

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-83
)	
UNITED PUBLIC WORKERS,)	DECISION NO. 194
AFSCME LOCAL 646, AFL-CIO,)	
)	
Complainant,)	
)	
and)	
)	
TONY T. KUNIMURA, Mayor,)	
County of Kauai,)	
)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On March 22, 1983, Complainant UNITED PUBLIC WORKERS, AFSCME LOCAL 646, AFL-CIO [hereinafter referred to as Complainant, Union or UPW], filed a prohibited practice complaint with the Hawaii Public Employment Relations Board against TONY T. KUNIMURA, Mayor of the County of Kauai [hereinafter referred to as Respondent, Employer or KUNIMURA].

Complainant alleges that it filed five grievances, under the Unit 1 collective bargaining contract, with the Department of Water, County of Kauai, as follows:

<u>GRIEV.</u>	<u>DATE GRIEVANCE FILED</u>	<u>SUBJECT MATTER</u>	<u>CONTRACTUAL SECTIONS VIOLATED</u>	<u>DATE OF ALLEGED VIOLATION</u>
1	12/22/82	Unlawful performance of standby work by supervisors	1.05, 21.01, 28	Continuously since on or about 12/22/82

<u>GRIEV.</u>	<u>DATE GRIEVANCE FILED</u>	<u>SUBJECT MATTER</u>	<u>CONTRACTUAL SECTIONS VIOLATED</u>	<u>DATE OF ALLEGED VIOLATION</u>
2	12/27/82	Unlawful establishment of a new work shift	1.05, 15.09 25.01, 26.02	Continuously since on or about 12/20/82
3	12/27/82	Unlawful assignment of overtime work to standby employees	1.05, 16.08, 28.01, 28.02	12/13/82
4	12/29/82	Unlawful failure to pay temporary assignment pay for work foreman, Leonard Rapozo	29.01	12/29/82
5	1/6/83	Refusal to provide time sheets and information needed to investigate grievance	15.09	On or about 1/6/83

Complainant alleges that Respondent KUNIMURA failed to consider the above grievances at the third step of the grievance procedure set forth in Section 15 of the contract and failed to render written decisions as required by Section 15.21 of the contract.

Complainant further alleges that, following its request for arbitration of the grievances, Respondent refused in writing to participate in the selection of an arbitrator in grievances 1 through 4 above, as required by Section 15.22 of the contract.

By the foregoing conduct, Complainant alleges, Respondent violated the terms of the collective bargaining agreement in violation of Subsections 89-13(a)(1), (7) and (8), Hawaii Revised Statutes [hereinafter referred to as HRS]. Complainant further

alleges that Respondent's reason and basis for refusing to arbitrate the grievances violated protected concerted activity in violation of Sections 89-11 and 89-3, HRS.

After due notice to the parties, a hearing was held on May 17, 1983. Both parties were afforded a full opportunity to call and cross-examine witnesses and submit exhibits and briefs.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

UPW is the exclusive representative, as defined in Subsection 89-2(12), HRS, of employees in Unit 1, as defined in Subsection 89-6(a)(1), HRS, and as such, represents Unit 1 herein.

KUNIMURA is the Mayor of the County of Kauai, and, therefore, a public employer, as defined in Subsection 89-2(9), HRS, of employees of the County of Kauai who are in Unit 1.

UPW filed five grievances arising from Hurricane Iwa on the dates specified above alleging violations of the Unit 1 collective bargaining agreement by the Department of Water, County of Kauai. The grievances were timely processed by UPW through Steps 1 and 2 of the grievance procedure and were denied at these steps by Jeremiah M. Kaluna, Deputy Manager-Engineer, and Ray Sato, Manager and Chief Engineer, respectively.

KUNIMURA was sworn in as Mayor of the County of Kauai on January 2, 1983. Tr. p. 16. At this time, KUNIMURA was busy

getting the County "back on its feet after Hurricane Iwa" which hit Kauai on November 23, 1982. He called the departments in order to familiarize himself with events which occurred before he took office. Tr. pp. 9, 12, 15 and 27. KUNIMURA indicated that the Hurricane Iwa emergency took top priority in the early days of his term and as soon as the emergency abated, he was able to devote his time to other less pressing concerns. Tr. pp. 28-29.

