STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and CHILD AND FAMILY SERVICE, Respondent.	CASE NO. 94-4(CE) ORDER NO. 1094 ORDER DENYING RESPONDENT'S MOTION TO DISMISS; NOTICE OF HEARING ON UNFAIR LABOR PRACTICE COMPLAINT

ORDER DENYING RESPONDENT'S MOTION TO DISMISS;
NOTICE OF HEARING ON UNFAIR LABOR PRACTICE COMPLAINT

On April 6, 1994, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), by and through its attorney, filed an unfair labor practice complaint with the Hawaii Labor Relations Board (Board) against Respondent CHILD AND FAMILY SERVICE (Employer).

The UPW alleged that the Employer violated the terms of the collective bargaining agreement between the Employer and the UPW by refusing to include Social Workers I through IV on the Neighbor Islands within the scope of the bargaining unit determined by the Hawaii Employment Relations Board (HERB) in Case No. 74-29.[1]

Therefore, the UPW alleged that the Employer interfered with the rights of employees guaranteed by § 377-4, Hawaii Revised

[1]In 1975, the Legislature abolished HERB, which administered collective bargaining laws in the private sector, effective January 1, 1986. The Legislature transferred the private sector functions to the Hawaii Public Employment Relations Board (HPERB), which was renamed the Hawaii Labor Relations Board (HLRB).

Statutes (HRS), and committed unfair labor practices in violation of §§ 377-7(1) [sic], 377-7(3) [sic] and 377-7(4) [sic], HRS.

On April 19, 1994, the Employer, by and through its attorney, filed a Motion to Dismiss for Lack of Jurisdiction with the Board. The Employer argued that the Board lacks jurisdiction over the instant complaint because the Employer and its employees are subject to the jurisdiction of the National Labor Relations Act (NLRA). In addition, the Employer argued that the National Labor Relations Board (NLRB) has neither declined to exercise jurisdiction nor indicated by its decisions and policies that it will not assume jurisdiction over a charitable non-profit agency whose gross revenues are in the same range as that of the Employer.

On April 25, 1994, the UPW filed a memorandum in opposition to the Employer's motion to dismiss. On May 16, 1994, the Employer filed supplemental exhibits in support of its motion. Thereafter, on June 6, 1994, the Board held a hearing on the Employer's motion to dismiss for lack of jurisdiction.

Based upon a thorough review of the record, the Board makes the following findings.

Complainant UPW is a representative as defined in § 377-1(4), HRS.

Respondent CHILD AND FAMILY SERVICE is a private, non-profit organization that provides social and welfare services within the State of Hawaii (State) and an employer as defined in § 377-1(2), HRS.

On September 11, 1974, the UPW filed a representation petition with HERB in Case No. 74-29. The UPW defined the

appropriate bargaining unit as including, among others, "[a]ll full-time and part-time professional staff (Social Workers I - IV)."

On February 4, 1975, subsequent to a hearing on the matter, HERB's Hearings Officer issued a Report and Recommended Order. On February 18, 1975, the Employer filed Exceptions to the Report and Recommended Order. Thereafter, on April 4, 1975, HERB held a hearing on the matter, and on May 1, 1975, issued a Decision and Order directing an election.

On July 2, 1975, an election was held, and on July 11, 1975, HERB issued a Certification of Results of Election certifying the UPW as the exclusive representative of Social Workers I through IV employed by the Employer.

The UPW and the Employer entered into an initial collective bargaining agreement effective January 1, 1976.

The UPW and the Employer were at all relevant times herein parties to a collective bargaining agreement for the period of March 1, 1992 through June 30, 1994.

At the time of the certification election in 1975, the Employer operated only on the island of Oahu and the Employer's annual operating budget was $500,000. The federal and state governments provided $166,000 for the Group Homes and Project program, and the Aloha United Fund and a combination of client fees, investments, private contributors, grants, and overhead reimbursements provided 70.5 percent and 29.5 percent of the remaining $235,000, respectively.

Presently, the Employer has operations on Oahu, Maui, Kauai, and in Kona and Hilo on the Island of Hawaii. The Employer currently derives revenues from contributions, fundraising efforts, contracts from the state and federal governments, contributions from the United Way, and revenues from some of its operations.

In fiscal year 1992, the Employer had gross revenues of $9,951,471, with over $1.6 million contributed by the United Way. During fiscal year 1994, the Employer received in excess of $2 million in revenues from the federal government. In recent years, the Employer has purchased goods and services from points outside the State, or from persons who purchased the goods and services from points outside of the State, in excess of $25,000 each fiscal year.

