

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
 UNITED PUBLIC WORKERS, AFSCME,)
 LOCAL 646, AFL-CIO,)
 Complainant,)
 and)
 LINDA LINGLE, Mayor, County of Maui;)
 STEPHEN YAMASHIRO, Mayor, County)
 of Hawaii; MARYANNE KUSAKA, Mayor,)
 County of Kauai; JEREMY HARRIS, Mayor,)
 City and County of Honolulu; RAYMOND)
 KOKUBUN, Director, Department of)
 Personnel, County of Maui; MICHAEL BEN,)
 Director, Department of Personnel, County of)
 Hawaii; ALLAN TANIGAWA, Director,)
 Department of Personnel, County of Kauai and)
 SANDRA EBESU, Director, Department of)
 Personnel, City and County of Honolulu,)
 Respondents.)

CASE NOS.: CE-01-410a
 CE-10-410b

ORDER NO. 1934

ORDER DENYING UPW'S MOTION TO ENFORCE BOARD ORDER AND FOR ASSESSMENT OF FEES AND COSTS

ORDER DENYING UPW'S MOTION TO ENFORCE BOARD ORDER AND FOR ASSESSMENT OF FEES AND COSTS

On August 16, 2000, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Motion to Enforce Order No. 1894 issued by the Hawaii Labor Relations Board (Board) on June 28, 2000, and for assessment of fees and costs against Respondents for failing to comply in a timely manner with the order in the above-captioned matter.

Responses opposing UPW's motion were filed by and through attorneys for Respondents as follows: Deputy Corporation Counsel Paul T. Tsukiyama for the City and County of Honolulu, JEREMY HARRIS, Mayor and SANDRA EBESU, Director of Personnel on August 25, 2000; Deputy Corporation Counsel John D. Kim for the County of Maui, LINDA LINGLE, Mayor and RAYMOND KOKUBUN, Director of Personnel on August 28, 2000; Assistant Corporation Counsel Ted H.S. Hong for the County of Hawaii, STEPHEN YAMASHIRO, Mayor and MICHAEL BEN, Director of Personnel on August 28, 2000, and Deputy County Attorney Margaret Hanson for the County of Kauai, MARYANNE KUSAKA, Mayor and ALLAN TANIGAWA, Director of Personnel on August 29, 2000.

On September 6, 2000, the Board held a hearing on the instant motion. All parties were afforded an opportunity to submit evidence and argument to the Board.

Before the close of the hearing, Respondents were instructed to supplement their opposing memoranda by the end of business on Friday, September 8, 2000, with a report to the Board and the UPW as to the steps taken to comply with Order No. 1894, the identification of, and dates certain when compliance regarding derogatory material pertaining to Unit 01 and 10 employees, could reasonably be accomplished. UPW was instructed to supplement its motion with information about the attorney's fees and costs incurred to bring the instant motion before the Board.

On September 7, 2000, UPW filed the Affidavit of Herbert Takahashi in support of the motion for assessment of fees and cost.

On September 8, 2000, Respondents filed with the Board: the Affidavit of Robin Chun-Carmichael, Division Chief, Labor Relations and Training Division, Deputy of Human Resources, City and County of Honolulu; the Affidavit of Ted H. S. Hong and Exhibit "A"; the Affidavit of John D. Kim and Exhibits "A-J"; and the Affidavit of Margaret Hanson.

After full consideration of the evidence and arguments on the motion, the Board makes the following Findings of Fact and Order.

FINDINGS OF FACT

1. On June 28, 2000, the Board issued Order No. 1894 to the UPW through its attorney of record, Herbert K. Takahashi, Esq. and to the Respondents through their attorneys of record, Maui County Corporation Counsel James Takayesu, Hawaii County Assistant Corporation Counsel Ted H.S. Hong, Kauai County Deputy County Attorney Margaret Hanson, and City and County of Honolulu Deputy Corporation Counsel Paul T. Tsukiyama.
2. The UPW is the exclusive representative of public employees included in bargaining Units 01 and 10, as defined in Hawaii Revised Statutes (HRS) § 89-2.
3. Respondent JEREMY HARRIS, Mayor, City and County of Honolulu, is the public employer, as defined in HRS § 89-2, of the employees of the City and County of Honolulu (City) and SANDRA EBESU, Director of Personnel, is his representative. As of December 31, 1999, the City has approximately 1,969 employees in bargaining Unit 01 and 187 employees in bargaining Unit 10.¹
4. Respondent STEPHEN YAMASHIRO, Mayor, County of Hawaii, is the public employer, as defined in HRS § 89-2, of the employees of the County of Hawaii

¹The Board takes administrative notice of the number of employees in bargaining units which is contained in HLRB Informational Bulletin No. 37 dated February 23, 2000.

