

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-254
)	
UNITED PUBLIC WORKERS, AFSCME,)	DECISION NO. 374
LOCAL 646, AFL-CIO,)	
)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW AND ORDER
)	
and)	
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii; JAMES TAKUSHI,)	
Director, Department of Human)	
Resources Development, State of)	
Hawaii and MARGERY BRONSTER,)	
Attorney General, State of)	
Hawaii,)	
)	
Respondents.)	

In the Matter of)	CASE NO. CE-10-255
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Complainant,)	
)	
and)	
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii; JAMES TAKUSHI,)	
Director, Department of Human)	
Resources Development, State of)	
Hawaii and MARGERY BRONSTER,)	
Attorney General, State of)	
Hawaii,)	
)	
Respondents.)	

In the Matter of)	CASE NO. CE-10-256
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Complainant,)	
)	
and)	

BENJAMIN J. CAYETANO, Governor,
State of Hawaii; JAMES TAKUSHI,
Director, Department of Human
Resources Development, State of
Hawaii and MARGERY BRONSTER,
Attorney General, State of
Hawaii,

Respondents.

In the Matter of

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

Complainant,

and

BENJAMIN J. CAYETANO, Governor,
State of Hawaii; JAMES TAKUSHI,
Director, Department of Human
Resources Development, State of
Hawaii and MARGERY BRONSTER,
Attorney General, State of
Hawaii,

Respondents.

CASE NO. CE-10-257

In the Matter of

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

Complainant,

and

BENJAMIN J. CAYETANO, Governor,
State of Hawaii; JAMES TAKUSHI,
Director, Department of Human
Resources Development, State of
Hawaii and MARGERY BRONSTER,
Attorney General, State of
Hawaii,

Respondents.

CASE NO. CE-10-258

In the Matter of)

CASE NO. CE-10-259

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

Complainant,)

and)

BENJAMIN J. CAYETANO, Governor,)
State of Hawaii; JAMES TAKUSHI,)
Director, Department of Human)
Resources Development, State of)
Hawaii and MARGERY BRONSTER,)
Attorney General, State of)
Hawaii,)

Respondents.)

In the Matter of)

CASE NO. CE-10-261

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

Complainant,)

and)

BENJAMIN J. CAYETANO, Governor,)
State of Hawaii; JAMES TAKUSHI,)
Director, Department of Human)
Resources Development, State of)
Hawaii and MARGERY BRONSTER,)
Attorney General, State of)
Hawaii,)

Respondents.)

In the Matter of)

CASE NO. CE-10-262

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

Complainant,)

and)

BENJAMIN J. CAYETANO, Governor,)
State of Hawaii; JAMES TAKUSHI,)
Director, Department of Human)
Resources Development, State of)
Hawaii and MARGERY BRONSTER,)

Attorney General, State of
Hawaii,

Respondents.

In the Matter of

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

Complainant,

and

BENJAMIN J. CAYETANO, Governor,
State of Hawaii; JAMES TAKUSHI,
Director, Department of Human
Resources Development, State of
Hawaii and MARGERY BRONSTER,
Attorney General, State of
Hawaii,

Respondents.

CASE NO. CE-10-263

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On July 28, 1995, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed six prohibited practice complaints (Case Nos.: CE-10-254, CE-10-255, CE-10-256, CE-10-257, CE-10-258 and CE-10-259) with the Hawaii Labor Relations Board (Board). On August 3, 1995, the UPW filed three additional prohibited practice complaints (Case Nos.: CE-10-261, CE-10-262, CE-10-263) with the Board. All nine complaints were filed against BENJAMIN J. CAYETANO, Governor, State of Hawaii; JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii and MARGERY S. BRONSTER, Attorney General, State of Hawaii (collectively Employer).

In all of the nine cases, the UPW alleged that representatives of the Employer failed to contact the UPW's legal representative, Herbert R. Takahashi, Esq. (Takahashi), within ten days of receipt of the UPW's notices of intent to proceed to individual arbitrations, for the purpose of selecting arbitrators. The UPW alleged that the conduct of the Respondents in all of the nine cases constitutes repeated violations of Section 15.22 of the Unit 10 collective bargaining agreement (contract), thereby repeatedly violating Sections 89-13(a)(1), (7) and (8), Hawaii Revised Statutes (HRS).

