STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and DR. LAWRENCE MIIKE, Director, Department of Health, State of Hawaii, Respondents.	CASE NO. CE-10-267 ORDER NO. 1947 ORDER GRANTING, IN PART, DENYING, IN PART, UPW'S MOTION TO ENFORCE BOARD DECISION NO. 408

ORDER GRANTING, IN PART, DENYING, IN PART, UPW'S MOTION TO ENFORCE BOARD DECISION NO. 408

On July 13, 2000, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a motion to enforce Decision No. 408 issued by the Hawaii Labor Relations Board (Board) on May 5, 2000. In support of its motion, the UPW submitted supplemental declarations of Herbert Takahashi, Esq., Merlene Akau, Roderick Casino, Evangeline Losbog, Shirley Layugan, Patricia Santos, Bryan Kawasaki, Angeles Ipalari-Tan and Kirin Tan.

Respondents BENJAMIN J. CAYETANO, Governor, State of Hawaii and DR. LAWRENCE MIIKE, Director, Department of Health, State of Hawaii (collectively Employer or Respondents) opposed UPW's motion on July 21, 2000.[1] On August 7, 2000,

[1]In its memorandum in opposition, Respondents took the position that: posting of the Board's Decision was completed by June 7, 2000; the affected employees suffered no loss of compensation, benefits or seniority; there have been no changes in the wages, hours of work and other terms and conditions of employment for any public sector employees in the pharmacy since the date of the Board's order; the information requested by the Union is no longer relevant, but was nevertheless forwarded to the UPW and all that remained was to inform the Board of the actions taken to comply, which Respondents' memorandum "presumably does." Respondents disputed any Board order to restore para medical assistants (PMAs) to their positions at the Hawaii State Hospital pharmacy, or return the PMAs to Bargaining Unit 10 or negotiate the current contract for pharmacy operations.

in support of its memorandum in opposition, Respondents submitted the supplemental declaration of William Elliott, Associate Administrator of Administrative and Support Services, Hawaii State Hospital, Department of Health, State of Hawaii, with general personnel information and employment records information on Angeles L. Ipalari-Tan and Bryan Kawasaki.

On August 9, 2000 the Board held a hearing on the instant motion. All parties were afforded a full and fair opportunity to submit evidence and argument to the Board. The Board also held two settlement conferences with the parties on September 13, 2000 and September 27, 2000, in an attempt to afford the parties an opportunity to resolve issues of compliance in particular with the Board's order "to make whole all affected PMA's for their loss of compensation, benefits and seniority."

On September 29, 2000, Respondents filed a final Compliance Report, pursuant to the Board's instruction at the last settlement conference on September 27, 2000.

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. The UPW is the exclusive representative of public employees included in Bargaining Unit 10, as defined in Hawaii Revised Statutes (HRS) § 89-2.

2. BENJAMIN J. CAYETANO, Governor, State of Hawaii, is the Public Employer and DR. LAWRENCE MIIKE, Director of Health, a designated representative, as defined in HRS § 89-2.

3. On May 5, 2000, the Board issued Decision No. 408, ordering Respondents as follows:

    (1) To make whole all affected PMA's for their loss of compensation, benefits and seniority;

    (2) To cease and desist from making unilateral changes in wages, hours of work, and other terms and conditions of employment at the pharmacy of the Hawaii State Hospital;

    (3) To cease and desist from refusing to provide information to the Union needed for the purposes for negotiations;

(4) To post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit assemble within 30 days hereof, and leaves such copies posted for a period of 60 consecutive days from the initial date of posting; and

(5) To notify the Board of the steps taken by Respondents to comply with this order within 30 days of receipt of this order.

4. Based on a review of Respondents' final compliance report, information gleaned at the motion hearing and the settlement conferences held, and supplemental declarations submitted by the parties, the Board finds the Respondents have not made every effort to substantially comply with item (1) of the Board's orders in Decision No. 408. Respondents should have begun compliance by first calculating the loss in compensation, benefits and seniority for each affected PMA from the date an affected PMA was terminated (or August 15, 1995, when Respondents unilaterally transferred and eliminated the PMA positions from the Hawaii State Hospital pharmacy, whichever is sooner) to September 30, 1998.[2]

5. Contrary to UPW's assertion that the affected PMAs are entitled to having their positions restored, or returned to Bargaining Unit 10, the make whole provision contained in item (1) of the Board's order in Decision No. 408, does not imply nor require restoring the affected PMAs to their positions at the Hawaii State Hospital pharmacy or returning them to Bargaining Unit 10.

6. Respondents have not substantially complied with the make whole provision of item (1) of the Board's order in Decision No. 408, regarding the loss in compensation, benefits and seniority, if any, to which Patricia Santos, Shirley Layugan and Evangeline Losbog may be entitled, for performing nurse duties in Unit E at the Hawaii State Hospital and moving to 24-hour shift work, performed 7 days a week, from an 8-hour, Monday-to-Friday work schedule.

7. Respondents have not substantially complied with the make whole provision of item (1) of the Board's order in Decision No. 408, regarding the loss in

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[2]Decision No. 408 finds that, "The pharmacy at the Hawaii State Hospital after August 15, 1995 continued to be operated by IPC at the same time, in the same location, providing the same services previously provided by civil servants. The IPC contract was renewed on a year-to-year basis until September 30, 1998 when it expired." This Board finds September 30, 1998 to be a reasonable and equitable cut-off date in making whole the affected PMAs since the dispute arose over the Respondents' actions to privatize the pharmacy services by contracting with IPC. Hence negotiating the effects on the PMAs impacted should coincide with the date the IPC contract expired.

compensation, benefits and seniority, if any, to which: Roderick Casino may be entitled for being demoted from a PMA III to a PMA II and doing work as a transporter at the Hawaii State Hospital; Bryan Kawasaki may be entitled for declining placement outside his classification as a PMA leading to his termination; and Angeles Ipalari-Tan may be entitled for declining placement in nursing, leading to her termination.

