

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO,
Executive Director, on behalf
of the complaint filed by
BRUCE PIED,

and

BRUCE PIED,

Complainant-Intervenor,

vs.

ALOHA ISLANDAIR, INC.,

Respondent.

) Docket No. 98-007-E-D

) HEARINGS EXAMINER'S SECOND
) SUPPLEMENTAL FINDINGS
) OF FACT, CONCLUSIONS OF
) LAW AND RECOMMENDED ORDER

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) Consolidated with
) Docket No. 98-008-E-D-RET

HEARINGS EXAMINER'S SECOND SUPPLEMENTAL FINDINGS OF
FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On November 29, 1999 this Hearings Examiner issued her Supplemental Findings of Fact, Conclusions of Law and Recommended Order in this case. On March 10, 2000 the Commission issued an

order sua sponte remanding this case to determine the specific amounts of back pay and front pay to be awarded to Complainant in accordance with this Hearings Examiner's recommended decision filed on May 28, 1999, and the supplemental recommended order mentioned above.

On March 13, 2000 Respondent Aloha IslandAir, Inc. ("IslandAir") filed a motion for reconsideration of the Commission's March 10, 2000 order. On March 14, 2000 the Commission issued an order summarily denying that motion.

On March 15, 2000 a scheduling conference was held at the Hawaii Civil Rights Commission conference room and by telephone conference. Participating were: Enforcement Attorney Cheryl Tipton and law clerk Jayna Kim on behalf of the Executive Director; David F. Simons, Esq. on behalf of Complainant; and Richard M. Rand, Esq. on behalf of IslandAir and under protest. On March 16, 2000 this Hearings Examiner issued a third scheduling conference order.

On March 29, 2000 Complainant filed its submission regarding calculation of back pay and front pay and the Executive Director filed a joinder in this submission. On April 20, 2000 Respondent filed its supplemental brief on these issues. With the agreement of the parties, Complainant filed a Submission of Modified Calculations of Back Pay and Front Pay on May 4, 2000.

On May 5, 2000 IslandAir requested further hearing on the issue of front pay. On May 12, 2000 this Hearings Examiner issued an order re-opening the hearing to take further evidence on the

issue of front pay. A hearing on the issue of front pay was held on July 20, 2000. In attendance were: David F. Simons, Esq. and paralegal K. Bartlett Durand, Jr. on behalf of Complainant; Complainant Bruce Pied; Enforcement Attorney Cheryl Tipton on behalf of the Executive Director; and Richard M. Rand, Esq. on behalf of IslandAir. On July 21, 2000 Complainant submitted a supplemental application for statutory award of costs and attorneys' fees. On July 31, 2000 the parties filed supplemental post-hearing briefs on the issues of front pay, costs and fees.

Having reviewed and considered the supplemental briefs together with the entire record of these proceedings, this Hearings Examiner hereby renders the following second supplemental findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT¹

34A. Since May 17, 1999 Complainant has been employed as a first officer with Polar Air Cargo, Inc. (hereinafter "Polar Air") flying 747 jets. Complainant has accumulated 550 hours of 747 jet time and 4,800 hours of total air time. He will be eligible to upgrade to a captain position at Polar Air in approximately 2-1/2 years. (Tr. at 879, 906-907, 946; Ex. 113)

34B. Polar Air is a scheduled and non-scheduled charter operation which flies freight and does not fly passengers. It is

¹ To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

based in New York and Miami, and its flight routes cover the entire world. Pilots at Polar Air are guaranteed a minimum of 60-68 hours of flight pay, must contribute \$58 per month for family medical insurance and receive 1%-2% in matching funds in their 401K plans. (Tr. at 880-881, 885, 912, 918, 925-927, 970, 978-979, 984; Exs. 95, 100)

34C. At Polar Air, Complainant often bids on the pacific rim route because it usually has the largest block of days off. This route requires Complainant to fly from New York to Chicago, Los Angeles, Honolulu, Fiji, Australia, Hong Kong, Russia, Anchorage, Chicago and back to New York. When commuting to and from Polar Air's base in New York, Complainant catches a flight to Los Angeles, stays over night, then catches a flight to New York in order to arrive at work on time and be ready to fly. When flying the pacific rim route, Complainant is able to return home to Kona about 2-3 times per month. (Tr. at 891-903, 923, 976; Ex. 95)

