

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-01-121
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	DECISION NO. 337
LOCAL 646, AFL-CIO,	)	
Complainant,	)	FINDINGS OF FACT, CONCLU-
	)	SIONS OF LAW AND ORDER
and	)	
	)	
BERNARD K. AKANA, Mayor of	)	
the County of Hawaii,	)	
	)	
Respondent.	)	
	)	

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FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On February 7, 1989, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant, Union or UPW) filed a Prohibited Practice Complaint with the Hawaii Labor Relations Board (Board) against BERNARD K. AKANA, Mayor of the County of Hawaii (Respondent, Employer or AKANA). Complainant alleges that Respondent interfered with, restrained or coerced Alice Aumua (Aumua) in the exercise of her rights guaranteed under Sections 89-1, 89-3, and 89-10, Hawaii Revised Statutes (HRS), in violation of Subsection 89-13(a)(1), HRS.

Complainant also alleges that Respondent discriminated against Aumua in violation of Subsection 89-13(a)(4), HRS, and refused and failed to comply with Sections 89-1, 89-3, 89-10(a), and 89-11(a), HRS, in violation of Subsection 89-13(a)(7), HRS. Complainant alleges that these violations occurred when Respondent

repudiated a grievance settlement agreement awarding the position of Golf Course Groundskeeper II to Aumua.

Thereafter, in its First Amended Complaint filed on March 14, 1989, in addition to its previous allegations, Complainant contended that Respondent also violated Subsections 89-13(a)(5) and (6), HRS.

After due notice to the parties, a hearing was held on May 9, 1989. Both parties were afforded a full opportunity to call and cross-examine witnesses, submit exhibits and file 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 Section 89-2, HRS, of employees in Unit 1, as defined in Subsection 89-6(a)(1), HRS.

AKANA was the Mayor of the County of Hawaii and, therefore, a public employer, as defined in Section 89-2, HRS, of employees of the County of Hawaii in Unit 1.

As of the date of the hearing, Aumua was employed as a Groundskeeper I for the County of Hawaii for eight years and three months and works at the Hilo Municipal Golf Course. Transcript (Tr.), pp. 83-84. Aumua twice unsuccessfully sought a promotion to the position of Groundskeeper II on December 27, 1986 and December 3, 1987, respectively. Tr., p. 43. The only significant difference between the qualifications of the Groundskeeper I and the Groundskeeper II is that the Groundskeeper II is qualified to

operate a Toro Greens Master and Jacobson truck to cut the golfcourse grass, whereas a Groundskeeper I is not. Tr., pp. 98-99. According to her estimation, Aumua performed over 2,000 hours of temporary assignments in the Groundskeeper II position. Tr., p. 98.

When Aumua was not selected for promotion, she filed grievances under the Unit 1 collective bargaining agreement. The first grievance culminated in an award by Arbitrator Stanley Ling, dated November 6, 1987, in which he found the selection procedure to be defective and ordered that it be redone. Tr., pp. 43-44; Complainant's (C's) Exhibit (Ex.) 5. The second selection process also resulted in the denial of Aumua's promotion. The grievance proceeded through the various steps of the contractual procedure to arbitration, and Walter Ikeda was selected as the arbitrator. Tr., pp. 44-45.

BERNARD K. AKANA was elected Mayor of the County of Hawaii and assumed the office on December 5, 1988, during the pendency of the second grievance. Tr., p. 15. The arbitration hearing was postponed by the arbitrator on December 7, 1988 to permit the parties to explore settlement. C's Ex. 7. The hearing was postponed over the objections of Susan LaBrenz, Managing Director. Tr., pp. 123, 152-153. LaBrenz indicated that the new administration met with the Corporation Counsel's Office and decided to maintain the previous administration's position concerning Aumua's grievance, which was to deny the grievance. Tr., p. 118. Mayor AKANA was not apprised of Aumua's case prior to December 20, 1988. Id.



UPW Hawaii County Division Head Jack Konno contacted the Mayor's office and arranged for a meeting on December 20, 1988. Konno, UPW Business Agent Anne Delos Santos, Lowell Chun-Hoon, Esq., and Aumua met with Mayor AKANA at approximately 1:30 p.m. Tr., pp. 16-17, 45-46. Prior to that meeting, AKANA had neither studied the history of Aumua's situation nor was he aware of the meeting's purpose. Tr., pp. 33-34.

