



STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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Transaction ID 61392436
Case No. OSH 2015-34

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

HI-POWER SOLAR, LLC,

Respondent.

CASE NO. OSH 2015-34

DECISION NO. 35

ORDER DENYING RESPONDENT'S
MOTION FOR ATTORNEY'S FEES AND
COSTS

ORDER DENYING RESPONDENT'S MOTION FOR ATTORNEY'S FEES AND COSTS

On November 3, 2015, the Hawaii Labor Relations Board (Board) received from the Hawaii Occupational Safety and Health Division, Department of Labor and Industrial Relations (HIOSH) a transmittal, dated May 18, 2015, of a Notice of Contest, dated March 31, 2015, from Respondent Hi-Power Solar, LLC (Hi-Power or Respondent) appealing a March 25, 2015 Citation and Penalty (Citation) issued by HIOSH arising out of Inspection No. 1041446.

On June 29, 2017, the Board issued Decision No. 34 Findings of Fact, Conclusions of Law, Decision and Order (Decision No. 34).

On July 28, 2017, the Complainant Director, Department of Labor and Industrial Relations (Director or Complainant) filed Director's Motion for Reconsideration of the Labor Board's Findings of Fact, Conclusions of Law, Decision and Order of June 29, 2017 requesting that the Board reconsider specifically the portion of Decision 34 involving the applicability of Hawaii Revised Statutes (HRS) § 386-14 to an informal settlement agreement (ISA) because the parties did not brief the issue (Motion for Reconsideration).

On August 4, 2017, Hi-Power filed Respondent's Memorandum in Opposition to Director's Motion for Reconsideration of the Labor Board's Findings of Fact, Conclusions of Law, Decision and Order of June 29, 2017 E-Filed on July 28, 2017 (Hi-Power Opposition to Reconsideration).

On August 4, 2017, Hi-Power also filed Respondent's Motion for Attorney's Fees and Costs (Motion) requesting reimbursement of its reasonable attorney's fees and costs incurred in defense of the March 25, 2015 Citation at issue in this case. The Motion was made under HRS Chapter 396 and Hawaii Administrative Rules § 12-42-8 and based on the Director's improper characterization of the Citation as "repeat-serious" based on the prior ISA, dated February 4, 2014, which was reached between the parties for an unrelated previous 2013 incident at another jobsite. Hi-Power took the position that it was the prevailing party because of its success in obtaining reduction of the penalty characterization and amount and the Director's withdrawal of Citation 1, Item 1; and that the Director's over-charging of the Citation as "repeat-serious" was frivolous and arguably in bad faith.

On August 10, 2017, the Director filed Director's Opposition to Respondent's Motion for Attorney's Fees and Costs asserting that there is no specific legal authority for the granting of attorney's fees and costs; Respondent cannot be considered to be the prevailing party in this contested case; and the legislative history of the Hawaii Occupational Safety and Health Law reveals that the legislature did not intend that attorney's fees and costs be imposed on the Director.

On August 14, 2017, the Board issued Order No. 928 Granting, In Part, Director's Motion for Reconsideration of the Labor Board's Findings of Fact, Conclusions of Law, Decision and Order of June 29, 2017 and Striking Respondent's Memorandum in Opposition to Director's Motion for Reconsideration of the Labor's [sic] Board's Findings of Fact, Conclusions of Law, Decision and Order of June 29, 2017 E-Filed on July 28, 2017; Amended Findings of Fact Conclusions of Law, Decision and Order (Order No. 928). Order No. 928, among other things, in granting in part, the Motion for Reconsideration, refused to hold a hearing on the Motion for Reconsideration and to reopen the record in this case but addressed the request for reconsideration by issuing an attached Decision 34A Amended Findings of Fact, Conclusions of Law, Decision, and Order (Decision No. 34A).

The Order in Decision No. 34A stated:

ORDER

1. The Board approves the Director's withdrawal of Citation 1, Item 1 alleging the violation of 29 CFR 1926.503(c).
2. Regarding Citation 1, Item 2, the Board affirms the violation of 29 CFR 1925.501(b)(2), reverses the characterization of "repeat-serious," and modifies the characterization to "serious," and remands the proposed penalty to the Director for further proceedings and determination. Based on the Director's reduction of the proposed penalty for a "repeat" violation of 29 CFR 1926.501(b)(1) from \$4,400 to \$2,800 at trial, the Board orders that any proposed penalty on remand

for the “serious” violation be less than the \$2,800 imposed for the repeat violation.

The grant or denial of attorney’s fees is reviewed under the abuse of discretion standard. Chun v. Bd. of Trustees of the Emp. Retirement Sys., 92 Hawai’i 432, 439, 992 P.2d 127, 134 (2000). The award of taxable costs is likewise discretionary and will not be disturbed absent a clear abuse of discretion. Pulawa v. GTE Hawaiian Tel., 112 Hawai’i 3, 10-11, 143 P.3d 1205, 1213 (2006).

In Decision No. 34A, the Board did not include attorney’s fees and costs in its Order and does not do so now. The Board acknowledges the cases relied on by Hi-Power in support of its request for attorney’s fees and costs. However, the Board finds these cases distinguishable and inapplicable to Hi-Power’s request for attorney’s fees and costs because unlike in those cases, the Director’s actions in this case were not subject to sanctions nor can her position in defense of the “repeat-serious” characterization be deemed frivolous or in bad faith. While as noted in Decision 34A, pre-trial notice of the withdrawal and the reduction of the penalty for Citation 1, Item 2 would have been more appropriate, the Board nonetheless supports the narrowing and focusing of issues in controversy and finds that the withdrawal and reduction of penalty at trial did not rise to the level of bad faith. Regarding the “repeat-serious” characterization, in the Order set forth in Decision No. 34A, the Board specifically affirmed the Director’s finding regarding Citation 1, Item 2, the violation of 29 CFR 1925.501(b)(2), upon which the characterization was based. The Board’s reversal of the “repeat-serious” characterization rested on its interpretation of the ISA terms. The issue of whether the ISA, based on its terms, could be the basis for a “repeat-serious” characterization was a case of first impression for the Board. The Director requested the opportunity to present arguments in support of her position regarding the issue of the Board’s interpretation and application of HRS § 396-14 to the ISA through the Motion for Reconsideration, which the Board allowed. While ultimately the Board did not find the arguments compelling, the Director had the right to appropriately defend and articulate her position and supporting arguments regarding the ISA as the basis for a repeat violation. The Board simply finds that the Director’s defense of her positions during these proceedings was zealous but did not constitute frivolous or bad faith conduct or punitive litigation. Accordingly, the Board disagrees with Hi-Power that the imposition of attorney’s fees and costs or any other sanctions is warranted in this case.

ORDER

For the reasons set forth above, the Board denies Respondent’s Motion for Attorney’s Fees and Costs.

DATED: Honolulu, Hawaii, Nov. 24, 2017.

HAWAII LABOR RELATIONS BOARD



Sesnita A. D. Moepono
SESNITA A.D. MOEPONO, Member

J.N. Musto
J.N. MUSTO, Member

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