STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and LARRY J. LEOPARDI, Chief Engineer, Director, Department of Facility Maintenance, City and County of Honolulu; CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu; JEREMY HARRIS, Mayor, City and County of Honolulu; THOMAS LENCHANKO, District Road Superintendent, Waianae District, Division of Road Maintenance, Department of Facility Maintenance, City and County of Honolulu; and CYNTHIA JOHANSON, Department Coordinator, Department of Facility Maintenance, City and County of Honolulu, Respondents.	CASE NO. CE-01-538 DECISION NO. 452 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On July 11, 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 LARRY J. LEOPARDI (LEOPARDI), Chief Engineer, Department of Facility Maintenance (DFM), City & County of Honolulu (C&C); CHERYL OKUMA-SEPE (OKUMA-SEPE), Director, Department of Human Resources (DHR), C&C; JEREMY HARRIS (HARRIS), Mayor, C&C; THOMAS LENCHANKO (LENCHANKO), District Road Superintendent, Waianae District, Division of Road Maintenance, DFM, C&C; and CYNTHIA JOHANSON (JOHANSON), Department Coordinator, DFM, C&C (collectively Employer or City). The UPW alleges that the Employer wilfully violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (7), and (8), by failing to give final and binding effect to Arbitrator Paul Aoki's (Aoki) decision and award which sustained the termination grievance filed by the UPW on behalf of Gregory Ortiz (Ortiz). The UPW contends that the C&C: (1) refused to reinstate Ortiz into his Heavy Truck Driver position; (2) refused to restore his seniority; (3) unilaterally and unlawfully

ordered him to be subject to alcohol and controlled substance testing as a condition to his placement within bargaining unit 01; and (4) refused to restore him as an employee in good standing with the C&C unless he passed an alcohol and controlled substance test.

On July 25, 2003, Respondents filed an Answer and Counterclaim with the Board. The City raised as a defense and a Counterclaim that the UPW interfered with Section 63 of the Unit 01 agreement and thereby violated HRS §§ 89-13(b)(4) and (5).

On July 28, 2003, the UPW filed a motion to strike the Counterclaim or alternatively for Particularization of the claim and an additional time to answer. The UPW argued that the counterclaim should be stricken because the Board's rules do not provide for counterclaims and alternatively, if counterclaims are permissible, the City's reference to Section 63 of the collective bargaining agreement is vague because that provision imposes obligations on the employer and not the Union. Accordingly, the UPW requested that the counterclaim be particularized and that additional time be given to the Union to frame an answer thereto.

On August 8, 2003, the Union filed a motion to amend the Complaint to include additional facts following the issuance of the Aoki arbitration award.

On August 11, 2003, the Board scheduled a hearing on the motions for August 21, 2003.

On August 13, 2003, Respondents filed a motion to continue the hearing scheduled on UPW's motion to amend the complaint due to the unavailability of counsel on the scheduled hearing date.

On August 18, 2003, the Union filed an opposition to Respondents' motion to continue contending that Complainant is entitled to a hearing on the merits of its complaint within 40 days of filing pursuant to the applicable Board rule, Hawaii Administrative Rules § 12-42-46, and no timely opposition had been filed by Respondents to the pending motions.

On August 18, 2003, Respondents filed their memorandum in opposition to the UPW's motion to amend its complaint.

On August 22, 2003, the Board issued Order No. 2208, granting Respondents' motion to continue the hearing and rescheduling the hearing for August 27, 2003 for good cause shown.

On August 27, 2003, the Board held a hearing on the motions. After consideration of the arguments made by the parties, the Board granted the UPW's motion to amend the complaint to allow the Board to consider the entire matter. The Board also

granted the UPW's motion to strike the counterclaim because allowing the counterclaim in the absence of guidelines would be confusing and possibly prejudicial to Complainant.

On August 27, 2003, the UPW filed a First Amended Prohibited Practice Complaint with the Board. The UPW alleged that Respondents violated the terms and conditions of a June 10, 2003 arbitration award by refusing to reinstate Ortiz as a Heavy Truck Driver and unilaterally changed the terms and conditions of his employment by requiring Ortiz to undergo pre-employment drug testing contrary to the requirements of Section 63.04 of the Unit 01 agreement; refusing to reinstate him in his former or an equivalent position until he passed a drug and alcohol test; involuntarily placing him on administrative leave from about June 23, 2003 to June 30, 2003 and on sick leave from July 1, 2003 to July 15, 2003; declining to cease and desist from refusing to comply with the arbitration decision and award as requested by the UPW on and after June 28, 2003; and suspending ORTIZ from July 16, 2003 to August 16, 2003 and refusing to reinstate him without participating in counseling, rehabilitation and follow-up testing. The UPW contends that Respondents violated HRS Chapter 89 and the Unit 01 agreement thereby violating HRS §§ 89-13(a)(1), (7), and (8).

