

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

WILLIAM TAKABA, Director, Department
of Finance, County of Hawaii; PATRICIA G.
ENGLEHARD, Director, Department of
Parks and Recreation, County of Hawaii; and
HARRY KIM, Mayor, County of Hawaii,

Respondents.

CASE NO. CE-01-532

DECISION NO. 469

FINAL DECISION ADOPTING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

FINAL DECISION ADOPTING PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 15, 2007, the Hawaii Labor Relations Board ("Board") filed its Proposed Findings of Fact, Conclusions of Law and Order ("Proposed Decision") in this matter. As the time limit for the filing of exceptions to the Proposed Decision has passed without exceptions being filed by any party, the Board hereby adopts the Proposed Decision as its Final Decision in this case.

DATED: Honolulu, Hawaii, June 29, 2007.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Gerald Takase, Deputy Corporation Counsel
Joyce Najita, IRC

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. WILLIAM TAKABA, et al.
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AND ORDER

(Cont'd.)

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PROPOSED FINDINGS OF FACT,
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PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 9, 2003, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW" or "Union") filed a prohibited practice complaint with the Hawaii Labor Relations Board ("Board") against Respondents WILLIAM TAKABA ("TAKABA"), Director, Department of Finance, County of Hawaii; PATRICIA G. ENGLEHARD ("ENGLEHARD"), Director, Department of Parks and Recreation, County of Hawaii; and HARRY KIM ("KIM"), Mayor, County of Hawaii (collectively "Respondents" or "County") alleging Respondents failed to comply with a decision and award rendered by Arbitrator Ronald Libkuman on November 20, 2002, pertaining to the performance of golf cart maintenance services by Unit 01 employees at the Hilo Municipal Golf Course. The Union alleged that the Respondents' unilateral decision to contract out golf cart maintenance services effective July 1, 2003 through a request for proposals ("RFP") constitutes a wilful violation of Hawaii Revised Statutes ("HRS") § 89-10.8; a wilful violation of § 15.20(b) of the Unit 01 agreement, and a wilful violation of the duty to recognize and bargain with the Union as required by Sections 1.01 and 1.05 of the Unit 01 agreement, thereby committing a prohibited practice in violation of HRS §§ 89-13(a)(1), (7), and (8).

On May 12, 2003, the Board provided notice of the filing of the prohibited practice complaint to the Respondents. Respondents failed to file a timely answer to the complaint and on May 28, 2003, the UPW filed a Motion for Admission of Material Facts Against Respondents and a Waiver of a Hearing in the proceeding. On June 23, 2003,

Respondents filed a Motion to Extend the Time to Answer the Complaint, or in the Alternative, to Dismiss the Prohibited Practice Complaint with the Board.

The Board conducted a hearing on the motions on July 18, 2003. After considering the arguments of the parties, the Board granted the UPW's Motion for Admission of Material Facts and Waiver of Further Hearings and denied the Respondents' Motion for an Extension of Time to Answer the Complaint or to Dismiss the Action.

The parties filed closing briefs on August 18, 2003.

After reviewing the record and the arguments in this matter, the Board hereby makes the following proposed findings of fact, conclusions of law, and order, pursuant to HRS § 91-11.¹

PROPOSED FINDINGS OF FACT

1. The UPW was, for all relevant times, an employee organization and the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 01, composed of blue collar nonsupervisory employees.
2. KIM was, for all relevant times, the Mayor, County of Hawaii and an employer as defined in HRS § 89-2. TAKABA was, for all relevant times, the Director of Finance, County of Hawaii, who represented the Mayor in dealing with employees and therefore was an employer within the meaning of HRS § 89-2. ENGLEHARD was, for all relevant times, the Director of Parks and Recreation, County of Hawaii, who represented the Mayor in dealing with

¹HRS § 91-11 provides as follows:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

While Board member Springer did not participate in the hearings in this case, he has reviewed the entire record, including the pleadings, transcripts, and exhibits filed herein.

Recreation, County of Hawaii, who represented the Mayor in dealing with public employees in her Department, and was therefore an employer within the meaning of HRS § 89-2. The Department of Parks and Recreation operates the Hilo Municipal Golf Course.