At the meeting, Chun-Hoon presented Aumua's qualifications, informed the Mayor of her previous 1986 promotion attempt, and explained that there had been various defects in the previous promotion. Tr., pp. 46-47. Delos Santos indicated that Aumua should be promoted because of her past temporary assignments to the Groundskeeper II position and her seniority. Tr., p. 68. A memo dated November 29, 1985 from Pat Engelhardt, the former Director of Parks and Recreation, to Aumua's supervisor Marvin Iida, was also disclosed to the Mayor. The memo referred to Aumua's workers' compensation claims, and specifically mentioned that her numerous claims should be considered in future promotional applications. C's Ex. 4; Tr., pp. 60, 68-69, 74-75.

AKANA confirmed that the pending Aumua grievance was presented to him at the meeting. He indicated that he did not feel coerced or threatened and that the meeting was extremely cordial. Tr., pp. 17, 19-20. He testified that he had seen Aumua previously at the Hilo Municipal Golf Course and had spoken with her. Tr., pp. 36-37. The Mayor asked how he could help Aumua. Chun-Hoon stated that he could promote Aumua to Groundskeeper II, and the Mayor then responded, "You got it." Tr., p. 47.

Aumua testified that the Mayor asked, "What can I do to help her?" The Mayor indicated that if he could be of help in any way, he would help her. Aumua stated that the Mayor asked Chun-Hoon, "Would you try to help me to draw up something that I will be willing to sign?" Chun-Hoon replied, "Yes, if you want me to." The Mayor then said, "Okay. You draw up the papers and you send it to me, and I'll sign it to have her promoted." Tr., pp. 85-86.

Delos Santos testified that there was an actual agreement to promote the Grievant to Groundskeeper II at the meeting and confirmed that the Mayor asked that a decision be prepared for him to sign. Tr., p. 67. Delos Santos testified that the Mayor stated that he had seen Aumua do the job and that he knew that she could do the job. Tr., p. 68.

The Mayor, however, testified that he did not agree to promote Aumua at the meeting. He testified, "I said I would back her up in any way that I can, but I didn't say that I would award her that position." Tr., p. 18. He further stated that he only asked that something be written for presentation to his Parks and Recreation director. Tr., p. 19. He also stated that he was attempting to assist Aumua as a friend rather than as a County executive resolving an employee grievance. Tr., pp. 40-41.

Following the meeting with the Mayor, Aumua and the Union representatives went to the Director of Parks and Recreation Larry Tanimoto's office to inform him of the meeting. Tanimoto testified that he was shocked when Konno described the outcome of the meeting. When asked if he would comply with the Mayor's actions, Tanimoto replied that he would live with it. Tr., p. 138.

At about 3:00 p.m. on December 20, 1988, the Mayor saw Tanimoto as they prepared for a cabinet meeting. Tanimoto stated that the Mayor related that the Aumua case had come up and that he had told the Union to, "Go draft something," and that he would subsequently discuss it with Tanimoto. Tr., p. 139. At about 4:30 p.m., Tanimoto discussed his meeting with the UPW with LaBrenz. Tr., p. 119. Tanimoto informed her that the Mayor had asked the Union to draft a settlement that would be discussed with LaBrenz and Tanimoto and that the two of them should give input to the Mayor. Tanimoto said LaBrenz was shocked at this and stated that all information should be gathered "so the Mayor can see where that case really is." Tr., p. 143. Tanimoto expressed concern that the Union was taking advantage of the Mayor. Tr., pp. 143-144.

On the following morning, LaBrenz told the Mayor that she and Tanimoto had previously decided to uphold the decision of the prior administration not to promote Aumua. Tr., pp. 119-120. Tanimoto also saw the Mayor and urged him to review the case. Tr., p. 145.

By letter dated December 28, 1988, Chun-Hoon summarized the meeting of December 20, 1988, and stated in pertinent part:

As we agreed at that meeting, I have prepared a decision in this matter awarding the promotion to the Groundskeeper II position at the Hilo Municipal Golf Course . . .

It was a pleasure to meet with you on December 20. I am gratified that we were able to work out a constructive solution to this grievance.

C's Ex. 3.



The decision which Chun-Hoon prepared for the Mayor's signature is a twelve-page typewritten document titled, "Decision Regarding Request to Reconsider Grievance". It contains a general introduction, a passage describing the factual background of the case, a discussion of the merits of Complainant's grievance including discussion of the alleged defective test procedures, alleged discrimination based on physical handicap and for filing Worker's Compensation claims, and a final section discussing remedies. C's Ex. 1.

LaBrenz testified that on or about December 28, 1988, rumors arose at a staff training meeting that the Mayor had overturned the decision of one of his department heads. Tr., p. 129. LaBrenz asked the Mayor about these rumors and testified that the Mayor stated that he had said to the Union at the meeting, "I told them I would support her." Tr., pp. 130-131, 132.

