

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-113
)	(ON REMAND)
MICHAEL L. LAST,)	
)	ORDER NO. 1865
Complainant,)	
)	ORDER DENYING RESPONDENT'S
and)	MOTION FOR ATTORNEY'S FEES
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	
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ORDER DENYING RESPONDENT'S MOTION FOR ATTORNEY'S FEES

Previously, in Order No. 1756, dated September 18, 1999, the Hawaii Labor Relations Board (Board) denied the Respondent's motion for an award of fees indicating, inter alia, that such an award was inappropriate in this case. The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) appealed the Board's order, with four similar orders, to the First Circuit Court in Civil No. 99-3543-09, United Public Workers, AFSCME, Local 646, and Michael L. Last and Hawaii Labor Relations Board, et al. The Court found insufficient findings and conclusions to indicate the basis and reasons for the decisions and orders of the Board under review and remanded the cases to the Board. The Court instructed the Board to render findings and conclusions in each case indicating the reason and basis for the agency's decision and order on the request for attorney's fees in accordance with § 91-12, HRS. Pursuant to the Court's order, the Board makes the following findings of fact, conclusions of law, and order.

On November 2, 1995, Complainant MICHAEL L. LAST (LAST) filed a prohibited practice complaint against the UPW with the Board. LAST alleged that Respondent UPW entered certain exhibits into the record during a hearing before the Board on March 8, 1994 in Case No. CU-01-98 and that these documents, consisting of a certification form and two payroll certifications, pertain to Complainant, are of a sensitive nature and their release caused great harm to his health and well-being. LAST also contends that he has evidence that the UPW obtained the documents by fraudulent means. LAST contended that the UPW violated § 89-13(b)(5), HRS, and §§ 1.07 and 1.08, of the applicable collective bargaining agreement (contract).¹

Thereafter, the UPW filed a motion to dismiss the instant complaint on grounds that the complaint was untimely and the Complainant failed to state a claim for relief. The Board conducted a hearing on the UPW's motion to dismiss on December 20, 1995.

By Order No. 1298, dated March 6, 1996, the Board granted the UPW's motion to dismiss the complaint. The Board found that LAST is an employee as defined in § 89-2, HRS, in bargaining

¹Sections 1.07 and 1.08 of the applicable contract state:

1.07 The Employer further agrees to provide the Union, upon request, but not more than twice a year, a list showing the names of the employees, their most recent dates of continuous hire, classification titles, and departments.

1.08 The Employer further agrees to provide the Union upon request, relevant personnel information needed to chart accurately an individual employee's personnel transactions.

unit 01. The Board further found that the UPW is the exclusive representative, as defined in § 89-2, HRS, of bargaining unit 01. The Board found that the complaint was filed more than one year and eight months from the date of the alleged prohibited practice by the UPW, i.e., the hearing on March 8, 1994 when the UPW introduced the allegedly improper exhibits into the record in Case No. CU-01-98. Accordingly, the Board dismissed the complaint for lack of jurisdiction because the complaint was filed beyond the Board's applicable statute of limitations. Assuming arguendo, that the Board had jurisdiction over the complaint, the Board further concluded that the complaint failed to state a claim for relief because the contract provisions in question imposed certain obligations upon the employer and not the exclusive representative. As such, the Board further concluded that LAST failed to state a claim for relief.

On April 19, 1996, the UPW filed a motion to award Respondent attorney's fees with the Board. The UPW contends that the instant complaint filed by Complainant LAST and his opposition to the UPW's motion to dismiss were patently frivolous. The UPW contends that LAST's conduct in this case forecloses access to the Board for meritorious cases and is contrary to the purpose of Chapter 89, HRS. The UPW further argues that LAST brought this complaint against the UPW for improper purpose; his complaint and opposition to the UPW's motion to dismiss was without proper basis in fact or warranted by applicable law.

In its five-page memorandum filed in support of the motion, the UPW admitted that normally litigation expenses are not recoverable by either party in proceedings before the labor board,

but argued that the reimbursement of attorney's fees and costs for frivolous litigation brought by a party is clearly authorized and appropriate. The UPW relied upon Care Manor of Farmington, 318 NLRB 330, 150 LRRM 1033 (1995); Heck's Inc., 215 NLRB 765, 88 LRRM 1049 (1974); and Tiidee Products, 194 NLRB 1234, 1236-1237, 79 LRRM 1175 (1972) as authority for its contentions. The UPW argued that LAST is responsible for bringing more than one frivolous action against the UPW and has decided to crowd the docket of the Board with meritless claims. The UPW also cites to writings on envelopes to counsel allegedly by LAST to support its contentions that LAST has an improper purpose for bringing the complaints. The UPW further argues that unless the Board takes appropriate action, LAST will continue to bring frivolous complaints against the Union so that the Union pays out more than what will be deducted from LAST's paycheck as a valid agency fee. Thus, the UPW requested fees in the amount of \$1,400.

On April 29, 1996, LAST filed a motion to dismiss Respondent's motion for fees with the Board. LAST contends that Respondent's memorandum contains allegations which are not supported by the facts or are otherwise false; that Respondent is attempting to restrict Complainant from exercising his constitutional rights; and is attempting to restrict Complainant from lawfully seeking redress against Respondent.