It was stipulated by and between the parties that letters at the third step of the grievance procedure sent by Joseph R. Brun, UPW Kauai Division Director, were received by KUNIMURA on January 24, 1984. Tr. p. 56. It was not disputed that these were the first grievances entertained by KUNIMURA. Tr. pp. 80-81. At the time, he had no set procedure for handling grievances at his level and was totally unversed in the specific provisions of the Unit 1 agreement. Tr. pp. 21, 24, 27 and 45. KUNIMURA testified that Brun's letter was sent to Ray Sato and he requested information on the grievances by telephone. Tr. pp. 17-18.

Sato recalled receiving the request for information and that he met with Kaluna and KUNIMURA to discuss the facts underlying the grievances. Tr. p. 100. The first four grievances were discussed at that meeting. Tr. p. 102. KUNIMURA indicated to Kaluna and Sato that he would consult with the Director of Personnel Services. Under the previous administration, however, the Union representatives requested a meeting at Step 3 to discuss grievances with the Mayor, notwithstanding contract provisions which make such requests optional. Tr. pp. 63-64, 71,

85-86 and 88. Neither KUNIMURA nor Brun called the other to set a third step meeting. Tr. pp. 42-44. KUNIMURA admitted that before he could act on UPW's letter, the applicable contractual deadline passed. Tr. p. 9.

On February 7, 1983, Herbert Doi, Director of Personnel Services, unexpectedly met Brun at the Department of Water. This was when Doi first learned of the grievances. Tr. p. 64. Brun indicated to Doi in no uncertain terms that all of the grievances would be taken to arbitration. Tr. p. 47. Doi tried to persuade Brun to talk with KUNIMURA about the grievances despite the lapsing of the seven-day deadline. When Brun refused, Doi informed KUNIMURA that UPW would request arbitration because KUNIMURA failed to respond in a timely manner at Step 3. Tr. p. 66. KUNIMURA did not issue a decision or try to get an extension of time upon discovering the contractual requirement because the Union seemed to be taking a hard stance by refusing to contact him to discuss the grievances. KUNIMURA felt the Union had "shut him up" and decided to let it go at that. Tr. pp. 74 and 79.

Thereafter, UPW requested arbitration of the grievances and the selection of the arbitrators. Petitioner's Exs. A-9, B-6, C-9, D-8 and E-7. The parties stipulated that the notices were received on February 18, 1983. Tr. p. 56. KUNIMURA met with Doi and Deputy County Attorney Michael Abe and decided to refuse arbitration on the basis that the request was untimely. The Employer calculated that 15 calendar days from February 2, 1983, the date which the Employer's response was due, was

February 17, 1983 and UPW's actual request was received too late. Tr. pp. 50-61. Thus, KUNIMURA informed Brun by letter, dated February 18, 1983:

This is in response to your four (4) letters dated February 15, 1983 but received by me on February 18, 1983 requesting additional time to April 8, 1983 so that your Union's Arbitration Committee can consider and decide which of the above grievances will be taken to arbitration.

I want you to personally know that while in the midst of eliciting pertinent information from the Manager and Chief Engineer of the Department of Water and his deputy regarding all of the above-captioned grievances, I was informed by my Director of Personnel Services that you had taken it upon yourself to recommend to your UPW headquarters, on Oahu, that the Union should take these grievances to arbitration. You indicated your recommendation resulted solely because my decision on these grievances at Step 3 was not transmitted to you within seven (7) working days pursuant to Section 15.21 of the Unit 1 Agreement.

Since you have already served official notice on me that the UPW intends to demand strict adherence and compliance with all contractual requirements, I will likewise expect and demand the same from you and the UPW which union you represent.

Therefore, your apparent failure to notify me of the UPW's desire to proceed with arbitration in all of the captioned grievances within fifteen (15) calendar days pursuant to Section 15.22 of the Unit 1 Agreement forfeits your right to further process these alleged grievances.