On November 4, 1992, the UPW filed an unfair labor practice charge against the Employer with the NLRB. The charge was subsequently withdrawn by the UPW.

By a Notice to Mediation Agencies dated April 27, 1994, the UPW notified the Federal Mediation and Conciliation Service of the proposed termination of the then existing collective bargaining agreement between the UPW and the Employer. Section 8(d) of the NLRA requires such notice.

By letter dated May 2, 1994, the UPW requested information in connection with a grievance from the Employer pursuant to Section 8(a)(5) of the NLRA.

With respect to the Employer's motion to dismiss for lack of jurisdiction, the Employer contends that in 1976, after the certification of election was issued herein, the NLRB changed its

approach toward non-profit charitable organizations and abolished the distinction between profit and non-profit institutions for jurisdictional purposes. Therefore, the Employer argues that the trend in NLRB cases is to assert and not decline jurisdiction over non-profit agencies such as the Employer.

The UPW, to the contrary, contends that HERB established jurisdiction in this matter because the NLRB declined jurisdiction in 1975. The UPW therefore argues that the Board, as HERB's successor, retains jurisdiction and has the power to ensure compliance with HERB's prior certification and decision.

Section 377-1(3), HRS, defines the term "employee" and provides in relevant part:

> "Employee" . . . shall not include . . . any individual subject to the jurisdiction of the Federal Railway Labor Act or the National Labor Relations Act, as amended from time to time; provided that the term "employee" includes any individual subject to the jurisdiction of the National Labor Relations Act, as amended from time to time, but over whom the National Labor Relations Board has declined to exercise jurisdiction or has indicated by its decisions and policies that it will not assume jurisdiction.

Based upon the evidence presented, the Board majority concludes that the Board has continuing jurisdiction over this matter and therefore denies the Employer's motion to dismiss.

Specifically, the Board majority finds that the Board has continuing jurisdiction over cases arising pursuant to certifications of election issued by the Board and its predecessor. In this case, HERB certified the UPW as the representative for employees of the Employer in Case No. 74-29. Therefore, until such

time as the NLRB asserts jurisdiction over the matter, the Board retains jurisdiction over the instant complaint.

ORDER

The Employer's motion to dismiss the instant unfair labor practice complaint for lack of jurisdiction is hereby denied.

YOU ARE HEREBY NOTIFIED that the Board will conduct a hearing, pursuant to § 377-9, HRS, on the instant unfair labor practice complaint on September 2, 1994 at 9:00 a.m. in the Board's hearings room, Room 203, 550 Halekauwila Street, Honolulu, Hawaii. The purpose of the hearing is to receive evidence and arguments on whether the Employer committed unfair labor practices as alleged by the UPW. The hearing may continue from day to day until completed. The parties shall submit four copies of any exhibits identified and introduced into the record to the Board. Additional copies for opposing parties shall also be provided.

All parties have the right to appear in person and to be represented by counsel or other representative.

DATED: Honolulu, Hawaii, August 16, 1994.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

DISSENTING OPINION

I respectfully dissent from the Board majority's order denying the Employer's motion to dismiss. In my view, the Board lacks jurisdiction over this matter because the NLRB has not declined to exercise jurisdiction nor indicated by its decisions and policies that it will not assume jurisdiction over this matter. In reaching this conclusion, I am persuaded by the Employer's arguments in its motion to dismiss.

In 1975, when HERB issued the certification of election herein, the NLRB generally would not assert jurisdiction over non-profit charitable organizations. See, Ming Quong Children's Center, 210 NLRB 899, 86 LRRM 1254 (1974). However, in 1976, the NLRB changed its position and abolished the distinction between profit and non-profit institutions for jurisdictional purposes. St. Aloysius Home, 224 NLRB 1344, 92 LRRM 1355 (1976). In that case, the NLRB held that "[t]he sole basis for declining or asserting jurisdiction over charitable organizations will now be identical with those which are not charitable." Id. at 1345.

In Hispanic Federation for Social Development, 284 NLRB 500, 125 LRRM 1201 (1987), the NLRB reviewed its various standards for asserting jurisdiction over charitable non-profit organizations. In that case, the NLRB established a $250,000 annual revenue standard "for all social service organizations other than those for which there exists a standard specifically applicable to the type of activity in which they are engaged." Id. at 501.

