

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-01-125
MICHAEL L. LAST,	)	ORDER NO. 1775
Complainant,	)	ORDER GRANTING RESPONDENT'S
and	)	MOTION TO DISMISS COMPLAINT
UNITED PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	
Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On May 13, 1996, Complainant MICHAEL L. LAST (LAST or Complainant) filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) with the Hawaii Labor Relations Board (Board). Complainant alleges that on May 6, 1996, he obtained a copy of an article in the November/December 1995 issue of Malama Pono, a newsletter published and distributed to its members by the UPW. LAST contends that the article is about him and contains false statements. LAST further contends that the publication of erroneous and harmful information in the article is a violation of § 3.01 of the Unit 01 collective bargaining agreement (contract) and therefore constitutes a violation of § 89-13(b)(5), Hawaii Revised Statutes (HRS).

On May 24, 1996, the UPW, by and through its counsel, filed a motion to dismiss the complaint or in the alternative, for summary judgment with the Board. UPW's motion is based on the grounds that (1) the complaint fails to state a claim for relief

and (2) the complaint is time-barred. In the alternative, the UPW contends that there are no genuine issues of fact in dispute and the UPW is entitled to judgment as a matter of law.

On June 3, 1996, Complainant filed a motion to dismiss Respondent's motion to dismiss complaint. By notice dated July 17, 1996, the Board scheduled a hearing on UPW's motion by conference call on August 13, 1996. Prior to the hearing date, Complainant orally notified the Board that he was not available on August 13, 1996 because of a scheduling conflict and the hearing was taken off the calendar. Upon a review of the record, the Board concludes that a hearing on the motion to dismiss the complaint or for summary judgment is unnecessary. Accordingly, based on a review of the record and memoranda filed by the parties, the Board makes the following finding of fact, conclusions of law and order.

#### FINDINGS OF FACT

MICHAEL L. LAST is an employee, within the meaning of § 89-2, HRS, of the County of Hawaii. LAST's position is included in Unit 01 but he is not a member of the Union.

The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, is the exclusive representative, as defined in § 89-2, HRS, of employees of the County of Hawaii who are included in Unit 01.

The Malama Pono is the UPW newsletter which is published and disseminated statewide to its members by the UPW. The November/December 1995 edition of the newsletter contained an article which reads as follows:

FORMER NEW YORKER WANTS BENEFITS

OF UNIT 1 AGREEMENT FOR FREE!

Michael Last is a limited term appointee of Mayor Yamashiro of the County of Hawaii. He works at the Hilo Wastewater Treatment Plant, Wastewater Division, Department of Public Works as an Assistant Wastewater Treatment Plant Operator and lives in Na'alehu on the Island of Hawaii.

Last filed a complaint against the UPW because the UPW refused to send the service fees he is required to pay to the UPW to an Atheists organization. The Hawaii Labor Relations Board (HLRB) conducted a hearing on the complaint. Last testified during the hearing. Some of the statements he made under oath:

1. He worked for 15 years in New York before coming to Hawaii.
2. He was familiar with the law that deals with a religious exemption for paying dues.
3. He belonged to the American Atheists Sect for 28 years.
4. He belonged to a union when he worked in New York which was voluntary.

After the hearing, the UPW found some information related to the statements made by Last under oath. The information the UPW received indicate the following:

1. Last worked in New York for about 9 years.
2. He did not know the law that deals with a religious exemption for paying dues.
3. His membership card in the American Atheists Sect indicated he became a member on July 12, 1994.
4. While Last worked in New York it was not voluntary to join the union.

The HLRB ruled that the UPW did not violate the law when it refused to send the service fees from LAST to the American Atheists because it is not a religion, because in fact, LAST testified that he does not have a religion. The HLRB's decision shows that LAST was not familiar with the law even though he testified under oath that he was. LAST's complaint contradicts itself in that he did

not want to pay dues because of a religious exemption, but he admits he does not have a religion. LAST continuously claims that UPW members extort money from him by requiring him to pay service fees. It seems clear that LAST wants to enjoy all the benefits, pay, and working conditions provided by the Unit 1 Contract, but he wants other workers to pay for it like they do in some states on the mainland.