34D. Complainant has joint custody of his children with his ex-wife. However, because of Complainant's job at Polar Air, his children can live with him only a few days each month and spend the majority of the month living with their mother. (Tr. at 884-885, 920-921)

34E. Aloha Airlines and Hawaiian Airlines are the two main national airlines based in Hawaii. These airlines have flight routes to the mainland west coast, within Hawaii and some pacific islands. Pilots at Aloha Airlines are guaranteed a minimum of 70-80 hours of flight pay per month and receive free medical benefits

and a fully funded pension plan of approximately 6% of their salary. Pilots at Hawaiian Airlines are guaranteed a minimum of 75 hours of flight pay per month. (Tr. at 1003-1005, 1009; Exs. 93, 94, 96, 99)

34F. Complainant's first officer position at Polar Air is not comparable or substantially equivalent to a first officer position with Aloha or Hawaiian Airlines. Complainant has to commute significantly farther (New York as opposed to Honolulu) to arrive at work. Complainant also flies longer routes (across the mainland United States, Honolulu, the Pacific, Asia and back to New York) than the routes flown by Aloha or Hawaiian Airlines. Because of the longer commute to work and routes flown, Complainant is not able to return home to Kona as often as he would if he worked for Aloha or Hawaiian Airlines. Complainant receives less minimum hours of flight pay, less pay per month² and less medical and pension benefits than first officers at Aloha or Hawaiian Airlines. (Tr. at 883, 949-952, 981; Exs. 96, 99, 100)

Finding of Fact No. 35 is amended as follows:

35. Complainant's actual income, the federal and state taxes on such income and the value of the benefits he received from August 31, 1990 to April 30, 2000 are as follows:

² Except for the first year when Hawaiian Airlines pays \$1,700/month and Aloha Airlines pays \$2,300/month, and the second year monthly salary at Hawaiian Airlines.

<u>period</u>	<u>earnings</u>	<u>taxes</u>	<u>benefits</u>
8-31-90 to 12-31-90	2,784	78	0
1-1-91 to 12-31-91	8,267	427	0
1-1-92 to 12-31-92	12,588	1,119	0
1-1-93 to 12-31-93	2,408	67	512
1-1-94 to 12-31-94	9,114	470	2,279
1-1-95 to 12-31-95	2,533	71	3,520
1-1-96 to 12-31-96	17,322	1,801	8,114
1-1-97 to 12-31-97	5,076	262	0
1-1-98 to 12-31-98	40,199	6,870	0
1-1-99 to 12-31-99	20,778	2,770	2,188
1-1-00 to 4-30-00	<u>11,970</u>	<u>1,064</u>	<u>1,038</u>
totals:	133,038	14,998	17,651

(Tr. at 195-196, 198-200, 889, 969; Exs. 55, 56, 57, 58, 59, 60, 61, 62, 100, 102; Stipulation Regarding Complainant Bruce A. Pied's Correct Pay and Benefits; Ex. 1 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

Finding of Fact No. 38 is amended as follows:

38. The income Complainant would have earned, the federal and state taxes on such income and the value of benefits he would have received if he were a first officer with IslandAir from August 31, 1990 through August 31, 1995, a captain with IslandAir from August 31, 1995 to August 31, 1998 and a first officer with Aloha Airlines from August 31, 1998 to April 30, 2000 are as follows:

<u>period</u>	<u>earnings</u>	<u>taxes</u>	<u>benefits</u>
8-31-90 to 12-31-90	4,815	134	6,609
1-1-91 to 12-31-91	14,493	1,288	13,617
1-1-92 to 12-31-92	16,065	1,670	13,745
1-1-93 to 12-31-93	17,692	1,840	13,879

1-1-94 to 12-31-94	21,849	2,913	14,220
1-1-95 to 8-31-95	15,628	4,247	9,140
8-31-95 to 12-31-95	13,065		4,500
1-1-96 to 12-31-96	39,194	6,373	15,642
1-1-97 to 12-31-97	38,256	6,220	15,565
1-1-98 to 8-31-98	25,504	5,643	9,627
8-31-98 to 12-31-98	9,200		4,719*
1-1-99 to 12-31-99	50,655	9,421	18,842
1-1-00 to 4-30-00	<u>20,421</u>	<u>2,273</u>	<u>6,692</u>
totals:	286,837	42,470	146,697

