

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-01-108
MICHAEL L. LAST,	)	ORDER NO. 1467
	)	
Complainant,	)	ORDER GRANTING UPW'S MOTION
	)	TO DISMISS COMPLAINT
and	)	
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	
	)	
Respondent.	)	

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ORDER GRANTING UPW'S MOTION TO DISMISS COMPLAINT

On June 5, 1995, Complainant MICHAEL L. LAST (LAST) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union or UPW) violated § 89-4, Hawaii Revised Statutes (HRS), because the Union failed to respond to his letter, dated March 23, 1995, requesting the refund of his fair share agency fees.

On July 13, 1995, the Board conducted a hearing on the merits of the case. The parties were afforded full opportunity to examine and cross-examine witnesses and present exhibits. The parties submitted written arguments to the Board on August 11, 1995.

Thereafter on August 15, 1997, the UPW filed a motion to strike Complainant's post-hearing statement with the Board. The UPW moved the Board to strike LAST'S references to communications

allegedly sent to UPW to which he received no response because they are not in evidence before the Board.

In addition, on August 28, 1997, the UPW, by and through its counsel, filed a motion to dismiss based upon mootness with the Board. The UPW alleged that on July 31, 1995, LAST wrote to the Union and demanded refund amounts pursuant to the Notice to Fair Share Agency Fee Payers which he claimed he first received on July 13, 1995, the date of the Board hearing in this matter. The Union thereupon processed LAST's demand for payment. On August 11, 1995, the UPW alleges that a check was issued to LAST in the amount of \$49.00. As LAST received his refund, the UPW contends that the instant complaint is moot.

On September 8, 1995, LAST filed a motion to deny Respondent's motion to strike Complainant's post-hearing statement; motion to deny Respondent's motion to dismiss based on mootness; motion to seek relief against attorneys for filing an instrument which contains a statement which said attorney cannot ascertain the validity thereof; motion to remove attorneys for Respondent from Case No. CU-01-108; and motion to submit additional information that has direct impact on the merits of Case No. CU-01-108. With respect to Respondent's motion to dismiss for mootness, LAST alleged that he never received a refund pursuant to his demand.

By letter, dated September 19, 1995, the UPW indicated that upon receipt of information that LAST did not receive a check for his dues refund, the Union stopped payment on the first check and reissued a second check to LAST. By letter dated September 28, 1995, LAST informed the Board that he received a check dated

September 15, 1995, from the UPW but the amount differs from the \$49.00 represented to be the correct amount by the UPW. In addition, LAST contends that there is no reason provided for the variance.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

Complainant LAST was, at all times relevant, employed as an Assistant Wastewater Treatment Plant Operator in the Department of Public Works, County of Hawaii. LAST's position is included in bargaining unit 01, as provided in § 89-6, HRS, but he is not a member of the UPW.

Respondent UPW was, at all times relevant, the exclusive representative of employees in bargaining unit 01 as provided in § 89-6, HRS.

LAST was on authorized leave without pay from the County of Hawaii from January through mid-March 1995. He returned to work on March 15, 1995. LAST testified that upon his return to work, a portion of his pay began to be deducted from his wages, in the form of an agency fee and transmitted to the Union.

By letter dated March 23, 1995 to the UPW, LAST requested that the UPW comply with § 89-4, HRS, and refund the amounts deducted from his pay for Union expenditures spent for political and ideological activities unrelated to terms and conditions of employment. The letter requested a refund by March 31, 1995 and also states that his request shall remain in effect and continue until written notice of discontinuance is sent. LAST stated that

postage was affixed and the letter was mailed through the United States Postal Service.

LAST did not receive a refund pursuant to his March 23, 1995 letter to the UPW.

Respondent UPW has a procedure to determine the amount of refunds for that part of the dues which represents the employee's pro rata share of expenditures made for political and ideological nature unrelated to terms and conditions of employment.

Respondent UPW also has a procedure to notify employees that they are entitled to receive a refund of their pro rata share of expenditures and the deadline for requesting such refunds. The procedure and amount of the refund is not in question in the instant complaint.

Gary Rodrigues, UPW State Director, testified about the procedures for handling mail received by the Union at its main office on Oahu. Rodrigues testified that since 1981 mail is time-stamped, sorted and routed by the receptionist to the addressee or to the appropriate division.

Rodrigues further testified that any request for a refund under § 89-4, HRS would be routed to the business office for determination of the amount owed and would be transmitted to Rodrigues for payment approval.

Rodrigues testified that in January 1995, the UPW sent to all service fee employees of bargaining units 01 and 10 a "notice to fair share agency fee payers." Rodrigues testified that the list of employees is computer-generated and that LAST's name was on the computer list. The notice required anyone requesting a refund

of the agency fees expended for non-collective bargaining activities to submit a request within 30 days after receipt of the notice. Rodrigues testified that employees on authorized leave of absence without pay such as LAST were also sent the notice.

Rodrigues further testified that approximately four to five refunds are processed annually after the notices are mailed to the employees. Neither the business office nor Rodrigues recalled a refund request by LAST and no letter was found after a search of the UPW's files.

#### DISCUSSION

In its motion to strike, the UPW contends that LAST cites several communications in his post-hearing statement which are not in evidence. The UPW contends that the only letter LAST submitted into evidence was dated March 23, 1995, while he refers to six other letters in his post-hearing statement. As those letters are not properly before the Board, the UPW requests that the Board strike LAST's entire statement or those portions which refer to the matters which are not properly in evidence.

LAST contends that while only one document was offered into evidence at the hearing, LAST mentioned that other communications were sent to the UPW and Respondent failed to respond. LAST contends that the references to the communications tend to prove Respondent's continued failure to respond to various communications.

