

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

|                                  |   |                             |
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| In the Matter of                 | ) | CASE NO. CE-01-231          |
|                                  | ) |                             |
| UNITED PUBLIC WORKERS, AFSCME,   | ) | ORDER NO. 1243              |
| LOCAL 646, AFL-CIO,              | ) |                             |
|                                  | ) | ORDER GRANTING UPW'S MOTION |
| Complainant,                     | ) | FOR SUMMARY JUDGMENT        |
|                                  | ) |                             |
| and                              | ) |                             |
|                                  | ) |                             |
| STEPHEN YAMASHIRO, Mayor, County | ) |                             |
| of Hawaii,                       | ) |                             |
|                                  | ) |                             |
| Respondent.                      | ) |                             |

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ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On August 11, 1994, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against STEPHEN YAMASHIRO, Mayor, County of Hawaii (County or Employer) with the Hawaii Labor Relations Board (Board). The UPW alleged that it filed a class grievance challenging the County of Hawaii Department of Public Works' use of a landfill manager to perform the work of bargaining unit members. The UPW further alleged that the Director of Personnel indicated that there was no Unit 01 agreement in effect covering the County of Hawaii employees and hence, no contract violations.

Thereafter, the UPW indicated its intent to arbitrate the grievance and requested Respondent to select an arbitrator pursuant to the grievance procedure of the Unit 01 collective bargaining agreement. Thus, the UPW contends that the Respondent wilfully violated §§ 89-13(a)(1), (7) and (8), Hawaii Revised Statutes (HRS).

On August 25, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that Respondent, in his answer filed on August 22, 1994, indicated that the Unit 01 agreement expired on June 30, 1993 and the County has not agreed to any extension of the agreement. Thus, Respondent indicated that the agreement does not apply to the present case. Based upon the Respondent's representations in its answer, the UPW contends that there are no genuine issues of material fact in dispute, and the UPW is entitled to judgment as a matter of law.

The UPW argued that the Board already held in Order No. 1090, in Case No. CE-01-204, United Public Workers, AFSCME, Local 646, AFL-CIO, which is presently pending before the Board, that pursuant to § 89-6(b), HRS, a simple majority of the public employers or their designated representatives may bind the entire employer group for the purposes of negotiations. In that case the Board held that the extensions of the Unit 01 agreement, effective from July 1, 1989 - June 30, 1995 (Contract), entered into by a majority of public employers was valid. Thus, UPW contended that since the same parties and issues are involved in this case, Respondent is estopped from contending that the Unit 01 Contract has not been validly extended.

Based upon the foregoing case, the UPW argued that once a multi-employer unit has been formed for bargaining purposes, the multi-employer group becomes the "employer" for purposes of bargaining and a public employer is not permitted to withdraw from the multi-employer unit for negotiations and act on its own. UPW thus contends that the doctrines of res judicata and collateral

estoppel preclude the relitigation of the validity of the Unit 01 contract extensions.

Further, the UPW relies upon previous Board decisions in Dennis Yamaguchi, 2 HPERB 656 (1981); State of Hawaii Organization of Police Officers, 3 HPERB 71 (1982); and Robert Burns, 3 HPERB 114 (1982) in arguing that the County's refusal to arbitrate the instant grievance constitutes a prohibited practice because of the Employer's noncompliance with § 15.22 of the Unit 01 Contract.<sup>1</sup>

On September 27, 1994, Respondent filed a memorandum in opposition to Complainant's motion for summary judgment. Respondent contends, assuming that the Contract provisions are valid, that the Board does not have jurisdiction over this complaint because the UPW failed to follow the grievance procedures in the Contract. Respondent alleged that the underlying grievance was inherently defective and the Employer was required to decline to process the grievance. Respondent further alleged that the Union declined to meet and discuss the grievance in violation of the Contract process. Respondent also contends that the refusal of

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<sup>1</sup>Section 15.22 of the Unit 01 Contract provides for the arbitration of grievances and states, in pertinent part:

15.22 Step 4. Arbitration. If the matter is not satisfactorily settled at Step 3, and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or his representative of its desire to arbitrate within thirty (30) calendar days of receipt of the decision of the Employer or his designated representative.

