believes that it does have jurisdiction to hear this case on the merits. It's also consistent with previous cases that this Board has heard from probationary employees such as the Troy Familiar case, just to cite one example.

The Board proceeded to hear the appeal. Both parties waived making opening statements.

Mr. Nosaka stated that he doesn't have any witnesses today. They're just appealing the process itself of the performance appraisal which in highlight shows that the department, or Human Resources, should have had this system set up to evaluate individuals to succeed in the County's employment.

Mr. Vares was hired by the County for a supervisor position which he was never trained for, and the minimum qualifications in his job description never required him to have supervisory skills. This is the issue that Mr. Vares argued from day one- - that he needed training to do these supervisory skills. The department failed to acknowledge that he needed help.

This department is brand new and was created because of a lawsuit by UPW. All the heads of this department- - the superintendent, supervisors, were all brand new. Nobody knew the

true intent of the rules of civil service to be successful and be trained.

That's the whole issue—that Mr. Vares was never trained to do his job, and there was no performance appraisal at all.

Upon Mr. White bringing up the County's Exhibit 1, it was discovered that because of an error with the Corporation Counsel's office, Mr. Nosaka had not received the County's exhibit packet.

Chair Robinson gave Mr. Nosaka two options: 1) take a recess to review these exhibits and proceed with the case, or 2) continue the hearing to another date.

Ms. Noda pointed out that in the exhibit packet includes several of Mr. Vares's documents.

The Board recessed at 10:54 a.m. to allow Mr. Nosaka to consult with his client, and reconvened the hearing at 10:58 a.m.

Mr. Nosaka requested a continuance so that he'd be able to put together exhibits for the Board as evidence on Mr. Vares's behalf.

Ms. Noda stated the County's objection for the record, as this is the second request for a continuance. Also, she did provide Mr. Nosaka with all of the discovery before last month's original hearing date of which she then did cull out just these appeal documents that she provided to UPW.

MOTION: Mr. Yoshiyama moved that the Board convene into an executive session to consult with counsel. The motion was seconded by Mr. Silva.

The Board convened into an executive session at 11:00 a.m. and reconvened into the hearing at 11:04 a.m.

MOTION: Mr. Silva moved that the request for a continuance be denied and that the Board delay making its final decision until Mr. Nosaka has an opportunity at a

future date for further presentations. The motion was seconded by Mr. Yoshiyama.

Discussion:

Chair Robinson noted that they can go through the hearing today but will not make a decision today. They will wait for a written response from Mr. Nosaka and the County in the event there are additional presentations and will reconvene the hearing on November 18, at which time, a decision will be made.

Chair Robinson set a November 5 deadline from Mr. Nosaka for any additional information he may have.

The motion was voted on and carried unanimously.

In presenting his case, Mr. Nosaka called upon Mr. Vares, who testified on his employment and the events that led to his termination. Mr. Vares was cross-examined by Ms. Noda, recrossed by both Mr. Nosaka and Ms. Noda, and questioned by the Board. Refer to recording for further testimony.

The Board recessed for lunch at 12:35 p.m. and reconvened at 1:10 p.m.

In presenting the County's case, Ms. Noda called upon Mr. Ben, who testified on the background and process for establishing a new custodial unit in the County. Refer to recording for further testimony.

Ms. Noda called upon Ms. Jennifer Sakamoto, who testified on the history of the newly formed custodian and groundskeeper positions under the Department of Public Works. Ms. Sakamoto was cross-examined by Mr. Nosaka, questioned by the Board, and recrossed by Mr. Nosaka. Refer to recording for further testimony.

Ms. Noda called upon Mr. Duane De Luz, who testified on the services provided, the performance appraisal process, the training provided, his employment background, and the investigation he

conducted on Mr. Vares. Mr. De Luz was cross-examined by Mr. Nosaka, recrossed by Ms. Noda, and questioned by the Board. Refer to recording for further testimony.

Ms. Noda called upon Mr. Claude “Keek” Hottendorf, who testified on his background, the training provided to Mr. Vares, and his experience working with Mr. Vares. Mr. Hottendorf was cross-examined by Mr. Nosaka, recrossed by Ms. Noda, and questioned by the Board. Refer to recording for further testimony.

Ms. Noda called upon Mr. Bruce McClure, who testified on his decision to terminate Mr. Vares. Mr. McClure was cross-examined by Mr. Nosaka and questioned by the Board. Refer to recording for further testimony.

