

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME
LOCAL 646, AFL-CIO,

Complainant,

and

CITY AND COUNTY OF HONOLULU,
DEPARTMENT OF ENVIRONMENTAL
SERVICES, City and County of Honolulu,

Respondents.

CASE NO. CE-01-630

ORDER NO. 2416

ORDER GRANTING, IN PART, AND
DENYING, IN PART, COMPLAINANT'S
MOTION TO CONSOLIDATE MOTION
FOR INTERLOCUTORY ORDER WITH
HEARING OF THE ACTION ON THE
MERITS, FILED ON OCTOBER 18, 2006;
AND FINAL ORDER

ORDER GRANTING, IN PART, AND DENYING, IN PART,
COMPLAINANT'S MOTION TO CONSOLIDATE MOTION FOR
INTERLOCUTORY ORDER WITH HEARING OF THE ACTION
ON THE MERITS, FILED ON OCTOBER 18, 2006 AND FINAL ORDER

On September 8, 2006, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW") filed a Prohibited Practice Complaint against the CITY AND COUNTY OF HONOLULU and DEPARTMENT OF ENVIRONMENTAL SERVICES, City and County of Honolulu (collectively "City") with the Hawaii Labor Relations Board ("Board"). The UPW alleged that the City violated their duty to bargain in good faith with Complainant UPW, by reneging on a verbal Settlement Agreement resolving a grievance filed on behalf of Byron Ona Young ("Young").

On September 13, 2006, Complainant filed a Motion for Interlocutory Order with the Board seeking an order enforcing the oral Settlement Agreement because of pending foreclosure proceedings on Young's residence. The Board conducted a hearing on the motion on September 18 and 19, 2006. The Board afforded the parties full opportunity to call and cross-examine witnesses, submit exhibits and present arguments to the Board. Thereafter on October 6, 2007, the Board issued Order No. 2402 approving Amended Findings of Fact, Conclusions of Law and Order Granting Complainants' (sic) Motion for Interlocutory Order in a Prohibited Practice Case ("Interlocutory Order") submitted by the City and approved by the UPW.

On October 18, 2006, Complainant, by and through its counsel, filed a Motion to Consolidate Motion for Interlocutory Order with Hearing of the Action on the Merits with the Board. Complainant's counsel states in an attached affidavit that the

hearing on the Motion for Interlocutory Order encompassed every point and issue concerning the Prohibited Practice Complaint filed in this matter and the Board should consolidate the hearing on the merits with the hearing on the Motion for Interlocutory Order. Complainant's counsel requested that the Board issue final findings of fact, conclusions of law, and order finding that Respondents breached the oral settlement agreement that was reached between the Complainant and Respondents and embodied in the Settlement Agreement as amended on or about March 16, 2006 and issue an order requiring Respondents to honor the terms of the oral settlement agreement which were not already implemented by the Interlocutory Order. Complainant also requested that the Board award attorney's fees incurred by the Complainant and interest at the prejudgment rate of 10% per annum from March 16, 2006 until the back pay and back benefits are paid to Young.

On October 25, 2006, Respondents filed a Memorandum in Opposition to Complainants' (sic) Motion to Consolidate Motion for Interlocutory Order with Hearing of the Action on the Merits filed Herein on October 18, 2006 with the Board. The City agreed that all material issues raised by the Complainant had already been presented, heard and adjudicated by the Board but argued that the motion should be denied in its entirety as a second order would be redundant. The City also argued that Complainant's request for attorney's fees and interest should also be denied as Complainant is not entitled to such an extraordinary remedy in this case.

The Board conducted a hearing on the instant motion on November 3, 2006 where Charles K.Y. Khim, Esq., represented the UPW and Deputy Corporation Counsel Clark Hirota represented the City. Also, on November 3, 2006, Complainant filed a Memorandum in Reply to Respondents' Memorandum in Opposition to Complainants' (sic) Motion for Interlocutory Order with Hearing of the Action on the Merits Filed Herein on October 18, 2006 with the Board. Complainant requested, *inter alia*, six months of back pay at 50 hours of wages per week and back fringe benefits for Young which were not included in the Interlocutory Order but allegedly provided by the oral Settlement Agreement.

The Board afforded the parties full opportunity to present evidence and argument on the instant motion. Based on the record in this case and the arguments of counsel, the Board hereby grants, in part, and denies, in part, the instant motion and incorporates findings of fact of the Interlocutory Order, dated October 6, 2006 into this final order.