Within ten (10) calendar days after the receipt of the notice of arbitration by the Employer, the parties shall meet to select an arbitrator as provided in Section 15.24.

the Employer and its representatives to participate in the grievance process is a question of fact.

In addition, Respondent contends that neither the Board nor the parties can retroactively legitimize a prior prohibited practice. Respondent also contends that the Complainant must establish that the parties intended to retroactively reinstate the grievance procedure and that the intent of the parties is a question of fact which precludes summary adjudication. Moreover, Respondent contends that the UPW business agent's participation in the underlying grievance in order to allegedly obtain money for her son is an inherent conflict of interest and is unlawful. Respondent also argues that collateral estoppel and res judicata do not apply because Order No. 1090, supra, is not a final order.

On October 21, 1994, the Board conducted a hearing on the UPW's motion for summary judgment which was consolidated for the purpose of hearing with similar motions filed in Case Nos. CE-01-228, CE-01-229, CE-01-230, CE-01-232, CE-01-233, and CE-01-235. All parties had full opportunity to present evidence and argument to the Board. The Board took the motions under advisement. Based upon a review of the record, the Board makes the following findings and conclusions.

Complainant UPW is the exclusive representative, as defined in § 89-2, HRS, of the employees of the County of Hawaii who are included in Unit 01.

Respondent YAMASHIRO is the Mayor of the County of Hawaii and is the public employer, as defined in § 89-2, HRS, of the County employees who are included in Unit 01.

The public employers and the UPW executed the four-year Contract for bargaining unit 01 employees on June 27, 1989, covering the period July 1, 1989 through June 30, 1993. Complainant's (C's) Exhibit (Ex.) 2. The public employers, except for YAMASHIRO, and the UPW executed a Memorandum of Agreement, dated June 4, 1993, extending the terms of the Contract from July 1, 1993 through August 31, 1993. C's Ex. 3. Thereafter, the same parties executed another Memorandum of Agreement, dated August 27, 1993, extending the Contract from September 1, 1993 through January 15, 1994. C's Ex. 4. The same parties executed a third Memorandum of Agreement, dated January 14, 1994, extending the terms of the Contract from January 16, 1994 through April 1, 1994. C's Ex. 5.

Subsequently, the public employers, including YAMASHIRO, and the UPW executed a Memorandum of Agreement, dated June 21, 1994, which constitutes the settlement on all sections of the collective bargaining agreement for Unit 01. The Memorandum of Agreement includes a retroactive effective date of July 1, 1993 and extends to June 30, 1995. The Memorandum of Agreement provides that the terms and conditions of the Contract which existed on June 30, 1993, were incorporated without change in the new Agreement except for certain provisions which were specifically set forth. The Memorandum of Agreement does not modify the applicable provisions of the Grievance Procedure, § 15, of the Contract. C's Ex. 6.

On May 19, 1994, Ray Casetta, landfill manager, of the Department of Public Works, County of Hawaii performed Equipment Operator III duties when he operated a bulldozer. On or about

May 27, 1994, the UPW, by its business agent, filed a grievance at Step 1 of the Unit 01 grievance procedure. C's Ex. 7. By letter dated June 1, 1994, Acting Solid Waste Division Chief Laurence E. Capellas, responded to the grievance. C's Ex. 8. Capellas states that although the Union declined to meet and discuss the grievance, he nevertheless addressed the merits of the grievance. Id. By letter dated June 16, 1994, the Union filed its grievance at Step 2 of the grievance procedure. C's Ex. 9. By letter dated June 20, 1994, Chief Engineer Donna Fay K. Kiyosaki stated that there were no violations of the agreement since there was no collective bargaining unit agreement in effect. C's Ex. 10. Kiyosaki also indicated that the Employer attempted to schedule a meeting with the business agent but was unable to because of the agent's unavailability. Id. By letter dated June 24, 1994, the UPW filed its grievance at Step 3. C's Ex. 11. By letter dated July 7, 1994, Director of Personnel Michael R. Ben stated that since there was no Unit 01 collective bargaining agreement in effect covering the County employees, there was no violation of the Contract nor any recognizable status for the UPW to raise such allegations. C's Ex. 12. Further, as his review of the department's actions revealed no violations of law or rules, Ben stated that no further action was necessary. Id. By letter dated July 26, 1994, counsel for UPW requested Respondent to select an arbitrator within ten days as required by § 15.22 of the Contract. C's Ex. 13. Respondent has not responded to the Union's request to select an arbitrator.