(Hawaii) and MICHAEL BEN, Director of Personnel, is his representative. As of December 31, 1999, Hawaii has approximately 439 employees in bargaining Unit 01, and none in bargaining Unit 10.

5. Respondent LINDA LINGLE, Mayor, County of Maui, is the public employer, as defined in HRS § 89-2, of the employees of the County of Maui (Maui) and RAYMOND KOKUBUN, is his representative. As of December 31, 1999, Maui has approximately 469 employees in bargaining Unit 01, and none in bargaining Unit 10.
6. Respondents MARYANNE KUSAKA, Mayor, County of Kauai, is the public employer, as defined in HRS § 89-2, of the employees of the County of Kauai (Kauai), and ALLAN TANIGAWA, Director of Personnel, is his representative. As of December 31, 1999, Kauai has approximately 321 employees in bargaining Unit 01, and none in bargaining Unit 10.
7. Order No. 1894 directed the Respondents:
 - (1) To cease and desist from their failure to provide the UPW the information requested on July 10, 1998 and September 3, 1998 in a timely manner as required by § 15.09² of the Units 01 and 10 collective bargaining agreements.
 - (2) To immediately post copies of this order in conspicuous places at its work sites where employees of bargaining Units 01 and 10 assemble and leave such copies posted for a period of 60 consecutive days from the initial date of posting.
 - (3) To notify the Board within 30 days of the receipt of this order of the steps taken to comply herewith.
8. No appeal of the Board's Order No. 1894 was filed by the Respondents within the thirty-day period for judicial review as provided under HRS § 91-14.
9. After the period for an appeal had passed, UPW sent Respondents a letter dated August 7, 2000, demanding compliance with the Order No. 1894 within seven days or the UPW would file an enforcement action with the Board.
10. By and through counsel, Respondents asked for more time, but UPW's response came in the form of this instant motion to enforce, filed on August 16, 2000.

²Section 15.09 of the current Unit 01 collective bargaining agreement (CBA) requires the Employer to photocopy and give the copied information to a grieving party within seven days versus the five days required under the past agreement reviewed by the Board at the hearing.

County of Maui Compliance

11. Except for a July 20, 2000 notice to the Board from the County of Maui Deputy Corporation Counsel John D. Kim, that on July 13, 2000 RAYMOND KOKUBUN requested the county departments of Public Works and Waste Management, Water Supply, Parks and Recreation, Housing and Human Concerns, Police and Fire, to post Order No. 1894, the Board received no other notice from Respondents of the steps taken to comply with Order No. 1894 until September 8, 2000 after Respondents' counsel were so instructed by the Board to submit additional information at the hearing on September 6, 2000.
12. Based on a review of the supplemental submissions made by Respondents, the Board finds that while every effort has now been made to substantially comply with the posting requirements of Board Order No. 1894, no "immediate" action was taken initially by Respondents except the County of Maui.
13. Based on a review of the Affidavit of Deputy Corporation Counsel John Kim, dated September 8, 2000, the County of Maui has substantially complied with Order No. 1894. What remains is for the County of Maui to make grievance files that may or may not contain derogatory material of any Unit 01 employees available for review upon appointment by UPW as provided under § 17.03 of the July 1, 1995-June 30, 1999 Unit 01 CBA.

