

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-105
)	
MICHAEL L. LAST,)	DECISION NO. 373
)	
Complainant,)	FINDINGS OF FACT, CON-
)	CONCLUSIONS OF LAW AND
and)	ORDER
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 14, 1994, 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 (UPW or Union) violated Section 89-13, Hawaii Revised Statutes (HRS) and the Board's order in Decision No. 359 by failing to immediately post copies of the decision.

The Respondent filed its answer on November 18, 1994, and on December 8, 1994, filed a motion to amend its answer to prohibited practice complaint to strike the fifteenth defense on page 4 of the answer. In his affidavit attached to the motion, Respondent's counsel stated that the fifteenth defense was erroneously included as a result of a computer carryover from another case before the Board. On December 12, 1994, Complainant filed a Motion to Deny Respondent's Motion to Amend Answer to Prohibited Practice Complaint contending, inter alia, that

Respondent maliciously offered the defense with the knowledge that it would discredit the character and reputation of the Complainant because it is contained in a public record.

After reviewing the record in the case and the Board files in Case Nos. CE-10-236 and CU-10-104 (consolidated), the Board determined that the fifteenth defense at issue in this case is identical to the fifteenth defense in Respondent's answer in the other case. In addition, the matters referred to therein specifically related to the other case. Hence, the Board, in Order No. 1140, granted UPW's motion to strike the defense because it found that the UPW inadvertently included the fifteenth defense in its answer.

Thereafter, on January 12, 1995, Complainant filed a motion for review of Order No. 1140. Complainant argued that the Board should not have considered the affidavit of Herbert R. Takahashi, Esq., as Takahashi did not file the answer which the Respondent seeks to amend. Complainant also argued that the Board should not have accepted the computer carryover explanation of Respondent. Finally, Complainant argued that the Board should not have accepted Respondent's explanation where Respondent's apology was not timely nor directed to Complainant. Complainant also requested that he be given copies of relevant documents in Case Nos. CE-10-236 and CU-10-104 (consolidated).

On February 2, 1995, the Respondent filed a statement regarding Complainant's motion for review, stating that Complainant presented no new arguments or bases upon which to reconsider the Board's prior ruling. In addition, Respondent attached a copy of

correspondence to the Office of Disciplinary Counsel regarding a complaint filed by LAST.

Upon review of Complainant's arguments, the Board viewed Complainant's motion as a motion for reconsideration and held that Complainant failed to present any compelling argument or evidence to reconsider and reverse its prior ruling. Thus, the Board denied Complainant's motion in Order No. 1146, issued on February 3, 1995.

Thereafter, on February 15, 1995, the Board conducted a hearing on the merits of the case.

At the hearing on the merits, LAST orally made a motion to disqualify UPW's attorney, Herbert Takahashi, on grounds that Takahashi failed to comply with Administrative Rules Section 12-42-885 (sic), because Takahashi submitted a document that was false which damaged Complainant's reputation and credibility.

Respondent's counsel, in his reply, contended that Complainant established no grounds for disqualification under Administrative Rules Section 12-42-7. The Board found no grounds for disqualification and denied Complainant's motion to disqualify Mr. Takahashi or his firm from representing the UPW in this matter.

The parties were afforded a full opportunity to examine witnesses and present exhibits. The parties also filed post-hearing arguments. 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, as defined in Section 89-6, HRS, 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.

In Decision No. 359, dated August 30, 1994, the Board found that the UPW improperly denied LAST a refund for agency fee payers under Section 89-4, HRS. These amounts represented his pro rata share of expenditures for activities of a political and ideological nature that are unrelated to terms and conditions of employment. In its order, the Board directed the UPW to refund the monies owed to LAST. The Board also ordered the UPW to immediately post copies of the decision in conspicuous places on the bulletin boards or space provided by the Employer for Union material at worksites where 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.

The UPW refunded the money owed to LAST, in accordance with Decision No. 359, within two weeks of the posting of the order. Transcript of the hearing held on February 15, 1995 (Tr.), page (p.) 14.

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Complainant LAST has been on leave of absence from his job since the last week of October 1994 but periodically visits his

work site. During his visits he observed no posting of Decision No. 359 until the latter part of December, between December 25 and the first of the New Year. According to LAST, the copy of the decision had a handwritten notation which read, "Posted on 12/4/94, 10:00 am." Tr. p. 15.

Sometime between August 30 and the end of 1994, Complainant LAST also spoke to Mary Jane Pedro, who worked at the Naalehu and the Pahala Solid Waste Transfer Station, regarding whether the decision was posted. She indicated that she did not see a copy of the Board decision or any item from the Board referencing LAST. Tr. p. 21.

