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Case No. OSH 2011-10**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

JAMES P. STONE,

Complainant,

vs.

HAWAII AIR AMBULANCE (HAWAII  
LIFE FLIGHT),

Respondent,

and

DIRECTOR, DEPARTMENT OF LABOR  
AND INDUSTRIAL RELATIONS,

Appellee.

CASE NO. OSH 2011-10

ORDER NO. 707

ORDER (1) GRANTING RESPONDENT HAWAII AIR AMBULANCE'S (HAWAII LIFE FLIGHT) MOTION TO STRIKE COMPLAINTANT JAMES P. STONE'S JULY 16, 2015 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i) FILED JUNE 29, 2015, AND (2) DENYING COMPLAINANT JAMES P. STONE'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. §396-11(i).

ORDER (1) GRANTING RESPONDENT HAWAII AIR AMBULANCE'S (HAWAII LIFE FLIGHT) MOTION TO STRIKE COMPLAINTANT JAMES P. STONE'S JULY 16, 2015 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i) FILED JUNE 29, 2015, AND (2) DENYING COMPLAINANT JAMES P. STONE'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. §396-11(i)

On June 18, 2015, the Hawaii Labor Relations Board (Board) issued Decision No. 28, Findings of Fact, Conclusions of Law, and Decision and Order (Decision 28). In Decision 28, the Board found and concluded that Complainant JAMES P. STONE (Stone) met his burden of proving he was wrongfully terminated by Respondent HAWAII AIR AMBULANCE (HAWAII LIFE FLIGHT) (HLF) due to his protected activity of reporting certain health and safety complaints. The Board also found that Stone's protected activity was a substantial factor

**I do hereby certify that this is a full, true and  
correct copy of the original on file in this office.**

Hawaii Labor Relations Board

in his termination. Thus, Stone was the prevailing party.

The Board ordered that a request for attorneys' fees or costs be made by motion filed no later than ten days after the date of Decision 28, and that the motion shall include sufficient detail to enable the Board to determine the reasonableness of the request. Also, any opposition to such motion shall be filed no later than ten days after the filing of the motion.

On June 29, 2015, Stone filed COMPLAINANT JAMES P. STONE'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i), together with the Memorandum in Support of Motion, Declaration of James C. McWhinnie, and Exhibits "1" – "3" (collectively Stone's Motion). Stone's Motion seeks an order awarding Stone \$315,619.25 in attorneys' fees (\$298,416.50 + \$14,061.39 GET + \$3,000.00 estimated for a Reply Memorandum + \$141.36 estimated GET) and \$2,671.62 in costs against HLF for the amounts incurred by Stone in his proceedings before the Board.

On July 10, 2015, HLF filed RESPONDENT HAWAII AIR AMBULANCE'S (HAWAII LIFE FLIGHT) MEMORANDUM IN OPPOSITION TO COMPLAINANT JAMES P. STONE'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i), FILED JUNE 29, 2015, together with Exhibits A-B (collectively HLF's Memo).

On July 10, 2015, Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or HIOSH) filed DIRECTOR'S OPPOSITION TO COMPLAINANT JAMES P. STONE'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i), together with the Declaration of Herbert B.K. Lau and Exhibits 1 – 9 (collectively HIOSH's Memo).

On July 16, 2015, Stone filed COMPLAINANT JAMES P. STONE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i) FILED JUNE 29, 2015, together with the Declaration of Sommerset K.M. Wong (collectively Stone's Reply Memo).

On July 23, 2015, HLF filed RESPONDENT HAWAII AIR AMBULANCE'S (HAWAII LIFE FLIGHT) MOTION TO STRIKE COMPLAINTANT JAMES P. STONE'S JULY 16, 2015 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i) FILED JUNE 29, 2015, together with its Memorandum in Support of Motion (collectively HLF's Motion to Strike).

On July 27, 2015, Stone filed COMPLAINANT JAMES P. STONE'S RESPONSE TO RESPONDENT HAWAII AIR AMBULANCE'S (HAWAII LIFE FLIGHT) MOTION TO STRIKE COMPLAINTANT JAMES P. STONE'S JULY 16, 2015 REPLY MEMORANDUM IN

SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, PURSUANT TO HAW. REV. STAT. § 396-11(i) FILED JUNE 29, 2015 (Stone's Response).