Konno wrote an article for Malama Pono, the Union's newspaper (C's Ex. 6), in which Konno described the meeting with the Mayor, the history of Aumua's grievances and which closed as follows:

UPW extends a great big 'MAHALO' to Mayor Bernard Akana for his decision to promote the senior employee at the Hilo Municipal Golf Course.

Mayor Akana, you made our day!

Tr., pp. 51-52.

About two weeks after the December 20th meeting with the Union, LaBrenz and Tanimoto met with the Mayor to discuss the Mayor's position on the case. Tr., p. 146. At that time, the

decision drafted by Chun-Hoon was not reviewed. Tr., p. 147. According to Tanimoto, the decision proposed by the Union was not discussed because the Corporation Counsel's office was handling the matter. Tr., pp. 149-150.

By letter, dated January 11, 1989, AKANA wrote to Konno stating:

I received the decision prepared by your attorney, Lowell Chun-Hoon, after my informal meeting with you.

I reviewed it with my appropriate agencies and decided to return this decision to you. I must ask that you pursue the grievance following the procedures set forth by the Unit 1 Agreement, Section 15.22.

C's Ex. 2.

This letter was received by the Union on January 18, 1989. Tr., p. 52. The Union filed the subject complaint with the Board on February 6, 1989.

#### DISCUSSION

##### 1. Respondent's Motion to Dismiss

On May 5, 1989, Respondent filed a Motion to Dismiss Complainant's Prohibited Practice Complaint with the Board. Respondent relies on Honolulu Police Department, 4 HLRB 560 (1988) (HPD) and argues that in the instant case, there was no final, binding, executed agreement awarding Aumua the promotion. As such, no violation occurred when Respondent refused to promote Aumua and the complaint should be dismissed.

At the hearing on May 9, 1989, counsel for Complainant stated that he did not receive a copy of the subject motion. The



Board, therefore, granted Respondent's withdrawal of the motion subject to renewal after the presentation of Complainant's case. Tr., pp. 5-8. The motion to dismiss was renewed in Respondent's Answering Brief, at pages 4-6.

As the Board entertains the subject motion after the presentation of Complainant's case, the motion is regarded as a motion filed under Rule 41(b), Hawaii Rules of Civil Procedure (HRCPP), as opposed to a motion to dismiss for failure to state a claim as provided for under Rule 12(b)(6), HRCPP.

Rule 41(b), HRCPP, states:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief.

Respondent argues that the right to bargain collectively as embodied in Chapter 89, HRS, is not at issue in the instant case. Respondent argues that the cause of action based on such a right, is not properly before the Board in the present case and should be dismissed.

The Board hereby denies the motion to dismiss. The Board is not persuaded by Respondent's mere assertion that the right to bargain collectively is not at issue in Complainant's charges regarding the validity of the oral settlement agreement allegedly entered into between the Respondent and the Union.

The Board has previously stated that the process of grievance adjustment is part and parcel of the collective

bargaining process. Dennis Yamaguchi, 2 HPERB 656 (1981); SHOPO and Damas and Fasi, 3 HPERB 12 (1982); Virginia Sanderson, 3 HPERB 25 (1982). Complainant's charges of Subsection 89-13(a)(1), (5), (6), and (7), HRS, violations are, therefore, not subject to dismissal on this basis.

Respondent also moves to dismiss Complainant's charges based on a violation of Subsection 89-13(a)(4), HRS. Subsection 89-13(a)(4), HRS, reads as follows:

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

\* \* \*

- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has formed, joined, or chosen to be represented by any employee organization.

Complainant argues that the "admissions that Respondent believed it was being taken advantage of by the Union--in the context of the unwavering evidence that the grievance was, in fact, settled on December 20--demonstrate that she has indeed been discriminated against because she joined and choose [sic] to be represented by Complainant UNITED PUBLIC WORKERS." Thus, Complainant argues, Aumua's promotion became "the unwitting victim of the Administration's preoccupation and hostilities with the union, and a violation of Subsection 89-13(a)(4) has been proven by the very words of Respondent's witnesses themselves."

The Board finds Complainant's argument to be without merit. It is clear that the controversy herein centers on the validity of the oral agreement allegedly entered into between the Mayor and the Union. The propriety of the alleged awarding of the promotion to Aumua and the reversal of previous grievance decisions are necessarily involved therein. The evidence alludes at points to Respondent's desire to "get tough" with the Union, but the substance of the evidence more centrally involves the propriety of the alleged oral agreement and accompanying grievance adjustments, as such. No substantial evidence supports the Subsection 89-13(a)(4), HRS, charge of discrimination and it is, therefore, dismissed. Carlsmith, Carlsmith, Wichman and Case v. George Gora, et al., 3 Haw. App. 98, 99 (1982).