At this time, Chair Robinson asked Mr. Nosaka if they still needed more time for further presentations or would like to conclude the hearing today.

The Board recessed at 3:23 p.m. and reconvened at 3:30 p.m., at which time, Mr. Nosaka informed the Board that they have no further presentations and would like to end the hearing today.

Mr. Nosaka stated the following in his closing statement:

The position of Daniel Vares is that he appealed to the Merit Appeals Board because he felt that he had no training to be a supervisor; he had no remedial training to make him aware where he lacked in his performance.

The employer violated civil service law, Chapter 76, when they did not even consider a demotion; they didn’t do his performance appraisal; the training was on appropriate behavior, and sexual harassment was done way after all these complaints came in.

The whole issue is that Mr. Vares just wanted to have a County job. He tried working with co-workers, everybody went against him because he tried to save the County money and time;

and this is what he ended up with. The Appellant feels that he shouldn't have even made the complaint about the workers stalling all the time, because now he's out of a job. So his position is that his record be made clean and that he be reinstated as a custodian/groundskeeper II.

Ms. Noda stated the following in her closing statement:

The County's first position is that the Appellant did not sustain his burden of proof and the burden of persuasion that the County violated any civil service rule, law, or regulation.

Second, while their allegation is that there was a violation of a civil service rule and law, Ms. Noda needs to emphasize, as she has several times today, that Mr. Vares was on initial probation. That status in the County is very different from being a civil service employee. The statutes that were cited and the requirements that they're saying the County was supposed to follow, such as the performance appraisal system that's in HRS, Chapter 76, are also for civil service employees. In addition, as the witnesses pointed out, there was no requirement for the County to do a formal evaluation until the three month period; and Mr. Vares did not get to three months of employment with the County.

There also was informal training or coaching provided by Renee DuPonte, the Appellant's first supervisor, when she gave him warnings or reminders, and put him on notice of what were inappropriate behaviors as a supervisor and what needed to stop. There was also input, feedback, coaching, and informal training by both Keek Hottendorf and Duane De Luz. The Appellant is asserting that the County did not provide any formal supervisory training for him, as if that was a requirement for the County to provide during his initial probation, when it was not.

If supervisory skills and abilities are minimum qualifications of the job that the Appellant was hired for and is set forth in the job description that was given out when Mr. Vares first applied, the County is not required to provide supervisory training for someone

who's supposed to already come in with supervisory skills and abilities.

The last point is that although Mr. Vares alleges retaliation based on his reporting the employees, that does not pan out, as summarized in Mr. De Luz's report to Bruce McClure during his investigation. As Mr. De Luz pointed out, all of these things came about only when an investigation started, when the investigation was initiated somewhat by Mr. Vares's input and comments.

In any event, as the County had set forth in the Motion to Dismiss, if Mr. Vares's position is whistleblowing or retaliation, the proper forum is in a different venue and not the Merit Appeals Board.

For an employee who was on initial probation a mere ten weeks, approximately, based on what skills, abilities, and training Mr. Vares was supposed to have already come into the job with and based on what County provided to Mr. Vares as far as foundational background training, coaching, and input, it was an appropriate and really necessary decision for the employer to not keep Mr. Vares on with the department. The County requests that the Merit Appeals Board uphold the decision of Mr. McClure, as well as uphold the decision of Mr. Rene Dela Cruz, who was the mayoral representative on the Step II appeal.

In rebuttal, Mr. Nosaka stated the following:

As Ms. Noda stated, their position is this performance appraisal requirement is not set up for civil service employees. For the record, they do the performance appraisal in three months and six months, so how can the County say this is not the area that they should be at? If Mr. Vares's performance was an issue, they should have addressed it at his first month there or his second month there, even though they didn't do it on his third month. They should have provided more training to be a supervisor. He knows for a fact that the County had supervisory training in place, but they never provided it to him, so it is his position that the Board reconsider the termination.

MOTION: Mr. Silva moved to convene into an executive session to consult with counsel. The motion was seconded by Mr. Cohen and unanimously carried.

The Board convened into an executive session at 3:39 p.m. and reconvened at 3:50 p.m.

MOTION: Mr. Yoshiyama moved that Mr. Vares's appeal be denied.