The Board held a Status Conference on October 12, 2015. As a result of the conference, a hearing on Stone's Motion and HLF's Motion to Strike was set for oral arguments on October 16, 2015. The hearing was held and the parties presented their oral arguments to the Board.

I. HLF's Motion to Strike

Based on the written arguments raised in HLF's Motion to Strike and oral arguments presented at the October 16, 2015 hearing, the Board grants HLF's Motion to Strike and the arguments raised in Stone's Reply Memo shall be disregarded by the Board.

II. Stone's Motion for Attorneys' Fees and Costs

It is clear that the law in Hawaii is that "[n]o attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation or agreement." Food Pantry, Ltd. V. Waikiki Business Plaza, Inc., 58 Hawaii 606, 618 (1978). The Hawaii Supreme Court has adopted the "American Rule" that each party is responsible for paying for his or her own litigation expenses unless one of the three exceptions apply.

There is no dispute that in this case there is no stipulation or agreement among the parties for the awarding of attorneys' fees to the prevailing party. Stone relies on HRS § 396-11(i) as its authority for an award of attorneys' fees under the American Rule. HRS § 396-11(i) states in part that the Board may "affirm, modify, or vacate the citation, the abatement requirement therein or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate" (emphasis added). Stone argues that the last phrase, "or direct other relief as may be appropriate," authorizes this Board to award Stone the attorneys' fees he requests in Stone's Motion.

Based on the written arguments presented in HLF's Memo<sup>1</sup> and HIOSH Memo and the oral arguments at the October 16, 2015, hearing, the Board disagrees with Stone's interpretation and application of HRS § 396-11(i). The Board finds more persuasive the positions taken by HLF and HIOSH. Significant to this Board's ruling is the Hawaii State Legislature's repeated

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<sup>1</sup> The Board does not agree with HLF's claim that the Board was not properly constituted when it issued Decision 28. Furthermore, HLF never raised this issue until now and HLF's challenge to former Chair Nicholson's seating on the Board and authority to participate in this case is untimely.

deliberations to amend HRS § 396-11(i) to allow the recovery of attorneys' fees and costs in an appeal of a HIOSH action under Chapter 396. The Legislature's actions to date indicate to the Board that the present law under Chapter 396 does not contemplate the granting of attorneys' fees and costs for any appeal of a HIOSH action. As such, the Board finds that Stone's Motion must be denied with respect to his request for attorneys' fees and costs.

All other issues and challenges raised by HLF and HIOSH to Stone's Motion, including but not limited to objections regarding "block billing" and redactions to invoices, are not addressed by the Board since these issues are now moot and irrelevant in light of the Board's ruling above.

ORDER

Based on the foregoing, the Board hereby (1) grants HLF's Motion to Strike, and (2) denies Stone's request for an order awarding him attorneys' fees and costs against HLF.

DATED: Honolulu, Hawaii, October 19, 2015.

HAWAII LABOR RELATIONS BOARD

  
KERRY M. KOMATSUBARA, Chair

  
ROCK B. LEY, Member



Copies to:

James C. McWhinnie, Esq., Attorney for Stone  
Corianne W. Lau, Esq., Attorney for HLF  
Herbert B.K. Lau, Deputy Attorney General, Attorney for HIOSH

DISSENTING OPINION BY SESNITA A.D. MOEPOHO, BOARD MEMBER

The majority opinion denies a motion filed by the prevailing party, Complainant, for attorney's fees and costs. The majority based its decision to deny the motion primarily on Food Pantry, *supra*, the *American Rule*, and arguments presented by Respondents HLF and HIOSH as stated above. I respectfully disagree with my learned colleagues for the following reasons:

1. CARL Corp. v. Department of Educ. 85 Haw. 431; 946 P.2d 1 (1997)

Under CARL Corp. v. Department of Educ. 85 Haw. 431; 946 P.2d 1 (1997), (CARL v. DOE) the Hawaii Supreme Court (Court) ruled on an appeal from a Department of Commerce and Consumer Affairs hearings officer's (hearings officer) decision, *inter alia*, that the hearings officer was wrong in concluding that Petitioner-Appellant (CARL) was not entitled to reasonable attorney's fees and costs as a prevailing protestor alleging violations of HRS chapter 103D, the Hawaii Procurement Code (Code), absent specific statutory language.

