STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and JEREMY HARRIS, Mayor, City and County of Honolulu; SANDRA H. EBESU, Director, Department of Personnel, City and County of Honolulu and ROBIN CHUN-CARMICHAEL, Division Chief, Labor Relations and Training, Department of Personnel, City and County of Honolulu, Respondents.	CASE NO. CE-01-397 DECISION NO. 398 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 29, 1998, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against JEREMY HARRIS, Mayor, City and County of Honolulu (HARRIS); SANDRA H. EBESU, Director, Department of Personnel, City and County of Honolulu (EBESU); and ROBIN CHUN-CARMICHAEL, Division Chief, Labor Relations and Training, Department of Personnel, City and County of Honolulu (CHUN-CARMICHAEL) (collectively City or Employer) with the Hawaii Labor Relations Board (Board). The UPW contends that the City unilaterally implemented disciplinary penalties and terms and conditions of employment on employees who operated commercial vehicles and occupied safety-sensitive positions who tested

positive for drugs and alcohol. The UPW contends that the City thereby breached the Stipulations and Order in a prior case, Case No. CE-01-340, which constitutes a wilful refusal to bargain in good faith and a prohibited practice in violation of Sections 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

The Board conducted hearings on the instant complaint on July 15, and 22, 1998. All parties were afforded the opportunity to present evidence and arguments to the Board.

On July 17, 1998, the UPW filed a motion for interlocutory relief pending the issuance of a final decision with the Board. The UPW requested that the Board enjoin Respondents from repudiating an April 9, 1997 settlement agreement which reinstates Alexander Amoy (Amoy), William Paia (Paia), and Arthur Salas (Salas) as employees of the City upon evaluation by a substance abuse professional (SAP) and acceptance into a treatment plan; (2) to affirmatively require HARRIS to temporarily assign Amoy, Paia, and Salas in nonsafety sensitive entry level positions under Section 14.05 of the Memorandum on Commercial Motor Vehicle Alcohol and Controlled Substance Testing; and (3) to affirmatively require HARRIS to restore Amoy, Paia, and Salas to their regular positions upon successful completion of their treatment programs.

On July 24, 1998, Respondents filed a memorandum in opposition to Complainant's motion for interlocutory relief with the Board. Respondents contend that the UPW failed to prove that it is entitled to interlocutory relief because Respondents have not violated the Board's order, dated April 10, 1997. Respondents also argue that the UPW's contentions are premised upon an oral

agreement which is not enforceable. Moreover, Respondents contend that Complainant failed to demonstrate irreparable harm and thus, is not entitled to interlocutory relief from the Board. In any event, Respondents further contend, the public interest does not favor the issuance of interlocutory relief in this case.

On July 31, 1998, the Board conducted a hearing on Complainant's motion for interlocutory relief.

Based upon a thorough review of the record and having considered the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant UPW is the exclusive representative, as defined in Section 89-2, HRS, of the employees of the City and County of Honolulu who are included in Unit 01.

Respondent JEREMY HARRIS is the Mayor of the City and County of Honolulu and the public employer as defined in Section 89-2, HRS, of employees of the City and County of Honolulu who are included in Unit 01.

Respondent SANDRA H. EBESU is the Director of Personnel, City and County of Honolulu, and a representative of the public employer as defined in Section 89-2, HRS.

Respondent ROBIN CHUN-CARMICHAEL is the Division Chief, Labor Relations and Training, Department of Personnel, City and County of Honolulu and is a representative of the public employer as defined in Section 89-2, HRS, to the extent described infra.

In early 1995, the UPW began negotiations with the multi-employer group over a uniform policy regarding the testing for

alcohol and drugs for drivers with commercial drivers licenses (CDL) pursuant to the U.S. Department of Transportation (DOT) rules. CHUN-CARMICHAEL was initially designated as the chief spokesperson for the multi-employer group and was later succeeded by Manabu Kimura, Chief Negotiator, State of Hawaii. Gary Rodrigues, UPW State Director (Rodrigues), was the chief negotiator for the Union.

During the course of negotiations, the State of Hawaii, Hawaii County and Maui County implemented interim policies providing for disciplinary sanctions for employees who tested positive for drugs or alcohol. The UPW filed a prohibited practice complaint with the Board against the State of Hawaii and Hawaii and Maui counties in Case No. CE-01-260, et seq., contesting the unilateral implementation of the disciplinary policies by the employers. On January 12, 1996, the Board issued an interlocutory order requiring, inter alia, the affected employers to cease and desist from imposing discipline and otherwise depriving employees of compensation as a result of positive test results, except for the removal of the employees from safety sensitive positions, pending negotiations. The City was not named as a Respondent in the foregoing complaint because the City, by CHUN-CARMICHAEL, had previously agreed not to unilaterally discipline employees for positive drug and alcohol tests.