On September 11, 2003, the Board scheduled a prehearing conference on September 24, 2003 and a hearing on the merits on October 14, 2003.

On September 12, 2003, the UPW filed a motion for summary judgment. The UPW alleged that there were no genuine issues of material fact in dispute, and it was entitled to judgment as a matter of law. The motion was opposed by Respondents.

On September 30, 2003, Respondents filed a motion to dismiss contending that the UPW failed to exhaust its contractual remedies. In addition, Respondents argued that the enforcement of the City's alleged failure to abide by Aoki's arbitration award was solely within the province of the circuit courts. The UPW opposed Respondents' motion.

On October 8, 2003, Respondents filed a motion to strike the Union's reply memorandum because the Board rules do not allow for the filing of a reply.

On October 9, 2003, the Board held a hearing on the motions. On October 29, 2003, the Board issued Order No. 2227, Order Denying Respondents' Motion to Dismiss Complaint and Denying Complainant's Motion for Summary Judgment; and Notice of Second Prehearing Conference. The Board, inter alia, declined to defer the contractual claims to the grievance process because of superceding policy consideration, i.e., the policy favoring arbitral finality and alleged collateral avoidance of an arbitration award. In addition, the Board denied the motion for summary judgment concluding that there were issues of material fact in dispute regarding the application or applicability of the testing rule, and the adequacy of steps taken toward the alleged reinstatement of Ortiz.

The Board held hearings on the instant complaint cases on March 9, 10, 12, 19, and 22, 2004. The parties were afforded full opportunity to present evidence on their behalf. Final closing memoranda were submitted on June 8, 2004.

After a thorough review of the entire record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence:

1. Complainant UPW is 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, including Ortiz.

2. Respondent HARRIS was for all relevant times, the Mayor of the C&C. Respondent LEOPARDI was for all relevant times, the Director of the DFM, C&C. Respondent OKUMA-SEPE was for all relevant times, the Director of the DHR, C&C. Respondent LENCHANKO was for all relevant times, District Road Superintendent, Waianae District, Division of Road Maintenance, DFM, C&C. Respondent JOHANSON was for all relevant times, the Departmental Coordinator of the Drug Testing Program, DFM, C&C. The Respondents were at all times relevant, the public employer or representatives of the public employer of Ortiz as defined in HRS § 89-2.

3. For all times relevant, Ortiz was a Heavy Truck Driver employed by the City and a public employee as defined in HRS § 89-2. Ortiz was included in bargaining unit 01.

4. For all times relevant, the UPW and HARRIS were parties to a multi-employer collective bargaining agreement covering Unit 01 employees. The agreement contains a drug testing provision as well as a grievance procedure that culminates in final and binding arbitration.

5. Ortiz was employed by the City Department of Public Works, later DFM, in the Waianae baseyard of the road maintenance division since March 3, 1980. He began employment as a Laborer I, was promoted to a Tractor Mower Operator in March 1981, and promoted again to a Heavy Truck Driver I in March 1983. Both the position of Tractor Mower Operator and Heavy Truck Driver require a Commercial Drivers License (CDL).

6. Section 382.301 of the Federal Motor Carrier Safety Regulations, provides in pertinent part:

> Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section.

Paragraphs (c) and (d) provide:

> (c) **Exception for pre-employment controlled substances testing.** An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:
>
> (1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and
>
> (2) While participating in that program, either
>
> (i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or
>
> (ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and
>
> (3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.
>
> (d)(1) An employer who exercised the exception in either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:
>
> (i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for alcohol or controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(d)(2) An employer who uses, but does not employ, a driver more than once a year to operate commercial motor vehicles must obtain the information in paragraph (d)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with

7. Section 63 of the Unit 01 Contract provides for the Commercial Motor Vehicle Alcohol and Controlled Substance Test and states in pertinent part as follows:

63.01 STATEMENT OF PURPOSE

63.01 a. Section 63. is intended to comply with the Omnibus Transportation Employee Testing Act of 1991 and the U.S. Department of Transportation's rules and regulations adopted as provided in the Act, hereafter "DOT Rules".