Hearings were held on September 5 and 6, 1995 at Honolulu, Hawaii. All parties were afforded full opportunity to present witnesses, exhibits and arguments before the Board. By Order No. 1233, dated October 3, 1995, the Board denied Respondents' Motion to Reopen the Hearing, or in the Alternative, for the Board to take Administrative Notice of the Record in HLRB Case No. CE-01-266. The Board's Order also consolidated the following nine cases for disposition: CE-10-254, CE-10-255, CE-10-256, CE-10-257, CE-10-258, CE-10-259, CE-10-261, CE-10-262, and CE-10-263. The Board's Order further granted Respondents' request for an extension of time for filing briefs until October 16, 1995.

Based upon a thorough review of all exhibits, testimony presented at the hearings and arguments, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The UPW is an employee organization and the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 10.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer as defined in Section 89-2, HRS.

Respondent JAMES TAKUSHI (Takushi) is the director of the Department of Human Resources Development (DHRD), State of Hawaii, who represents the interests of the Governor or acts in his interest in dealing with public employees, as such TAKUSHI is deemed to be a public employer as defined in Section 89-2, HRS.

Respondent MARGERY S. BRONSTER is the Attorney General for the State of Hawaii.

The UPW and the State of Hawaii are parties to a multi-employer collective bargaining agreement covering bargaining unit 10 employees for the period July 1, 1993 to June 30, 1995. The contract has been extended twice, most recently to June 30, 1996.

Section 15 of the contract sets forth the grievance procedure and Section 15.22 of the contract, pertaining to Arbitration provides, 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 the 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. [Emphasis added.]

Complainant's Exhibit (C's Ex.) 4.

According to the Employer's practice, upon receipt of the Union's notice of intent to arbitrate a grievance and request for the selection of an arbitrator, the DHRD Director transmits the letter to DHRD's labor relations division chief who assigns the case to a labor relations specialist. Thereafter, the division prepares a letter to the Union for the Director's signature acknowledging receipt of the letter and informing the Union that the Attorney General's assistance is being requested. Another letter is drafted to the Attorney General to request the assignment of counsel. Thereafter, the labor relations staff awaits contact from the assigned deputy attorney general who contacts the UPW's counsel.

In June of 1995, the procedure was altered to also require approval from TAKUSHI or his labor relations staff on the arbitrators to be proposed by the Employer.

In Case No. CE-10-254, on or about May 10, 1995, the UPW filed a grievance under Section 15 of the contract alleging a violation of Section 17.03 of the contract. CE-10-254, C's Ex. 1. By letter dated June 28, 1995, which was received on or about June 30, 1995 Gary Rodrigues (Rodrigues), State Director of the UPW informed TAKUSHI of the Union's intent to proceed with arbitration of the grievance. CE-10-254, C's Ex. 2. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. The ten-day contact period expired on July 10, 1995.

By letter dated July 5, 1995, from Takahashi to TAKUSHI, which was received on July 5, 1995, the UPW's counsel recited the foregoing provision of Section 15.22 which requires the parties to meet and select an arbitrator within ten calendar days of receipt of Rodrigues' notice of arbitration letter. The letter also extended the ten-day contact period to July 15, 1995. CE-10-254, C's Ex. 3. On August 2, 1995, the UPW's counsel was informed that Deputy Attorney General Francis Keeno (Keeno) was assigned to the case. Keeno's initial contact concerning selection of the arbitrator was made on or about August 25, 1995, by telephone call to Takahashi.

In Case No. CE-10-255, on or about May 10, 1995, the UPW filed a grievance under Section 15 of the contract alleging numerous contractual violations. CE-10-255, C's Ex. 1. By letter dated July 12, 1995, from Rodrigues to TAKUSHI, which was received on or about July 17, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. CE-10-255, C's Ex. 2. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. The ten-day contact period expired on July 27, 1995.

By letter dated July 14, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. The letter also extended the ten-day contact period to July 24, 1995. CE-10-255, C's Ex. 3. By letter dated August 2, 1995, the UPW's counsel was informed that Keeno was assigned to the case. CE-10-255, Respondent's Exhibit (R's Ex.) D. Keeno made initial contact with Takahashi by telephone on or about August 25, 1995.