These are some of the similarities between the instant case and CARL v. DOE: both cases, (1) started with complaints alleging violations of statutory law and regulations created to protect the public; (2) had decisions rendered by a head of a public agency responsible for enforcing statutes that protect the public; and (3) appealed their original decisions to either a hearings officer or an appeals board with statutory authority to review the appeal *de novo* in an administrative agency proceeding and render a final order consisting of findings of fact and conclusions of law that is appealable to the appellate courts.

CARL v. DOE, *supra*, originated as a protest alleging violations of the Code. A decision was rendered by a "Chief Procurement Officer" or a head of a state agency. CARL's appeal was heard by a hearings officer *de novo* under HRS § 103D-709. HRS § 103D-709 requires that all parties to the proceeding have an opportunity to present oral or documentary evidence, conduct cross-examination as may be required and present argument on all issues involved. The Court cited:

HRS § 103D-709 gives the Hearings Officer jurisdiction to "review and determine *de novo* any request from any . . . offeror . . . aggrieved by a determination of the chief procurement officer [or] head of a purchasing agency[,]" and authorizes the Hearings Officers to "issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision" regarding "whether the determinations of the chief procurement officer or the head of the purchasing agency . . . were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract." HRS §§ 103D-709(a),(b) & (f).

85 Haw. 431 at 447.

One of the issues presented to the hearings officer was CARL's request for attorney's fees and costs that were incurred as a result of its protest alleging violations of the Code. The hearings officer concluded that he was statutorily limited by HRS § 103D-707 that governs remedies after an award and accordingly, attorney's fees and costs are not included and CARL's request for attorney's fees was denied.

The Court disagreed:

Because nothing in the procurement code precludes an award of attorney's fees to a successful protestor, and, under the circumstances of this case, requiring CARL to bear the fees incurred in its protest would undermine the purposes of the Code, we agree with CARL (emphasis added).

85 Haw. 431 at 458.

Furthermore, the court recognized that the Code's public purpose is universal across the United States as attested by the Supreme Court of New Mexico in Planning & Design Solutions v. City of Santa Fe, 118 N.M. 707, 885 P.2d 628 (1994):

The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Of all the interests involved in competitive bidding, the public interest is the most important. An economical and efficient system of procurement directly benefits taxpayers. . . . It is certainly in the public interest that the [State] abide by the procurement rules it has set for itself.

*885 P.2d at 631* (citations and internal quotation marks omitted).

85 Haw. 431 at 456.

The Court continued:

Requiring such a protestor to bear its own attorney's fees strengthens the financial disincentive to pursue a protest once the contract has been awarded, and essentially nullifies the most effective enforcement mechanism in the Code.

In the long term, this can only decrease competition among vendors. Moreover, if the procedural provisions of the Code are unenforceable except at the discretion of the prosecutor, the Code cannot “increase public confidence in the integrity of the system” or, as it demonstrably failed to do in the instant case, “provide for fair and equitable treatment of all persons dealing with the government procurement system.” Although the Code does not expressly authorize the award of attorney’s fees under the circumstances of the instant case, interpreting HRS § 103D-704 to preclude such an award renders the Code incapable of furthering the purposes and policies that required its enactment.

83 Haw. 431 at 460.

The Court concluded:

Accordingly, because the legislature has failed to provide any statutory remedy for bad faith conduct on the part of the purchasing agency, and because requiring the protestor to bear the financial burden of enforcing the Code under these circumstances undermines the purposes of the Code we hold that a protestor is entitled to recover its attorney’s fees incurred in prosecuting its protest if: (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS § 103D-701(f); and (3) the award of the contract was in bad faith. See, e.g., *Bolander & Sons v. City of Minneapolis*, 438 N.W.2d 735, 738-39 (Minn. Ct. App. 1989) (holding that where the contract is currently being performed, the successful protestor is entitled to its costs in preparing its unsuccessful bid and its expenses, including attorney's fees), *aff’d*, 451 N.W.2d 204 (Minn. 1990).