After reviewing the record and the arguments in this case, the Board finds that LAST's post-hearing brief improperly

argues matters which are not in evidence. As such, those references shall be stricken from LAST's post-hearing statement.

On September 8, 1995, Complainant LAST moved, inter alia, to remove the law firm of Takahashi, Masui & Vasconcellos from representing the UPW in this matter. LAST contends that UPW's attorney stated in an affidavit that he received a refund check when in fact he contends he never received a check. In addition, LAST indicates that Rebecca Covert states in an affidavit that she is the attorney who represented the ILWU at a hearing on July 13, 1995. LAST argues that Covert's status as ILWU's attorney is irrelevant here. LAST argues that based upon a previous communication from the Office of Disciplinary Counsel, Supreme Court of Hawaii, that Respondent's attorneys should be removed for gross negligence.

The Board notes that under Administrative Rules § 12-42-9, the Board may suspend or disbar any attorney or other representative from practice before the Board for contemptuous conduct at any hearing. After considering the concerns raised by Complainant, the Board finds that Respondent's counsel's conduct does not fall into this category so as to warrant sanctions by this Board. The Board does not view counsel's actions in this case to be grossly negligent nor maliciously misleading. Should Complainant find that counsel's actions warrant review by other agencies, Complainant should seek relief in the proper forum.

Complainant LAST also moves to submit additional information which allegedly has direct impact on this case. LAST seeks to submit newspaper articles from the August 27, 1995 edition

of the Honolulu Advertiser and the August 31, 1995 edition of the Honolulu Star-Bulletin where Rodrigues failed to respond to comments from the newspapers. LAST states that he cannot verify the validity of statements contained in the publications, but if shown to be accurate, LAST contends that Rodrigues has an established record of electing not to respond to requests.

Based upon Complainant's offer of proof, the Board finds that the newspaper articles are not relevant to the facts in this case. Further, the fact that Rodrigues did not comment on two news stories does not tend to prove that he received LAST's request for refund or that Rodrigues does not respond to nonmembers' requests for dues refunds. Thus, the Board believes that the articles are of little probative value. Accordingly, the Board denies LAST's motion to consider the additional evidence proffered.

With respect to UPW's motion to dismiss the complaint for mootness, the UPW contends that after the close of the hearing in this matter on July 13, 1995, LAST sent a letter to the UPW dated July 31, 1995 requesting a refund for the amount deducted for activities of a political and ideological nature unrelated to terms and conditions of employment. LAST stated in the letter that he first received a copy of the Union's Notice to Fair Share Agency Fee Payers, dated December 9, 1994 on July 13, 1995. Therefore, LAST requested a refund and set a deadline of August 15, 1995 for the UPW to comply with his request.

According to the affidavit of UPW's counsel, upon receipt of LAST's request the Union proceeded to process LAST's demand. On August 11, 1995, a check drawn on UPW's account was issued to LAST

for \$49.00. Attached to the motion was a photocopy of the check issued to LAST, dated August 11, 1995. As the Complainant requested the return of his refund in this complaint, and without waiving its contention that LAST was included in the earlier mail-out and did not respond to the Union, the Union contends that LAST's complaint is now moot.

In his response to the UPW's motion, dated September 8, 1995, LAST contends that he never received a refund pursuant to his demand for refund dated July 31, 1995. Thereafter on September 20, 1995, the UPW, by and through its counsel, indicated to the Board that upon receipt of LAST's letter stating that he did not receive the refund check, counsel notified the Union and a stop payment order was placed on the first check and the Union reissued a second check to LAST. By letter dated September 29, 1995, LAST informed the Board that he had received a check from the UPW dated September 15, 1995 but the amount of the check varied from the amount represented by the UPW to be the proper amount of the refund.

The Board takes notice that on November 13, 1995, LAST filed another prohibited practice complaint with the Board in Case No. CU-01-117. Complainant contended that the UPW represented that it refunded \$49.00 to him but that he only received a check in the amount of \$45.40. Upon receipt of the complaint, the Union determined that there was an inadvertent accounting error and it promptly issued a check, dated November 17, 1995, to LAST in the amount of \$3.60. In Order No. 1318, issued on April 11, 1996, the

Board dismissed the complaint because the issues were moot as the UPW had paid LAST the full amount of his refund.

Similarly in this case, the Board finds that there is no actual controversy in this case and that the case is moot. Here, LAST contended that the UPW failed to respond to his request for a dues refund. The UPW contended at hearing that LAST's letter of March 23, 1995 was never received by the Union. Thus, the Union did not respond to LAST's request. Upon receiving a copy of the Notice to Fair Share Agency Fee Payers which LAST contended that he saw for the first time on July 13, 1995, notwithstanding Rodrigues testimony that a notice was mailed to him in January 1995, LAST requested a refund of his dues in July 1995. Thereafter, the Union issued checks to LAST which amounted to his full refund. Since LAST has received full payment of \$49.00, this complaint is moot as it has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987).

Based upon the foregoing, the Board hereby grants the UPW's motion to dismiss complaint.

#### CONCLUSIONS OF LAW

The Board lacks jurisdiction over a prohibited practice complaint where the issues are moot.

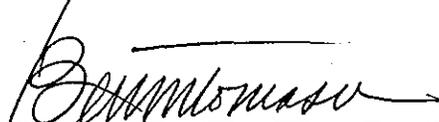
Upon receipt of LAST's request for a refund of his dues, the UPW paid LAST the full amount of his refund and thus, the issues raised in the complaint are moot.

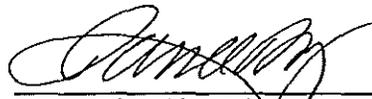
ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, May 22, 1997.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
CHESTER C. KUNITAKE, Board Member

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