In Case No. CE-10-256, on or about May 22, 1995, the UPW filed a grievance under Section 15 of the contract alleging a violation of Section 17.03 of the contract. CE-10-256, C's Ex. 1. By letter dated June 28, 1995, from Rodrigues to TAKUSHI, which was received on or about June 30, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-256, C's Ex. 2. The ten-day contact period expired on July 10, 1995.

By letter dated July 17, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. The letter also extended the ten-day contact period to July 27, 1995. CE-10-256, C's Ex. 3. By letter dated July 25, 1995, from Deputy Attorney General Lester M.H. Goo to Takahashi, the UPW's counsel was informed that Goo was assigned to the case. CE-10-256, C's Ex. 3.

In Case No. CE-10-257, on or about April 26, 1995, the UPW filed a grievance under Section 15 of the contract alleging numerous contractual violations. CE-10-257, C's Ex. 1. By letter dated July 3, 1995, from Rodrigues to TAKUSHI, which was received on July 7, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-257, C's Ex. 2. The ten-day contact period expired on July 17, 1995.

By letter dated July 7, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. The letter also extended the ten-day contact period to July 17, 1995. CE-10-257, C's Ex. 3. By letter dated July 25, 1995, from TAKUSHI to Rodrigues, the Employer acknowledged receipt of the July 3, 1995 letter, and informed the Union that the matter had been referred to the Attorney General's Office and that assigned counsel would contact Takahashi. CE-10-257, R's Ex. C. By letter dated August 2, 1995, from Keeno to Takahashi, the UPW's counsel was informed that Keeno was assigned to the case. CE-10-257, R's Ex. E. Keeno made initial contact with Takahashi by telephone on or about August 25, 1995.

In Case No. CE-10-258, on or about May 12, 1995, the UPW filed a grievance under Section 15 of the contract alleging several contractual violations. CE-10-258, C's Ex. 1. By letter dated July 3, 1995, from Rodrigues to TAKUSHI, which was received on July 7, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-258, C's Ex. 2. The ten-day contact period expired on July 17, 1995.

By letter dated July 7, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. The letter also extended the ten-day contact period to July 17, 1995. CE-10-258, C's Ex. 3. By letter dated July 13, 1995, from TAKUSHI to Rodrigues, the Employer acknowledged receipt of the July 3, 1995

been referred to the Attorney General's Office and that assigned counsel would contact Takahashi. CE-10-258, C's Ex. 3. Deputy Attorney General Janice Kemp was assigned to the case and made initial contact with Takahashi by telephone on or about August 15, 1995.

In Case No. CE-10-259, on or about April 7, 1995, the UPW filed a grievance under Section 15 of the contract alleging several contractual violations. CE-10-259, C's Ex. 1. By letter dated June 28, 1995, from Rodrigues to TAKUSHI, which was received on June 30, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-259, C's Ex. 2. The ten-day contact period expired on July 10, 1995.

By letter dated July 5, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. The letter also extended the ten-day contact period to July 15, 1995. CE-10-259, C's Ex. 3. By letter dated July 17, 1995, from Takahashi to TAKUSHI, the Employer was informed that the Union would be requesting a list of arbitrators from the Board. CE-10-259, C's Ex. 3. By letter dated July 19, 1995, from the Board to Takahashi, a list of the names of five arbitrators was submitted to the UPW's counsel. CE-10-259, C's Ex. 4.

By letter dated July 20, 1995, from Keeno to Takahashi, the UPW's counsel was informed that Keeno was assigned to the case.

CE-10-259, R's Ex. F. Keeno made initial contact with Takahashi by telephone on or about August 25, 1995.

In Case No. CE-10-261, on or about April 25, 1995, the UPW filed a grievance under Section 15 of the contract alleging numerous contractual violations. CE-10-261, C's Ex. 1. By letter dated July 18, 1995, from Rodrigues to TAKUSHI, which was received on July 21, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-261, C's Ex. 2. The ten-day contact period expired on July 31, 1995.

