

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-98
)	
MICHAEL L. LAST,)	DECISION NO. 359
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On January 31, 1994, Complainant MICHAEL L. LAST (LAST) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union). LAST alleged that the UPW violated Sections 89-4 and 89-3.5, Hawaii Revised Statutes (HRS), by (1) refusing to refund that portion of his statutory dues which were used for activities of a political and ideological nature unrelated to terms and conditions of employment and (2) refusing to send the remaining balance of his dues to the American Atheists, Inc.

On March 8, 1994, the Board conducted a hearing on the merits of the case. The parties had full opportunity to present evidence and arguments to the Board. Thereafter, the parties also filed post hearing briefs with the Board. 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 by the County of Hawaii (County or Employer). Complainant is a member of bargaining unit 01 but not a member of the UPW.

Respondent UPW was at all times relevant the exclusive representative, as defined in Section 89-2, HRS, of bargaining unit 01 members.

On August 16, 1993, the County hired LAST as an Assistant Wastewater Treatment Plant Operator in the Department of Public Works. Transcript of hearing held on March 8, 1994 (Tr.), p. 29; Respondent's (R's) Exhibit (Ex.) 1, p. 3. LAST was hired on a limited term appointment (LTA) to expire on August 31, 1993. Tr., p. 30. During this period, the Employer failed to deduct service fees from LAST's paycheck. Tr., p. 31. Thereafter, the County extended LAST's appointment from September 1, 1993 to April 30, 1994. Tr., p. 30. The Employer deducted monthly fees of \$28.98 from LAST's paycheck for September, October, November, and December of 1993. Tr., p. 34. LAST learned of the deductions after receiving his paycheck for the period ending September 30, 1993. Tr., pp. 36, 55; Complainant's (C's) Ex. 3.

LAST sent a letter to the UPW, dated October 28, 1993, asking the Union to refund that portion of his Union dues which were used for activities of a political and ideological nature unrelated to the terms and conditions of employment pursuant to Section 89-4, HRS. Tr., pp. 10-11; C's Ex. 1. LAST requested that the refund be computed commencing with the payroll dated

September 15, 1993. C's Ex. 1. LAST also asked the Union to remit the remaining balance of funds deducted from his earnings to the American Atheists, Inc., pursuant to Section 89-3.5, HRS. Tr., p. 12; C's Ex. 1.

According to UPW State Director Gary Rodrigues, he considered whether LAST was eligible for reimbursement under the AFSCME Constitution which affords reimbursements "for political or ideological" expenditures. Tr., p. 61. His investigation indicated that LAST was not a member, and therefore was not eligible for reimbursement. Tr., p. 62.

The AFSCME Constitution, Article IX, Section 11, provides in relevant part:

Any member, except those who are members pursuant to a union shop or similar provision, who objects to the expenditure of any portion of dues for partisan political or ideological purposes shall have the right to dissent from such expenditures. The amount of the Union's expenditures for such purposes shall be determined annually in the following manner (R's Ex. 2; Tr., p. 60.)

Rodrigues did not consider Complainant's letter to be a fair share objection under the Hudson decision.¹ Tr., pp. 68, 93-94. By letter dated November 8, 1993, Rodrigues informed LAST that his request for a refund was denied because he was not a Union

¹In Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the U.S. Supreme Court held that the procedure used by the Chicago Teachers Union to delineate chargeable and nonchargeable expenses to agency fee payers was unconstitutional. The Court set forth the constitutional requirements for the union's collection of agency fees, including an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while the challenges are pending.

member. Tr., p. 12; C's Ex. 2. Rodrigues also refused his request to remit his dues to the American Atheists, Inc. because his request "[did] not comply with the provisions of Chapter 89-3.5, HRS." Tr., p. 13; C's Ex. 2.

In most cases, the Employer notifies the Union of new hires but not until several months after hire. Tr., p. 78. However, as soon as new hires are named and the Union is aware that the employee has chosen to be a service fee employee, the Union normally sends a notice to the employee informing him/her of the rebate process pursuant to the Hudson requirements. Tr., pp. 56-57, 79. LAST did not receive a notice from the Union.