In accordance with the agreement not to unilaterally discipline employees, CHUN-CARMICHAEL contacted Rodrigues to discuss specific cases as they arose. According to Rodrigues, the parties developed a specific disciplinary criteria which was consistent with the UPW's position in the multi-employer

bargaining. For the first positive test, the employee would be removed from the safety-sensitive function and subjected to treatment in accordance with instructions from an independent SAP. On the second positive test, the employee would be suspended for ten days and on the third positive and thereafter, the employee would be suspended for 20 days.

In 1996, several City department heads unilaterally discharged employees who had multiple positive tests. Arthur Salas received a dismissal letter dated May 24, 1996. William Paia received a dismissal letter dated June 6, 1996. Charles Canipe received a dismissal letter dated August 29, 1996. Alexander Amoy received a dismissal letter dated September 16, 1996. Clyde Zukemura and G. Zuttermeister each received dismissal letters dated November 6, 1996.

Kenneth Sprague, Director of Public Works, City and County of Honolulu, cited the application of the "just cause" provisions, in his dismissal letters to Salas, Amoy, Zukemura, and Zuttermeister. CHUN-CARMICHAEL testified that the City and the UPW had not agreed that the just cause provisions of the contract were applicable. CHUN-CARMICHAEL admitted that the agreement with the UPW did not permit the City to discharge any employee without the consent of the UPW. Thus, when CHUN-CARMICHAEL learned of the dismissals, she recognized that the unilateral dismissals violated the City's earlier commitments to the UPW.

On December 19, 1996, the UPW filed a prohibited practice complaint against the City with the Board in Case No. CE-01-340. The UPW alleged that the City unilaterally disciplined employees with positive drug and alcohol tests in violation of a mid-1996

agreement with UPW not to unilaterally impose discipline for positive drug and alcohol tests pending completion of the multi-employer negotiations over the CDL Memorandum of Agreement (MOA). Prior to the complaint being filed, CHUN-CARMICHAEL instructed personnel officers to rescind the dismissal actions. Thus, Sprague withdrew the dismissal letters sent to Zukemura and Zuttermeister on November 15, 1996.

CHUN-CARMICHAEL investigated the actions underlying the prohibited practice complaint and provided the UPW with a list of affected employees. CHUN-CARMICHAEL and Rodrigues met and agreed that the discharges of Amoy, Paia, and Salas would be rescinded. CHUN-CARMICHAEL met with various personnel officers from the City to inform them of the decision to take corrective action and to draft the rescission letters. Thus, Paia was sent a letter rescinding his dismissal, dated February 28, 1997. Amoy and Salas were sent similar letters, dated March 6, 1997. The letters provided that the prior dismissals were being rescinded and the employees were being reinstated "retroactively" upon their compliance with a referral to a SAP.

Specifically, by letters respectively dated March 6, 1997, Dr. Jonathan K. Shimada, Acting Director and Chief Engineer of the Department of Public Works, City and County of Honolulu, wrote to Amoy and Salas as follows:

> The September 16, 1996 dismissal letter that was sent to you will be rescinded if you return to the treatment program referred by the Substance Abuse Professional.
>
> You may be reinstated to your former position with our department retroactive to the date that you were dismissed. However, you must obtain clearance from the SAP before being

> allowed to return to work. If you remain in compliance with the SAP, complete any recommended treatment program, and provide a clean return to work drug and alcohol screen, you will be able to return to work.
>
> Again, I want to stress the necessity of returning to the Substance Abuse Professional if you choose to return to City employment. You must contact Carey Brown immediately, at 522-2472 to schedule an appointment and also Cynthia Johanson at 523-4645, or Evelyn Young at 527-6348 by March 20, 1997 to let us know your intention. If we do not hear from you by this date, we will assume that you are not interested in taking this opportunity to return to City employment.

By letter dated February 28, 1997, Sprague, Acting Director of Wastewater Management, wrote to Paia as follows:

> After additional discussions with the United Public Workers, your employment with the department as a Wastewater Collection System Repairer, which was terminated on June 19, 1996, may be reinstated. This opportunity for reinstatement requires that you return to the Substance Abuse Professional. You will be required to remain in compliance, complete the treatment program recommended by the Substance Abuse Professional, and to provide a clean return to work drug and alcohol screen. If you are willing to comply, your reinstatement will be retroactive to the date of dismissal.
>
> You must contact Ms. Carey Brown, Substance Abuse Professional, Straub ReSource, immediately at 522-2472 to schedule an appointment and contact Tim Houghton at 527-6668 or Elvina Yamashiro at 527-6667, by March 13, 1997 to let us know your intention.
>
> If we do not hear from you by this date, we will assume that you are not interested in taking this opportunity to return to City employment and you will not be reinstated.

