



STATE OF HAWAII
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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FILE

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

In the Matter of)	CDR-2007-2
)	
FRANCIS M. LYDON,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	ORDER DISMISSING THE PETITION
)	
vs.)	
)	
BOARD OF DIRECTORS, MAALAEA)	
BANYANS,)	
)	
Respondent.)	
_____)

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER DISMISSING THE PETITION

I. INTRODUCTION

On January 23, 2007, Francis M. Lydon ("Petitioner"), filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

During the February 26, 2007 prehearing conference, the Hearings Officer directed Petitioner and Respondent Board of Directors, Maalaea Banyans ("Respondent"), through its attorney, Robert E. Rowland, to submit briefs addressing the Hearings Officer's jurisdiction in this matter. Consequently, on February 28, 2007, Respondent filed its brief along with a request to continue the hearing. Petitioner filed its response on March 5, 2007.

On March 7, 2007, the Hearings Officer heard arguments on the jurisdiction/standing issue via telephone conference. Petitioner appeared *pro se* and Respondent was represented by Robert E. Rowland, Esq.

Having heard the arguments of the parties and having reviewed and considered the 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. On October 16, 2006, Maui Mediation Services (“MMS”), sent an introductory letter to the President of Respondent, Noel Pyatt, indicating that Petitioner wished to mediate a violation of “a by law and a common element issue” and a “conflict of interest occurring with the resident manager.”

2. After receiving the October 16, 2006 letter, Asset Property Management, Inc. (“APMI”), the managing agent for the Association of Apartment Owners of Maalaea Banyans, responded to MMS requesting specific information on the issues raised by Petitioner.

3. On November 8, 2006, MMS contacted APMI with a new introductory letter indicating that Petitioner wanted to mediate “the business that is being run out of the office,” “an apology from the resident manager” and “the voting policy.”

4. On November 27, 2006, APMI informed MMS that Respondent was “more than willing to mediate if the subject matter was specific to an agenda,” and requested a “specific agenda, information and a meeting date.”

5. On December 8, 2006, MMS responded to APMI and included a written statement prepared by Petitioner describing his complaints. According to Respondent, because it did not believe that “MMS had been successful or able to obtain a succinct agenda from Petitioner as to the issues to be mediated, (and left it up to the Board to contact Petitioner to iron out what the issues would be), the Board, although still willing to mediate with Petitioner, did not feel it was the Board’s responsibility to take further action.”

6. To date, Petitioner and Respondent have never participated in a mediation of this dispute.

7. On January 23, 2007, Petitioner filed the instant request for hearing with OAH.

III. CONCLUSIONS OF LAW

Hawaii Revised Statutes (“HRS”) §514A-121.5 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).

In *Daniel Deigert v. the AOA International Colony Club, CDR-2006-1 (2006)*, the AOA argued 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 the AOA, because the petitioner did not participate in any mediation, the petitioner lacked standing to bring this action and, consequently, OAH lacked jurisdiction to hear the dispute. In granting the AOA's motion to dismiss, the Hearings Officer concluded:

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*.
(footnote omitted).

In the case at hand, there is no dispute that Petitioner requested that Respondent participate in mediations. However, according to the record, a dispute arose between the parties over certain information that Petitioner had requested from Respondent (footnote omitted) 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 the parties have not participated in any mediation, Petitioner lacks standing to bring this action and the Hearings Officer lacks jurisdiction to hear this case pursuant to HRS §514A-121.5(e).

Likewise in this case, it is undisputed that the parties have not yet participated in any mediation of this controversy. The Hearings Officer must therefore conclude that Petitioner currently lacks standing to bring this action and the Hearings Officer lacks jurisdiction to hear this dispute¹.

IV. ORDER

Based on the foregoing considerations, the Hearings Officer orders that the request for hearing herein be and is hereby dismissed without prejudice.

Dated at Honolulu, Hawaii: MAR 7 2007 _____

/s/ CRAIG H. UYEHARA

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

¹ Petitioner was uncertain as to whether this action was being brought pursuant to HRS §514A-121.5 or HRS Chapter 514B. In that regard, the Hearings Officer notes the following: (1) HRS §514A-121.5 was repealed effective July 1, 2006; and (2) Act 277, Session Laws of Hawaii (Regular Session 2006), which amends HRS Chapter 514B, is virtually identical to HRS §514A-121.5(b). Thus, to the extent that HRS Chapter 514B governs this case, the Hearings Officer's analysis and conclusion regarding HRS §514A-121.5 as set forth herein would be equally applicable to Act 277.