In late December of 1992 or early 1993, the UPW distributed a "Notice to fair share agency fee payers" to approximately 1,299 employees in Units 01 and 10. Tr., pp. 66, 78; R's Ex. 4. The deadline for filing objections to the amount of refunds was February 1, 1993. R's Ex. 4. The UPW decided sometime in 1993 to change from a fiscal year basis to a calendar year basis for calculating the apportionment of chargeable and non-chargeable expenditures. Tr., p. 103. LAST did not receive the 1993 notice since he was hired after the notice had been mailed. The 1994 notice was sent by the UPW during the first week of March 1994 to 1,376 agency fee payers. R's Ex. 5, Tr., pp. 68, 77. LAST received a copy of the 1994 notice on or about March 2, 1994. Tr., pp. 56-57. Under the terms of the program refunds may be requested up through April 15, 1994. R's Ex. 5. If LAST were eligible for fair share objection under Hudson he would have been eligible for

a refund of \$4.16 per month for each eligible month in 1993. Tr., pp. 69-70.

With respect to LAST's claim regarding the remittance of the balance of his service fee monies to the American Atheists, Inc. on September 29, 1982, the UPW and the Employer entered into a "Memorandum of Agreement" (Agreement) which identifies three charities to which religious objectors can contribute. Tr., pp. 72-73; R's Ex. 7. According to the Agreement, the parties agreed that the monies can be forwarded to the Kuakini Home, Palama Settlement and Big Brothers/Big Sisters of Honolulu. R's Ex. 7. Since 1982, no other charities have been added to the Agreement. Tr., p. 73. The American Atheists, Inc. is not one of the charities set forth in the Agreement. R's Ex. 7.

DISCUSSION

At the hearing held on March 8, 1994, the Union moved to dismiss the complaint on the grounds that (1) LAST did not suffer any injury under Section 89-4, HRS; (2) his complaint was untimely and therefore the Board lacks jurisdiction over his complaint; and (3) he lacks standing to complain because he is not a member of any religious sect as provided under Section 89-3.5, HRS. After hearing arguments on the motion, the Board granted the Union's motion to dismiss the allegations of a Section 89-3.5, HRS, violation but denied the rest of the Union's motion.

At the outset, the Union contends that the complaint is barred by the applicable statute of limitations. Section 377-9(1), HRS, and Administrative Rules Section 12-42-42(a) requires prohibited practice complaints to be filed within ninety days of

the alleged violation. The Union argues that Complainant's claim arose on or about October 28, 1993 when he requested the refunds from UPW.

Based upon the record the Board finds that the Union's response to LAST is the basis for this complaint. The Union's memorandum, dated November 8, 1993, notified LAST that his request for a refund had been denied. LAST filed this complaint on January 31, 1994. Accordingly, LAST's complaint was filed within ninety days of the occurrence of the alleged prohibited practice and the Board has jurisdiction over this complaint.

LAST requested the Union to remit the remaining balance of his dues to the American Atheists, Inc. pursuant to Section 89-3.5, HRS. LAST alleges that the Union refused to do so thereby committing a prohibited practice by refusing to comply with Section 89-3.5, HRS.

Section 89-3.5, HRS, provides in pertinent part:

[A]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objection to joining or financially supporting employee organizations shall not be required to join or financially support any employee organization as a condition of employment; except that an employee may be required in a contract between an employees' employer and employee organization in lieu of periodic dues and initiation fees, to pay sums equal to the dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three funds, designated in the contract or if the contract fails to designate any funds, then to any fund chosen by the employee. . . .

Complainant contends that he is a member of the American Atheists, Inc. which qualifies as a nonreligious nonlabor organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

The Union argues that LAST is not a member of an organized religion which traditionally holds conscientious objection to supporting a labor organization and further has not suffered any economic damage since he owes the Union monies. In addition, the Union argues that LAST's complaint is untimely.

Based upon the facts in the record, the Board finds Complainant failed to prove that the Union violated Section 89-3.5, HRS. The record does not support a finding that the American Atheists, Inc. is a bona fide religion or sect which holds conscientious objection to supporting employee organizations. The Board finds that Complainant LAST failed to demonstrate that he is a "member of and adheres to established and traditional tenets or teachings of a bona fide religion." LAST in fact stated, "I don't have a religion." Tr., pp. 37, 38.

In addition, although LAST contends that the American Atheists, Inc. is a sect, there is nothing in the record to indicate that the organization has "historically held conscientious objections to joining or financially supporting employee organizations." According to LAST, the organization leaves the question of whether to join or financially support an employee organization "up to the individual member." Tr., p. 43. The organization distributes no documents which addresses the issue of labor or union membership. Tr., p. 47. LAST also indicated that

there is nothing incompatible with being a member of the American Atheists, Inc. and being a member of a labor organization. Tr., p. 49.

Based upon the record, the Board dismissed LAST's prohibited practice charges based upon the Section 89-3.5, HRS, violation.