As most of you know, I have been a strong union advocate for years and have always believed that promptness in settling grievances and complaints leads to better labor-management relations. However, because of your callous attitude in handling these grievances and your disregard and failure to observe Section 15's formal time require-

ments, I am herewith advising you, with regrets, that I consider them all to be null and void.

Very truly yours,

/s/ Tony T. Kunimura
TONY T. KUNIMURA
MAYOR, COUNTY OF KAUAI

Petitioner's Exs. A-10 and 11. While similar letters were sent for grievances 2, 3, and 4, KUNIMURA agreed to arbitrate the fifth grievance. Petitioner's Ex. E-8; Tr. pp. 61 and 119.

The relevant contract provisions state:

15.07 The specific time limits and procedures as hereinafter provided shall be followed in processing all grievances. Any grievance not filed in accordance with such procedure or within the time limits specified within each step need not be considered by the Employer. By mutual consent of both parties, any step as hereinafter provided may be waived and/or the time limits within each step may be extended. If the management representative fails to respond within the time limits specified at any step, the grievance may be filed at the next step.

* * *

15.20 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 the Employer or his representative in an attempt to settle the grievance.

15.21 The decision of the Employer or his representative shall be in writing and transmitted to the grieving party within seven (7) working days after receipt of the letter of appeal unless extended by mutual consent.

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 fifteen (15) 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 and select an arbitrator.

* * *

15.26 If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

Joint Exhibit 1.

CONCLUSIONS OF LAW

Complainant submits the following issues for the Board's determination. Complainant alleges that Respondent failed to render written decisions within seven days as required by Section 15.21 of the contract. Complainant further alleges that, following its request for arbitration of the grievances, Respondent unilaterally refused in writing to participate in the selection of an arbitrator as required by Section 15.22 of the contract. By the foregoing conduct, Complainant alleges Respondent has violated the terms of a collective bargaining agreement in violation of Subsection 89-13(a)(8), HRS. Complainant also alleges that Respondent's reason and basis for refusing to arbitrate the grievances violate protected concerted activity in

violation of Subsection 89-13(a)(1), HRS. United Public Workers' Memorandum of Fact and Law, p. 1.

The aforementioned subsections provide:

Section 89-13. Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

or

- (8) Violate the terms of a collective bargaining agreement.

The Board concludes that any other matters raised by the subject complaint but not argued are waived. Specifically, the Board finds that Complainant failed to support its allegation that Respondent failed or refused to comply with the provisions of Chapter 89, HRS. Accordingly, the allegation of a Subsection 89-13(a)(7), HRS, violation is dismissed.

A. VIOLATION OF SUBSECTION 89-13(a)(8), HRS

1. Refusal or Failure to Issue Written Decisions

The obligation of the Employer to render a written decision within a prescribed period at Step 3 of the grievance procedure is unquestioned. Section 15.21 of the contract, cited supra, specifically provides that the written decision shall be transmitted to the grieving party within seven (7) working days after receipt of the letter of appeal unless extended by mutual

consent. It is also undisputed that KUNIMURA failed to issue written decisions in response to grievances 1 through 4, which he received in late January. KUNIMURA admitted at hearing that the deadline passed without his issuance of a written decision due to oversight. Tr. p. 9. While KUNIMURA failed to comply with the contract by failing to respond at Step 3, Subsection 89-13(a), HRS, requires that violations must be wilfully committed to constitute prohibited practices.

"Wilful" has been interpreted by the Board to mean "conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS." Aio, et al. and HSTA, 2 HPERB 458, 491 (1980) ____ Haw. ____, ____, ____ P.2d ____, ____ (1983). However, while adhering to a literal interpretation of the term, the Board in Aio made it clear that wilfulness could be inferred from circumstances depending on whether obligations under the law which are allegedly broken are clearly delineated in settled doctrines. 2 HPERB at 481. The Board has also ruled that wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions. State of Hawaii Organization of Police Officers (SHOPO), et al. and Frank F. Fasi, 3 HPERB 12, 23 (1982); Burns and State of Hawaii Organization of Police Officers (SHOPO) and Eileen R. Anderson, 3 HPERB 114, 123 (1982).