63.01 b. Where it is found that a section does not comply with the DOT Rules, the DOT Rules shall prevail where valid and the parties shall renegotiate to bring the section into compliance.

63.01 c. The workplace shall be free from the risks posed by the use of alcohol and controlled substance to the safety of the public and to Employees.

63.01 d. Employees subject to alcohol and controlled substance tests and who are subject to disciplinary actions by Section 63. shall be afforded "due process" as provided in Section 63.

* * *

63.03 b. **CONTROLLED SUBSTANCE. An Employee shall not**:

63.03 b.1. Report to work or continue working when using a controlled substance, except when the controlled substance is prescribed by a physician who has advised the Employee the substance does not adversely affect the ability to operate a vehicle.

63.03 b.2. Possess controlled substance while working.

63.03 b.3. Use controlled substance while performing safety sensitive functions.

63.03 b.4. Perform safety sensitive functions after testing positive until a return to work test is administered and results in a negative test.

63.03.b.5. Refuse to submit to a required controlled substance test.

63.04 **TEST.**

63.04 a. **REQUIRED TEST.**

Prior to the first time an Employee performs a safety sensitive function and/or being placed on a temporary assignment list, the Employee shall be subject to a controlled substance test, except as provided in the DOT Rules referred to in Section 63.01a.[1]

[1]See, UPW's Ex. 29, pp. 29-20 to29-23.

8. Section 63 of the Unit 01 Contract provides for specific controlled substance tests, such as, testing within 32 hours following an accident (63.05a.); Random Test (63.06); Probationary Period Test (63.06 b); a 1998 Test (63.06c.); a Reasonable Suspicion Test (63.07); Return to Work Test Controlled Substance Test (63.08b); and Follow Up Test. Section 63 does not have a specific provision for testing a regular employee whose name is withdrawn from the random testing pool after a three- to four-month leave of absence due to an injury or disciplinary suspension for reasons unrelated to the drug testing provisions.

9. On September 4, 2002, Ortiz was discharged for the unauthorized use of a City vehicle. The UPW challenged the termination in a grievance alleging a lack of "just cause."

10. On June 10, 2003, Arbitrator Aoki issued an arbitration award sustaining the termination grievance, changing the termination to a suspension without backpay, and reinstating Ortiz to the same or equivalent position as follows:

> Grievant shall be reinstated to the same or equivalent position that he held when he was terminated and his seniority and other rights as an employee shall be reinstated as they existed on the date of his termination. The reinstatement shall occur within two weeks of the date of this decision. Grievant shall not receive any back pay or credit for the period from this termination until his reinstatement. In any future disciplinary actions, this decision and award shall be treated as a suspension without pay and may be taken into account in the application of progressive discipline.

11. Pursuant to Aoki's arbitration award, OKUMA-SEPE rescinded Ortiz's discharge and reinstated Ortiz to his former Heavy Truck Driver position. OKUMA-SEPE changed Ortiz's discharge for the period September 5, 2002 to June 22, 2003, to reflect a leave of absence without pay - suspension.[2]

12. On June 23, 2003, Lorrie Manassas-Liu (Manassas-Liu), the former divisional drug coordinator, who was involved in Ortiz's termination grievance, asked JOHANSON, DFM Personnel Management Specialist V and departmental coordinator for the drug testing program since 1994, whether Ortiz should be subjected to a pre-duty/preemployment drug test when he reported to work. JOHANSON determined based on her understanding and interpretation of the DOT Rules and Section 63.04 of the Unit 01 Contract relating to

[2]See, UPW's Exhibit (Ex.) 22.

preemployment testing, that Ortiz needed to be tested because she "knew that [Ortiz] had been removed from the drug testing pool when he was terminated.[3]

13. JOHANSON was aware that Section 63 did not expressly provide for preemployment testing of an employee being reinstated after a disciplinary discharge.[4]

14. As the departmental coordinator for drug testing, JOHANSON supervises the drug and alcohol testing program for the department. A staff person under her supervision maintains the database from which the random testing names are drawn. According to JOHANSON, the department conducts monthly drug tests of 10 to 12 employees selected randomly from a database of departmental

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[3]See, Tr. Vol. I, pp. 196, 203-04.

[4]During direct examination, JOHANSON testified as follows:

Q.: (By Mr. Takahashi) You were aware, were you not, that the Collective Bargaining Agreement did not expressly require testing – for drug testing, that is, preemployment, for an employee who had been discharged?
A.: Yes.

