

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-115
)	(ON REMAND)
MICHAEL L. LAST,)	
)	ORDER NO. 1879
Complainant,)	
)	ORDER DENYING RESPONDENT'S
and)	MOTION FOR ATTORNEY'S FEES
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	

ORDER DENYING RESPONDENT'S MOTION FOR ATTORNEY'S FEES

Previously, in Order No. 1758, dated September 8, 1999, the Hawaii Labor Relations Board (Board) denied Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO's (UPW or Union) motion for an award of fees indicating, inter alia, that such an award was inappropriate in this case. The UPW appealed the Board's order, with four similar orders, to the First Circuit Court in Civil No. 99-3543-09, United Public Workers, AFSCME, Local 646, and Michael L. Last and Hawaii Labor Relations Board, et al. Upon review, the Court found insufficient findings and conclusions to indicate the basis and reasons for the decisions and orders of the Board under review and remanded the cases to the Board. The Court instructed the Board to render findings and conclusions in each case indicating the reason and basis for the agency's decision and order on the request for attorney's fees in accordance with § 91-12, HRS. Pursuant to the Court's order, the Board makes the following findings of fact, conclusions of law, and order.

On November 2, 1995, Complainant MICHAEL L. LAST (LAST) filed the instant prohibited practice complaint against the UPW with the Board. LAST alleged that since September 30, 1993, the UPW caused the remittance of funds for activities of a political and ideological nature unrelated to the terms and conditions of his employment. LAST alleged that UPW's remittance of such funds upon request is not allowed by law and the use of remitted funds for political or ideological nature was unauthorized by UPW members. LAST further contended that he was not reimbursed additional monies equal to the amount of interest which Complainant could have received on the monies. LAST contended that the UPW violated §§ 89-13(b)(4) and (5), Hawaii Revised Statutes (HRS).

Thereafter, on November 22, 1995, the UPW filed a motion to dismiss the instant complaint on grounds that the complaint was untimely; that the Complainant failed to state a claim for relief; and Complainant lacked standing to assert the rights of Union members since he is not a member of the Union.

By Order No. 1317, dated April 11, 1996, the Board granted the UPW's motion to dismiss the complaint. The Board held that the instant complaint was time-barred because it was filed more than 90 days from the date of the alleged prohibited practice by the UPW. The Board further stated assuming arguendo that the Board had jurisdiction over the complaint, the Board found LAST failed to state a claim for relief because § 89-4, HRS, provides for payroll deductions of amounts equivalent to regular dues from nonmembers. In addition, § 89-4, HRS, does not provide for the return of any interest earned on refunded amounts. Accordingly, the Board dismissed the complaint.

On April 19, 1996, the UPW filed a motion to award Respondent attorney's fees with the Board. The UPW contends that the Union is entitled to attorney's fees because the instant complaint and LAST's opposition to the UPW's motion to dismiss were patently frivolous. The UPW contends that LAST's conduct in this case forecloses access to the Board for meritorious cases and is contrary to the purpose of Chapter 89, HRS. The UPW further argues that LAST brought this complaint against the UPW for improper purpose and his complaint and opposition to the UPW's motion to dismiss were without proper basis in fact or warranted by applicable law.

In its six-page memorandum filed in support of the motion, the UPW admitted that normally litigation expenses are not recoverable by either party in proceedings before the labor board, but argued that the reimbursement of attorney's fees and costs for frivolous litigation brought by a party is clearly authorized and appropriate. The UPW relied upon federal labor law cases, i.e., Care Manor of Farmington, 318 NLRB 330, 150 LRRM 1033 (1995); Heck's Inc., 215 NLRB 765, 88 LRRM 1049 (1974); and Tiidee Products, 194 NLRB 1234, 1236-1237, 79 LRRM 1175 (1972) as authority for its contentions. The UPW argued that LAST is responsible for bringing more than one frivolous action against the UPW and has decided to crowd the docket of the Board with meritless claims. The UPW also cites to writings on envelopes to counsel allegedly by LAST to support its contentions that LAST has an improper purpose for bringing the complaints. The UPW further argues that unless the Board takes appropriate action, LAST will continue to bring frivolous complaints against the Union so that

the Union pays out more than what will be deducted from LAST's paycheck as a valid agency fee. Thus, the UPW requested fees in the amount of \$1,750.00.