* does not include per diem

(Exs. 54, 91, 99, NN; Ex. 1 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

Finding of Fact No. 39 is amended as follows:

39. Complainant's past lost earnings, the federal and state taxes on such lost earnings and his past lost benefits are therefore as follows:

<u>period</u>	<u>lost earnings</u>	<u>taxes</u>	<u>lost benefits</u>
8-31-90 to 12-31-90	2,031	57	6,609
1-1-91 to 12-31-91	5,227	862	13,617
1-1-92 to 12-31-92	3,477	552	13,745
1-1-93 to 12-31-93	15,284	1,773	13,367
1-1-94 to 12-31-94	12,735	2,442	11,941
1-1-95 to 12-31-95	26,160	4,176	10,120
1-1-96 to 12-31-96	21,872	4,571	7,528
1-1-97 to 12-31-97	33,180	5,958	15,565
1-1-98 to 12-31-98	-5,495	-1,227	14,346
1-1-99 to 12-31-99	29,877	6,651	16,554
1-1-00 to 4-30-00	8,451	1,659	5,654

(Tr. at 969; Ex. 1 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to

Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

39A. Complainant's annual after tax loss amounts, the cumulative loss amounts and the statutory interests on such cumulative loss amounts are as follows:

<u>period</u>	<u>annual loss</u>	<u>cumulative loss</u>	<u>10% annual interest</u>
8-31-90 to 12-31-90	8,583	8,583	858
1-1-91 to 12-31-91	18,982	27,565	2,756
1-1-92 to 12-31-92	16,671	44,236	4,424
1-1-93 to 12-31-93	26,878	71,114	7,111
1-1-94 to 12-31-94	22,234	93,348	9,335
1-1-95 to 12-31-95	32,104	125,452	12,545
1-1-96 to 12-31-96	24,829	150,281	15,028
1-1-97 to 12-31-97	42,787	193,068	19,306
1-1-98 to 12-31-98	10,078	203,146	20,314
1-1-99 to 12-31-99	39,780	242,926	24,292
1-1-00 to 4-30-00	<u>12,446</u>	255,372	<u>25,537</u>
totals:	255,272		141,506

(Ex. 1 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

Finding of Fact No. 40 is amended as follows:

40. The amount Complainant would earn and the benefits he would receive (not including per diem) if he were a third year first officer with Aloha Airlines from May 1, 2000 and continues to be a first officer until he reaches age 60, and the present value of those total amounts are as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
5-1-00 to 12-31-00	40,841	13,382
1-1-01 to 12-31-01	71,700	20,894
1-1-02 to 12-31-02	81,690	21,493
1-1-03 to 12-31-03	87,743	21,857
1-1-04 to 12-31-04	88,713	21,953
1-1-05 to 12-31-05	89,311	22,951
1-1-06 to 12-31-06	89,939	21,988
1-1-07 to 12-31-07	90,571	22,026
1-1-08 to 12-31-08	91,234	22,104
1-1-99 to 12-31-99	92,053	22,115
1-1-10 to 12-31-10	92,053	22,115
1-1-11 to 12-31-11	92,053	22,115
1-1-12 to 12-31-12	<u>92,053</u>	<u>22,153</u>
totals:	1,099,954	277,146
present value:	935,056	236,708

(Tr. at 957, 989; Exs. 91, 99; Ex. 1 to Stipulation Regarding Complainant Bruce A. Pied's Correct Pay and Benefits; Ex. 2 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

41. The amounts Complainant will earn if he is employed as a first officer with IslandAir from May 1, 2000 to December 31, 2004; as a captain with IslandAir from January 1, 2005 to December 31, 2007; and as a first officer with Aloha Airlines from January 1, 2008 to December 31, 2012, and the present value of those total amounts are as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
5-1-00 to 12-31-00	12,505	9,322
1-1-01 to 12-31-01	18,758	13,895
1-1-02 to 12-31-02	20,267	13,989
1-1-03 to 12-31-03	22,103	14,103
1-1-04 to 12-31-04	23,542	14,192
1-1-05 to 12-31-05	44,717	15,505
1-1-06 to 12-31-06	46,859	15,638