On May 6, 1996, the UPW filed a two-page supplemental submission in support of its motion with the Board which included copies of envelopes with disparaging comments against the Union which LAST allegedly sent to UPW's counsel. The UPW contends that

the exhibits support its contention that LAST filed a frivolous complaint against the UPW for improper purpose.

On May 28, 1996, the Board held a hearing on UPW's motion to award Respondent attorney's fees by conference call. All parties were afforded a full and fair opportunity to present evidence and argument.

After considering the record before the Board and the authorities cited by the UPW, the Board denies the UPW's motion for attorney's fees. The Board is not persuaded by the cases cited by the UPW that the Union is entitled to fees for successfully defending a complaint which it claims to be frivolous.

In Ariyoshi v. HPERB, 5 Haw.App. 533, 704 P.2d 917 (1985) (Ariyoshi), the Court recognized that the Board has the authority to award fees in the appropriate case. The Court stated at p. 544:

This jurisdiction follows the rule that attorney's fees are not recoverable unless authorized by statute, rule of court, stipulation, agreement, or Hawaiian precedent. THC Financial Corp. v. LR&I Development One, 65 Haw. 477, 653 P.2d 789 (1982); Cuerva & Associated v. Wong, 1 Haw.App. 194, 199-201, 616 P.2d 1017, 1021 (1980). An exception has been carved from this rule, however, in cases where a union member, in an action against his union, has "rendered a substantial service to his union as an institution and to all of its members." Salvador v. Popaa, 56 Haw. 111, 112-13, 530 P.2d 7, 9-10 (1974) (footnote omitted); see also, 9 A.L.R.3d 1045 (1966). Cf., 2 S. Speiser, Attorneys' Fees §§ 14:46-47 (1973). . . .

The Hawaii appellate courts thus recognize that attorney's fees are not recoverable unless a statute, rule of court, stipulation, agreement, or Hawaiian precedent provides for

such recovery. There is no specific statute,² rule of court, stipulation, or agreement which provides that the Board may award attorney's fees. In Salvador v. Popaa, supra, the Hawaii Supreme Court found an exception to the general rule where a union member in an action against his union renders substantial service to the union and its members.

Previously, in Dennis Yamaguchi, 2 HPERB 656 (1981) (Yamaguchi), the Board awarded attorney's fees to the employee who brought a complaint against the union for breach of its duty of fair representation and the employer in the exercise of its remedial authority to undo the effects of egregious prohibited

²While § 607-14.5, HRS, provides that attorney's fees can be awarded to a party for defending an allegedly frivolous claim, those provisions only apply to the courts in civil actions. Section 607-14.5, HRS, provides:

Attorneys' fees in civil actions. (a) In any civil action in this State where a party seeks money damages or injunctive relief, or both, against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party, and enter as part of its order, for which execution may issue, a reasonable sum for attorneys' fees, in an amount to be determined by the court upon a specific finding that the party's claim or defense was frivolous.

(b) In determining the award of attorneys' fees and the amounts to be awarded, the court must find in writing that all claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action.

Since the foregoing provisions are not applicable to administrative agencies, the Board concludes that it lacks the statutory authority to award attorney's fees to a respondent for successfully defending a prohibited practice complaint alleged to be frivolous.

practices where the Board found the employer's and union's violations to be unusually flagrant. The Board stated:

The Board recognizes that an award of attorney's fees and litigation costs is an extraordinary remedy. Nevertheless, as remedies must be fashioned on a case-by-case basis, it believes that the serious and unusual nature of the violations in this case warrants the extraordinary remedy and this award *should not* be construed as a precedent for similar claims in the future. The Board's policy with respect to retrospective attorney's fees and litigation costs is to deny such awards unless the violations are so flagrant or unusual that traditional remedies prove to be inadequate. Furthermore, there must be a direct nexus between the violation and such awards.

Id., at p. 679.

Thereafter, in Jo desMarets, 5 HLRB 620 (1996), the Board found the employer unlawfully interfered with the employees' right to file grievances by retaliating and discriminating against her and further violated the contractual provisions setting forth the grievance procedures. The employee had also filed a complaint against her employer and her union for breach of fair representation. The Board again noted that an award of fees was an extraordinary remedy and awarded the employee her attorney's fees because of the flagrant violations committed.

It is clear from the two cases where the Board has awarded attorney's fees, that the Board has maintained its policy to render such awards in very limited circumstances where it has found unusually flagrant violations of the collective bargaining law where traditional remedies would prove inadequate. In each of these cases, an individual employee brought charges against the union and the employer and successfully prevailed in the claims.

There is no Board precedent for an award of fees against a pro se complainant where the complaint was dismissed.

