

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. 1979
 ORDER DENYING UPW'S MOTION
 TO AWARD ATTORNEY'S FEES

ORDER DENYING UPW'S MOTION TO AWARD ATTORNEY'S FEES

On November 3, 2000, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), by and through its counsel, asked the Hawaii Labor Relations Board (Board) to award fees, subsequent to the Board's Order No. 1947, granting, in part, and denying, in part, UPW's Motion to Enforce Decision No. 408.¹

Complainant characterizes Respondents' conduct in failing to comply with the remedial provisions of Decision No. 408 as egregious in nature and contends that their opposition to the UPW's enforcement motion was frivolous and in bad faith, citing Tiidee Products, Inc., 194 NLRB 1234, 79 LRRM 1175 (1972). Accordingly, as the UPW prevailed in part, in its motion for enforcement of Board's Decision No. 408, the UPW is seeking an award for attorney's fees for 49 hours of work at \$190 per hour.

On November 22, 2000, Respondents, by and through their counsel, filed an answering affidavit stating that the Board lacks authority under HRS § 377-9(d) to award money damages or attorney's fees. Respondents also state that the Board specifically found in its Order No. 1947 granting in part, and denying in part, UPW's Motion to Enforce that Respondents made every effort to substantially comply with 4 of the 5 items required. The Board found that Respondents did not substantially comply with only one item of Decision No. 408 and Respondents contend that they have in good faith attempted to comply with each

¹UPW's Motion to Enforce Decision No. 408, filed on July 13, 2000, did not include a request for attorney's fees and costs.

of the Board's requirements. Respondents also note that the UPW did not cite any rule or statute to support an award of fees in a prohibited practices complaint and argue that the equities in this case do not support an award of fees.

Based upon full consideration of the record, the Board makes the following findings of fact and conclusion of law.

FINDINGS OF FACT

1. The UPW is the exclusive representative, as defined in HRS § 89-2, of employees of the State of Hawaii included in bargaining unit 10.
2. BENJAMIN J. CAYETANO, Governor, State of Hawaii, is the public employer as defined in HRS § 89-2, of employees of the State of Hawaii included in bargaining unit 10 and DR. LAWRENCE MIIKE, Director of Health is a designated representative of the public employer.
3. On October 25, 2000, the Board issued Order No. 1947 granting in part, and denying in part, UPW's motion to enforce Board Decision No. 408, finding, inter alia, that the Respondents have not substantially complied with the make-whole provision of item (1) with respect to Patricia Santos, Shirley Layugan, Evangeline Losbog, Roderick Casino, Bryan Kawasaki, and Angeles Ipalani-Tan. The Board clarified that its order did not require the affected PMA's to have their positions restored at the Hawaii State Hospital or returned to Unit 10. The Board also found that Respondents have substantially complied with items (2), (3), (4), and (5) of the Decision.
4. Based upon the record before it, the Board finds that Respondents' conduct resulting in its failure to comply with item (1) of the Board's remedial order was not egregious or a flagrant violation of HRS Chapter 89. The Respondents contended that the failure to comply with the make-whole provision was due in part to a dispute over whether Respondents were required to restore the PMA positions to the Hawaii State Hospital as the UPW claimed or whether it involved seeking alternative placements or the payment of monetary compensation as contended by the Respondents. Respondents further claimed that the UPW refused to provide Respondents with information regarding subsequent employment or income earned by the affected employees.
5. Based upon the record before it, the Board finds that Respondents' defense to the UPW's motion to enforce was not frivolous or made in bad faith.

DISCUSSION

The UPW contends that it is entitled to attorney's fees because it was compelled to undertake these enforcement proceedings before the Board. The UPW contends that the Respondents' conduct constitutes a flagrant violation of HRS Chapter 89 and is egregious in nature citing Jo desMarets, 5 HLRB 620 (1996). The UPW also argues that Respondents' opposition to the motion to enforce was frivolous and in bad faith and intended to deny employee's rights established under HRS Chapter 89 warranting an award of attorneys fees under established case precedent, citing Tiidee; Farrens Tree Surgeons Inc., 264 NLRB No. 90, 111 LRRM 1305 (1982); Care Manor of Farmington, 318 NLRB No. 29; Napili Shores Condominium v. NLRB, 939 F.2d 717 (1991).

