



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 MAY 29 A 9 28

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
CONDOMINIUM MANAGEMENT DISPUTE RESOLUTION PROGRAM
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of)	CMDR 2008-2
)	
ALICE CLAY,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION
)	
vs.)	
)	
ONE KALAKAUA SENIOR LIVING)	
ASSOCIATION,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On April 17, 2008, Alice Clay ("Petitioner") filed a request for administrative hearing to resolve a condominium management dispute pursuant to Hawaii Revised Statutes ("HRS") Chapter 514A. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On May 14, 2008, a Notice of Rescheduled Hearing was issued, rescheduling the hearing to July 29, 2008 by agreement of the parties.

On May 15, 2008, Petitioner filed a Motion for Leave to Amend Attachment "A" to the Request for Hearing ("Motion"). On June 26, 2008, the parties filed a stipulation to grant Petitioner's Motion.

By a letter dated July 28, 2009, George W. Van Buren, Esq., attorney for One Kalakaua Senior Living Association ("Respondent") notified the Hearings Officer that the parties agreed to reschedule the hearing to August 21, 2008.

On August 21, 2008, the hearing was convened by the undersigned Hearings Officer. Petitioner was present and was represented by Guy P.D. Archer, Esq. Respondent was represented by Mr. Van Buren. After the evidentiary hearing, it appeared that all issues were resolved, except for the issue of Respondent's compliance with HRS § 514B-149(a). The parties agreed to attempt to resolve the last issue.

At a pre-hearing conference held on November 20, 2008, the parties notified the Hearings Officer that they were still attempting to resolve the issue, but agreed to a briefing schedule regarding the issue of Respondent's compliance with HRS § 514B-149(a). The parties were also requesting an award of attorney's fees and costs.

On December 22, 2008, Respondent filed its Supplemental Memorandum of Points and Authorities. On January 9, 2009, Petitioner filed a memorandum in response to Respondent's supplemental memorandum. On January 9, 2009, R. Laree McGuire, Esq., co-counsel for Respondent, filed a Request for an Award for Attorney's Fees and Costs. On January 13, 2009, Petitioner filed a Motion to Strike Respondent's Request for an Award of Attorney's Fees and Costs¹ and on January 15, 2009, Petitioner filed her Request for an Award of Fees and Costs. On January 26, 2009, Petitioner filed a supplemental memorandum regarding Respondent's request for an award of fees and costs. On February 2, 2009, Respondent filed a memorandum in opposition to Petitioner's request for an award of fees and costs.

On March 30, 2009, Petitioner filed Excerpts from Respondent's Resident Handbook and House Rules, Revised November 26, 2008 and on April 14, 2009; Petitioner filed her memorandum regarding the independent auditor's report presented at Respondent's annual meeting on March 25, 2009.

II. FINDINGS OF FACT

1. Petitioner's request for hearing identified six areas of dispute:
 - i. Restrict right of owners and tenants to rent parking spaces assigned to the respective condominium units as limited common elements.

¹ In a telephone conference held on January 23, 2009, the parties resolved the issue of Ms. McGuire's status in this case and so a ruling on the Motion is not necessary.

- ii. Deprive owners and tenants of the fundamental right to post information relevant to condominium operation on a bulletin board reserved for owners and tenants.
- iii. Charge a portion of the salary and benefits of the assisted living administrator to owners who do not receive assisted living services in violation of the Declaration that requires expenses benefiting particular owners and tenants to be allocated.
- iv. Deprive owners and tenants of a property interest in their individual prepaid meal allowance tickets.
- v. Interfere with contractual obligations of owners and tenants who must move in or out of condominium units on particular days by prohibiting use of elevators for such purposes on all Tuesdays, Wednesdays and Thursdays.
- vi. Impose unreasonable penalties up to \$350 on owners and tenants who fail to comply with the House Rules and Guidelines.

2. Prior to the hearing on August 21, 2008, Respondent proposed: (1) to add four (4) hours of elevator time on Wednesday during which time the owners and tenants may move household furniture in and out of the building, (2) to limit the review period for bulletin board postings to a maximum of 48 hours, (3) that for promotional purposes, it would allow the current practice of charging a prospective owner or tenant's meal to the owner's monthly unused meal credits and (4) that it will comply with due process requirements regarding the imposition of penalties for violations of house rules.² Petitioner stated that these proposals were acceptable provided that the proposed changes to the House Rule were adopted with adequate notice at the next regularly scheduled meeting of Respondent's Board of Directors.