8. Based on a review of Respondent's final compliance report and the supplemental declaration of Kirin Tan, the Board finds that as an emergency hire Kirin Tan was not included in Bargaining Unit 10 and therefore, is not an "affected PMA" within the meaning of item (1) of the Board's order in Decision No. 408 entitled to the make whole provisions including loss in compensation, benefits and seniority.

9. Based on a review of Respondents' final compliance report, the Board is satisfied that Derek Cabral was absent from work due to a work-related injury from August 8, 1988 until his termination on December 10, 1999; and is not an "affected PMA" within the meaning of item (1) of the Board's order in Decision No. 408.

10. Based on a review of Respondents' final compliance report and information gleaned at the motion hearing and settlement conferences held, the Board finds that Respondents have made every effort to substantially comply with items (2), (3), (4), and 5 of the Board's order in Decision No. 408.

11. Decision No. 408, item (2), does not impose on Respondents a duty to bargain over any new contracts for pharmacy operations at the Hawaii State Hospital. Indeed, negotiating any new contract for pharmacy operations at the Hawaii State Hospital is inconsistent with Act 230, 1998 SLH, discussed by the Board within Decision No. 408.

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 § 377-9; ...."

3. The Board has jurisdiction over UPW's Motion to Enforce as provided under HRS § 377-9(e) and Hawaii Administrative Rules (HAR) §12-42-51.

4. Petitioning the circuit court for an enforcement order is discretionary, not mandatory.

5. The Board concludes that Respondents have made substantial compliance to give effect to items (2), (3), (4), and (5) contained in Decision No. 408.

6. The Board concludes that Respondents have not substantially complied with item (1) contained in Decision No. 408, to the extent that calculations on loss in compensation, benefits and seniority from the last date worked as PMAs at the Hawaii State Hospital to September 30, 1998 to which Patricia Santos, Shirley Layugan, Evangeline Losbog, Roderick Casino, Bryan Kawasaki and Angeles Ipalari-Tan may be entitled have not been made and negotiated with the UPW to the satisfaction of the Board.

DISCUSSION

The UPW moves this Board to petition the circuit court for enforcement of its order as provided by statute (HRS §§ 89-14 and 377-9(e)) and rule (HAR § 12-42-51), alleging that Respondents have failed to comply with the orders by the Board set forth in Decision No. 408.

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 of the party's last known post office address, and thereupon the judge shall have jurisdiction in the premises.

The 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 (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.

Throughout the course of the hearing and settlement conferences, Respondents have taken steps to comply with the Board's order. Initially, however, that was not the case. Respondents applied a very narrow reading of the Board's order and posted the order at the Hawaii State Hospital only.

Initially, UPW asserted non-compliance because Respondents refused or failed to comply with each item of the order except the posting requirement contained in item (4) of Decision No. 408 believing the posting at Hawaii State Hospital only was sufficient. However, the UPW later sought posting throughout the State at "worksites where employees of the bargaining unit assemble." The Board is satisfied that Respondents took the additional steps necessary to comply with the broader language of the Board's order.

Based on a review of Respondents' final compliance report, the Board is satisfied that Respondents have taken all reasonable steps to substantially comply with the Board's order "to cease and desist from making unilateral changes in wages, hours of work and other terms and conditions of employment at the pharmacy of the Hawaii State Hospital" in accordance with item (2). When the Board issued its decision, it was cognizant of the fact that the Hawaii State Hospital no longer operates a pharmacy. Therefore, it did not order, nor did it mean to impose on Respondents a requirement to restore the PMA positions or bargain over a new contract.

Regarding the make whole language contained in item (1) of Decision No. 408, Respondents initially took very little, if any steps to comply. On the other hand, UPW applies an overly broad reading of the Board's decision by demanding that Respondents restore the PMA positions to the Hawaii State Hospital Pharmacy.

Respondents claim that four of the affected PMAs who were retrained and placed in comparable or superior positions have resulted in the "same base pay, shortage differential, seniority dates, retirement plan, sick and vacation leave benefits, health fund benefits, and all other rights and benefits afforded regular civil service employees." Regarding the affected PMAs who declined to be retrained and transferred, Respondents have not been able to calculate their loss in compensation, benefits and seniority in order to make an offer in an effort to resolve the make whole language of item 4 of Decision No. 408.

As a result, based on the documentation submitted and declaration of William Elliott, the Board is not satisfied that Respondents have substantially complied with item (1) contained in Decision No. 408, to the extent that calculations on loss in compensation, benefits and seniority from the last date worked as PMAs at the Hawaii State Hospital to September 30, 1998 to which Patricia Santos, Shirley Layugan, Evangeline Losbog, Roderick Casino, Bryan Kawasaki and Angeles Ipalari-Tan may be entitled. Absent specific calculations on which reasonable offers can be put on the table and negotiated,[3] Respondents' efforts to comply with the Board's order have fallen short.

ORDER

The UPW's motion to enforce Board order is granted, in part, with respect to the make whole order in item (1); and denied, with respect to items (2), (3), (4), and (5), contained in Decision No. 408.

DATED: Honolulu, Hawaii, October 25, 2000.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Board Chairperson

CHESTER C. KUNITAKE, Board Member

KATHLEEN RACUYA-MARKRICH, Board Member

[3]The settlement conferences held by the Board failed primarily because Respondents' representatives had no settlement authority.

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