

NO. 24476

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

LEWIS W. POE, Petitioner-Appellant, v.  
HAWAII LABOR RELATIONS BOARD, STATE OF HAWAI'I,  
Respondent-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NO. 00-01-3610)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Petitioner-Appellant Lewis W. Poe (Poe) is a public employee of the State of Hawai'i and a member of Bargaining Unit 03. Respondent-Appellee is the Hawaii Labor Relations Board, State of Hawai'i (HLRB). Poe appeals from the HLRB's August 31, 2000 Order No. 1913 and October 26, 2000 Order No. 1948. We reverse.

BACKGROUND

On August 15, 2000, in HLRB Case No. DR-03-81, Poe filed a petition with the HLRB seeking a declaratory ruling that no certificate of service requirement applies to an application to the HLRB for issuance of an HLRB subpoena. Poe alleged that he had applied for the issuance of a HLRB subpoena in Case No. CU-03-148 but his application was rejected because it was not accompanied by a certificate of service of the application on all parties. Poe designated for clarification Hawai'i Administrative

Rules (HAR) § 12-42-8(g) (7) regarding subpoenas and HAR § 12-42-2 regarding the construction of rules.

On August 31, 2000, the HLRB issued Order No. 1913 denying Poe's August 15, 2000 petition. The HLRB decided that HAR § 12-42-8(a) (6) requires that a party filing an application for a subpoena pursuant to HAR § 12-42-8(g) (7) (B) must file with the application a certificate of service on all parties. More specifically, the HLRB decided, in relevant part, as follows:

8. HAR § 12-42-8(a) which refers to the filing of documents in proceedings before the Board states:

(6) Unless otherwise specifically provided by a particular rule, regulation, or order of the board, the original and five copies of the papers, with certificate of service on all parties, shall be filed.

9. HAR § 12-42-8(g) (7) does not specifically provide that the written Application need not be accompanied by a certificate of service or otherwise except the Application from the operation of the certificate of service requirement of § 12-42-8(a) (6).

10. In addition, under HAR § 12-42-8(g) (7) (C) (i) a motion to revoke the subpoena may be filed with the Board no later than five days from the service of the subpoena. In the interests of justice and fairness, if the parties are not served with the Application, they would not be on notice that the Board has issued subpoenas in the case and the time for filing a motion to revoke will start to run.

11. Thus, the Board, in this case properly rejected POE's Application because it did not conform to the HAR.

12. HAR § 12-42-9(f) provides that:

The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can be reasonably be [sic] expected to exist in the near future.

(2) The petitioner's interest is not of a type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.

(3) The issuance of a declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.

(4) The matter is not within the jurisdiction of the board.

13. In the Board's view, POE's petition and his legal arguments lack substantial merit and in view of the Board's clear authority set forth in its administrative rules to require a certificate of service on an Application, the Board hereby declines to issue a declaratory order in this case. Moreover, POE's concerns on the Board's procedures arise in the context of pending cases before the Board. These matters should be raised and addressed in the pending cases and not in the context of an ancillary declaratory ruling petition.

14. Accordingly, the Board hereby denies POE's petition for a declaratory order in this case.

(Footnote omitted.)

Poe's September 11, 2000 motion for reconsideration was denied by Order No. 1948 issued on October 26, 2000, stating, in relevant part, as follows:

**FINDINGS OF FACT**

. . . .

4. Petitioner cites HAR § 12-41-15 as authority for the filing of an Application orally or ex parte. The foregoing rule provides:

A party may make written application for subpoenas requiring the attendance and testimony of witnesses and production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. An application for a subpoena requiring the production of evidence shall not be granted unless the evidence is described with sufficient particularity to enable it to be identified by the producer. An application for a subpoena whether ad testificandum or duces tecum prior to a hearing shall be made to the board. An application during a hearing shall be made orally to the person conducting the hearing. Application for the subpoenas may be made ex parte. Upon application, the board or the person to whom the application is made shall forthwith issue the subpoena.

5. The foregoing rule applies to proceedings arising under HRS Chapter 377 and is not applicable to Case No. CU-03-148 because it arises under HRS Chapter 89.<sup>1</sup>

. . . .

7. As the Petitioner's Application was governed by the HAR Chapter 42, the appropriate rule is HAR § 12-42-8(g) (7).

8. The Board had good cause to refuse to issue a declaratory ruling on the instant petition. The Board considered Petitioner's remaining arguments and finds them to be without merit.