* * *

Q.: You're aware that Section 63 on drug testing establishes terms and conditions of employment or conditions of work?
A.: Correct.
Q.: And what you were doing in this decision on June 23rd of having Mr. Ortiz tested represented a change from what the contract expressly states. You were adding a term that wasn't there, correct?
A.: No, I think the contract was silent on the matter.
Q.: Well, yes. And the Union didn't know, the employees didn't know, correct, that they could be tested after they were discharged?
A.: We had not issued anything in writing.
Q.: Correct, right. So I asked you earlier, you aware that the contract does not expressly allow this, testing of discharged employees?
A.: I was not aware.
Q.: You're not aware of any provision in the contract, correct?
A.: Correct, because it was silent on the matter.
Q.: Right, and it had never happened before, correct?
A.: Correct.

See, Tr. Vol. I, pp. 206, 209.

employees that includes 50% of the workforce with CDLs or in safety sensitive positions every year.

15. An updated list of employees who are in the random drug testing pool is provided to the Union every calendar year. JOHANSON testified that: "Once they're in the pool, they're in there forever, unless they move out of a CDL or a safety sensitive position, or unless they're terminated or –". Since the beginning of the drug testing program in 1995, the random pool list is updated by removing employees who are no longer in a CDL or safety sensitive position, or off-the-job from an industrial injury for more than three or four months. However, JOHANSON admitted that the Union was never notified as to how and when an employee would be removed from the list or that the employees would be subject to a "pre-duty" drug test when they returned to the job.[5] According to JOHANSON, Ortiz was the first City employee who had been terminated to be subjected to preemployment testing prior to reinstatement.

16. On June 23, 2003, Manassas-Liu telephoned LENCHANKO at 7:35 a.m. and instructed him to have Ortiz drug-tested. LENCHANKO notified Ortiz of the drug test at 7:55 a.m.[6] when Ortiz reported to work and thereafter LENCHANKO took Ortiz for the drug test.

17. On June 23, 2003, Ortiz tested positive for the first time. As a result, Ortiz received a 20-day suspension and was placed in the drug rehabilitation program. On January 28, 2004, Ortiz resigned from his job consistent with the First and Second Positive Controlled Substance Test provisions contained in Section 63.15c and 63.15d of the BU 01 Contract.[7]

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[5]See, Tr. Vol. I, pp. 168-71.

[6]See, UPW's Ex. 48-4.

[7]See, Tr. Vol. I, pp. 220-22. Section 63.15 states as follows:

> **63.15 c. FIRST POSITIVE CONTROLLED SUBSTANCE TEST.**
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> **63.15 c.1.** An Employee who tests positive for controlled substance for the first time shall be discharged unless the Employee agrees to sign Exhibit 63.15d. Controlled Substance Last Chance Agreement, whereby the Employee agrees to resign from employment in the event of a second positive controlled substance test occurring within two (2)

18. By letter dated January 14, 2004, UPW State Director Dayton M. Nakanelua requested OKUMA-SEPE to negotiate modifications to the provisions of Section 63.04a. (Pre-employment Testing) of the collective bargaining agreements to conform to the DOT Rule 382.102 for CDL drivers.[8] OKUMA-SEPE failed to respond to the UPW's request for bargaining. Tr. Vol. II, p. 311.

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years of the first positive controlled substance test exclusive of time from the date the Employee has been removed from performing safety sensitive functions, including time spent in evaluation and treatment, until the date the Employee has returned to performing safety sensitive functions following a negative return to work test(s).

63.15 c.2. When the Employee signs Exhibit 63.15d. Controlled Substance Last Chance Agreement, the Employee shall be suspended for twenty (20) work days instead of being discharged.

63.15 c.3. The Employee shall be referred to the SAP and must comply with the SAP's recommended rehabilitation program.

63.15 d. **SECOND POSITIVE CONTROLLED SUBSTANCE TEST.**

An Employee who tests positive for a controlled substance for a second time within two (2) years of the first positive controlled substance test exclusive of time from the date the Employee has been removed from performing safety sensitive functions, including time spent in evaluation and treatment, until the date the Employee returned to performing safety sensitive functions following a negative return to work test(s) shall be deemed to have resigned as provided in Exhibit 63.15 d Controlled Substance Last Chance Agreement.

[8]See, UPW Ex. 31. Nakanelua explains in pertinent part, as follows:

The proposal requires the City to notify employees of their continued participation in the City's random controlled substance testing program whenever they are expected to be out of work for a period of more than thirty (30) days, so they remain exempt from "preemployment testing" upon their resumption of duties.