This case raises identical legal issues to those raised and decided by the Board in Order No. 1190, in Case No. CE-01-210, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1225, in Case No. CE-01-213, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1226, in Case No. CE-01-214, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1228, in Case No. CE-01-219, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1236, in Case No. CE-01-226, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1237, in Case No. CE-01-227, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1238, in Case No. CE-01-228, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1239, in Case No. CE-01-229, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1242, in Case No. CE-01-230, United Public Workers, AFSCME, Local 646, AFL-CIO. The Board in those cases decided that Hawaii County was bound by the agreements reached between the majority of the public employers and the UPW to extend the terms of the collective bargaining agreement pending negotiations for a successor agreement. The Board held that grievances arising during the terms of the Contract extensions were valid and the County's refusal to arbitrate the grievances constituted a prohibited practice as violative of §§ 89-13(a)(5) and (8), HRS. The Board further held that the agreement entered into between the public employers and the UPW with the retroactive effective date also bound the parties to recognize grievances arising during the affected term, i.e., July 1, 1993 - June 30, 1995. Thus, the Board held that the County should have proceeded to arbitration on the grievances filed by the

UPW and the Board ordered the County to submit the cases to arbitration.

Under the facts of this case, the Union filed its grievance on or about May 27, 1994, during the period of the retroactive contract. The County failed to respond to the UPW's request for arbitration but previously indicated in the grievance procedure that the County did not recognize the validity of the Contract. Based upon the holding in the foregoing cases, the Board concludes that the retroactive contract was valid and the County was obligated to comply with the applicable grievance procedure and arbitrate the subject grievance.

The County contends that the UPW's alleged irregularities in the grievance procedure renders the underlying grievance defective and extinguishes the County's obligation to process the grievance. First, the County contends that the grievance was not signed by the proper grievant in violation of §§ 15.02<sup>2</sup> and 15.03<sup>3</sup>

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<sup>2</sup>Section 15.02 of the Contract provides as follows:

The term grievance as used in this Agreement shall mean a complaint filed by a bargaining unit employee covered hereunder or on an employee's behalf by the Union, alleging a violation, misinterpretation, or misapplication, of a specific provision of this Agreement occurring after its effective date.

<sup>3</sup>Section 15.03 of the Contract provides as follows:

Any individual employee may formally process his grievance and have the grievance heard without the participation of the Union representative. No meeting called for such purpose shall be held without first making an attempt to arrange a mutually acceptable meeting time with the affected employee and the Union representative, provided that such

of the Contract. In addition, the County contends that the Union failed to meet on the grievance and therefore refused to engage or follow the grievance procedure which in turn violated §§ 15.04,<sup>4</sup> 15.08<sup>5</sup> and 15.12<sup>6</sup> of the Contract. Finally, the County contends that the UPW business agent cannot represent the interests of her son since it creates a conflict of interest.

The Board notes that the County never raised these issues during the grievance process. Kiyosaki and Ben stated, inter alia, that their reason for not considering the grievance was that there

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meeting shall be held within the time limits hereinafter prescribed.

<sup>4</sup>Section 15.04 of the Contract provides as follows:

No adjustment shall be made at any step of the procedure which is inconsistent with the terms of the Agreement. If the Union alleges that the Employer has made a settlement proposal which is inconsistent with the Agreement, it shall process the case to the next step of the grievance procedure.

<sup>5</sup>Section 15.08 of the Contract provides as follows:

A grievance shall, whenever possible, be discussed and settled informally between the grievant and his immediate supervisor. The grievant may be assisted in his request by his Union steward or Representative.