85 Haw. 431 at 461.

Similar to the Code, HRS Chapter 396 was created to forward a public purpose to protect and ensure that every working man and woman is provided a safe and healthful working environment. This public purpose is not just limited to employees but also affects the public if unsafe and unhealthful working conditions are allowed to go unchecked. It is impossible for HIOSH to police Chapter 396 by itself. HIOSH depends on employees as well as the public to inform them of statutory violations. The legislative intent and the Code’s public purpose is articulated in HRS § 396-2:

**Findings and purpose.**

\* \* \*

. . . There is a need to assure so far as possible, every working man and woman in the State safe and healthful working conditions. This legislation is also designed to permit and encourage employer and employee efforts to reduce injury and disease arising out of employment, and to stimulate them to institute new programs and to perfect existing programs for providing safe and healthful working environments.

Further, HRS §§ 396-6(a) & (b) requires:

(a) Every employer shall furnish to each of the employer's employees employment and a place of employment which are safe as well as free from recognized hazards. No employer shall require or direct or permit or suffer any employee to go or be in any employment or place of employment which is not free from recognized hazards that are causing or likely to cause death or serious physical harm to employees or which does not comply with occupational safety and health standards, rules, regulations, citations, or orders made pursuant to this chapter except for the specific purpose of abating said hazard.

(b) Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe.

The original complaint in this instant case was brought under HRS § 396-8(e), also known as the "Whistleblower section." This statute protects an employee who has knowledge that his or her employer is violating Chapter 396 and comes forward to inform HIOSH.

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

(1) No person shall discharge, suspend or otherwise discriminate in terms and conditions of employment against any employee by reason of:

- (A) The employee's failure or refusal to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or
  - (B) The employee's failure or refusal to engage in unsafe practices in violation of this chapter or of any standard, rule, regulation, citation or order issued under the authority of this chapter;
- (2) Upon discretion of the director or request, names of complainants may be withheld from the employer;
- (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;
- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;
- (5) Upon receipt of the complaint, the director shall investigate to determine if a discharge or discrimination in violation of this subsection has occurred; [and]
- (6) If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority[.] (Emphasis added).

The Director rendered a decision in this instant case denying Stone's complaint of discrimination and wrongful discharge by his employer for filing a complaint of Chapter 396

violations. The Director found that Stone was discharged under a legitimate business reason and it was not used as a pretext to discharge him. Stone timely appealed to the Board pursuant to HRS § 396-11(e). The Board is designated the appeals board under HRS § 396-3. The Board derives its authority and powers in part from HRS § 396-11(h) and (i), which states:

(h) The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a prior formal hearing at the department level, the proceedings of which are required to be transcribed, in which case review before the appeals board shall be confined to the record only.

(i) The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate (emphasis added).

Unlike CARL v. DOE, HRS § 396-11(i) has a provision that authorizes the Board, among others things, discretionary authority to “direct other relief as may be appropriate” in its decision. Equally important is HRS § 396-8(e)(6), the statute that mandates HIOSH specifically to:

(6) If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority[.] (Emphasis added).

In CARL v. DOE, the Court reasoned that since hearings officers have jurisdiction to review determinations made under the code, they also have jurisdiction and authority to act on protested solicitations and awards in the same manner and extent as contracting officials authorized to resolve the same:

Although this provision is contained in the subsection governing initial agency review and not in HRS § 103D-709, which governs review by the Hearings Officer, hearings officers have jurisdiction to review determinations made pursuant to HRS § 103D-701 de novo. HRS § 103D-709(a). Therefore, hearings officers have jurisdiction and authority to act on protested solicitations and awards in the same manner and extent as contracting officials authorized to resolve protests under HRS § 103D-701.

85 Haw. 431 at 456.

Applying this same ruling, the Board has jurisdiction and authority to act on complaints brought under HRS § 398-6(e) in the same manner and extent as the Director is authorized to resolve the same. Therefore, the Board is mandated under HRS § 396-6(e)(6) to order the employer to provide all appropriate relief to the employee, if the Board determines that the provisions of this subsection have been violated.

