

Electronically Filed
Supreme Court
SCWC-22-0000446
10-JUN-2024
09:11 AM
Dkt. 32 OPC

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

AUGUSTINA J. DEAN,
Petitioner/Claimant-Appellant-Appellant,

vs.

STATE OF HAWAI'I, DEPARTMENT OF EDUCATION,
Respondent/Employer-Appellee-Appellee,

and

STATE OF HAWAI'I, DEPARTMENT OF EDUCATION,
WORKERS' COMPENSATION UNIT,
Respondent/Insurance Carrier-Appellee-Appellee.

SCWC-22-0000446

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-22-0000445; CASE NO. AB 2022-043, DCD NO. 2-15-40652
and CAAP-22-0000446; CASE NO. AB 2022-044, DCD NO. 2-16-40013)

June 10, 2024

CONCURRING OPINION BY GINOZA, J.

I concur that Petitioner/Claimant Augustina Dean (**Dean**) is entitled to have her appeal to the Labor and Industrial Relations Appeals Board (**LIRAB**) addressed on the merits, but write separately to set forth my reasoning.

The LIRAB concluded that Dean appealed one day late from a Decision entered on March 9, 2022, by the Director of the Department of Labor and Industrial Relations (**Director**). The LIRAB's Decision and Order made a finding that the Director's Decision "was dated and sent to the parties on March 9, 2022." (Emphasis added.) Because Hawaii Revised Statutes (**HRS**) § 386-87(a) (2015) provides that a decision by the Director shall be final unless a party appeals "within twenty days after a copy has been sent to each party[,]" the LIRAB determined that the due date for a timely appeal was March 29, 2022. Dean filed her appeal on March 30, 2022.

The Intermediate Court of Appeals (**ICA**) affirmed the LIRAB's dismissal on grounds that Dean did not challenge the LIRAB's findings and conclusions. Further, the ICA stated that without a transcript from the LIRAB's Order to Show Cause hearing (**OSC Hearing**) it could not assess the claims Dean had raised in her letter to the LIRAB explaining why her appeal should not be dismissed.

In my view, Dean sufficiently challenged the manner in which she was being served in this case. As the ICA notes,

Dean's opening brief filed in the ICA does not comply with Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28, but our appellate courts seek to allow litigants to have their cases heard on the merits where that is possible, Marvin v. Pflueger, 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012), and "pleadings prepared by pro se litigants should be interpreted liberally." Erum v. Llego, 147 Hawai'i 368, 380-81, 465 P.3d 815, 827-28 (2020) (citations and internal quotation marks omitted). Dean's opening brief contains a section titled "Point of Error" wherein she mixes a variety of complaints about the way in which she has been served in this case. This section includes her general assertion that "[t]he burden is on Workers' Compensation to show proof that service was made properly." Given the record and LIRAB's dismissal, Dean sufficiently raised the manner in which she was served the Director's Decision. Indeed, Dean's letter responding to the LIRAB's Order to Show Cause asserted that she "did not receive [the Director's Decision] for over 3 weeks after the hearing" and that she "called and wrote email to [the] facilitator and hearing officer regarding the mail that did not reach me."

With regard to a lack of transcript in the record, after accepting Dean's application for writ of certiorari, this court ordered that the audio and/or video recording of the OSC

Hearing, held on June 30, 2022, be transmitted as part of the record on appeal. This court's order stated:

Pursuant to Rule 4 of the Hawai'i Court Records Rules (HCRR), the record shall include "audio or video recordings of court proceedings[.]" HCRR Rule 4(d). Pursuant to Hawai'i Rules of Appellate Procedure Rules 11(b)(3) and 10(e)(2), audio or video recordings of proceedings shall be transmitted as part of the record on appeal only upon direction of the appellate court. Cambridge Management, Inc. v. Jadan, 149 Hawai'i 56, 58-59, 481 P.3d 63, 65-66 (2021).

A supplemental record on appeal was entered and we now have the benefit of reviewing the OSC Hearing held on June 30, 2022.

In this case, Dean filed two appeals to the LIRAB. Her first LIRAB appeal, initiated in April 2016, culminated in a decision in November 2019, reversing a prior decision by the Director and ordering a new hearing by the Director. During the course of that first LIRAB appeal, Dean sent correspondence to the LIRAB in January 2018, stating she was "relocating again" and providing an address in Arkansas. Subsequently, in November 2018, Dean sent another letter to the LIRAB providing a new address in Arkansas.

After the further hearing by the Director, the Director's Decision was issued on March 9, 2022. This is the decision from which Dean now seeks to appeal, but the LIRAB dismissed her appeal as untimely.

The LIRAB issued its Order to Show Cause on May 11, 2022, requiring the parties to show cause why Dean's appeal

should not be dismissed as untimely. Dean responded with a letter filed on May 26, 2022, claiming she did not receive the Director's Decision for over three weeks after the hearing, that she called and wrote to the facilitator and hearings officer about the mail not reaching her, and that non-receipt of mail caused her delay in submitting the appeal.

At the OSC Hearing on June 30, 2022, Dean stated she waited for the Director's Decision and it did not come, that she called the facilitator¹ who then called back and informed Dean the decision had already been sent in the mail. According to Dean, it was already over two weeks by then, she had not received the Director's Decision and the facilitator said she would mail another copy. Dean further stated that when it was almost the end of the month, she requested that the facilitator send the decision to her by email, and the decision was sent to her by mail and email towards the end of the month. Dean stated she responded a day or two later and it was already a day late. After the Employer's counsel argued that Dean's proffered reasons for her untimely appeal were "unsubstantiated by the record," Dean stated:

I have all the emails that were going back and forth with [the facilitator], if they are also required, I was not aware that they should be part of this. I had sent in a letter with the circumstances that had followed after the

¹ During the OSC Hearing, Dean gave the name of the facilitator and stated the individual was with DCD, which is an apparent reference to the DLIR's Disability Compensation Division.

decision, but if they are needed, I can send them over as well[.]

The OSC Hearing was brought to a close without having Dean submit the emails. On July 5, 2022, the LIRAB issued its Decision and Order dismissing Dean's appeal as untimely.

I agree with the majority that under HRS § 386-87(a) (2014) and Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. Of Appeals of City & Cnty. of Honolulu, 86 Hawai'i 343, 350, 949 P.2d 183, 190 (App. 1997), the LIRAB had the burden to establish when the Director's Decision was "sent to each party." Given the record in this case, the question is not only whether LIRAB can sufficiently establish when the Director's Decision was sent, but whether it was sent to Dean at her correct address.

Here, although there is a one-page document stating "Date of Decision/Date Mailed" was March 9, 2022, there is nothing to show where the Director's Decision was purportedly mailed. Dean asserted that she did not receive the Director's Decision by mail, that she communicated with a DCD facilitator seeking to get a copy of the decision, that the facilitator indicated the decision had already been mailed, and that Dean finally requested that the facilitator email the Director's Decision to her. This all raised the question whether the Director's Decision was sent to the correct address. Further, given the LIRAB's Order to Show Cause and that Dean asserted she

had emails to substantiate her communications with the facilitator, the emails should have been allowed into the record and considered before Dean's appeal was dismissed.

Based on the record in this case, because LIRAB relied on the March 9, 2022 date as triggering the twenty-day appeal period, there is not adequate evidence of both when and to what address the Director's Decision was mailed. I conclude the LIRAB did not meet the requirements under HRS § 386-87(a) to show that it sent the Director's Decision to Dean, such as to trigger the twenty-day appeal period.

Based on the above, I respectfully concur.

/s/ Lisa M. Ginoza