The charge remaining for the Board's consideration is the alleged violation of Section 89-4, HRS. Complainant argues that he is entitled to a refund of that portion of the agency fee paid by Complainant to Respondent which are expended for political or ideological purposes. Complainant submits that the specific amount should be determined by the Board.

Section 89-4, HRS, provides in pertinent part:

The employer shall deduct an amount equivalent to the regular dues from the payroll of every nonmember employee in the appropriate bargaining unit, and shall remit the amount to the exclusive representative; provided that the deduction from the payroll of every nonmember employee shall be made only for an exclusive representative which provides for a procedure for determining the amount of a refund to any employee who demands the return of any part of the deduction which represents the employees' pro rata share of expenditures made by the exclusive representative for activities of a political and ideological nature unrelated to terms and conditions of employment.

LAST was hired on August 16, 1993 and began paying fees to the Union in September of 1993. As a nonmember of the Union, LAST requested and was entitled to receive a refund of his statutory dues expended for political and ideological purposes unrelated to collective bargaining. Rodrigues indicated that if LAST's letter raised questions about fair share he would have sent

him a notice to agency fee payers and given him whatever refunds were due. Tr., pp. 103-104.

Rodrigues reviewed LAST's personal history file and determined that LAST was a nonmember of the Union. Tr., p. 61. Rodrigues indicated that he did not consider LAST's request to be a Hudson request. However, the Board finds that LAST's letter clearly states that the refund is requested pursuant to Section 89-4, HRS, and that he seeks the return of that part of the deduction which represents his pro rata share of expenditures for activities of a political and ideological nature that are unrelated to the terms and conditions of employment. The Union failed to send LAST a Notice to Agency Fee Payers and denied his request for a refund.

Moreover, although the Union asserted that LAST had not requested a refund pursuant to the 1994 Notice at the time of the hearing, the Board finds that LAST nevertheless was improperly denied his refunds for the applicable months in 1993.

Based on the evidence in the record, the Board finds that the Union committed a prohibited practice in violation of Subsection 89-13(b)(4), HRS, when it refused LAST's request for a refund on that portion of his statutory dues which were used "for activities of a political and ideological nature unrelated to terms and conditions of his employment." Subsection 89-13(b)(4), HRS, prohibits an employee organization or its designated agent from refusing to comply with any provision in Chapter 89, HRS. The Board further finds that the UPW, as a natural consequence of its actions committed a prohibited practice by denying LAST the refund

requested. Accordingly, the Board concludes that the UPW wilfully refused to refund the monies to LAST.

The Board finds based upon the record that LAST is entitled to a refund of \$4.16 for the last four months of 1993. The Board also finds it inappropriate to allow the Union the right of set-off in this matter. Instead, the Union may enforce its right to collect outstanding monies allegedly owed by LAST through a separate proceeding.

As a final matter, the UPW, by and through its counsel, filed a motion to re-open the record and permit the admission of Rodrigues' affidavit on July 1, 1994. Rodrigues' affidavit indicates that at the time of the hearing it was not known whether LAST would file a request for a refund and that he in fact did not file such a request. LAST filed an objection to the UPW's motion to re-open. In view of the Board's decision, the Board denies UPW's motion on the basis that the material contained is immaterial.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject prohibited practice complaint pursuant to Section 89-13, HRS.

The employee organization commits a prohibited practice under Section 89-13(b)(4), HRS, by violating the provisions of Chapter 89, HRS.

Pursuant to Section 89-4, HRS, a nonmember employee may receive a refund from the exclusive representative of statutory dues for amounts spent on political or ideological purposes unrelated to collective bargaining. Here, the Union wilfully

violated the statute by improperly refusing to refund the monies owed him.

ORDER

In accordance with the foregoing, the Board hereby orders and directs the following:

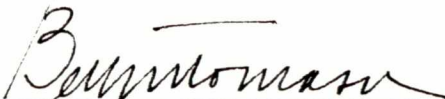
The UPW is ordered to cease and desist from violating Section 89-4, HRS, by refusing to refund portions of Complainant's statutory dues which were used for activities of a political and ideological nature unrelated to the terms and conditions of employment.

The UPW is directed to refund Complainant \$4.16 per month for the period from September through December 1993.

Respondent shall immediately post copies of this decision in conspicuous places on the bulletin boards or space provided by the employer for Union material at the worksites where the employees of bargaining unit 01 assemble and leave said copy posted for a period of sixty (60) consecutive days from the initial date of posting.

DATED: Honolulu, Hawaii, August 30, 1994.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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Sandra H. Ebesu
SANDRA H. EBESU, Board Member

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