Respondents contend that the Board lacks remedial authority under HRS § 377-9 to authorize an award of money damages or fees and that the UPW fails to cite a rule or statute supporting attorney's fees in the context of a prohibited practice complaint.

While the Board recognizes that it does not have specific statutory authority to award attorney's fees, it has relied upon its broad remedial authority in HRS § 377-9 and the Intermediate Court of Appeals' holding in Arivoshi v. HPERB, 5 Haw.App. 533, 704 P.2d 917 (1985)² to fashion "affirmative" relief to successful employee complainants in the form of attorney's fees. In Jo desMarets, *supra*, the Board granted fees to an employee complainant where the employee charged her employer and the union with prohibited practices and the Board found that the employer unlawfully interfered with the employee's right to file grievances by retaliating and discriminating against her and further violated the contractual provisions setting forth the grievance procedure. The Board considered the fee award to be an extraordinary remedy to compensate the complainant for unusually flagrant violations of the collective bargaining law.

After reviewing the record, the Board does not find that the Respondents' conduct rises to the level of egregious conduct which the Board found in Jo desMarets. Respondents contended that the failure to comply with the make-whole provision was due in part to a dispute over the interpretation of the Board's order as to whether Respondents were required to restore the PMA positions to the Hawaii State Hospital or whether seeking alternative placements or the payment of monetary compensation as Respondents contended was sufficient. Respondents also claimed that the UPW refused to provide Respondents with information regarding subsequent employment or income earned by the affected employees. Thus, the Board does not find that the Respondents' failure to comply with the Board's remedial order to be a flagrant violation of the collective bargaining law. Moreover, the

²In Arivoshi, *supra*, the Supreme Court recognized an exception to the rule that fees are not recoverable unless authorized by statute, rule, stipulation agreement or Hawaiian precedent, where a union member in an action against his union has rendered a substantial service to his union as an institution.

Board finds Ariyoshi and Jo desMarets to be distinguishable because the complainants were employees, not an exclusive representative or an employer.

In addition, the Board does not follow the Tiidee, supra, line of cases decided by the National Labor Relations Board which appears to have been overruled in Unbelievable, Inc. v. NLRB, 118 F.3d 795, 155 LRRM 2833 (D.C. Cir. 1997). Further, on the facts presented, the Board does not find Respondents' defense to the motion to enforce to be frivolous. Respondents submit that they disagreed with the UPW as to the breadth of the remedial order and the UPW refused to provide them information necessary to determine any damages.³

Based on the foregoing, the Board finds that the UPW failed to establish any entitlement to fees in this case and accordingly, denies its motion for fees.

CONCLUSION OF LAW

1. The UPW is not entitled to attorney's fees for bringing the motion to enforce its order.

ORDER

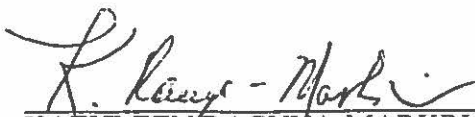
The Board hereby denies the UPW's motion to award attorney's fees.

DATED: Honolulu, Hawaii, January 12, 2001

HAWAII LABOR RELATIONS BOARD



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

³Prior to issuing Order No. 1947, the Board held two settlement conferences in an attempt to encourage the parties to resolve the make-whole provisions of Decision No. 408.

CONCURRING OPINION

I concur with the majority's opinion that Respondent's conduct in this case does not rise to the level of egregious conduct as required by Jo desMarets. However, I do not agree that the instant case is distinguishable from controlling authority because the movant in this case is a union rather than an employee.



BRIAN K. NAKAMURA, Chair

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