1-1-07 to 12-31-07	49,480	15,800
1-1-08 to 12-31-08	61,262	20,074
1-1-99 to 12-31-99	71,700	20,894
1-1-10 to 12-31-10	81,690	21,473
1-1-11 to 12-31-11	87,743	21,857
1-1-12 to 12-31-12	<u>88,713</u>	<u>21,953</u>

totals: 629,339 218,715

present value: 515,965 184,364

(Ex. 99; Ex. 2 attached to Complainant's Submission of Calculations of Back Pay and Front Pay; Ex. 1 attached to Complainant's Submission of Modified Calculations of Back Pay and Front Pay)

III. CONCLUSIONS OF LAW³

A. Back Pay (amended)

Complainant's income and the value of the benefits he received from August 31, 1990 through April 30, 2000 was \$150,689. The amount he would have earned as a first officer and captain with IslandAir, and as a first officer with Aloha Airlines and the value of benefits he would have received during this same period would have been \$433,534. Thus, his pre-tax loss amount for this period is \$282,845. Federal and state income taxes on Complainant's earnings losses are \$27,472. Complainant's total after tax loss amount is therefore \$255,373.

³ To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

Prejudgment interest on Complainant's after tax loss amount is \$141,506.

Federal and state income taxes on Complainant's after tax loss amount and his prejudgment interest amount (\$396,879) are \$169,416.

I therefore determine that Respondent should be ordered to pay Complainant back pay in the amount of \$566,295.

B. Front Pay (amended)

Pursuant to the Commission's March 10, 2000 order, the yearly differentials between Complainant's projected earnings as a first officer with a national airline based in Hawaii (see, FOF No. 40) and his projected earnings if he is hired as a first officer with IslandAir and advances in accordance with my earlier recommended decision (see, FOF No. 41) are:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
5-1-00 to 12-31-00	28,336	4,060
1-1-01 to 12-31-01	52,942	6,999
1-1-02 to 12-31-02	61,423	7,504
1-1-03 to 12-31-03	65,640	7,754
1-1-04 to 12-31-04	65,171	7,761
1-1-05 to 12-31-05	44,594	7,446
1-1-06 to 12-31-06	43,080	6,350
1-1-07 to 12-31-07	41,091	6,226
1-1-08 to 12-31-08	29,972	2,030
1-1-99 to 12-31-99	20,353	1,221
1-1-10 to 12-31-10	10,363	622
1-1-11 to 12-31-11	4,310	258
1-1-12 to 12-31-12	<u>3,340</u>	<u>200</u>
totals:	470,615	58,431
present value:	419,091	52,344

The present value of the total amount of such differentials is \$471,435.

Respondent IslandAir argues that this Hearings Examiner's May 28, 1999 recommended order regarding instatement and front pay are moot since Complainant has already obtained employment as a first officer with Polar Air. However, the record shows that Complainant sought and still seeks a position flying passenger planes with a national airline based in Hawaii. (See, FOF Nos. 7, 37; Tr. at 30-32, 883, 885, 947) Complainant's present position with Polar Air is not comparable or substantially equivalent. (See, FOF No. 34F) Jobs are substantially equivalent if they are in the same line of work and afford virtually identical compensation, responsibility, working conditions, status and promotional opportunities. In Re Shaw/Sam Teague, Ltd. et.al., Docket No. 94-001-E-P (March 3, 1995); Ford v. Nicks, 866 F.2d 865, 49 EPD 38,659 at 55,600 (6th Circ. 1989). The record shows that Complainant's monthly pay⁴ and benefits as a first officer at Polar Air are lower than those of first officers at Aloha and Hawaiian Airlines. In addition, Complainant has to commute farther to work, fly longer routes and cannot return home to Hawaii more than 2-3 times per month.

I therefore continue to recommend that Respondent be ordered to place Complainant in the next IslandAir ground school class that includes first officer pilots and to pay Complainant front pay

⁴ Except for the first year when Hawaiian Airlines pays \$1,700/month and Aloha Airlines pays \$2,300/month, and the second year monthly salary at Hawaiian Airlines.

consisting of a supplemental salary based on the yearly differentials as stated above until he obtains a first officer position flying passenger planes with a national airlines based in Hawaii or until he reaches age 60.