On August 1, 1994, Ann Delos Santos, formerly a UPW Business Agent, was promoted and replaced Jack Konno as UPW Hawaii Division Director. Roland Kadota is the sole business agent or field representative for the Island of Hawaii. In November 1994, Delos Santos received a request from the UPW State Director to post Decision No. 359 on all of the bulletin boards at County baseyards. Delos Santos and Kadota individually posted the decision and kept notes as to the dates and times that the decision was posted at the 45 work locations in the County of Hawaii. Based on the notes, a chart was prepared showing each work location and the date and by whom the decision was posted. Respondent's (Resp.) Exhibit (Ex.) 4; Tr. p. 29. Thereafter, the UPW State Director directed Delos Santos to check the bulletin boards after the 60th day following the initial posting by worksite to determine whether the decisions were still posted.

On or about February 6, 1995, Delos Santos personally checked the Hilo Treatment Plant and verified that the decision was still posted. She or Kadota also checked each of the other worksites between January 30, 1995, and February 14, 1995, and observed that the decisions remained posted. Resp. Ex. 5; Tr. pp. 33-34.

DISCUSSION

Complainant LAST contends that UPW failed to comply with Board Decision No. 359 and therefore violated Section 89-13, HRS, and Administrative Rules Section 12-42-50, when it did not post Decision No. 359 immediately as required by the order. LAST does not identify any specific subsection of Section 89-13, HRS, alleged to have been violated.

The UPW admits that it did not post Board Decision No. 359, dated August 30, 1994 at the 45 various worksites until the period between November 23 and November 25, 1994. The issue is whether the Union committed a prohibited practice by failing to post copies of the Board decision until that time.

The Union contends that the Board lacks jurisdiction of the instant prohibited practice complaint because Section 377-9(e), HRS, and Administrative Rules Section 12-42-51 clearly sets forth the procedure to be utilized when a party fails or neglects to obey a Board order.

Section 377-9(e), HRS, provides:

(e) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit judge of the judicial circuit wherein the person resides or usually transacts business

for the enforcement of the order and for appropriate temporary relief or restraining order, and shall certify and file in the court the record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which the order was entered, and the decision and order of the board. Upon such filing the board shall cause notice thereof to be served upon the person by mailing a copy to the person's last known post office address, and thereupon the judge shall have jurisdiction in the premises.

Administrative Rules Section 12-42-51 provides:

Section 12-42-51 Enforcement of order. If any party fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit judge of the judicial circuit wherein such party resides or usually transacts business for the enforcement of the order and for appropriate temporary relief or restraining order, and shall certify the file in the court the record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which the order was entered, and the decision and order of the board. Upon such filing the board shall cause notice thereof to be served upon the party by mailing a copy to the party's last known post office address, and thereupon the judge shall have jurisdiction in the premises.

The Union argues that under the statute and administrative rule, the Board may file appropriate court action to enforce Decision No. 359 but lacks jurisdiction to reconsider the decision and provide the additional relief LAST seeks in the instant prohibited practice complaint.

Without ruling that the Board lacks jurisdiction of a prohibited practice complaint alleging failure to comply with a Board order, the Board finds that the preferable procedure to remedy non-compliance is to petition the Board to seek judicial

enforcement of its order. In Decision No. 168, State of Hawaii Organization of Police Officers (SHOPO), 3 HPERB 111 (1982), the Board considered such a petition and, after a hearing, dismissed the petition as moot.

LAST was not represented by an attorney and during the hearing, represented that he called the Board office regarding the failure to post Decision No. 359 and was advised by a Board employee that filing a prohibited practice complaint was the appropriate way to seek relief.

Under these circumstances, the Board believes that the complaint should be considered as a petition for enforcement and will consider it as such.

The evidence in the record indicates that the UPW did not post copies of Board Decision No. 359, issued on August 30, 1994 until the period between November 22 and November 25, 1994. However, at the time of the hearing in this case, the posting requirement had been met.

The Union contends that the delay was caused by the retirement of Jack Konno as the UPW Hawaii County Division Director on July 31, 1994 and his replacement by Ann Delos Santos. According to the UPW, posting of the decision "fell through the cracks" during the transition period when Delos Santos replaced Konno.

LAST focuses on the fact that the decision was not posted "immediately" as required by the Board's order.

Because at the time of the hearing in this matter, the Union had posted Decision No. 359 as required and otherwise fully

complied with the Board's order, the Board finds that this matter is moot and dismisses the complaint. Although the Board is concerned with the delay in posting, there is no evidence in the record that LAST was prejudiced in any way by the delay in posting. Thus, seeking judicial enforcement of the Board's order would serve no useful purpose.

CONCLUSIONS OF LAW

The Board has jurisdiction over this matter pursuant to Sections 89-14 and 377-9, HRS.

Failure to obey a Board order should be addressed by filing a petition to enforce the order.

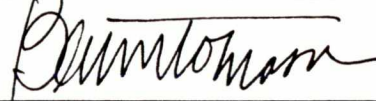
No useful purpose would be served by seeking judicial enforcement of a Board order when, after a delay in compliance, there is full compliance with the order and the complaining party suffers no prejudice.

ORDER

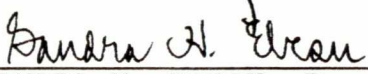
The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, February 27, 1996

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

MICHAEL L. LAST and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO; CASE NO. CU-01-105
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