In United Way of Howard County, Inc., 287 NLRB 987, 127 LRRM 1185 (1988), the NLRB reaffirmed the principles of St. Aloysius Home and Hispanic Federation and held that a social service organization with revenues of over $1.3 million far exceeded the "minimum jurisdictional amount of $250,000." Id. at 988. The NLRB noted that the Hispanic Federation standard "is intended to be broad, and not narrowly tailored to a particular social service organization as our colleague suggests. This is so because of the diversity of social service organizations which come before us." Id.

In YMCA of the Pikes Peak Region v. NLRB, 914 F.2d 1442, 135 LRRM 2553 (10th Cir. 1990), cert. denied, 111 S.Ct. 1681, 137 LRRM 2056 (1991), the court explained the NLRB's approach to jurisdiction over charitable non-profit organizations:

> The YMCA also argues that the Board should have asserted jurisdiction only upon finding that the YMCA had a "significant" impact on interstate commerce. Citing Ming Quong Children's Center, 210 NLRB No. 125, 86 LRRM 1254 (1974), it contends that charitable organizations as a general rule do not have such an impact. This contention misstates the law. In The Rhode Island Catholic Orphan Asylum (St. Aloysius Home), 224 NLRB No. 70, 92 LRRM 1355, 1357 (1976), the Board expressly did away with the Ming Quong rule:
>
> > [W]e see no reason to establish separate standards for institutions that seek to accomplish the same end but differ only in whether they are charitable or noncharitable. The sole basis for declining or asserting jurisdiction over charitable organizations will now be identical with those which are not charitable.
>
> That non-profit institutions should be analyzed for jurisdiction in a manner

> identical to that applied to their for-profit counterparts has been consistently reaffirmed. (Citations omitted.) Furthermore, it is irrelevant for jurisdictional purposes that an enterprise is wholly charitable in its purpose, as well as in its organizational structure. (Citations omitted.)
>
> As with all organizations, charitable organizations must have a sufficient impact on interstate commerce for the Board to exercise its jurisdiction. (Citation omitted.) Because the YMCA has met the discretionary jurisdictional standards, (citation omitted), we conclude that the Board did not abuse its discretion in finding the YMCA's impact on interstate commerce to be "sufficient."

Based upon the foregoing line of cases, I am of the opinion that the evidence before the Board supports a finding that the Employer meets current NLRB jurisdictional standards for charitable non-profit organizations.

The evidence indicates that the Employer's annual revenues exceed $9 million and are derived from a number of sources and expended on a number of different programs. In addition, the evidence indicates that the Employer purchases more than $25,000 in goods and services from points outside the State and from persons who purchase goods and services from points outside the State. Therefore, the evidence supports a finding that the Employer has a sufficient impact on interstate commerce and is subject to the jurisdiction of the NLRB.

With respect to the UPW's argument that the Board has proper jurisdiction once the NLRB "has declined to exercise jurisdiction" in the past, I do not agree. Here, there is a persuasive argument that the decisions and policies of the NLRB have changed and that the NLRB would now assert jurisdiction over

this complaint. Significantly, the evidence before the Board indicates that the UPW on its own initiative has previously invoked NLRB jurisdiction.

While the UPW relies on Armbruster v. Nip, 5 Haw. App. 37, 677 P.2d 477, cert. denied, 67 Haw. 685, 744 P.2d 781 (1984), to support its argument, I find that case to be distinguishable from the instant case. In Armbruster, the appellants went to the NLRB and the NLRB declined to assert jurisdiction. Here, there is no evidence to indicate that a petition was ever filed with the NLRB or that the NLRB ever declined to assert jurisdiction.

Furthermore, although the UPW expresses concern that the Employer will argue the "employer control" doctrine of Res Care, Inc., 280 NLRB 670, 122 LRRM 1265 (1986), if brought before the NLRB, the Employer submits that it could not and would not assert that defense before the NLRB.

Based upon the foregoing, I find that the weight of the evidence indicates that the NLRB would assert jurisdiction over this matter. Therefore, I would find that the Employer and its employees are subject to the jurisdiction of the NLRA.

Section 377-1(3), HRS, clearly defines "employee" to exclude individuals "subject to the jurisdiction of the . . . National Labor Relations Act, as amended from time to time . . . ." In addition, § 377-1(2), HRS, defines an "employer", in part, as "a person who engages the services of an employee . . . ." Based upon the evidence before the Board, I would conclude that neither the Employer nor its employees are subject to Chapter 377, HRS, at this time.

I would require some form of evidence to indicate that the NLRB has declined jurisdiction over this matter prior to accepting jurisdiction over this case. Accordingly, I would grant the Employer's motion to dismiss for lack of jurisdiction without prejudice.

BERT M. TOMASU, Chairperson

Copies sent to:

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