SUPPLEMENTAL FINDINGS OF FACT

1. On October 6, 2006, the Board issued an Interlocutory Order, Order No. 2402, which provided in the Scope of Relief Ordered:

The foregoing indicates that the following interlocutory relief is appropriately awarded to Complainant herein:

- 1) Effective retroactively to April 20, 2005, Complainant Young shall be reinstated to the position of Equipment Operator that he was discharged from, on April 20, 2005, in accord with the Settlement Agreement that was agreed to on March 16, 2006; Complainant Young is hereby ordered to return to work on October 16, 2006.
 - 2) In order to alleviate the irreparable damage of the loss of Complainant Young's marital dwelling, Respondents shall, by Sunday, October 15, 2006, deliver, via hand delivery, a check or other negotiable instrument payable to Complainant Young which constitutes the payment of one (1) year's worth of back pay, with tax calculations being done as if Complainant Young had been continuously employed from April 20, 2005 to the date the back pay payments are made, in order to avoid Respondents having to deduct an inordinately large amount of Federal and state taxes.
2. The Settlement Agreement reached between the parties on March 16, 2006 and memorialized as Exhibit C attached to Respondents' Memorandum in Opposition to Complainants' (sic) Motion for Interlocutory Relief Filed on September 8, 2006, filed on September 15, 2006 ("Exhibit C"), provides *inter alia*, for back pay to Young from April 20, 2005 to the date of his reinstatement to employment for 50 hours per week and back fringe benefits, including reimbursement for the portion of the health insurance premium that the City would have had to pay to the Employer Union Health Benefits Trust Fund ("EUTF") on Young's behalf; and reinstating Young's accrued vacation and sick leave credits and providing additional leave credits to the date of his reinstatement.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this Complaint pursuant to HRS §§ 89-5 and 89-13.
2. Hawaii Revised Statutes (“HRS”) § 377-9(d) made applicable to the Board in prohibited practice cases by HRS § 91-14¹ provides in part:

Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. ...

Under the foregoing provision, it is clear that a final order is contemplated after the issuance of an interlocutory order. Thus, the Board finds the City’s argument that the issuance of a final order is redundant in this case to be without merit. As the parties agree that all material issues have been presented and addressed in the hearing on Complainant’s Motion for Interlocutory Order and based upon a review of the record, the Board concludes it is appropriate to issue a final order in this matter.

3. The Interlocutory Order, Order No. 2402, dated October 6, 2006 provides for Young’s reinstatement effective retroactively to April 20, 2005 and one year’s back pay. In the instant motion, Complainant requested the remainder of the back pay due and owing from April 20, 2006 to October 16, 2006, Young’s return to work date, at 50 hours of work per week. Complainant also requested back fringe benefits, including reimbursement of payments for medical payments, back service credit and contributions to the Employees Retirement System, and back seniority.
4. Based upon a review of the record, the Board concludes that the City violated HRS § 89-13(a)(5) by making an oral agreement to settle the subject grievance by converting Young’s discharge to a written warning and

¹HRS § 91-14 provides in part:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; ...

agreeing to back pay and reinstatement, and by subsequently repudiating the Settlement Agreement.

5. In this case, the Board's intent as well as the intent of the parties was to provide as a remedy, the implementation of the wrongfully repudiated Settlement Agreement, embodied in Exhibit C. The Board hereby orders the City to implement the remedy agreed to in the Settlement Agreement, Exhibit C, less any benefits awarded by the Interlocutory Order.
6. While not raised in argument before the Board, the Board notes that recently, the Hawaii Supreme Court held in Preble v. Board of Trustees of Employees' Retirement System of the State of Hawai'i, 111 Hawai'i 498, 143 P.3d 37 (2006), that the retirement system board of trustees was not authorized to award attorney fees absent a statute or regulation providing such authority. Accordingly, notwithstanding the Board's holding in Dennis Yamaguchi, II HPERB 656 (1981), inasmuch as the Board is an administrative agency, our powers are likewise limited to those provided by statute. The Board concludes similarly to the retirement system board, the Board lack the authority to award attorneys fees and accordingly, the Board hereby denies Complainant's request for attorney's fees.
7. The Board concludes that there is no basis to award interest on any back pay award. Accordingly, the Board hereby denies Complainant's request for 10% per annum interest on any back pay awarded.

ORDER

Respondents shall implement the terms of the Settlement Agreement, Exhibit C, including inter alia, paying Young the remainder of back pay from April 20, 2005 to October 15, 2005 at 50 hours per week and back fringe benefits, including reimbursing Young for the portion of the health insurance premium that the City would have had to pay to the Employer Union Health Benefits Trust Fund ("EUTF") on Young's behalf; and reinstating Young's vacation and sick leave credits.

DATED: Honolulu, Hawaii, January 30, 2007.

HAWAII LABOR RELATIONS BOARD

Brian K. Nakamura
BRIAN K. NAKAMURA, Chair

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Emory J. Springer
EMORY J. SPRINGER, Member

Sarah R. Hirakami
SARAH R. HIRAKAMI, Member

Copies sent to:

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