By letter dated July 20, 1995, from Takahashi to TAKUSHI, which was received on or about July 21, 1995, the UPW's counsel again recited Section 15.22 of the contract. By letter dated July 25, 1995, from TAKUSHI to Rodrigues, the Employer acknowledged receipt of the July 18 letter from Rodrigues, and informed the Union that the matter had been referred to the Attorney General's Office and that assigned counsel would contact Takahashi. CE-10-259, C's Ex. 3. By letter dated August 2, 1995, from Keeno to Takahashi, the UPW's counsel was informed that Keeno was assigned to the case. CE-10-261, R's Ex. G. Keeno made initial contact with Takahashi by telephone on or about August 25, 1995.

In Case No. CE-10-262, on or about March 20, 1995, the UPW filed a grievance under Section 15 of the contract alleging a violation of Section 11.01 of the contract. CE-10-262, C's Ex. 1. By letter dated July 11, 1995, from Rodrigues to TAKUSHI, which was

received on July 17, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-262, C's Ex. 2. The ten-day contact period expired on July 27, 1995.

By letter dated July 17, 1995, from Takahashi to TAKUSHI, the UPW's counsel again recited Section 15.22 of the contract. By letter dated July 25, 1995, from TAKUSHI to Rodrigues, the Employer acknowledged receipt of the July 11, 1995 letter from Rodrigues, and informed the Union that the matter had been referred to the Attorney General's Office and that assigned counsel would contact Takahashi. CE-10-262, C's Ex. 3. Deputy Attorney General Eric Medeiros was assigned to the case on August 7, 1995, and made initial contact with Takahashi on August 16, 1995.

In Case No. CE-10-263, on or about April 26, 1995, the UPW filed a grievance under Section 15 of the contract alleging numerous contractual violations. CE-10-263, C's Ex. 1. By letter dated July 18, 1995, from Rodrigues to TAKUSHI, which was received on July 21, 1995, the Employer was informed of the Union's intent to proceed with arbitration of the grievance. The letter also requested that TAKUSHI's representative contact Takahashi concerning the selection of an arbitrator to hear the case. CE-10-263, C's Ex. 2. The ten-day contact period expired on July 31, 1995.

By letter dated July 20, 1995, from Takahashi to TAKUSHI, which was received on July 21, 1995, the UPW's counsel again

recited Section 15.22 of the contract. By letter dated July 25, 1995, from TAKUSHI to Rodrigues, the Employer acknowledged receipt of the July 18, 1995 letter from Rodrigues, and informed the Union that the matter had been referred to the Attorney General's Office and that assigned counsel would contact Takahashi. CE-10-263, C's Ex. 3. By letter dated August 2, 1995, from Keeno to Takahashi, the UPW's counsel was informed that Keeno was assigned to the case. CE-10-263, R's Ex. H. Keeno made initial contact with Takahashi by telephone on or about August 25, 1995.

In all of the nine cases, TAKUSHI testified that his staff, or the attorney assigned to each case, was responsible for contacting the UPW's counsel, after receipt of notice of arbitration letters from Rodrigues.

In all of the nine cases, TAKUSHI's staff, or the attorney assigned to each case, failed to contact Takahashi, for the purpose of selecting an arbitrator, within ten calendar days of receipt of either Rodrigues' notice of arbitration letters or Takahashi's subsequent letters.

DISCUSSION

The gravamen of the UPW's complaint is that the Employer's representative failed to contact Takahashi within ten calendar days of receipt of the Union's notice of intent to arbitrate letter for the purpose of selecting an arbitrator.

The UPW alleges that the Employer's conduct violated Section 15.22 of the contract and therefore violated Sections 89-13(a)(1), (7), and (8), HRS, which provides as follows:

(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 under this chapter;

* * *

(7) Refuse or fail to comply with any provision of this chapter;

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

Section 15.22 of the contract provides that within thirty calendar days of the receipt of an unsatisfactory decision at Step 3 the Union may serve the Employer or his representative with its notice of intent to arbitrate the grievance. The contract further provides that within ten calendar days after the receipt of the notice of arbitration, the parties shall meet to select an arbitrator. The contract further provides that in the event that the parties are unable to select an arbitrator thirty days after receipt of the notice to arbitrate, the parties may request a list of arbitrators from the Board.

The Board finds that in each of the cases before the Board, the Employer's representative did not meet with the Union within ten calendar days to select an arbitrator as required by the clear and unambiguous contract terms.