**CONCLUSION OF LAW**

Petitioner failed to establish that the Board violated HAR § 12-42-9(f) and/or HRS § 91-8 in rendering Order No. 1913.

(Footnote omitted; footnote added.)

On November 27, 2000, Poe filed an appeal from Order No. 1913, dated August 31, 2000, and Order No. 1948, dated October 26, 2000. After a hearing on April 16, 2001, Circuit Court Judge E. Eden Hifo, on July 9, 2001, entered an order affirming both appealed orders. Judge Hifo's order stated, in relevant part, as follows:

When the Board has chosen to abide by a rule which it has adopted and when the Board says that an application for the issuance of a subpoena is required to have an accompanying Certificate of Service, the Court does not find the Board's failure to issue a declaratory ruling regarding its rejection of Poe's two **ex parte** applications for subpoenas was in error. Accordingly, IT IS HEREBY ORDERED that the Board's Order Nos. 1913 and 1948 are affirmed, and the instant appeal is hereby dismissed [sic].

(Emphases in original.)

On July 12, 2001, Judge Hifo entered a judgment in favor of HLRB and against Poe. This appeal followed.

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<sup>1</sup> Hawaii Revised Statutes (HRS) Chapter 377 (1993) is the Hawaii Employment Relations Act. It does not apply to the State of Hawai'i as an employer. HRS § 377-1(2). HRS Chapter 89 (2001) pertains to Collective Bargaining in Public Employment.

In its answering brief, the HLRB states, in relevant part, as follows:

POE contends that HAR § 12-41-15 provides for the ex parte application of subpoenas and applies to proceedings arising under HRS Chapter 377 and thus the rule also applied to Case No. CU-03-148 although the case arises under HRS Chapter 89. POE argues that no certificate of service was legally required when he filed his two applications with the Board and the Court abused its discretion in affirming the Board's determination.

. . . .

HRS Chapter 377, the Hawai'i Employment Relations Act, applies to employment relations in the private sector and is administered by the Board pursuant to HRS § 377-2. HAR § 12-41-1, refers to the Scope and construction of the rules in Chapter 41 of HAR Title 12 and provides:

This chapter is adopted to aid the Hawaii employment relations board . . . and interested persons in proceedings under the Hawaii employment relations act, chapter 377, Hawaii Revised Statutes, as amended. . . .

HRS Chapter 89 provides for collective bargaining in public employment. HRS § 12-42-1 refers to the Scope of the rules promulgated in Chapter 42 of HAR Title 12 and provides:

These rules govern procedure before the Hawaii public employment relations board under chapter 89, HRS, as amended and such other statutes as may now or hereafter be administered by the board.

It is clear then that the Board administers two chapters of rules; Chapter 41 applicable to private sector proceedings and Chapter 42 which is applicable to public sector proceedings. The Board submits that HAR § 12-41-15 is therefore not applicable to the instant proceedings as those rules pertain to private sector proceedings and POE is a public employee who invoked the Board's jurisdiction under Chapter 89 by filing a prohibited practice complaint in the underlying case, Case No. CU-03-148. . . .

While the Board recognizes that the procedure for the processing of prohibited practice complaints parallels the processing of unfair labor practice complaints under HRS Chapter 377, there is no provision in HRS § 377-9 which addresses the requirements for the application for subpoenas. As such, the Board contends that the provisions of HAR Chapter 42 were applicable to the proceedings, and POE cannot rely upon the Board's private sector rules of procedure in Chapter 41 to seek exceptions from the plain requirements of its rules in Chapter 42.

## PRELIMINARY DECISIONS

After deciding that Poe's "petition and his legal arguments lack substantial merit" and that the HLRB had "clear authority set forth in its administrative rules to require a certificate of service on an Application[,]" the HLRB decided that "[t]hese matters should be raised and addressed in the pending cases and not in the context of an ancillary declaratory ruling petition." We conclude that this latter decision was an HLRB advisory and not a determination that the HLRB lacked jurisdiction.

We agree with the HLRB that this case is not governed by HRS Chapter 377 and HAR Chapter 41 and that it is governed by HRS Chapter 89 and HAR Chapter 42.

