STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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 S. BRONSTER, Attorney General, State of Hawaii, Respondents.	CASE NO. CE-10-393 DECISION NO. 397 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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CONCLUSIONS OF LAW, AND ORDER

On April 27, 1998 Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondents BENJAMIN J. CAYETANO, Governor, State of Hawaii; JAMES TAKUSHI, Director, Department of Human Resources Development (TAKUSHI); and MARGERY S. BRONSTER, Attorney General, State of Hawaii (collectively "Employer") informed the Union that a grievance was non-arbitrable and failed to proceed with the selection of an arbitrator thus committing a prohibited practice in violation of Sections 89-13(a)(1), (7), and (8), Hawaii Revised Statutes (HRS).

On May 26, 1998, the UPW filed a motion to continue the hearing. By Order No. 1633, dated May 29, 1998, the Board granted the UPW's request to continue the hearing.

On July 20, 1998, the Board held a hearing on the instant case. All parties were afforded a full opportunity to present evidence and arguments before the Board. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant UPW was, at all times relevant, the exclusive bargaining representative of employees in bargaining unit 10, as defined in Section 89-2, HRS.

Respondent BENJAMIN J. CAYETANO was, at all times relevant, a public employer within the meaning of Section 89-2, HRS.

Respondent TAKUSHI was, at all times relevant, the Director of the Department of Human Resources and Development, and is a representative of a public employer in dealing with public employees within the meaning of Section 89-2, HRS.

Respondent MARGERY S. BRONSTER was, at all times relevant, the Attorney General of the State of Hawaii, and is a representative of a public employer in dealing with public employees within the meaning of Section 89-2, HRS; however, she is not a representative of a public employer in dealing specifically with unit 10 employees. The UPW and the State of Hawaii, by and through the Governor and his representatives, are parties to a

collective bargaining agreement (contract) covering Unit 10 employees in the State of Hawaii.

On October 1, 1997, the UPW filed a unit 10 grievance on behalf of John Napaepae with the Department of Public Safety, State of Hawaii.

By letter dated April 2, 1998, from UPW State Director Gary W. Rodrigues to TAKUSHI, the Union informed the Employer that the grievance was being submitted to arbitration.

By letter dated April 7, 1998, from TAKUSHI to Rodrigues, the Employer informed the Union that the Union's April 2 letter, requesting arbitration, was untimely and that the Employer had closed the case at the end of December 1997. In addition, the Employer would not consider the notice to arbitrate because of untimeliness. The letter further stated that if the Union persisted in arbitrating the grievance, the Employer would contest arbitrability on the basis of untimeliness.

By letter dated May 4, 1998, from James E. Halvorson, Deputy Attorney General, to David M. Hagino, Esq., Halvorson proposed the names of three individuals to serve as arbitrator in the grievance-arbitration.

By letter dated May 6, 1998, from Hagino to T. David Woo, Esq., Woo was informed that he had been selected to serve as arbitrator in the grievance-arbitration.

DISCUSSION

Complainant UPW contends that Respondents violated Sections 89-13(a)(1)(7) and (8), HRS, which provide as follows:

> 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 by this chapter;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement;

The gravamen of UPW's complaint focuses on TAKUSHI's April 7, 1998 letter to Rodrigues which the UPW contends constitutes a refusal to arbitrate. The UPW further contends that TAKUSHI's unilateral determination that the matter is non-arbitrable is an attempt at substituting his judgment for that of an arbitrator in violation of Section 15.26 of the contract which provides:

> 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.

It is clear from the expressed language in Section 15.26 of the contract that the determination of arbitrability is for an arbitrator to decide.

The Employer maintains that TAKUSHI's April 7 letter did not constitute a refusal to arbitrate, but merely informed the Union that the Union's April 2 notice letter would not be considered "because it was untimely filed." The Employer cites as

further evidence its willingness to arbitrate by referring to the letter's closing paragraph which states "should you persist in arbitrating this case, the Employer will contest arbitrability based on untimeliness."

After reviewing the evidence in the record and the totality of the circumstances, the Board finds that TAKUSHI's April 7 letter, while going well beyond acknowledging receipt of the Union's notice of intent to proceed to arbitration, essentially constitutes a statement of the Employer's position with respect to arbitrability and not an outright refusal to arbitrate.

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. In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570 (1996) in Case Nos.: CE-10-254, et seq., the Board determined that those cases involved conduct which was repetitious and fell 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 courts to determine whether the employer violated the provisions of the contract by not meeting to select an arbitrator within ten days.

Of substantial significance to the Board is the Employer's subsequent conduct as evidenced by the May 4, 1998 letter from Halvorson to Hagino proposing a list of arbitrators and Hagino's May 6, 1998 letter confirming the selection of

T. David Woo, Esq., as arbitrator. While the timing of Halvorson's letter, dated eight days after the instant complaint was filed, is certainly suspect, an arbitrator was in fact selected to hear the case.

CONCLUSIONS OF LAW

Where an Employer proceeds with the selection of an arbitrator, there appears to be no actionable controversy existing between the parties. Hence, the Board finds this case to be moot.

ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, February 23, 1999.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

Copies sent to:

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