The Union, nevertheless, argues that the Board may award fees in this case by adopting the bad faith exception to the general American rule that litigants bear their attorney's fees and litigation expenses recognized by the National Labor Relations Board (NLRB) in Tiidee Products, Inc., 194 NLRB 1234, 79 LRRM 1175 (1972) (Tiidee). While the Intermediate Appellate Court clearly stated in Ariyoshi, supra, that only Hawaiian precedent should be construed as providing authority to award fees, arguably, the Board has previously relied upon the NLRB's interpretation of federal labor laws in applying the provisions of Chapter 89, HRS, where the governing statutes are similar. After reviewing the cases cited by the Union, however, the Board does not find the cases persuasive in supporting an award of fees in this case.

In Tiidee, supra, the NLRB ordered an employer who had unlawfully refused to bargain with the union to reimburse the NLRB and the union for their expenses incurred in investigating and prosecuting the case at the Board and court levels to discourage future frivolous litigation. The U.S. Court of Appeals which remanded the case to the NLRB specifically found that the employer's refusal to bargain was a clear and flagrant violation of the law and that its objections to the representation election were patently frivolous. IUE v. NLRB, 73 LRRM 2870 (1970). The Court of Appeals noted that NLRB's previous purely prospective bargaining order actually rewarded the employer's refusal to bargain during the period following the union's organizing of the company.

Further, the Court suggested that the NLRB's posture encouraged frivolous litigation before it and in the reviewing courts.

In Heck's, Inc., 215 NLRB 765, 88 LRRM 1049 (1974), the NLRB clarified its policy with respect to granting extraordinary remedies and stated that the NLRB's intent to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in "clearly aggravated and pervasive misconduct" or in the "flagrant repetition of conduct previously found unlawful" where the defenses are "debatable" rather than "frivolous."

In the cases cited by the UPW, the NLRB awarded investigation and litigation fees to itself and to the union as part of a make-whole remedy where the respondent employers asserted a frivolous defense to the NLRB's unfair labor practice charges. According to the National Labor Relations Act, the NLRB staff investigates and prosecutes the unfair labor practice cases before the NLRB. Thus understandably, the courts of appeals found that a respondent employer with a frivolous defense to unfair labor practice charges in an organizing setting which requires the persistent prosecution by the NLRB unnecessarily clogs the NLRB dockets and resources as well as the courts. In addition, the court in Tiidee, supra, found that the respondent employer profited by the delays caused by the imposition of its frivolous defense.³

³In Tiidee, supra, the NLRB discussed the appellate court's concern with the adequacy of the conventional bargaining order under the circumstances of the case. The Board stated:

The court noted that the bargaining order herein was 'counterproductive' and actually rewarded Respondent's refusal to bargain during the critical period following the

These cases are not similar to the instant case where fees are sought by a union against its pro se bargaining unit member for filing prohibited practice complaints alleged to be frivolous. In Farrens Tree Surgeons, 264 NLRB No. 90, 111 LRRM 1305 (1982), a case more similar to the instant case, the NLRB found that the dismissal of an unfair labor practice complaint did not entitle a respondent to an award of attorney's fees. The NLRB found that the case did not constitute frivolous litigation.

Based on the foregoing, the Board is not persuaded that the federal cases cited by the Union create the authority for the Board to award fees in this case. Moreover, the egregious circumstances considered by the courts of appeals and the NLRB in the prejudice suffered by the employees during the pendency of the NLRB proceedings where the employer's frivolous defenses were asserted are absent in this case.

Assuming arguendo, the Board has the authority to award attorney's fees to respondents for successfully defending claims filed against them, the Board finds that the UPW failed to prove that the instant complaint was frivolous. In Coll v. McCarthy,

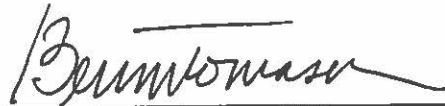
Union's certification as the collective-bargaining representative. Thus, the court stated during the delay in bargaining Respondent enjoyed lower labor expenses and probably will continue to do so in the future because the Union, probably having lost the allegiance of a majority of the unit employees will not be able to bargain effectively. The court suggested that the Board consider other remedies to 'prevent the employer from having a free ride during the period of litigation.' Finally, the court concluded that the bargaining order encourages frivolous litigation before the Board and the courts.

72 Haw. 20, 804 P.2d 881 (1991), the court defined a "frivolous" claim or defense justifying an award of fees as being manifestly and palpably without merit so as to indicate bad faith on the pleader's part. Here, LAST, appears pro se, and filed an untimely complaint alleging specific contract violations by the access to information he believed was confidential with the Board. The Board finds that the complaint was not totally unsupported by the facts and the law. Thus, the Board would not find LAST's complaint to be frivolous. Moreover, awarding fees in a case of this nature would have a chilling effect on employee complainants who, without counsel, choose to bring complaints against the union or employer before the Board under Chapter 89 and 377, HRS.

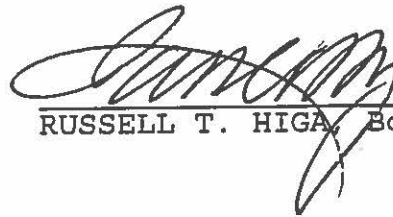
Based on the foregoing, the Board hereby denies Respondent's motion for an award of attorney's fees.

DATED: Honolulu, Hawaii, May 16, 2000.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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