In the instant case, the circumstances clearly suggest that KUNIMURA's noncompliance with the Step 3 procedures was not wilful.

KUNIMURA's actions upon first receiving the grievances indicate he had every intention of resolving the grievances through the contractual procedures. He called Sato and informed him of the Step 3 filings and set the investigatory process into motion. It was at this point, however, that the grievances were waylaid due to the KUNIMURA's pressing obligations growing out of the hurricane emergency and no decisions were rendered. The facts indicate that KUNIMURA's preoccupation with the hurricane emergency, along with his unfamiliarity with the Unit 1 contract and his obligations thereunder resulted in the grievances being ignored at the third step.

The Board concludes by a preponderance of the evidence that KUNIMURA failed to respond to the grievances due to his newness in his position, his corresponding lack of familiarity with the Unit 1 contract and his reasonable decision to devote his personal and office resources to the extraordinary situation caused by the hurricane. It was these factors, rather than a wilful intent to violate Chapter 89, that precipitated the alleged contract violations. No prohibited practices were thus committed by KUNIMURA's failure to respond to the grievances at Step 3.

2. Refusal to Arbitrate Grievances

Upon the failure of KUNIMURA to respond to grievances 1 through 4 at Step 3, a series of tactical maneuvers by both parties were set into motion attended by a misunderstanding of motives and a hardening of positions on both sides. Brun, having refused the plea of Doi to talk with KUNIMURA, was perceived by

the Mayor to be adopting an antagonistic approach in the collective bargaining relationship. Brun, perhaps, may have perceived the same of KUNIMURA's failure to respond at Step 3. With the parties thus alienated, each side was left with the recourse of preserving all contractual rights in what was appearing to be turning into a legal siege. Brun thus requested arbitration, as the Union was entitled to under the contract. KUNIMURA, at the advice of his staff, and in keeping with the hardline attitudes prevailing in the controversy, adopted an interpretation of the contract under which the request for arbitration was deemed untimely.

It is at this stage that the Board receives this case. The refusal to arbitrate was the culmination of the coincidence of a series of unusual events which included Hurricane Iwa, the transition from Malapit's to KUNIMURA's administration, KUNIMURA's preoccupation with the hurricane clean-up and lack of familiarity with the contractual grievance machinery, and UPW's resort to an uncompromising assertion of its employees' rights.

In Decision No. 79, State of Hawaii Organization of Police Officers v. Fasi, 1 HPERB 715 (1977), the Board held that under applicable contractual provisions, the decision of arbitrability is for the arbitrator to make. Therein, grievances were appealed to the third step and were denied by the Civil Service Director for failure to make timely filing. Arbitration was thereafter denied due to the untimely Step 3 filing. Id. at 718. The Board held that the Employer could not unilaterally determine the arbitrability of the grievances. Under the applic-

able contract provisions, the decision was for the arbitrator to make. The failure to "utilize the total grievance procedure" was deemed a wilful violation of Subsection 89-13(a)(8), HRS. Id. at 720. The Board therefore ordered the dispute be submitted to arbitration.

Article 32 of the relevant SHOPO contract stated:

Step IV. Arbitration.

d. If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such jurisdiction, the grievance shall be referred back to the parties without decision or recommendation.

Id. at 719.

The UPW contract in the instant matter contains a substantially similar provision, i.e.:

15.26 If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

In the instant case, KUNIMURA denied UPW's request for arbitration due to an alleged failure to notify him of the desire to proceed with arbitration "within 15 calendar days." Because of the alleged noncompliance with contractual time limits and a "callous attitude in handling the grievance," the Employer considered the grievances "null and void." Petitioner's Exs. A-10, B-9, C-11 and D-10. The application of the Fasi holding indicates that there was a prohibited practice committed here.