City and County of Honolulu Compliance

14. The City discussed the issue of an appeal in mid-July, but admitted no compliance report was sent to the Board due to lack of communication between the Office of Corporation Counsel and the Department of Human Resources over who would draft the report.
15. By Affidavit of Paul T. Tsukiyama, dated August 25, 2000, he admits that "an apparent lack of communication" between him and the Department of Human Resources "caused a failure by the City to notify this Board within 30 days of a receipt of the Order of the steps taken to comply."
16. Posting of Order No. 1894 by the City began as of August 25, 2000, and on September 5, 6, and 7, 2000 in the departments employing Unit 01 and Unit 10 employees.
17. The City departments are at various stages of reviewing grievance and other relevant files for derogatory material of Unit 01 employees. Reviews completed by the Customer Services Department, Department of Transportation Services, Honolulu Fire Department, Honolulu Police Department, Department of the Medical Examiner have located no derogatory material. The Department of Enterprise Services is undergoing a review and will provide copies of any derogatory material found. The Department of Maintenance is undergoing a review and will provide copies of

derogatory material based on advice from the Corporation Counsel as to which documents are subject to the Order. The Board of Water Supply will resume a review of grievance and other relevant files upon advice from the Corporation Counsel and the Department of Human Resources to clarify the scope of the order. The Department of Human Resources review of the extensive grievance files is ongoing.

18. Given the number of Unit 01 employees at the City, the Board finds it unreasonable to expect completion of the derogatory material review process to be accomplished within the seven-day period provided in § 15.09 of the Unit 01 CBA.
19. Based on a review of the City's Affidavit of Robin Chun-Carmichael dated September 8, 2000, the City has substantially complied with Order No. 1894.

County of Kauai Compliance

20. Posting of Order No. 1894 by Kauai County did not begin until after September 6, 2000. This is due to the oversight of Deputy County Attorney Margaret Hanson whose affidavit, dated September 8, 2000, states that Order No. 1894 was not forwarded to the Department of Personnel and all other departments with Unit 01 employees for immediate posting until September 6, 2000.
21. Kauai County has completed the processing of reviewing grievance and other relevant files for derogatory material and forwarded these files to UPW on September 6, 2000.
22. Based on a review of the Affidavit of Margaret Hanson, dated September 8, 2000, Kauai County has substantially complied with Board Order No. 1894.

County of Hawaii

23. Posting of Order No. 1894 by Hawaii County did not begin until the week before, or on or about, September 7, 2000. Assistant Corporation Counsel Ted H.S. Hong admits, the "failure to post the Board's Order No. 1894, was due to a misunderstanding concerning duplication and distribution of the Order for which your affiant is responsible."
24. On September 7, 2000, Hawaii County compiled a list in writing to the UPW of the files on hand on derogatory material and available to review upon appointment.
25. Based on a review of the Affidavit of Ted Hong, dated September 8, 2000 and Exhibit A, Hawaii County has substantially complied with Board Order No. 1894.

ASSESSMENT OF FEES AND COSTS

26. UPW's counsel Herbert Takahashi, Esq. has incurred fees of \$1,900.00 by spending 10 hours at a rate of \$190.00 per hour to bring this motion before the Board, plus costs of \$151.25, totaling \$2051.25.
27. Respondents could not meet UPW's demand for information for a number of reasons including the short time period, lack of staff to access and review records, and lack of clarity about the process.
28. In opposing UPW's motion to enforce, Respondents argued against the assessment of fees and costs because their need for more time did not rise to the level of flagrant conduct.
29. The Board finds that once the decision not to appeal was made by the City, and the Counties of Hawaii and Kauai, Board Order No. 1894 was given very low, if any, priority until UPW sent its demand letter of August 7, 2000.
30. The untimely compliance was due in part to the lack of communication between Respondents' counsel and their clients, except for Maui County, but was not deliberate, egregious, or flagrant.

DISCUSSION

The UPW moves this Board to petition the circuit court for enforcement as provided by statute (HRS §§ 89-14, 377-9(e)) and rule (Hawaii Administrative Rules (HAR) § 12-42-51), alleging that Respondents have failed to comply with Order No. 1894. HAR § 12-42-51 provides in part:

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 . . . 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, 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.

UPW contends that although the statute and rule use the word "may", the filing for a court enforcement, is mandatory, not permissive. The Board disagrees.

Where the statute and rule use the words "shall" and "may" in close juxtaposition, their ordinary meaning applies. Pele Defense Fund v. Puna Geothermal Venture, 8 Haw. App. 203, 212, 797 P.2d 69 (1990). (Giving the word "may" its ordinary meaning, the appeals court concluded that the receipt of additional evidence after the close of the second hearing was discretionary with

the Planning Commission.) Similarly, we conclude that petitioning circuit court for an enforcement order is discretionary, not mandatory.