DISCUSSION

The UPW contends that the City wilfully violated HRS § 89-10.8[9] and Section 15.20B of the Unit 01 contract by disregarding the final and binding nature of Aoki's arbitration award. The UPW argues that Ortiz's name was withdrawn from the random drug testing pool on September 19, 2002 without the Union's knowledge. The UPW also contends that during the arbitration of Ortiz's termination grievance, the City did not raise the issue of drug testing as a condition to his reinstatement. Further, during the Circuit Court proceedings for the confirmation of the award, the Court rejected the City's argument that the unconditional order of Ortiz's reinstatement was contrary to the DOT rules and the City did not appeal the Court's order. Thus, the UPW argues that the City is precluded from collaterally attacking the arbitration award by requiring Ortiz to submit to a drug test. Instead of reinstating Ortiz, the UPW contends that Ortiz was placed on standby status for four hours and then on a leave of absence. Ortiz was not allowed to return to his work duties until September 29, 2003 and he was compelled to accept another 20-day suspension, tender a conditional resignation, agree to waive his right to file a grievance and ultimately resign effective January 28, 2004.

The UPW additionally contends that the City engaged in inherently destructive conduct to deter protected activity by effectively discharging Ortiz because he successfully challenged three disciplinary actions through the Union's grievance procedure. The UPW argues that the City undermined the Union and diminished its capacity to effectively represent the employees in the bargaining unit. Thus, direct proof of discriminatory or unlawful motive is not required to establish a prohibited practice. The UPW argues that Respondents effectively undermined the Union by disregarding the final and binding effect of the Aoki award as intended by Section 15 and unilaterally modifying the provisions of Section 63 by requiring a pre-employment drug test of a regular employee without even notifying the Union of the mid-term modifications to the applicable terms and conditions of work. The UPW therefore contends that Respondents wilfully interfered with, restrained and coerced Ortiz in the exercise of his rights in violation of HRS § 89-13(a)(1) and violated the

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[9]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.

statutory and contractual (Section 1.05[10]) rights of employees in violation of HRS §§ 89-13(a)(7) and (8).

The UPW argues that the Respondents offer no proof of legitimate and substantial business justification for their decisions in refusing to reinstate Ortiz unconditionally. The Union submits that there was nothing Ortiz did on June 23, 2003 to warrant being kept off the job and treated in the manner he was.

The UPW next argues that the disciplinary suspension and discharge of Ortiz constituted wilful violations of Sections 11, 14, and 63. The UPW contends that there was no adequate forewarning and prior notice of the testing in this case. The UPW argues that the City's policy on pre-employment testing did not forewarn Ortiz that he could be tested as a condition of his reinstatement.

In response, the City contends that the testing of Ortiz was in accordance with the parties' collective bargaining agreement as Section 63 covers the controlled substance testing that Ortiz was required to undergo. The contract specifically provides that where it is found that a section does not comply with the U.S. Department of Transportation's (DOT) rules, the DOT rules shall prevail where valid and the parties shall renegotiate to bring the section into compliance. The City argues that the DOT rules require Ortiz to undergo pre-employment controlled substances testing prior to performing safety sensitive functions and Section 382.301 specifically notes that if a driver such as Ortiz is taken out of the DOT random testing pools for a period of more that 30 days, a pre-employment drug test under Section 382.301 is required before the driver can return to safety sensitive duties. The City maintains that the Board should defer to the U.S. DOT's interpretation of its rules contained in the illustrations under Section 382.301 which state:

> Question 3: Is a pre-employment controlled substances test required if a driver returns to a previous employer after his/her employment had been terminated?
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> Guidance: Yes. A controlled substances test must be administered any time employment has been terminated for more that 30 days and the exceptions under § 382.301(c) were not met.

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[10]Section 1.05 provides:

> The Employer agrees that it shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

> Question 4: Must all drivers who do not work for an extended period of time (such as layoffs over the winter or summer months) be pre-employment drug tested each season when they return to work?
>
> Guidance: If the driver is considered to be an employee of the company during the extended (layoff) period, a pre-employment test would not be required so long as the driver has been included in the company's random testing program during the layoff period. However, if the driver was not considered to be an employee of the company at any point during the layoff period, or was not covered by a program, or was not covered for more than 30 days, then a pre-employment test would be required.