Respondent argues that the instant complaint should be dismissed on the basis of the HPD case. Respondent cites the HPD case for the proposition that an oral agreement between the parties settling a grievance is not binding absent a final and executed settlement agreement.

In response, Complainant distinguishes the HPD case on the basis that (1) it involved allegations of Subsections 89-13(b)(2) and (5) violations; (2) that the agreement in HPD to settle the grievance was "tentative"; (3) that the parties in HPD refused to place the settlement on the record before the arbitrator, whereas herein it was the intention of the parties to memorialize the agreement in writing; (4) that the union in HPD was ascribed to have an illicit motive "acting in bad faith by entering into a tentative settlement agreement to somehow forestall the



arbitration in this matter," whereas herein the Union wished to explore settlement; and (5) in HPD, the Board found no "compelling facts or authority which would invoke any equitable principle to enforce the tentative settlement agreement."

In the HPD case, the Board found an oral agreement to settle a grievance to be "tentative" pending the execution of formal documents. That case should not be construed to mean that the Board considers all oral agreements tentative until it is memorialized in formal written documents executed by the parties. Such a holding would hamper orderly and harmonious collective bargaining as neither party could ever be confident that a negotiated settlement would not be rejected prior to execution of formal documents.

In Mine Workers v. Peggs Run Coal Co., 343 F. Supp 68, 80 LRRM 2736 (W.D. Pa. 1972), the U. S. District Court enforced an arbitration board agreement to settle grievances where the issue of whether or not an agreement was reached was in dispute and the agreement was not reduced to writing. The Court stated that the critical issue was whether or not an agreement was reached and upon resolving that issue in favor of the union, enforced the oral agreement. Numerous arbitration decisions also support the proposition that oral agreements to settle grievance are binding on the parties.

In this case, although the Mayor in his testimony denied granting the promotion, his testimony is outweighed by the testimonies of Aumua, Delos Santos, and Konno who all unequivocally testified that the Mayor granted the promotion to Aumua without

qualification. While the agreement herein was never reduced to writing, it is clear from the evidence that an agreement was reached. While the Board is mindful that this conclusion rests on statements of parties aligned with the Union which could be self-serving, the preponderance of the evidence indicates the opposing parties, through discussion, obtained a meeting of minds on the awarding of a promotion to Aumua.

The motion to dismiss on the basis of the HPD case is, therefore, denied.

## 2. Case-in-Chief

As discussed above, the Board concludes that at the meeting on December 20, 1988, Mayor AKANA agreed to promote Aumua to the Groundskeeper II position. His testimony asserting that he only agreed to help Aumua in general terms is outweighed by the testimonies of Aumua, Konno and Delos Santos.

The Board thus concludes that the Mayor, by a preponderance of the evidence, orally agreed to settle Aumua's grievance by promoting her to the Groundskeeper II position. AKANA's subsequent repudiation of the agreement constitutes an intentional and wilful violation of Subsection 89-13(a)(5), HRS. The Subsection 89-13(a)(6), HRS, charges are dismissed as that statutory provision refers to Section 89-11, HRS, arbitration procedures which are not at issue here. In view of the foregoing conclusions, the Board finds it unnecessary to address the UPW's allegations of Subsections 89-13(a)(1) and (7), HRS.

### CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to Sections 89-5 and 89-14, HRS.

There is insufficient evidence to prove the Union's charges of discrimination by the Employer. Thus, the UPW's charges of a Subsection 89-13(a)(4), HRS, is dismissed.

The Employer wilfully violated Subsection 89-13(a)(5), HRS, by making an oral agreement to settle the subject grievance by promoting Aumua and by subsequently repudiating the agreement.

The Employer did not refuse or fail to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11, HRS. Section 89-11, HRS, relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement. Section 89-11, HRS, is not applicable to this case.

### ORDER

Respondent is directed to promote Aumua to Groundskeeper II retroactive to December 20, 1988, the date of the meeting when the agreement was reached.

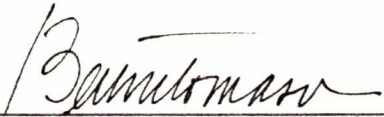
Respondent Employer shall immediately post copies of this decision in conspicuous places on the bulletin boards at the worksites where the employees of the bargaining unit assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.



UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and BERNARD K.  
AKANA; CASE NO. CE-01-121  
DECISION NO. 337  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, April 27, 1993.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member

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