3. On or about October 20, 1971, the UPW was certified as the exclusive bargaining representative of blue-collar nonsupervisory employees in bargaining unit 01.
4. Since on or about July 1, 1972 and thereafter, the UPW and the County of Hawaii have been parties to approximately 13 successive collective bargaining agreements covering Unit 01 employees on a multi-employer basis.
5. Since the 1950's, the County of Hawaii has operated the Hilo Municipal Golf Course, which is an 18-hole public golf course located in Hilo, Hawaii.
6. All blue-collar non-supervisory employees including groundskeeper Is, IIs, and IIIs, repairer-welders, and other equipment operators at the Hilo Municipal Golf Course are covered by the Unit 01 collective bargaining agreement.
7. On or about July 1998 the UPW and the County mutually agreed under Section 1.05 of the Unit 01 agreement that groundskeepers at the Hilo Municipal Golf Course would perform golf cart maintenance services, i.e., to stage, fuel, wash, clean, and return golf carts to designated areas 7 days a week, and amended the work hours of Unit 01 employees who were affected thereby.
8. Golf cart maintenance services of the nature performed by groundskeepers at the Hilo Municipal Golf Course have customarily and historically been performed by Unit 01 employees in all public golf courses on Oahu since at least 1987.
9. On or about February 8, 2002, Respondents unilaterally decided to contract out the golf cart maintenance services performed by groundskeepers at the Hilo Municipal Golf Course effective June 1, 2002.
10. On or about March 27, 2002 the UPW filed grievance GWR-02-02 alleging that Respondents violated sections 1, 14, 23, and 26 of the Unit 01 agreement by their decision to contract out said services.
11. Unable to resolve their differences in GWR-02-02 the parties agreed to submit the dispute to Arbitrator Ronald Libkuman who was selected pursuant to Section 15, of the Unit 01 agreement.

12. Arbitral hearings were held on September 6, 9, and 10, 2002 and the parties submitted post hearing briefs on or about October 28, 2002 addressing the various issues arising in GWR-02-02.
13. On November 20, 2002 Arbitrator Libkuman rendered his decision and award in which he found that respondents had violated Sections 1.01, 1.02, 1.05 and 14.01 of the Unit 01 agreement and had infringed the prior constitutional rights of employees under the state and federal constitutions. The arbitrator summarized his decision on the major issues in the following “conclusions of law”:
 1. The Arbitrator has jurisdiction to consider the issues raised by Grievance 02-02 including the application of the CBA and the provisions of HRS Chapter 89 and other civil service laws to Grievance 02-02.
 2. The County, by unilaterally amending the Position Description Forms of Groundskeeper I Union members breached Sections 1.01, 1.02, 1.05 and 14.01 of the CBA between the Union and the County in that the County failed to engage in collective bargaining regarding this change which affected working schedules, job descriptions, and other conditions of employment and resulted in the loss of the equivalent of 2.5 Union jobs. A breach of sections 1.10, 1.02 and 1.05 of the CBA stands alone and does not require a breach of any other section of the CBA to support a grievance.
 3. The County by amending the Position Description Forms of Groundskeeper I Union members did not breach Sections 23 and 25 of the CBA.
 4. The Arbitrator has jurisdiction to consider the constitutional issues regarding the application of Article XVI to the issues raised by Grievance 02-02 including the issue of privatization.
 5. Groundskeeper I Union members were civil service employees as defined in Article XVI of the Hawaii State Constitution and HRS Sec. 76-77 HRS (sic) and were therefore entitled to the provision of Article XVI of the Hawaii State Constitution and civil service laws of the State of Hawaii including HRS Chapters 89, 76, and 77. The County, by unilaterally amending the Position Description Forms of Groundskeeper I Union members violated the rights of Union members under Article XVI of the Hawaii State Constitution and HRS Sec. 76-77 by

privatizing the equivalent of 2.5 Union jobs. The Union has standing to exercise these constitutional rights for Union members. (Emphasis added.)