3. At Respondent's Board's meeting on August 28, 2008, the Board agreed to change the procedure for the rental of parking stalls assigned to individual unit owners and tenants to allow unit owners and tenants to rent individual parking stalls to employees of the skilled nursing facility, care givers, family members, and others who are known to the unit owner or tenant.

² Prior to the evidentiary hearing on August 21, 2008, Respondent's motion to dismiss Petitioner's claim regarding the \$350.00 penalty was dismissed as the claim was moot.

4. At the Board meeting on August 28, 2008, the Board also agreed to: (1) provide additional elevator hours for owners/tenants moving furniture in and out of the building in connection with a unit purchase or rental and to allow occasional moving of single pieces of furniture at times other than permitted provided there is a timely request and administration approval, (2) institute a two business day turn around for approving or denying items that owners and tenants want to post on the community bulletin board and (3) keep informal the policy of allowing non-transferable meal credits to be used for promotional purposes where an owner wants to rent or sell a condominium unit.

5. The Resident Handbook and House Rules (revised November 26, 2008) contain changes made by Respondent regarding the issues of the elevator hours for moving, due process procedures, bulletin board communications and parking. These changes are consistent with the relief requested in Petitioner's request for hearing.

6. Respondent's Declaration states at § 11.5:

11.5 **One Kalakaua Club.** The One Kalakaua Club is that part of the Association which provides services and amenities through the facilities to the owners and occupants of the apartments in the Project.

(a) The following services which are established on the basis of a minimum of one person for each apartment and assessed on a per person basis as part of the common expense to an owner is as follows:

- (1) Meals in the restaurant and dining area.
- (2) Wellness program
- (3) Arts and Crafts program
- (4) Recreational program and game room
- (5) Other social programs

(b) The following service or uses are based on the owner and/or occupant requesting and/or purchasing the same:

- (1) Beauty Salon

(2) Skilled nursing facility. An apartment owner and/or his or her designated occupant shall be entitled to priority accommodation in such Facility as established by the Association.

(3) Other services or uses that are offered.

7. In *Alice P. Clay, et al. v. One Kalakaua Senior Living Association, et al.*, Civil No. 02-1-1042-04 EEH, Judge Eden Elizabeth Hifo made the following findings of fact:

1. The Declaration of Condominium Property Regime of One Kalakaua Senior Living Association provides at § 11.5 that “other services offered” at One Kalakaua by the One Kalakaua Club are “based on the owner and/or occupant, requesting and/or purchasing the same”.

2. Plaintiff admits that all “other services offered” include assisted living services and that One Kalakaua charges for all “other services offered”.

8. The Department of Health, State of Hawai'i granted One Kalakaua Senior Living a license to operate an Assisted Living Facility with a maximum of 166 units (the entire project).

III. CONCLUSIONS OF LAW

The issues to be resolved is whether Hawai'i Revised Statutes (“HRS”) § 514B-149 requires Respondent to have a separate operating account for its assisted living facility operations and whether either party is entitled to an award of attorney's fees.

Hawai'i Revised Statutes § 514B-149(a) provides:

§ 514B-149 Association fiscal matters; handling and disbursement of funds. (a) The funds in the general operating account of the association shall not be commingled with funds of other activities such as lease rent collections, rental, time share, and assisted living facility operations, nor shall a managing agent commingle any association funds with the managing agent's own funds.

Respondent argued that only one account is necessary because the entire project is licensed as an assisted living facility. Petitioner claims that pursuant to HRS § 514B-149, funds for Respondent's in-house assisted living program should be kept in a separate account. Based

on the evidence presented, the Hearings Officer concludes that HRS § 514B-149 requires Respondent to keep the monies collected pursuant to section 11.5(b) of Respondent's Declaration in a separate account, as those services are in addition to what would be, in a typical condominium, considered to be common expenses and/or maintenance fees. Respondent's contention that Club Dues (Section 11.5(a) of Respondent's Declaration) must be included in the separate account is rejected as the Club Dues are designated as a common expense.

The Hearings Officer reviewed the arguments presented with respect to Petitioner's and Respondent's requests for attorney's fees and costs and concludes that Petitioner and Respondent have failed to show that an award of attorney's fees and costs to either party is warranted.

IV. DECISION

Based on the foregoing, the Hearings Officer finds that HRS § 514B-149(a) requires that Respondent maintain a separate account for monies collected under Section 11.5(b) of its Declaration. Pursuant to HRS § 514A-121.5(i), the Hearings Officer orders the parties to bear their own costs, including attorney's fees.

MAY 29 2009

DATED: Honolulu, Hawaii, _____.

/s/ SHERYL LEE A. NAGATA

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs