

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2009 JUN 23 A 10 02

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 0809-3
)	
JOHN K. WONG, Member, Board of)	HEARINGS OFFICER'S FINDINGS OF
Directors, AOA Waikiki Banyan)	FACT, CONCLUSIONS OF LAW AND
)	DECISION; APPENDICES "A" and "B"
Petitioner,)	
)	
vs.)	
)	
ASSOCIATION OF APARTMENT)	
OWNERS OF WAIKIKI BANYAN,)	
)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On January 30, 2009, John K. Wong ("Petitioner") filed a request for administrative hearing to resolve a condominium management dispute pursuant to Hawaii Revised Statutes ("HRS") Chapter 514B. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On March 10, 2009, Respondent filed a Motion to Dismiss ("Motion"). On March 19, 2009, the parties filed a Stipulation for Partial Dismissal, and Respondent filed a withdrawal of its Motion.

On March 25, 2009, the hearing was convened by the undersigned Hearings Officer. Petitioner was present and was represented by Jason F. Oliver, Esq. Respondent was represented by Katie L. Lambert, Esq.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. By a letter dated November 12, 2008 to the President of Respondent's Board of Directors, Petitioner requested information regarding the "annual salaries of each staff member on AOA's budget including other benefits such as medical etc." Petitioner is a unit owner at the Waikiki Banyan and is a member of Respondent's Board of Directors. Petitioner wanted this information in order to evaluate the 2009 requirement for salaries.

2. Petitioner did not receive the requested information so he initiated mediation at The Mediation Center of the Pacific, Inc. At the mediation held on January 21, 2009, the parties agreed that the scope of the mediation was the "availability of employee salary and benefits information pursuant to HRS sections 514B-106 and 514B-152."

3. The mediation was concluded two days later because Petitioner did not receive the information he requested.

4. The Waikiki Banyan Employee Handbook ("Employee Handbook") provides in part:

The information in your personnel file is kept confidential other than to authorized persons who need to review your employment information. Authorized persons include Admin, the President of the Board of Directors and Board members who sign the appropriate waiver.

5. Respondent has offered Petitioner the opportunity to receive the documents in dispute provided that he signs a confidentiality agreement, copy of which is attached hereto and incorporated herein as Appendix "A". Six other Board members have signed this agreement.

6. Petitioner believes Appendix "A" is too restrictive and believes that an affidavit pursuant to the provisions of Hawai'i Revised Statutes ("HRS") § 514B-154(b)(1) is sufficient. A copy of such a statement signed by Petitioner is attached hereto and incorporated herein by reference as Appendix "B".

III. CONCLUSIONS OF LAW

The issues to be resolved is whether Respondent is in violation of its declaration, by-laws, house rules or Part VI of HRS Chapter 514B by requiring Petitioner to sign something other than Appendix “B” in order for Petitioner to receive employee salary and benefits information and whether either party is entitled to an award of costs, including attorney’s fees.

Hawai’i Revised Statutes § 514B-152 provides in relevant part:

The association shall keep financial and other records sufficiently detailed to enable the association to comply with requests for information and disclosures related to resale of units. Except as otherwise provided by law, all financial and other records shall be made reasonably available for examination by any unit owner and the owner’s authorized agents.

Additionally, HRS § 514B-154(b)(1) provides:

(b) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledger, check ledgers, insurance policies, contracts and invoices of the association for the duration those records are kept by the association and delinquencies of ninety days or more shall be available for examination by unit owners at convenient hours at a place designated by the board; provided that:

(1) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interests of the association, its members, or both[.]

Petitioner contends that he is entitled to receive salary and benefits information if he executes an affidavit containing the language in HRS § 514B-154(b)(1). Respondent contends that pursuant to the Employee Handbook and HRS § 514B-125, which provides that a board may adjourn a meeting and reconvene in executive session to discuss and vote upon matters concerning personnel, Petitioner must execute a confidentiality agreement whereby Petitioner agrees not to disclose the information except to address Respondent’s personnel matters with other Board members who sign the Confidentiality Agreement an/or the Board President and only in executive session, which is more restrictive than what is provided in HRS § 514B-154(b)(1).

Based on the evidence presented, the Hearings Officer finds that HRS § 514B-154(b)(1) is inapplicable to Petitioner's request for employee salary and benefits information and concludes that Respondent's request that Petitioner sign a confidentiality agreement such as Appendix "A" is not a violation of Respondent's declaration, bylaws, house rules of part VI of HRS Chapter 514B.

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

IV. DECISION

Based on the foregoing, the Hearings Officer finds that Petitioner failed to show that Respondent was in violation of its declaration, bylaws, house rules or Part VI of HRS Chapter 514B by requiring Petitioner to sign a confidentiality agreement such as Appendix "A" prior to allowing Petitioner to view employee salary and benefits information. Pursuant to HRS § 514B-161(k), the Hearings Officer orders the parties to bear their own costs, including attorney's fees.

DATED: Honolulu, Hawaii, JUN 23 2009.

/s/ SHERYL LEE A. NAGATA

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

AGREEMENT CONCERNING CONFIDENTIAL PERSONNEL INFORMATION

Personnel information is confidential. The Waikiki Banyan Employee Handbook provides that members of the Board of Directors who sign an appropriate waiver may review certain personnel information on a need-to-know basis. Copies of personnel records will not be produced.

By requesting access to confidential personnel information, you declare, represent and warrant that:

1. Your request is made in good faith for the protection of the interests of the association, its members or both;
2. You will not disclose the information to any other person or entity, by any means, directly or indirectly, except as is provided for in this agreement;
3. The sole use of the information will be for addressing Association personnel matters, consistent with the advice of Association counsel;
4. The information will only be discussed with other Board members, who have also signed this agreement, and/or the Board President, and only in executive sessions of Board meetings (pursuant to Hawaii Revised Statutes Section 514B-125(b));
5. You have been informed that any unauthorized disclosure of the personnel information will be considered a breach of your fiduciary duty as a director, pursuant to Hawaii Revised Statutes Section 514B-106(a);
6. You may be denied indemnification by the Association, per By-Laws Article VI, Section 2, if you make any unauthorized disclosure of the information;
7. You may be denied insurance coverage under any insurance policy obtained by the Association, if you make any unauthorized disclosure of the information; and
8. You have been informed that the Association reserves all of its rights and remedies in the event of any unauthorized disclosure of the information.

I, _____, being a member of the Board of Directors of the AOA of Waikiki Banyan, do declare

under penalty of law that the foregoing is true and correct.

Executed on _____, 20__ at Honolulu,
Hawaii.

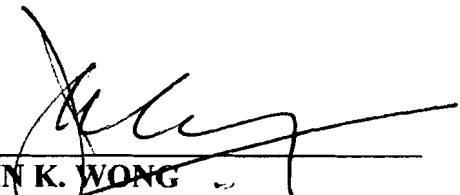
[signature] _____

[print name] _____

AFFIDAVIT OF JOHN K. WONG

Pursuant to the provisions of §514B-154(b)(1) Hawaii Revised Statutes, I do hereby declare, acknowledge and affirm under penalty of law that the financial information that I have requested to examine concerning the current salary and benefits of employees of the Association of Apartment Owners of Waikiki Banyan is requested in good faith for the protection of the interests of the Association or its member or both.

DATED at Honolulu, Hawaii this 24th day of February, 2009



JOHN K. WONG
[Information redacted]
Waikiki Banyan Condominium

APPENDIX "B"

CMAA No. 0809-3
PLAINTIFFS | EXHIBIT 0
DEFENDANTS |
IN EVIDENCE — FOR IDENTIFICATION
RE: D _____, 19_____

CLERK