13. The arbitral award of November 20, 2002 ordered Respondents to restore “golf cart work” to bargaining unit 01 on or before January 1, 2003, and Respondents restored said services to bargaining unit 01 groundskeepers sometime in January 2003.
14. On November 21, 2002, the UPW filed a motion to confirm Arbitrator Libkuman’s decision and award in S.P. No. 02-1-0514 in the circuit court of the first circuit.
15. On March 31, 2003, the Honorable Dexter Del Rosario granted the union’s motion to confirm the November 20, 2002 arbitration decision and award and entered that “judgment” be entered in favor of the UPW.
16. No appeal has been filed from the March 31, 2003 order confirming the arbitration award, and the “judgment” entered by Judge Del Rosario in S.P. No. 02-1-0514 is final and binding against Respondents.
17. On or about April 11, 2003, Respondents unilaterally decided once again to contract out golf cart maintenance services at the Hilo Municipal Golf Course effective July 1, 2003.²
18. On April 21, 2003, the UPW requested Respondents to cease and desist from their unilateral course of conduct contrary to the November 20, 2002 arbitration decision and award and the March 31, 2003 court judgment in favor of the union.

²TAKABA requested proposals for the privatization of the golf pro shop, golf cart rentals, and driving range at the Hilo Municipal Golf Course for a contract period of eight years from July 1, 2003 to June 30, 2011. The specification referred to the provision of golf cart maintenance services as follows:

- H. The Concessionaire’s Responsibilities. The Concessionaire shall:
 1. Prepare golf carts for patron use by “staging” the required number of carts estimated needed for each days use.
 2. Wash and clean golf carts, including periodically spraying the undercarriage and wheel wells to remove mud and dirt and store carts in assigned areas.

UPW’s Exhibit (“Ex.”) 9.

19. On and after April 23, 2003, Respondents wilfully refused to comply with the Union's request, proceeded to announce changes in work hours, and to unilaterally implement their contracting out decision through the procurement process.³
20. At no time prior to their aforementioned conduct did Respondents negotiate changes to Sections 1 or 14 of the Unit 01 agreement or to the July 31, 1998 agreement affecting golf cart maintenance work by groundskeepers at the Hilo Municipal Golf Course.
21. In April 2003, the Unit 01 agreement which covered the period July 1, 1999 to June 30, 2003 and all prior agreements and understandings under Section 1.05 were extended to June 30, 2005 by and between the UPW and all public employers.
22. On and after April 11, 2003, Respondents have wilfully violated HRS § 89-10.8, by their failure and refusal to give "final and binding" effect to the November 20, 2002, arbitration decision and award rendered by Arbitrator Ronald Libkuman which is "valid and enforceable" under Chapter 89.

³On April 23, 2003, Respondent ENGLEHARD notified the Union of the employer's intent to change the hours of work at the Municipal Golf Course effective July 1, 2003 "in anticipation of a new concession agreement." UPW's Ex. 12. ENGLEHARD indicated that the terms and conditions of work of "groundskeepers" who performed the golf cart maintenance work would be affected commencing on July 1, 2003:

This letter is in anticipation of a new concession agreement for Golf Pro Shop, Golf Cart Rentals, and Driving Range operations at the Hilo Municipal Golf Course. We are intending to change Golf Course Groundskeeper I hours as of July 1, 2003, and are therefore requesting consultation to change the work schedule for Golf Course Groundskeeper I positions. The last shift from 10:45 AM to 7:30 PM will be eliminated effective July 1, 2003, and all positions will be scheduled to work from 6:00 AM to 2:30 PM. This change will allow for the most efficient use of employees to staff the Golf Course grounds keeping operations. It will also allow the staff to have improved working hours and time off on weekends.

On April 28, 2003 Rodney Acia was selected as the successful bidder pursuant to the RFP. UPW's Exs. 13 and 19.

23. On May 4, 2003, the Union again requested Respondents to cease and desist from implementing the unilateral changes.

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Hawaii Administrative Rules (“HAR”) 12-42-45 provides, in part, as follows:

(a) A respondent shall file a written answer to the complaint within ten days after service of the complaint. One copy of the answer shall be served on each party, and the original and five copies, with certificate of service on all parties, shall be filed with the board.