Since LAST's first complaint, he has filed many more frivolous complaints with the HLRB. It is clear that he intends to be another (name deleted) who has made it a habit of filing frivolous complaints and law suits against the UPW.

LAST first saw the newsletter on May 6, 1996.

On January 31, 1994, LAST filed a prohibited practice complaint with the Board against the UPW (Case No. CU-01-98) which alleged that the UPW had violated §§ 89-4 and 89-3.5, 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 August 30, 1994, the Board issued Decision No. 359 in Case No. CU-01-98 which dismissed the alleged violation of § 89-3.5, HRS, and found a violation of § 89-4, HRS, by the UPW because of its failure to refund that portion of the agency fee paid by LAST to the UPW which were expended for political or ideological purposes.

#### DISCUSSION

LAST contends that the UPW violated § 3.01 of the contract by publishing the article complained about in the

Malama Pono and thereby violated § 89-13(b)(5), HRS, which provides that violation of a collective bargaining agreement is a prohibited practice.

Section 3.01 of the contract states:

The Employer and the Union agree that neither party will discriminate against any employee because of membership or non-membership or lawful activity in the Union or on the basis of race, color, creed, sex, age, disability, or lawful political activity, except for bona fide occupational or legal requirements.

The UPW contends that the instant complaint fails to state a claim for relief because a Union's right to distribute newsletters on subjects relating to employment cases such as LAST's complaint in Case No. CU-01-98 is protected "free speech" and not subject to regulation under Chapter 89, HRS. The UPW agrees that LAST had filed a prohibited practice complaint against the Union and that it had expended resources to defend against the charges. It contends that the article in question served to inform its members as to the outcome of the proceedings and is protected "speech" under § 89-3, HRS, which allows employees to engage in "concerted activities" for their "mutual aid and protection."

LAST's response to the UPW's motion to dismiss or for summary judgment offers no theory as to how the article constitutes discrimination against him except for an assertion that it contains false statements. The Board presumes his theory is that any disparaging or untrue remarks made about him in the article were because of his creed (ascribing to the beliefs of the American Atheists, Inc.) or for non-membership in the Union and, therefore, constitutes discrimination against him for either or both of these reasons.

The record discloses that LAST and the UPW have had a contentious relationship. The Malama Pono article in question was prompted by the proceedings and Board decision in Case No. CU-01-98 in which LAST alleged that the UPW violated certain provisions of Chapter 89, HRS. The article is one-sided as it focuses on the dismissal of one of the alleged violations and ignores the violation found by the Board. It also contains unfavorable comments directed toward LAST. However, given the circumstances which gave rise to the article and the adversarial relationship between the UPW and LAST, the Board concludes that, as a matter of law, the publication of the article was not discriminatory under § 3.01 of the contract. The UPW was presenting its side of a controversy in which it was involved and the article, however self-serving and slanted toward the Union's position, cannot be viewed as discrimination prohibited under the contract.

In making its determination, the Board is not passing upon the truthfulness of the statements contained in the article. If the article contains false statements as alleged by LAST, and such statements are actionable, LAST is free to take appropriate legal action.

#### CONCLUSIONS OF LAW

The Board has jurisdiction of this complaint pursuant to §§ 89-5 and 89-14, HRS.

The article in Malama Pono does not constitute discrimination prohibited by § 3.01 of the contract.

ORDER

The Board hereby dismisses the instant complaint for failure to state a claim for relief.

DATED: Honolulu, Hawaii, September 16, 1999.

HAWAII LABOR RELATIONS BOARD



\_\_\_\_\_  
BERT M. TOMASU, Chairperson



\_\_\_\_\_  
RUSSELL T. HIGA, Board Member

Copies sent to:

Michael L. Last  
Herbert R. Takahashi, Esq.  
Joyce Najita, IRC