In addition, the City relies upon an interpretation by the DOT in a letter dated March 3, 2004. City's Ex. F. The City also contends that there is no authority in the contract or in practice which supports a claim that Ortiz should have been placed in a non-safety sensitive position following the results of his failed drug test. Section 63.14(e)(1).

Compliance with the Aoki Award

In the instant case, the Board finds that the reinstatement of Ortiz by the Respondents satisfies the award of the arbitrator. In accordance with Aoki's arbitration award, OKUMA-SEPE rescinded Ortiz's discharge and reinstated Ortiz to his former Heavy Truck Driver position. OKUMA-SEPE changed Ortiz's discharge for the period September 5, 2002 to June 22, 2003, to reflect a leave of absence without pay - suspension. However, prior to Ortiz assuming the safety sensitive job responsibilities, the City subjected him to pre-duty drug testing under its interpretation of the federal regulations. While the UPW contends that the drug testing was retaliatory against Ortiz for having exercised his rights to grieve and diminished the standing of the Union, the Board finds that the UPW failed to prove by a preponderance of evidence that the City drug-tested Ortiz in a retaliatory manner. It is clear that JOHANSON determined that Ortiz should be tested based on her interpretation of the federal rules. JOHANSON was not Ortiz's supervisor or involved in the previous disciplinary actions against Ortiz. Thus, the Board concludes that the UPW failed to show any animus on the part of the City[11] in administering the test prior to Ortiz assuming

[11]The UPW established that Manassas-Liu initiated the question of whether Ortiz should be drug tested and she later instructed LENCHANKO to take Ortiz to be drug tested when, by her position, she should not have been involved in the process. Upon examination, Manassas-Liu was unable to recall specific events involving the drug testing. However, JOHANSON testified clearly and credibly that she decided that Ortiz had to be tested.

his safety sensitive job duties. The test was administered to comply with the federal regulations and such testing was proper under the federal regulations.

In prior cases, the Board recognized that compliance with federal statutes is not negotiable, but where the employer has discretion under federal law, regulation, or administrative opinions in implementing federal law, the duty to bargain applies. Decision No. 242, Hawaii Fire Fighters Association, Local 1463, 4 HLRB 164 (1987); University of Hawai`i Professional Assembly v. Tomasu, 79 Hawai`i 154, 900 P.2d 161 (1995). Thus, although the UPW strenuously argues that Respondents are required to negotiate over the drug testing provisions before requiring Ortiz to be subjected to drug testing, the Board cannot ignore the federal regulations which require testing of employees who have been out of the random pool for more than 30 days. Clearly, the federal regulations trump any contrary collective bargaining provision and any City policy on the matter. In this case, the collective bargaining agreement does not address the administration of the test for regular employees who are disciplined or on leave for an extended period and are subsequently reinstated or returned to the job. Thus, the Board finds that the UPW failed to prove by a preponderance of evidence that the City committed a prohibited practice by failing to comply with the arbitration award when it drug tested Ortiz prior to his assuming the safety sensitive job responsibilities. Moreover, the UPW also failed to prove that there was a corresponding requirement for the City to place Ortiz in a nonsafety sensitive position after Ortiz tested positive rather than following the provisions in the Unit 01 contract.

Unilateral Implementation

The UPW contends that Respondents failed to negotiate with the UPW prior to the administration of the drug test. In reviewing the collective bargaining contract, the Board finds the following provisions of the agreement to be applicable:

> **63.01 a.** Section 63, is intended to comply with the Omnibus Transportation Employee Testing Act of 1991 and the U.S. Department of Transportation's rules and regulations adopted as provided in the Act, hereafter "DOT Rules".
>
> **63.01 b.** Where it is found that a section does not comply with the DOT Rules, the DOT Rules shall prevail where valid and the parties shall renegotiate to bring the section into compliance.
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> * * *
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> **63.04 a.** **REQUIRED TEST.** Prior to the first time an Employee performs a safety sensitive function

> and/or being placed on a temporary assignment list, the Employee shall be subject to a controlled substance test, except as provided in the DOT Rules referred to in Section 63.01 a.

It is clear from the contract provisions that drug testing "prior to the first time that an Employee performs a safety sensitive function and/or being placed on a temporary assignment list. . . ." is addressed. There is, however, no contractual provision that specifically permits the testing of an employee who was in the random drug testing pool, but removed from the pool due to a job action, and subsequently returned to the position. In addition, the conditions or procedures for removal from the random pool are not addressed as well as any notice to the Union. Section 63.01b states that contract sections not in compliance require negotiations to bring such sections into compliance and it is clear that Respondents did not negotiate discretionary aspects of the drug testing prior to implementing them.