Upon receipt of the letter, Amoy contacted Carey Brown, the SAP at Straub (Brown), and was given an appointment. Several hours later, Straub informed Amoy that the appointment was cancelled. Brown informed Amoy that she did not have the proper

paperwork from the City. Amoy then called Cynthia Johanson, Personnel Management Specialist and departmental coordinator for drug and alcohol testing (Johanson), who informed Amoy that the City was trying to work out the problem with Straub.

Salas also promptly called Brown for an appointment. Brown denied receiving the letter rescinding Salas' dismissal, dated March 6, 1997. Salas then informed Johanson that he was interested in coming back to work, and was instructed to wait until she got back to him.

Paia also contacted Brown as instructed. Brown informed Paia that she could not give him an appointment because he was no longer a CDL driver. Thereafter, Paia contacted Elvina Yamashiro, Personnel Management Specialist and departmental CDL coordinator, who informed Paia to "wait while they worked on a contract with Straub." Yamashiro informed Paia that she would get back to him.

Straub Clinic had an oral agreement with the City to provide SAP services under the DOT rules. Patricia Anderson, coordinator of Straub's employee assistance program, acknowledged being informed of the "re-employment" of three former employees in a letter to Jennifer Tobin, Department of Personnel, City and County of Honolulu, dated March 12, 1997. Anderson consulted with Straub's risk manager and legal counsel and decided that Straub would not provide SAP services for Amoy, Paia, and Salas without a written agreement with the City containing an indemnification provision because of potential liability. Although Straub continued to accept other referrals for SAP services from the City, Straub declined to provide the same services to Amoy, Paia, and Salas.

By letter dated April 1, 1997, EBESU transmitted settlement agreements regarding Amoy, Paia, and Salas, to the UPW. EBESU indicated in her letter of transmittal to Rodrigues that the settlement agreements were drafts and that the City wanted the Retirement System and the Health Fund to review the documents after Rodrigues' review. The settlement agreements were premised on the complaint filed with the Board against the City and indicate that the agreements were entered into to resolve the complaint. The settlement agreements provide for the rescission of the prior discharges and the reinstatement of the employees upon the evaluation of the SAP. The agreements also provided that the employees would be on authorized leave without pay from the date of discharge until the date of reinstatement.

Rodrigues reviewed the documents and contacted CHUN-CARMICHAEL on April 9, 1997 informing her that he felt the agreements were okay. Rodrigues considered the matter resolved without condition. The parties expected that all three employees would be promptly referred to a SAP and they would be reinstated if they cooperated with the referral and evaluation process.

Thereafter, on April 10, 1997,[1] the Board approved the Stipulations and Order (Order) entered into between the City and the UPW in Case No. CE-01-340. The Order provides in part:

> 7. Pending the successful completion of multi-employer negotiations over the aforementioned subject and the implementation of a memorandum of agreement, representatives of the UPW and Employer agreed that the Employer would <u>not</u> unilaterally impose disciplinary

[1]The Stipulations and Order was signed by the parties on April 9, 1997 and filed by the Board on April 10, 1997.

penalties and terms and conditions of employment upon those who tested positive for drugs and alcohol;

* * *

9. Commencing on and after December 1995 and continuing to the present bargaining unit 1 employees have been placed on leave of absence without pay, suspended, and in some cases discharged by the Employer for positive drug and alcohol test results.

10. In certain cases, disciplinary action have been implemented by the Employer which have affected certain employees with regard to pay and benefits.

* * *

13. Employer agrees to cease and desist from unilaterally implementing disciplinary penalties against bargaining unit employees for positive drug and alcohol test results, and further agrees to pay back pay as may be appropriate on a case by case basis, and on a negotiated basis with the UPW.

14. A violation of the terms and provisions of this Stipulation and Order shall be a prohibited practice under Sections 89-13 and 89-14, and shall subject a violator to remedies as may be deemed appropriate by the Board, including but not limited to attorney's fees and costs to the prevailing party.

The employees did not receive further instructions from the City or Straub and were not restored to any work. Amoy continued to call Johanson almost every week and Salas called Johanson six or seven times. They were told that the City was still working on the matter and were instructed to wait. At one point, Amoy attempted to call HARRIS but was referred to CHUN-CARMICHAEL who told Amoy that he was "guaranteed" his job back.

Amoy, Paia, and Salas were never informed as to the true reason why they were not being referred to an SAP.

The City representatives admit that the delay in restoring Amoy, Paia, and Salas to their positions was not due to the employees' or the Union's actions. Although the settlement agreements were subject to the Retirement System's and Health Fund's review, neither of the agencies had a problem with the settlement agreements.