MOTION: Mr. Cohen moved to amend the motion to deny Mr. Vares's appeal based on no civil service rules or laws being violated. The motion was seconded by Mr. Silva.

Discussion:

Mr. Cohen stated that the issue that was brought up on the three month and six month final evaluation process is important. An evaluation is a communication device to make it clear where the employee stands. He believes that communication did take place so he does not see any issue regarding the evaluation process.

Regarding the training, this was also done informally. His understanding is that the supervisory management training is new, and there was no formalized training program at that time.

The minimum qualifications or job description does state supervisory responsibilities, and that's a prerequisite for the position to have leadership capabilities. Some issues have come up here that he finds credible, and therefore he would support the motion.

Mr. Yoshiyama stated that speaking to the motion, he does not see any violation of civil service rule or law. He will avoid substituting his judgment as far as the termination is concerned; and he thinks there is a range of appropriate actions. It could have been in terms of more time or a lesser penalty, but that would have

been substituting his judgment. As a Board member determining whether a civil service rule was violated, he does not find that any rules were violated.

Chair Robinson noted that Mr. De Luz and Mr. Hottendorf did make an effort to counsel the Appellant and did work in ways to improve relationships and make that position grow. They seemed to have gone the extra mile before taking the action they did.

The motion was voted on and unanimously carried.

The hearing adjourned at 3:55 p.m.

ANNUAL EVALUATION FOR DIRECTOR OF HUMAN RESOURCES FOR PERIOD JULY 1, 2007 TO JUNE 30, 2008

The Board reconvened into its regular session at 3:57 p.m. to continue discussion on the above.

Mr. Ben distributed Circular No. 07-08 and recalled that after numerous discussions that were held, he had developed that circular at the direction of the Board who asked that Mr. Ben come up with a plan to address concerns that were raised. The circular is what Mr. Ben came up with and presented to the Board. The Board was satisfied with the circular going out.

If the Board will note, in the circular there is a mechanism that says when the department heads have a problem, they can talk to Ron Takahashi; and Mr. Takahashi will bring the complaints to the Board. The underlying reason for doing it that way is that the Board would have timely complaints coming before them that can be taken care of on timely basis rather than trying to tax people's memories, which was one of the objections Mr. Ben had. Whatever the Board decides, Mr. Ben wants to remind the Board of this process that was in place. If there's a complaint about how this department performs, the department heads were given an avenue to raise it with the Board.

Chair Robinson noted that the previous questionnaire that was sent to all department heads was subjective. Mr. Silva brought up a good point – that they should have something more objective, not subjective, where it’s in essence a rating. That’s something that can be done in email attachment or by telephone.

Mr. Ben stated that he appreciates that, but he needs to remind the Board that under the rules that the Board adopted, the evaluation is “meets expectations” or “does not meet expectations.” Rules have the force and effect of law, and that’s what needs to be followed. To implement the other avenue is to change the rules. If the Board wants to expand the criteria, they will have to go through rulemaking.

Mr. Cohen stated that it’s the structure that’s important, not how they are doing it. They are looking at communication as the primary purpose of what they are trying to do. They are community people trying to get feedback, both positive and negative.

Mr. Ben stated that he has only one real concern with going back and soliciting input again because then it says never mind this process in the circular; “you still can tell us whatever comments you have.” During the last two evaluations, Mr. Ben’s biggest concern was department heads who didn’t speak up, then making allegations with Mr. Ben not knowing who was saying what.

Chair Robinson inquired into the processes of the other commission- appointed department heads- - Police, Fire, Water, and Liquor.

Mr. Ben responded that Liquor hasn’t implemented an evaluation procedure, but Water, Police, and Fire have. However, Mr. Ben would point out that their functions are totally different. The other commissions have specific duties they perform whereas the Merit Appeals Board is an adjudicatory body.

For Mr. Silva's and Mr. Yoshiyama's information, this rule came into effect in 2003. Before that there were no evaluations done for any of the previous directors.

After further discussion, it was decided that the information from last year would be circulated for Mr. Yoshiyama's and Mr. Silva's benefit. After reviewing the information, they can come to a decision regarding the annual evaluation for fiscal year 2007-2008.

ADJOURNMENT

The meeting adjourned at 4:15 p.m.

Respectfully submitted,

Secretary, Merit Appeals Board

APPROVED:

**G. Rick Robinson
Chair**

vym