* * *

(g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of a hearing.

3. The instant complaint was filed with the Board on May 9, 2003. The Board issued the Notice to Respondents on May 12, 2003 directing Respondents to file an answer no later than the tenth day after service of the complaint. The UPW filed a Motion for Admission of Material Facts Against Respondents & Waiver of Hearing for Failure to Answer on May 28, 2003. Thereafter, on June 23, 2003, Respondents filed a Motion to Extend the Time to Answer, or in the Alternative, to Dismiss the Prohibited Practice Complaint with the Board.
4. Based on the filings of the parties, the Board finds that the Respondents did not timely file an answer in response to the Board’s Notice. Respondents argue that they relied upon the UPW’s business agent’s representation that the matter would be resolved. Nevertheless, thereafter Respondents failed to timely file a response to the UPW’s May 28, 2003 motion and without justification failed to file a motion to extend the time to answer with the Board for nearly a month. The Board finds under these facts, that Respondents failed to timely answer the complaint and their failure constitutes an admission of the material facts alleged in the complaint and a waiver of a hearing.

5. Previously in Lewis W. Poe, Case No. CU-03-174, the union similarly failed to file a timely answer to the complaint and the Board granted the union's motion to extend the time to answer the prohibited practice complaint. The Board thereafter ultimately dismissed the complaint in Order No. 1946, dated October 24, 2000. The employee appealed the Board's dismissal in Civil No. 00-1-3607-11, and the Circuit Court, by Honorable Judge Eden E. Hifo, reversed the Board's order in Case No. CU-03-174 and remanded the case to the Board for further proceedings finding that the Board erroneously permitted the union an extension to file an answer.
6. An employer violates HRS § 89-13(a)(7) by wilfully refusing or failing to comply with any provision of HRS Chapter 89.
7. An employer violates HRS § 89-13(a)(8) by wilfully violating the terms of a collective bargaining agreement.
8. HRS § 89-10.8(a) provides, in part:

A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.

9. Section 15.20b of the Unit 01 agreement provides:
 - 15.20b. The award of the Arbitrator shall be final and binding provided, the award is within the scope of the Arbitrator's authority as described as follows:
 - 15.20b.1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the sections of this Agreement.
 - 15.20b.2. The Arbitrator shall be limited to deciding whether the Employer has violated, misinterpreted, or misapplied any of the sections of this Agreement.
 - 15.20b.3. A matter that is not specifically set forth in this Agreement shall not be subject to arbitration.

15.20b.4 The Arbitrator shall not consider allegations which have not been alleged in Steps 1 and 2.

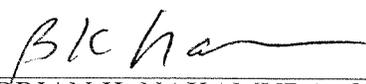
10. The Libkuman arbitration award, as confirmed by the First Circuit Court, is a final and binding decision pursuant to HRS § 89-10.8(a) and Section 15.20 of the Unit 01 agreement. Based upon the evidence in the record, the Board concludes that the Respondents unilaterally decided to privatize the golf cart maintenance services at the Hilo Municipal Golf Course failed to give final and binding effect to the Libkuman award and thereby wilfully violated HRS § 89-10.8(a) and Section 15.20b of the Unit 01 agreement. The Board concludes that Respondents thereby committed prohibited practices in violation of HRS §§ 89-13(a)(7) and (8).

PROPOSED ORDER

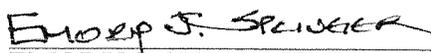
1. The Board orders the Respondents to cease and desist from repudiating the Libkuman award by privatizing the golf cart maintenance services at the Hilo Municipal Golf Course.
2. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of Unit 01 assemble, and leave such copies posted for a period of 60 days from the initial date of posting.
3. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, June 15, 2007.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with the Board pursuant to HRS § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by the Board in its discretion. In such event, the parties will be so notified.

Copies sent to:

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Gerald Takase, Deputy Corporation Counsel
Joyce Najita, IRC