Treatment of the grievances as null and void evinces an intentional refusal to process them to arbitration. The wilfulness of the violation is presumed as it arose as a natural consequence of KUNIMURA's express refusal to arbitrate, with no mitigating factors such as confusion or uncertainty as to contractual obligations present. The natural consequence of this action is to deprive the employees of the right to have their grievances arbitrated. Thus such action is a wilful contract violation and a prohibited practice under Subsection 89-13(a)(8), HRS. The contract establishes that the issue of arbitrability is for the arbitrator to resolve. We make no finding as to the timeliness of the Union's request for arbitration.

The Board notes that while the Union's intransigence in not contacting KUNIMURA to inquire as to the status of the grievances was not in keeping with the spirit of harmonious and cooperative labor relations and the UPW's hardline attitude appears to depart from the practice under Mayor Malapit's administration, no such past practice was firmly established by the Employer. See State of Hawaii Organization of Police Officers, et al. and Frank F. Fasi, 3 HPERB 47 (1982).

B. VIOLATION OF SUBSECTION 89-13(a)(1), HRS

Complainant charges that the KUNIMURA's position, stated in the letter of February 18, 1983, that all grievances were to be considered null and void because of the "callous attitude" displayed by Respondent in demanding arbitration without settlement efforts, amounts to a retaliation against the Union.

for doing what it was obligated to do under the contract. Complainant thus charges that the right to pursue grievances to arbitration is guaranteed to employees in Section 89-3, HRS, and is protected from employer violation through Subsection 89-13(a)(1), HRS. Memorandum of Fact and Law at p. 7.

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).

Based upon the facts presented, the Board concludes that the Union was acting in accordance with the contract in requesting arbitration. Under Section 15.07, cited supra, the Union is entitled to take the grievance to the next step when management fails to respond at any step. Thus, UPW acted within its contractual rights when it demanded arbitration upon KUNIMURA's failure to respond at Step 3.

Although the Union interprets the Employer's action as retaliation for its requesting arbitration, we do not perceive it as such. The facts presented indicate KUNIMURA denied the Union's request because of the UPW's attitude and perceived failure to comply with contractual time requirements rather than

UPW's assertion of its rights to proceed to arbitration, per se. Nevertheless, the Employer's deliberate refusal to submit the grievances to arbitration, interfered with and restrained the respective employees' right to engage in the lawful, protected activity of pursuing their grievance thus violating a right implicitly guaranteed by Chapter 89, HRS. The wilfulness of the violation is presumed as it arose as a natural consequence of KUNIMURA's express refusal to arbitrate, with no mitigating factors. The wilful violation of a Chapter 89 right constitutes a wilful violation of Subsection 89-13(a)(1), HRS and a prohibited practice.

ORDER

As discussed supra, the allegation of a Subsection 89-13(a)(7), HRS, violation is dismissed.

In addition, because of uncontroverted evidence that Grievance No. 5 has been resolved, the Board finds that case moot.

As to the remaining grievances, the Board finds that the Employer's refusal to submit the disputes to an arbitrator constituted a violation of the terms of the Unit 1 collective bargaining agreement and the subject employees' right to pursue concerted activity under Section 89-3 and was a wilful violation of Subsections 89-13(a)(1) and (8), HRS.

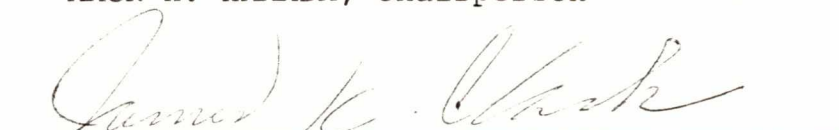
The Board orders the Employer to cease and desist this prohibited practice.

Affirmatively, the Board orders the parties to submit the remaining grievances to an arbitrator(s) to determine jurisdiction in accordance with Article 15.26 of the contract, and further orders the Employer to report on the extent to which he has complied with this order no later than 45 days after the date of this decision, together with proof of service of said report upon Complainant.

DATED: Honolulu, Hawaii, June 8, 1984.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member


JAMES R. CARRAS, Board Member

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