The Employer filed a motion to dismiss the prohibited practice complaints because the Union failed to exhaust its contractual remedies. The Employer contends that the Union should be required to request a list of names from the Hawaii Labor Relations Board under the provisions of the contract prior to

maintaining these prohibited practice complaints. The Employer argues that the contract provides a specific remedy, i.e., to have the parties request a list of arbitrators from the Board, and that the Union should be required to exhaust all of the contractual procedures before bringing a prohibited practice charge before the Board. In addition, the Employer contends that arbitrators have already been selected in some of these cases and therefore the complaints are moot. Further, the Employer contends that the obligation to select an arbitrator is mutual and that the Union is equally at fault in the non-selection because the UPW has not proposed any names for consideration.

In response, the Union contends that deferral to arbitration is inappropriate in this case because the Employer has frustrated access to the arbitration process. Further, the Union contends that the instant dispute does not involve contract interpretation; the Union alleges that the ten-day requirement to select an arbitrator is clear from the contract language and is not subject to interpretation. Additionally, Complainant contends that the issues are not moot because in some cases the Employer's representative has not contacted UPW's counsel. The UPW further contends that these cases fall within an exception to the mootness doctrine because the legal issues at issue are capable of repetition which will evade review.

After reviewing the arguments presented, the Board denies the Employer's motions to dismiss the prohibited practice complaints. The Board agrees with the UPW that the Union need not request a list of arbitrators from the Board prior to bringing

these prohibited practice charges before the Board. Here, the UPW alleges that the Employer violated the grievance procedure of the contract by failing or refusing to select an arbitrator within ten days of the Union's notice to arbitrate. If the Board required the Union to request a list of arbitrators prior to bringing a charge to enforce the provision regarding the initial selection of the arbitrator, the Board would render that provision nugatory.

Moreover, the Board concludes that the legal issues before the Board are not rendered moot by the selection of the arbitrator in several of the cases. In Application of Thomas, 73 Haw. 223 (1992), the Hawaii Supreme Court recognized that as a general rule, the courts will not decide abstract propositions of law or moot cases. However, the Court also recognized an exception to the general rule in cases involving legal issues which are capable of repetition yet evading review. The Union contends that the Employer engaged in repeated violations of Section 15.22 and thus, the dispute before the Board is neither an abstract question nor a matter which has been resolved.

Based upon the foregoing, the Board concludes that the issues before the Board are not moot. The Board finds that these cases involve conduct which is repetitious and falls within the exception to the mootness doctrine since the eventual selection of the arbitrator would effectively moot the legal issues without permitting the Board or the courts to determine whether the Employer violated the provisions of the contract by not meeting to select an arbitrator within ten days.

With respect to the merits of the complaints, the Board concludes based upon the evidence and arguments presented that the Employer violated 15.22 of the contract. In the cases before the Board, the UPW sent its notice of intent to arbitrate to the Employer's representative, Personnel Director TAKUSHI. TAKUSHI testified that under the Unit 10 contract, contact must be made within ten days of receipt of the letter requesting arbitration. Thus, the Employer was aware of its responsibility under the contract to contact UPW's counsel within the respective time frame. In each of these cases, UPW's counsel wrote to TAKUSHI indicating that the UPW intended to invoke the ten-day provision of the contract and gave the Employer ten additional days to contact him to select an arbitrator. In some cases, TAKUSHI did not respond; in some cases, contact was made by the Attorney General's Office well beyond the contractual time limits.

In reviewing the express language of Section 15.22 of the contract which requires the parties to meet and select an arbitrator within ten calendar days of the Employer's receipt of the notice of intent to arbitrate, Rodrigues testified that compliance with the provision could be accomplished if someone representing the Employer, with the authority to select an arbitrator, made actual contact with the UPW's counsel within the ten-day time period. This appears to be a reasonable interpretation of the provision. Neither party argued that the provision required a face-to-face meeting, or that the arbitrator must be selected, during the ten-day period. The question then

becomes what sort of response is required within ten calendar days of receipt of Rodrigues' letter.