In determining whether these two statutes (HRS §§ 396(e)(6) and 396-11(i)) allow for attorney's fees and costs, the court has stated often that:

In construing statutes, a courts' [sic] primary objective is to ascertain and give effect to the intention of the legislature as gleaned primarily from the language contained in the statute i.e. . . . Accordingly, "it is well settled that this court is bound by the plain, clear and unambiguous language of a statute unless the literal construction would produce an absurd and unjust result, and would be clearly inconsistent with the purposes and policies of the statutes." . . . The foregoing does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review . . . . Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

*Survivors of Medeiros v. Maui Land & Pineapple Co.*, 66 Haw. 290, 297, 660 P.2d 1316, 1321 (1983) (citations omitted); *see also Konno*, 85 Hawai'i at 71, 937 P.2d at 407; *Shiple v. Ala Moana Hotel*, 83 Haw. 361, 365, 926 P.2d 1284, 1288 (1996); *Bragg v. State Farm Mut. Auto. Ins. Co.*, 81 Haw. 302, 306, 916 P.2d 1203, 1207 (1996); *Sato v. Tawata*, 79 Haw. 14, 17, 897 P.2d 941, 944 (1995).

85 Haw. 431 at 459.

Based on the foregoing, the *American Rule* does not apply in the instant case and Chapter 396 allows the Board to award attorney's fees and costs.

2. *HRS §§ 396(e)(6) and 396-11(i) are plain, clear and unambiguous*

The language of HRS §§ 396(e)(6) and 396-11(i) is plain, clear and unambiguous and the literal construction is in keeping with Chapter 396's public purpose to ensure that all employees are provided with a safe and healthful work place and allows the Director and the Board to include attorney's fees and costs in decisions. To not allow attorney's fees and costs would be a financial

burden for any employee to report a Chapter 396 violation and would seriously discourage an employee from reporting violations.

HLF argues that Stone should have brought a claim under HRS Chapter 378, a.k.a “the Whistleblowers’ Protection Act,” to be awarded attorney’s fees and costs. This argument would decisively discourage an employee from reporting violations if the employee had to maintain two litigations under two separate chapters, and would benefit only employers and not employees.

Further, the reason why the *American Rule* should not be applied to violations under HRS § 396-8(e) is that it produces an absurd and unjust result. Why would any employer voluntarily agree to pay for the employee’s attorney’s fees and costs if the employee prevails? Would this *ever* occur? Would it not be more beneficial for the employer to *not* agree, as this would provide disincentive for the employee to continue, knowing that the employee will have to pay his or her own legal costs in bringing a claim? Does this promote HRS Chapter 396’s public purpose?

3. *Applying HRS Chapter 378, Part V, Whistleblowers’ Protection Act (WPA)*

HRS § 378-64 provides:

**Remedies ordered by court.**

A court, in rendering a judgment in an action brought pursuant to this part, shall order, as the court considers appropriate, reinstatement of the employee or public employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney’s fees and witness fees, if the court determines that the award is appropriate (emphasis added).

Under HRS § 378-64, a court in rendering a judgment in an action brought under the WPA is required to order actual damages among others and has the discretion to award all or a portion of the costs of litigation, including reasonable attorney’s fees and witness fees.

Why should a complainant under HRS § 396-8(e) not be afforded the same remedies as his or her counterpart under the WPA? To provide disparate remedies is discriminatory and places HRS § 396-8(e) on a lesser status. Such treatment would also discourage an employee from bringing a claim under HRS Chapter 396 and encourage the same employee to bring a claim under the WPA, thereby increasing the circuit court cases.

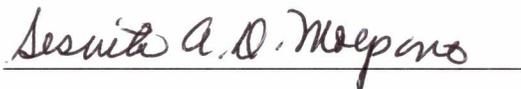
Therefore, it is necessary for me to conclude that since the court has the authority to provide actual damages and attorney's fees and costs in its judgment under the WPA, then Chapter 396 should also provide the same.

4. *Finding of reasonable attorney's fees and costs.*

Based on the foregoing reasons and arguments, I find that Stone is entitled to reasonable attorney's fees and costs as included in his motion, except for the amount of \$3,141.36 for his reply to Respondents' oppositions to his motion and \$8,443.976 for paralegal services.

5. *HLF's argument that the Board is not legally constituted.*

Since the majority has not specifically addressed this issue, I will address it by finding that this issue is irrelevant to the Motion before the Board and therefore will not be addressed. Further, and solely for the sake of argument, even assuming the argument was sound, the Board's final decision had a consensus of the remaining members who constituted a majority of the Board.



SESNITA A.D. MOEPONO, Member