The UPW argues that absent an appeal for judicial review as set forth in HRS § 91-14, Order No. 1894 became final and binding thirty days after receipt of the decision issued on June 28, 2000. The Board agrees.

In seeking an assessment of fees and costs of \$2051.25 against Respondents, UPW argues that the relevant time period for determining whether the noncompliance of Respondents was flagrant should go as far back as 1998, when information was first requested, or in the alternative, to May 5, 2000 when the Board issued Order No. 1858 ordering UPW to draft its proposed order in this case. The Board disagrees.

For purposes of determining whether petitioning the circuit court for an enforcement order is warranted, the relevant time period begins upon issuance of Order No. 1894 on June 28, 2000.

Upon receipt of the order, Respondents made a determination not to appeal. This Board is of the opinion that the decision not to appeal was a mistake. On its face, Order No. 1894 appears to contradict an earlier ruling by the predecessor board that an arbitrator's award against the Public Employer, State of Hawaii did not apply to Respondents. Consequently, when Order No. 1894 was issued, Respondents understandably were unsure about how to proceed and the extent to which files that may or may not contain derogatory material needed to be gathered and turned over to the UPW.

Upon issuance of Order No. 1894, Respondents had a few options besides seeking judicial review. With a new Board in place, Respondents had the option of filing a motion for reconsideration or a motion for clarification of the Board's order. Doing nothing, however, was not, is not, and should never be, an option.

Since filing an appeal would not automatically stay the Board's order, and absent a motion for reconsideration or clarification before the Board, Respondents were obligated to take immediate action to comply. At the very least, Respondents should have posted the order and reported to the Board as to what was being done to comply within the 30-day period.

The record shows that only the County of Maui acted responsibly to comply with the order. When Respondents received UPW's August 7, 2000 demand for information and files, they made reasonable requests for more time. Instead, Respondents were served with the instant motion.

Since no report to the Board was made within the 30-day period, it would have been appropriate and proper to support the memoranda opposing UPW's motion to enforce with information as to the steps taken to comply. This was not done until the Board on September 6, 2000 instructed Respondents' counsel to do so by September 8, 2000.

Under the circumstances, this Board forgives, the low priority given, and lack of communication between Respondents and their counsel about Order No. 1894. But Respondents

and their counsel are on notice that this is the first and last time. In the future, the Board will not accept excuses that counsel failed to communicate with their clients. Indeed, the Board will not hesitate to find it necessary and proper to impose sanctions on counsel and Respondents for failing to take timely action to comply with a Board's order.

Based on the supplemental affidavits submitted on September 8, 2000, the Board is satisfied that Respondents have made a good faith effort to comply with Order No. 1894. Therefore, it would be unproductive and an inefficient use of the circuit court's time for this Board to petition for enforcement. See, Michael L. Last, 5 HLRB 564 (1996).

CONCLUSIONS OF LAW

1. HRS §89-5(b), authorizes the Hawaii Labor Relations Board to:
 - * * *
 - (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;
 - (5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers,
 - * * *
 - (9) Adopt rules relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91.
2. HRS § 89-14 provides that: 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; . . .
3. The Board has jurisdiction over UPW's Motion to Enforce as provided under HRS § 377-9(e) and HAR §12-42-51.
4. Petitioning the circuit court for an enforcement order is discretionary, not mandatory.
5. As of September 8, 2000, the Board concludes that Respondents have made substantial compliance to give effect to Order No. 1894.


ORDER

The UPW's motion to enforce Board order and for assessment of fees and costs is hereby denied.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and LINDA LINGLE, Mayor,
County of Maui; et al.
CASE NOS.: CE-01-410a, CE-10-410b
ORDER NO. 1934
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ASSESSMENT OF FEES AND COSTS

DATED: Honolulu, Hawaii September 26, 2000.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chairperson


CHESTER C. KUNITAKE, Board Member


KATHLEEN RACUYA-MARKRICH, Board Member

Copies sent to:

Herbert R. Takahashi, Esq.
John D. Kim, Deputy Corporation Counsel
Ted H.S. Hong, Assistant Corporation Counsel
Margaret Hanson, Deputy County Attorney
Paul T. Tsukiyama, Deputy Corporation Counsel
Joyce Najita, IRC