



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of)	CDR-2006-1
)	
DANIEL DEIGERT,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS PETITION
vs.)	
)	
ASSOCIATION OF APARTMENT OWNERS)	
OF INTERNATIONAL COLONY CLUB,)	
)	
Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS PETITION

I. INTRODUCTION

On March 2, 2006, Daniel Deigert ("Petitioner"), filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH") pursuant to Hawaii Revised Statutes ("HRS") §514A-121.5. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 28, 2006, Respondent Association of Apartment Owners of International Colony Club ("Respondent") filed the instant motion. The motion came before the undersigned Hearings Officer on April 12, 2006, with Petitioner appearing *pro se* and via telephone, and with Respondent represented by Scott R. Grigsby, Esq.

Having heard the arguments of the parties and having reviewed and considered the motion, memoranda, records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. The present dispute between Petitioner and Respondent concern, among other things, Petitioner's construction of exterior improvements to his unit in the International Colony Club condominium project ("Project").

2. In an effort to resolve the dispute, the attorney for Respondent, by letter dated October 24, 2005, provided Petitioner with a list of possible mediators for Petitioner's consideration.

3. By letter dated November 9, 2005, Petitioner informed Respondent that:

[w]e are herewith noticing you of our approval of three of the arbitrators that you recommended, which are listed in order of our preference as follows:

- 1 – Judge Marie Milks
- 2 – Thomas Crowley, III, Esq.
- 3 – Ellen Carson, Esq.

4. Respondent's attorney contacted Dispute Prevention & Resolution, Inc. ("DP&R") to obtain dates that Judge Milks would be available for mediation and, by letter dated December 14, 2005, informed Petitioner of the dates of Judge Milks' availability. Respondent also provided Petitioner with a form used by DP&R entitled, "Submission to ADR Form" for Petitioner's review and execution.

5. On January 5, 2006, Respondent's attorney received the ADR Form which had been completed and executed by Petitioner.

6. By letter dated January 6, 2006, Petitioner informed Respondent that Petitioner would "hold the date of Monday, January 30, open for mediation." Petitioner also requested certain "essential information" from Respondent including a list of those participating in the mediation, a list of issues, documentation to confirm that an adjoining owner approval rule had been implemented in accordance with the bylaws or a written explanation of the need to include the owners of cottages 29 and 35 in the mediation process, an explanation of the need to mediate an adjoining owner approval rule, and an explanation

as to why Respondent has not responded to our request for a meeting to dispute and resolve fines before taking on the expense of an outside mediator.

7. On or about January 16, 2006, counsel for Respondent was informed by DP&R that Petitioner was refusing to participate in mediation on the ground that he was awaiting certain information from Respondent¹.

8. By letter dated January 18, 2006, Respondent's attorney wrote to Petitioner and stated in part:

* * * *

We understand that despite your agreement to mediate this matter before retired Judge Marie Milks on January 30, 2006, you are now refusing to do so on the specious grounds that you are awaiting "information" from the Association.

The issues that the Association expects to address at the mediation were set forth with particularity in the Association's letter to you dated March 28, 2005, a copy of which is enclosed. Further, any unauthorized additions or alterations that you have constructed since March 28, 2005 will be addressed at the mediation.

The participants at the mediation will include, one or more members of the Association's Board of Directors, the Association's counsel, and as you have acknowledged in various letters, the owners of cottages No. 29 and No. 35.

By letter dated July 18, 2005, this office provided your attorney, Peter A. Horovitz, with a copy of the minutes from the annual meeting held on March 11, 1995 wherein the owners approved the House and Ground Rules. Copies of the July 18, 2005 letter and March 11, 1995 minutes are enclosed.

Please notify this office immediately[sic] as to your intentions to participate in mediation.

¹ Petitioner takes issue with the allegation that he refused to proceed with the mediation. According to Petitioner, he postponed the mediation because he did not receive the information he had previously requested from Respondent – a claim that Respondent disputes. In any event, it was clear from the record that the mediation was never held.

9. On or about January 24, 2006, Petitioner wrote to Respondent and again requested “proof of the validity of an alleged adjoining owner approval rule”. Petitioner went on to state:

* * * *

In order to mediate resolution of an alleged adjoining approval rule, with the owners of cottages #29 and #35 as participants, it will be necessary to document that such rule has been approved. Accordingly, if you want to mediate, “*any other unauthorized additions or alterations that we have constructed since March 28, 2005*”, you’ll have to state what these alleged “*additions and alterations*” are.

If you fail to provide this information in time for a January 30 mediation you will have postponed mediation for the fifth time in the past six months. Needless-to-say, if it was ever your intention to facilitate a swift, fair and honorable resolution and end what has become a senseless and discriminatory denial of our right to repair, improve and enjoy our home, it is not reflected in either your actions or your attorney’s words.

* * * *

10. On January 31, 2006, Respondent’s attorney received a facsimile from another mediation service, Mediation Services of Maui. The facsimile stated that, “Daniel Deigert has contacted our office and would like to invite you to mediation . . .”

11. On February 15, 2006, Respondent’s attorney sent a Demand for Arbitration pursuant to HRS §514A-121, to Petitioner and the owners of the adjoining units.