In reviewing the testimony in the case, it is clear that no one consulted with the Labor Relations Division of DHR which originally negotiated the contractual provisions but rather, Jennifer Tobin (Tobin) of the Benefits Research and Transactions Branch of DHR who in turn consulted with someone in the DOT. This appears to have resulted in the problems elaborated earlier where the UPW was not even notified or consulted about the requirement for drug testing. Moreover, the City, by JOHANSON, did not decide to drug test Ortiz until the morning when Ortiz was to resume his position notwithstanding the arbitration award was rendered approximately two weeks earlier. Further, in January 2004, the UPW requested the City to negotiate modifications to the contract but the City did not even acknowledge receipt of the letter or otherwise act on the request. Thus, we find that the City's conduct to be wilful ignorance of a proper request to negotiate. The fact that certain aspects of the proposal could have been non-negotiable is immaterial in the Board's view as the Union's request was simply ignored. Respondents failed to negotiate with the UPW under Chapter 89 and the contract provision requiring negotiation to comply with the federal regulations. We therefore conclude that the Respondents committed a prohibited practice in violation of HRS §§ 89-13(a)(7) and (8) and order that negotiations with the UPW proceed on appropriate subjects, i.e., procedures for drug testing employees returning to work after 30 days and/or who have been removed from the random testing pool.

In fashioning a remedy in this case, the Union requests that Ortiz be reinstated to his position. However, the Board will not disturb Ortiz's resignation. Even though the Board found a prohibited practice in the City's failure to negotiate a "preduty" testing provision for employees removed from the random drug testing pool, the fact is that Ortiz resigned as a consequence of a second positive drug test and in accordance with a last chance agreement pursuant to Section 63.15d. Notwithstanding the Union's determined efforts to secure Ortiz's job, the Board will not disturb the consequences of the drug testing provisions which the parties bargained for and which resulted in Ortiz's resignation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

2. An employer commits a prohibited practice under HRS § 89-13(a)(1) when it interferes, restrains, or coerces an employee in the exercise of any right guaranteed under Chapter 89.

3. An employer commits a prohibited practice under HRS § 89-13(a)(7) when it fails to comply with any provision of Chapter 89.

4. An employer commits a prohibited practice under HRS § 89-13(a)(8) when it violates the terms of a collective bargaining agreement.

5. The UPW failed to prove by a preponderance of evidence that the City engaged in inherently destructive conduct to deter protected activity by discharging Ortiz because he successfully challenged three disciplinary actions through the Union's grievance procedure. The UPW also failed to prove by a preponderance of evidence that the City undermined the Union and diminished its capacity to effectively represent the employees in the bargaining unit by disregarding the final and binding effect of the Aoki award as intended by Section 15 and unilaterally modifying the provisions of Section 63 by requiring a pre-employment drug test of a regular employee without even notifying the Union of the mid-term modifications to the applicable terms and conditions of work. The UPW thus failed to prove that the City violated HRS § 89-13(a)(1).

6. Although certain aspects of controlled substance testing is nonnegotiable because of the federal mandates, there are aspects which are negotiable and are contained in the collective bargaining agreement. The Unit 01 agreement negotiated between the parties further requires that sections of the agreement not in compliance with DOT Rules shall be negotiated into compliance.

7. The drug testing employees who have been taken out of the random testing pool because of absence from the job is clearly not addressed by the agreement.

8. The Respondents failed to notify the Union or consult over the drug testing of an employee being returned to work after being taken out of the random pool and wilfully ignored the Union's request to negotiate over the subject matter. Consultation and negotiation are provided for in HRS § 89-9 and Section 1.05 of the Unit 01 contract. The Board concludes that the City violated HRS

§ 89-9, thereby committing a prohibited practice in violation of HRS § 89-13(a)(7). The Board also concludes that the City violated Section 1.05, thereby committing a prohibited practice in violation of HRS § 89-13(a)(8).

ORDER

Based on the foregoing, the Board issues the following:

1. Respondents are ordered to cease and desist from taking unilateral actions on matters subject to the negotiations process and deal with the Union appropriately. On the matter of drug testing, the Respondents are ordered to negotiate modifications to Section 63.04a to conform with the DOT Rules 382.102 for CDL drivers.

2. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of the affected bargaining unit 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 30, 2005.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
CHESTER C. KUNITAKE, Member

Opinion Concurring in Part, and Dissenting in Part

I concur for the most part with the Board majority's findings and conclusions of law that the UPW failed to prove the City engaged in inherently destructive conduct by requiring its employee to undergo a drug test upon reinstatement as a Heavy Truck Driver thus constituting a prohibited practice under HRS § 89-13(a)(1). However, based on the Board majority's finding that the UPW failed to prove the City modified the provisions of

Section 63 by requiring a pre-employment drug test of Ortiz, I would have dismissed the alleged violations of a prohibited practice under HRS §§ 89-13(a)(7) and (8).

I respectfully dissent with the Board majority's conclusion and order that the City is under a duty to negotiate a specific procedure for an employee who is taken off the random drug test after being terminated, then reinstated by an arbitrator. Under the circumstances, the preemployment drug testing provision adequately covers pre-duty testing of a returning employee. The decision by the City's departmental drug program coordinator that Ortiz was required to undergo a preemployment (preduty) drug test upon reinstatement was based on a reasonable interpretation of the applicable federal regulation, i.e., Section 382-301(b) and (c), Federal Motor Carrier Act, and Section 63 of the Contract. Therefore, I would find that the returning employee was properly required to undergo a preduty test, which is consistent with the preemployment testing provisions bargained for in Section 63.04 of the Contract and in compliance with the federal rules.

The City sought guidance from the Federal Motor Carrier Safety Administration, U.S. Department of Transportation and learned that its interpretation was correct.[12] Insofar as the U.S. DOT is the administrative agency charged with the

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[12]See Respondent's Ex. F. In a letter to DHR Director OKUMA-SEPE, dated March 2, 2004, Donald Wayne Carr, Field Office Supervisor, U.S. Department of Transportation, Federal Motor Carrier Safety Administration, wrote in pertinent part as follows:

> You (sic) letter describes the circumstances of an employee who was terminated and later reinstated by an arbitrator. The employee had been terminated almost a year before being reinstated as if he had never left. You also note that the employee was removed from your random pool at the time he was terminated and did not participate in a similar program during the time prior to his reinstatement. You ask if a pre-employment (pre-duty) test for controlled substances is required.
>
> Your employee is required to take a pre-employment controlled substances test, with a negative result reported to you, prior to allowing the employee to perform safety sensitive functions. You are correct to note in your letter a pre-existing interpretation offered by the Federal Motor Carrier Safety Administration. The interpretation is listed as number 3, under Section 382.301 and restated here for clarity.
>
> > Question 3: Is a pre-employment controlled substances test required if a driver returns to a previous employer after his/her employment had been terminated?

responsibility of carrying out the mandate of the motor vehicle controlled substances testing, its interpretations are entitled to persuasive weight and should be followed by the Board. Since the pre-duty testing of ORTIZ was in compliance with the pre-employment testing provisions of Section 382.301 of the Federal Motor Carrier Safety Regulations, there is no valid basis for requiring the City to renegotiate drug testing provisions in accordance with section 63.01b of the Contract. Therefore, I would find that OKUMA-SEPE did not commit a prohibited practice by ignoring the UPW's January 2004 request to bargain, because there is no section in the contract that is out of compliance with the federal rules to be negotiated.

In this case, the Board ought to defer to the City's obligation to comply with the federal rules requiring that Ortiz be subject to a preemployment drug test as provided under Section 63.04a of the Contract. Moreover, the Board ought to commend the City's departmental drug program coordinator (JOHANSON), for a job well done. By correctly interpreting and applying the federal DOT drug testing rules to Ortiz, the City was able to keep our roads safe. This case is a good example of how difficult it is for the Employer to enforce a drug free workplace policy. Fortunately, for the City it has people like JOHANSON, who are sincere, reasonable and diligent about their work.

Finally, while I concur with the Board majority's good sense not to reinstate Ortiz, I question whether the Union's determined efforts in trying to secure Ortiz's job was a wise decision. Since the Union could not challenge Ortiz's resignation under the Contract, it appears the filing of this complaint was a clever attempt to circumvent the consequences of a second positive drug test and the last chance agreement signed by Ortiz. For the reasons given above, I would have dismissed the complaint in its entirety.

/s/
KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Paul K. W. Au, Deputy Corporation Counsel
Joyce Najita, IRC
William Puette, CLEAR
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Guidance: Yes. A controlled substances test must be administered any time employment has been terminated for more than 30 days and the exceptions under Section 382.301(c) were not met.