## DISPOSITIVE QUESTION

The dispositive question is whether the HLRB was right or wrong when it decided that HAR Chapter 42 authorizes the HLRB to reject an application for a subpoena as long as the application is not accompanied by a certificate of service of the subpoena on all parties.

## STANDARD OF REVIEW

This court has explained that

the general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

State v. Ferrer, 95 Hawai'i 409, 422, 23 P.3d 744, 757 (App. 2001) (citations omitted).

DISCUSSION

HAR Chapter 42 states, in relevant part, as follows:

§ 12-42-8 **Proceedings before the board.** (a) Filing of documents:

(1) All complaints, pleadings, submittals, petitions, reports, exceptions, briefs, memoranda, and other papers required to be filed with the board shall be filed at the board's office.

. . . .

(6) Unless otherwise specifically provided by a particular rule, regulation, or order of the board, the original and five copies of the papers, with certificate of service on all parties, shall be filed.

. . . .

(g) Hearings:

. . . .

(3) Motions:

. . . .

(C) All motions other than those made during a hearing shall be subject to the following:

. . . .

(ii) The moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties.

. . . .

(7) Subpoenas:

. . . .

(B) Any party may file a written application for subpoenas with the board before the hearing.

- (C) Motion to revoke subpoenas:
  - (i) A motion to revoke a subpoena may be filed with the board not later than five days from the date of service of the subpoena.
  - (ii) The board shall give notice of the filing of a motion to revoke to the applicant for subpoena.

In its Order No. 1913, the HLRB decided the following syllogism: (1) absent specific exception, HAR § 12-42-8(a)(1) and (6) requires "[a]ll . . . papers required to be filed with the board" to be accompanied "with certificate of service on all parties"; (2) HAR § 12-42-8(g)(7) pertaining to subpoenas does not contain a specific exception; and (3) absent service of the application for the subpoena on all parties, an unserved party might not have notice that the five days to file a motion to revoke the subpoena will start to run if and when the subpoena is served.

We conclude that the following three relevant facts conclusively contradict the HLRB's position. First, HAR § 12-42-8(a)(1) expressly refers to "complaints, pleadings, submittals, petitions, reports, exceptions, briefs, memoranda, and other papers required to be filed with the board[.]" "In accordance with the rule of *ejusdem generis*, such terms as 'other,' . . ., when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described." 73 AM. JUR. 2D, *Statutes* § 135 (2001). The kinds of documents specifically mentioned in HAR § 12-42-8(a)(1) are not "of the same nature as"



subpoenas. Moreover, although HAR § 12-42-8(g)(3) specifically refers to "motions," and HAR § 12-42-8(g)(7) specifically refers to "subpoenas," HAR § 12-42-8(a)(1) does not specifically mention either one in its list of documents.

Second, HAR § 12-42-8(g)(3)(C)(ii) expressly states that "[t]he moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties." If HAR § 12-42-8(a)(1) and (6) applied to all documents, including motions, HAR § 12-42-8(g)(3)(C)(ii) would be redundant. The fact that HAR § 12-42-8(g)(7) does not contain a requirement similar to HAR § 12-42-8(g)(3)(C)(ii) indicates that the HAR § 12-42-8(g)(3)(C)(ii) type requirement does not apply to subpoenas.

Third, HAR § 12-42-8(g)(7)(C)(ii) states that "[t]he board shall give notice of the filing of a motion to revoke [a subpoena] to the applicant for subpoena." If HAR § 12-42-8(a)(1) and (6) applied to subpoenas and motions to revoke subpoenas, and HAR § 12-42-8(g)(3)(ii) applied to motions to revoke subpoenas, HAR § 12-42-8(g)(7)(C)(ii) would be redundant.

#### CONCLUSION

Accordingly, we reverse the HLRB's ruling contained in its August 31, 2000 Order No. 1913 and in its October 26, 2000

Order No. 1948 that HAR § 12-42-8(a)(1) and (6) authorize the HLRB to reject an application for a subpoena as long as it is not accompanied by a certificate of service on all parties. We also reverse the circuit court's July 12, 2001 Judgment affirming the HLRB's actions.

DATED: Honolulu, Hawai'i, October 4, 2002.

On the briefs:

Lewis W. Poe,  
Petitioner-Appellant, pro se.

Chief Judge

Valri Lei Kunimoto  
for Respondent-Appellee.

Associate Judge

Associate Judge