On April 29, 1996, LAST filed a motion to dismiss Respondent's motion for fees with the Board. LAST contends that Respondent's memorandum contains allegations which are not supported by the facts or are otherwise false; that Respondent is attempting to restrict Complainant from exercising his constitutional rights; and is attempting to restrict Complainant from lawfully seeking redress against Respondent.

On May 6, 1996, the UPW filed a two-page supplemental submission in support of its motion with the Board which included copies of envelopes with disparaging comments against the Union which LAST allegedly sent to UPW's counsel. The UPW contends that the exhibits support its contention that LAST filed a frivolous complaint against the UPW for improper purpose.

On May 28, 1996, the Board held a hearing on UPW's motion to award Respondent attorney's fees by conference call. All parties were afforded a full and fair opportunity to present evidence and argument.

After considering the record before the Board and the authorities cited by the UPW, the Board denies the UPW's motion for attorney's fees. The Board is not persuaded by the authorities cited by the UPW that the Union is entitled to fees for successfully defending a complaint which it claims to be frivolous.

In Order No. 1865, dated May 16, 2000, in Case No. CU-01-113, Michael L. Last, the Board held, based on the same arguments advanced in this case that the UPW was not entitled to

attorney's fees against Complainant because this jurisdiction follows the rule that attorney's fees are not recoverable unless authorized by statute, rule of court, stipulation, agreement, or Hawaiian precedent. Ariyoshi v. HPERB, 5 Haw.App. 533, 704 P.2d 917 (1985). The UPW failed to cite any statute, rule of court, stipulation, agreement or Hawaiian precedent as authority in its request for fees. The Board also declined to adopt the National Labor Relations Board's (NLRB) holding in Tiidee Products, Inc., 194 NLRB 1234, 79 LRRM 1175 (1972), because of the differences in the underlying statutes and the policies considered by the NLRB and the appellate courts. Moreover, the Board is reluctant to award fees in a case of this nature as it may have a chilling effect on employee complainants and foreclose the filing of meritorious claims against the union or employer with the Board under Chapters 89 and 377, HRS.

Assuming arguendo, however, that the Board has the authority to award attorney's fees to Respondent for successfully defending claims filed against them, the Board finds that the UPW failed to prove that the instant complaint was frivolous. In Coll v. McCarthy, 72 Haw. 20, 804 P.2d 881 (1991), the Court defined a "frivolous" claim or defense justifying an award of fees as being manifestly and palpably without merit so as to indicate bad faith on the pleader's part.

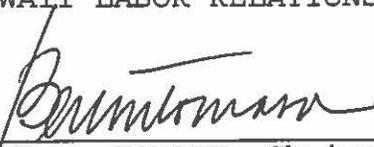
Here, LAST appears pro se and filed a complaint alleging that UPW has caused him to remit funds for use solely and exclusively for activities of a political and ideological nature unrelated to the terms and conditions of employment. LAST claimed that the fact that Respondent refunds amounts collected upon

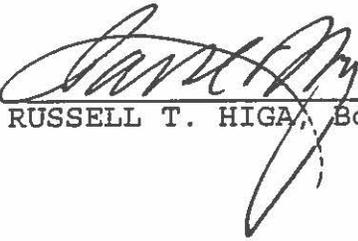
request does not justify the collection of funds in the first place. LAST contended that under this continued practice the UPW has use of his funds without any provision to compensate him for lost interest he could have received. The Board finds that the complaint was not totally unsupported by the facts and the law. LAST's arguments are not unlike the arguments advanced by nonmember employees before the U.S. Supreme Court in Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) and later cases challenging the constitutionality of agency fee refund procedures. Thus, the Board does not find LAST's complaint to be patently frivolous.

Based on the foregoing, the Board hereby denies Respondent's motion for an award of attorney's fees.

DATED: Honolulu, Hawaii, June 7, 2000.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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