12. On March 2, 2006, Petitioner filed the instant request for hearing with OAH.

III. CONCLUSIONS OF LAW

In bringing this motion, Respondent challenges the jurisdiction of OAH to hear this matter. According to Respondent, OAH lacks jurisdiction over this matter because (1) Petitioner did not *participate in mediation* prior to filing this action; and (2) in any event, Petitioner’s request for hearing was untimely.

HRS §514A-121.5(b) provides in relevant part:

§514A-121.5 Mediation; condominium management dispute resolution; request for hearing; hearing.

(a) If an apartment owner or the board of directors requests mediation of a dispute involving the interpretation or enforcement of the association of apartment owners' declaration, bylaws, or house rules, or involving section 514A-82(b)(1) to (13), 514A-82.1, 514A-82.15, 514A-82.3, 514A-82.5, 514A-82.6, 514A-83, 514A-83.1, 514A-83.2, 514A-83.3, 514A-83.4, 514A-83.5, 514A-84, 514A-84.5, or 514A-92.5, the other party in the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation; unless at the end of the mediation process, both parties agree that one party shall pay all or a specified portion of the mediation costs. *If an apartment owner or the board of directors refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees in accordance with section 514A-94.*

(b) If a dispute is not resolved by mediation as provided in subsection (a), in addition to any other legal remedies that may be available, *any party that participated in the mediation may file a request for a hearing with the office of administrative hearings, department of commerce and consumer affairs, as follows:*

(1) The party requesting the hearing must be a board of directors of a duly registered association of apartment owners, or an apartment owner that is a member of a duly registered association pursuant to section 514A-95.1;

(2) The request for hearing must be filed within thirty days from the final day of mediation;

(3) *The request for hearing must name one or more parties that participated in the mediation as an adverse party and identify the statutory provisions in dispute; and*

(4) *The subject matter of the hearing before the hearing officer may include any matter that was the subject of the mediation pursuant to subsection (a).*

* * * *

(e) *The hearings officers appointed by the director of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review any request for hearing filed under subsection (b).* The hearings officers shall have the power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue written decisions that shall be final and conclusive, unless a party adversely affected by the decision files an appeal in the circuit court under section 91-14.

* * * *

(Emphasis added).

At the outset, Respondent argues that pursuant to HRS §514A-121.5(b), actual participation in mediation is a prerequisite to the filing of a request for hearing with OAH. Thus, according to Respondent, because Petitioner did not participate in any mediation, Petitioner lacks standing to bring this action and, consequently, OAH lacks jurisdiction to hear this dispute.

The Hearings Officer begins the analysis by examining the plain language of the statute at issue. *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawaii 309 (2002). In doing so, the foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. *Yamagata v. State Farm Mut. Auto. Ins. Co.*, 107 Hawaii 227 (2005). And where the language of the statute is plain and unambiguous, the Hearings Officer's duty is to give effect to its plain and obvious meaning. *Allstate Ins. Co., v. Schmidt*, 104 Hawaii 261 (2004).

Because "participate" is not statutorily defined, the Hearings Officer looks to its plain meaning. *Kawamata Farms*, 86 Hawai'i at 255 (1997) ("where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning."). According to Webster's Dictionary, "participate" means to take part or share in something. Thus, "participation in mediation" requires more than merely requesting, agreeing, or attempting to initiate mediation. It refers to the active involvement of the parties in mediating their differences. This conclusion is consistent with and buttressed by the language in HRS §514A-121.5(b)(2) which refers to the requirement that the request for hearing be filed within 30 days *from the final day of mediation*, in HRS §514A-121.5(b)(3)

that the request must name one or more parties *that participated in the mediation*, and in HRS §514A-121.5(b)(4) that the subject matter of the hearing may include any matter that was *the subject of the mediation*.²

In the case at hand, there is no dispute that Respondent requested and Petitioner agreed to participate in mediation before Judge Milks. However, according to the record, a dispute arose between the parties over certain information that Petitioner had requested from Respondent³ and as a result, the mediation was never held. And although Petitioner subsequently attempted to arrange for mediation with another service, Respondent declined, opting now for arbitration. Under these circumstances, the Hearings Officer must conclude that because Petitioner did not participate in any mediation he lacks standing to bring this action. Consequently, the Hearings Officer lacks jurisdiction to hear this case pursuant to HRS §514A-121.5(e).

Having determined that Petitioner lacks standing, it is unnecessary to consider Respondent's alternative allegation that the petition was untimely.

IV. ORDER

Based on the foregoing considerations, Respondent's Motion to Dismiss Petition is granted and the Hearings Officer orders that the petition herein be and is hereby dismissed.

Dated at Honolulu, Hawaii: April 13, 2006

/s/ CRAIG H. UYEHARA

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

² By making actual participation in mediation a prerequisite to the initiation of an action before OAH, the Legislature presumably sought to encourage the parties to resolve their differences by compromise rather than litigation. The Legislature's intent to promote the settlement of disputes in mediation is also reflected in HRS §514A-121.5(a): "If an apartment owner or the board of directors refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees in accordance with section 514A-94."

³ By making actual participation in mediation a condition to the filing of an action with OAH, the statute also encourages the parties to settle these procedural disputes so that the mediation can proceed.