D. Attorney Fees and Costs (addendum)

Pursuant to the Commission's June 3, 1999 order sua sponte remanding case for further proceedings, I will consider Complainant's supplemental request for attorneys' fees and costs.

Complainant seeks \$7,329.12 in costs expended since his last application and award in November 1999.⁵ Complainant lists fees of \$5,706.00 from his expert witness, Dr. Loudat, without providing an invoice or breakdown. Since the first hearing in this case, Dr. Loudat has only modified certain figures in his initial report. I will therefore decrease the award of his costs to \$2,000. I also feel that a rate beyond 10 cents per copy is excessive and will award \$352 for copying costs. Finally, I decline to award any costs for facsimiles, since Complainant also seeks long distance telephone costs. Complainant therefore should be awarded additional costs of \$2,981.62 for a total of \$21,402.62.

Complainant seeks additional attorney's fees in the amount of \$32,143.33.⁶ I recommend that the fees sought be reduced by

⁵ In my November 29, 1999 Supplemental Findings of Fact, Conclusions of Law and Recommended Order, I determined Complainant's costs to be \$18,421.

⁶ In my November 29, 1999 Supplemental Findings of Fact, Conclusions of Law and Recommended Order, I determined Complainant's attorney's fees to be \$95,936.88.

\$6,081.25. Specifically, I would reduce Complainant's fees by the following hours:

David Simons

- 2.1 hours t/c conf/mtg with KBD re: post hearing brief research
- 1.5 hours memo re: discovery of contract
- 9.5 hours preparing for argument before Commission

K. Bartlett Durand (paralegal)

- 1.75 hours reviewing documents produced by Respondent
- 15.7 hours preparing for hearing before Commission
- 3.4 hours conf. with DFS re: motion to quash
- 1.2 hours pulling info. for amicus
- 3.0 hours analyzing documents from Hawaiian Airlines
- 2.0 hours work on evidence for hearing
- 4.5 hours conf. with DFS and work on exhibits
- 1.5 hours attorneys fee application and preparation for hearing

Therefore, the additional fees to be awarded should be \$25,808.42 for a total of \$121,745.30. Because this total attorney's fees amount is greater than the amount of punitive damages awarded⁷, it shall constitute the whole of Complainant's punitive damage award. Lee v. Aiu, 85 Haw. 19, 35 (1997) (attorneys' fees cannot be awarded in addition to exemplary damages; rather, they must constitute the whole of the punitive damage award or be accounted for a portion of the total punitive damage award).⁸

⁷ In my November 29, 1999 Supplemental Findings of Fact, Conclusions of Law and Recommended Order, I determined that Complainant should be awarded \$100,000 in punitive damages.

⁸ Complainant and the Executive Director argue that H.R.S. §§ 368-17(a)(9) and 378-5(c) allow the award of attorneys' fees in addition to an award of punitive damages. However, § 368-17(a)(9) states that punitive damages may include payment of all or a portion of a complainant's attorneys' fees, which is in accord with Lee v. Aiu, *supra*. H.R.S. § 378-5(c) applies to civil actions brought in circuit court, not to this Commission.

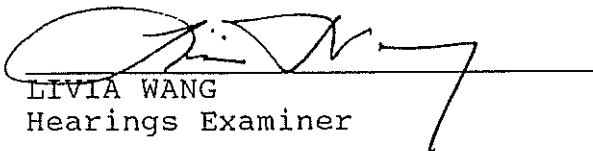
IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondent to pay Complainant back pay in the amount of \$566,295.
2. Respondent to pay Complainant front pay consisting of a supplemental salary based on the yearly differentials stated in Conclusion of Law B above, until he obtains a first officer position flying passenger planes with a national airlines based in Hawaii or until he reaches age 60.
3. Alternatively, Respondent to pay Complainant front pay in the amount of \$471,435.
4. Respondent to pay Complainant punitive damages in the amount of \$121,745.30.
5. Respondent to pay Complainant his costs in the amount of \$21,402.62.

Dated: Honolulu, Hawaii, August 21, 2000.

HAWAII CIVIL RIGHTS COMMISSION


LIVIA WANG
Hearings Examiner

Copies sent to:

Cheryl Tipton, Esq., HCRC Enforcement Attorney
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