<sup>6</sup>Section 15.12 of the Contract provides as follows:

After the presentation of the grievance and upon request, the grieving party and/or the Union representative, as the case may be, shall be provided an opportunity to meet with division head or his designee in an attempt to settle the grievance. The decision of the division head or his designee shall be in writing and shall be transmitted to the grieving party within seven (7) working days after receipt of the grievance unless extended by mutual consent.

was no Unit 01 contract in effect. Further, the County's arguments raise issues concerning the arbitrability of the grievance which should be resolved by an arbitrator. Based upon the cases previously decided by the Board, the Board finds that the County unlawfully refused to recognize the validity of the Contract extensions and the Unit 01 agreement which was retroactive to July 1, 1993, and therefore failed to process the underlying grievance in this matter to arbitration. The Board concludes that the County was obligated to comply with the applicable grievance procedure and arbitrate the subject grievance where it could properly pose its objections to the Union's handling of the grievance.

In Decision No. 194, United Public Workers, 3 HPERB 507 (1984), the Board held that the employer's treatment of the grievances as null and void evinced an intentional refusal to process them to arbitration. The wilfulness of the violation was presumed as it arose as a natural consequence of the employer's express refusal to arbitrate the grievances with no mitigating circumstances. The natural consequence of the action was to deprive the grievants of their right to have their grievances arbitrated. In addition, the Board in that case also found that the employer violated § 89-13(a)(1), HRS, by its refusal to arbitrate grievances. The Board stated at p. 517:

While the right of an employee to pursue a grievance to arbitration through the collective bargaining agreement is not specifically provided in Chapter 89, HRS, Section 89-3, HRS, protects the employee's right to pursue "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from

interference, restraint, or coercion." The employee's right to pursue and correct a grievance has been held to constitute lawful protected activity. Keokuk Gas Service, Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970).

The Board, therefore, found in Decision No. 194 that the employer's deliberate refusal to submit the grievances to arbitration interfered with and restrained the respective employees' rights to engage in the lawful, protected activity of pursuing their grievances thus violating rights implicitly guaranteed by Chapter 89, HRS.

As set forth above, the Board concludes that the contract with the retroactive effective date of July 1, 1993 was valid. The Board concludes that these contracts bind the County to recognize the grievances filed during the affected time period in which the instant grievance arose. The Board therefore, finds, based upon the County's refusal to respond to the UPW's request to arbitrate because there was no valid contract in effect, that the County committed prohibited practices in violation of §§ 89-13(a)(1) and (8), HRS.

Here, the Employer's deliberate refusal to submit the grievance to arbitration violated the contractual provision relating to arbitration and also interfered with and restrained the employee's right to engage in the lawful, protected activity of pursuing its grievance, thus violating a right implicitly guaranteed by Chapter 89, HRS. The Board finds that the deprivation of statutory and contractual rights occurred as a

natural consequence of the County's actions and, therefore, the County's actions were wilful in this case.

In accordance with the foregoing, the Board hereby concludes that the UPW is entitled to judgment as a matter of law and the Employer has committed prohibited practices by its refusal to arbitrate the subject grievance.

Finally, as Complainant failed to state a claim under § 89-13(a)(7), HRS, by failing to designate which provisions of Chapter 89, HRS, were violated, the Board hereby dismisses such charge.

#### ORDER

The Board hereby orders the Employer to cease and desist from refusing to recognize the validity of the Unit 01 contract with the retroactive effective date. Affirmatively, the Board orders the parties to submit the subject dispute, in good faith, to arbitration.

The Employer shall, within thirty (30) days of the receipt of this order, post copies of the order in conspicuous places on the bulletin boards at the worksites where Unit 01 employees of the County assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.

The Employer shall notify the Board within thirty (30) days of the receipt of this order of the steps taken by the Employer to comply herewith.

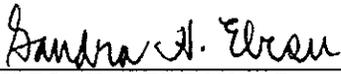
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. STEPHEN  
YAMASHIRO; CASE NO. CE-01-231  
ORDER NO. 1243  
ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

DATED: Honolulu, Hawaii, October 30, 1995.

HAWAII LABOR RELATIONS BOARD

  
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BERT M. TOMASU, Chairperson

  
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RUSSELL T. HIGA, Board Member

  
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