At a minimum, the contract requires that a representative from the Employer contact the UPW's counsel to discuss the selection of an arbitrator. It is incumbent upon the Employer to implement whatever procedures are necessary to comply with the contract. Clearly, this contact and follow-up discussion need not result in the actual selection of an arbitrator. Sections 15.24 and 15.25 of the contract outline alternative methods of selecting an arbitrator if the parties fail to select by mutual agreement. C's Ex. 4.

While the Employer relies on past practice and custom to excuse its noncompliance with the terms of the contract, the Board finds that the past practice is irrelevant as an interpretative aid where the contract is clear and unambiguous. State of Hawaii Organization of Police Officers, et al., 3 HPERB 47 (1982). Here, the contract clearly requires the Employer's response ten days after the Union's request for arbitration.

The Employer also contends that the Employer has proposed thirteen arbitrators for the nine grievances and the Union has proposed only one. The Employer argues that it would thus be unfair for the Board to find a prohibited practice where the Union has expended "meager" efforts in the selection of arbitrators and that the Union's refusal to recommend names of arbitrators is an act of bad faith since it is contrary to the spirit and purpose of Section 15.22. The Employer thus argues that in each of these cases, the Union could have proposed names to the various Employer

representatives involved to consider and that the Employer had not committed a prohibited practice by not identifying the person authorized to discuss the selection of arbitrators within the ten-day deadline.

The Board is not persuaded that the foregoing excuses Employer non-compliance with the applicable contract provision. It is apparent that under the Employer's procedure for routing the Union's correspondence, valuable time is consumed while an attorney is assigned to the case but who does not have the authority to select an arbitrator. If the authority to select the arbitrator is with TAKUSHI, then it appears to the Board that the selection process can be made at the outset of the routing process rather than waiting for the assignment of counsel. In any event, the Employer's responsibility under the contract is clear and its repeated violations of the contract provision at issue constitute prohibited practices under Section 89-13(a)(8), HRS.

The Employer argues that the Union must prove by a preponderance of the evidence that it acted in a wilful manner. In United Public Workers, AFSCME, Local 646, AFL-CIO, Decision No. 194, 3 HPERB 507 (1984), the Board, while acknowledging its previous interpretation of "wilful" as meaning "conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS" nevertheless stated that "wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions." Id. at 514.

Thus, based upon the evidence before this Board, the Board finds that the natural consequence of the Employer's actions

in failing to contact UPW's counsel to select an arbitrator constitutes a delay and frustration of the grievance process. Thus, the Board finds that the Employer's actions in these cases were wilful violations of the contract.

The Board further finds that the Employer's violations of the grievance process constitute violations of Section 89-13(a)(1), HRS, because the Employer's conduct interfered with the rights of the employees and the Union to timely process the grievances involved. While the contract provides that the parties may request a list of arbitrators from the Board, the Board recognizes that this process is more time-consuming and also limits the choices of arbitrators which the parties could freely propose if the selection process was done in accordance with the contract.

The grievance procedure set forth in Section 15 of the contract which culminates in final and binding arbitration, provides for an efficient and informal process for resolving contractual disputes. Delays, where strict timelines are prescribed, serve only to frustrate this process.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to Sections 89-5 and 89-13, HRS.

An employer commits a prohibited practice in violation of Section 89-13(a)(1), HRS, by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89.

The Employer wilfully interfered with the rights of bargaining unit 10 employees when it failed to abide by the timelines set forth in the contractual grievance procedure.

An employer commits a prohibited practice in violation of Section 89-13(a)(7), HRS, when it refuses or fails to comply with any provision of Chapter 89.

The Union failed to prove that the Employer refused or failed to comply with any provision of Chapter 89, except as indicated below.

An employer commits a prohibited practice in violation of Section 89-13(a)(8), HRS, when it violates the terms of a collective bargaining agreement.

The Employer wilfully violated Section 15.22 of the contract when it failed to have a representative, with authority to select an arbitrator, contact the UPW's counsel within ten calendar days of receipt of the Union's letter noticing its intent to arbitrate the grievance.

ORDER


The Employer is ordered to cease and desist from committing the instant prohibited practices and shall comply with the requirements within the time period prescribed in Section 15.22 of the contract.

The Employer shall immediately post copies of this decision in conspicuous places at its worksites where 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.

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

DATED: Honolulu, Hawaii, April 11, 1996.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

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