The three employees also called the Union about their status. Rodrigues contacted CHUN-CARMICHAEL about the noncompliance by the City. She informed him that Straub refused to see the three employees and the Union urged her to take legal action against Straub and consider having another provider perform the SAP services.

The City, however, took no legal action against Straub and did not offer alternative services for the three employees. On February 28, 1998, nearly one year after the employees received their rescission letters, the City and Straub entered into a written agreement which contained a "double indemnity" or mutual indemnification clause. After the agreement with Straub was reached the City did not refer the employees to Straub.

When CHUN-CARMICHAEL was informed of the Straub Agreement, she unilaterally modified the terms of the settlement agreements but did not discuss the changes with Rodrigues. She sent the new drafts to Dayton Nakanelua (Nakanelua) at the UPW, who was assigned to follow through on the settlement agreements in early 1998. The new drafts required the employees' drug clearance before their terminations were rescinded. The proposed changes

were substantive and included a paragraph which would deny backpay to the three employees during the delay since April 9, 1997. According to CHUN-CARMICHAEL, she scheduled meetings with the UPW to finalize the settlement agreements but Nakanelua cancelled the meeting scheduled in May 1998. Rodrigues wanted the City to comply with the April 9, 1997 Settlement Agreements. Thereafter, in June 1998, HARRIS instructed CHUN-CARMICHAEL that she was no longer authorized to bring the employees back.

Previously, CHUN-CARMICHAEL and Rodrigues reached an understanding with respect to another group of employees who the Employer claimed was not cooperating with the treatment protocol required by the DOT rules. The City and the UPW agreed to have the discharges of at least three of the individuals in this group rescinded by the City. According to Rodrigues, the parties agreed that a noncompliant employee could not be discharged thereafter, unless the City provided the UPW written verification that the employee was (1) given notice of their noncompliance, (2) the employee was given an opportunity to correct himself, and (3) there was proof of repeated noncompliance thereafter. If the City complied with the foregoing conditions, the Union agreed that the non-complying employee could be discharged. If the conditions were not met, the employee could not be discharged and backpay would be due.

CHUN-CARMICHAEL understood the foregoing to be the understanding with the Union but was not aware that Straub's letters of noncompliance were not sent to the employees. The City did not provide the UPW with any of the requested documentation to verify compliance with the foregoing conditions. According to the

Union, Clifford Corronel, James Wong, Gary Grance, Ryan Domingo, Clyde Zukemura, George Zuttermeister, Maynard Calad, Fidel DeSoto, and Ernest Lum were not given written notice of noncompliance or given the opportunity to take corrective action before being discharged or asked to resign.

The record reflects that City representatives and Rodrigues met to discuss pending disciplinary actions. By letter dated August 18, 1997, EBESU confirmed to Rodrigues that the parties had met and disciplinary penalties were discussed. EBESU confirmed that the City agreed to follow the disciplinary penalties contained in the MOA and that the City intended to dismiss Clyde Zukemura, George Zuttermeister, Gary Grance, Ryan Domingo, and Ryan Bongo. EBESU indicated that these employees were noncompliant with treatment recommendations, had been on leave without pay for at least a year, and were previously notified that they were subject to dismissal. EBESU also indicated that the City intended to dismiss Thomas Strout who tested positive four times and had been on leave without pay since May 1997. Rodrigues, however, disagreed with Strout's termination because he was compliant with the treatment program.

Thereafter, by letter dated, September 12, 1997, EBESU informed Rodrigues of the disciplinary action to be taken against employees pursuant to further discussions between Rodrigues and EBESU. EBESU indicated that Thurman Braye, Abraham Levi, and Thomas Strout would be suspended and Clyde Zukemura, George Zuttermeister, Gary Grance, Ryan Domingo, Ryan Bongo and James Wong would be terminated.

With respect to the progress of multi-employer bargaining, according to Rodrigues, the Respondents were not satisfied with the terms of the understanding reached between CHUN-CARMICHAEL and Rodrigues and EBESU submitted several written proposals for new terms for the noncompliant group on May 8, 1997 and August 19, 1997. The City negotiators sought the retroactivity of the terms regarding the discipline of employees with multiple positive test results. However, since none of the other employers discharged anyone prior to October 1, 1997, the UPW did not agree to the City's retroactivity proposal.

On October 1, 1997, the MOAs for CDL testing for Units 01 and 10 became effective. The MOA for Unit 01 provides for no discipline on the first positive drug test, a 20-day suspension for the second positive, and a last chance resignation on the third positive test in two years.

By letter dated, December 31, 1997, the City dismissed Fidel DeSoto for noncompliance with the treatment protocol. In addition, Ernest Lum opted to retire and Maynard Calad resigned on or about November 12, 1997 in lieu of termination.

On May 29, 1998, the UPW filed the instant prohibited practice complaint alleging that the City repudiated numerous agreements with the Union in connection with the implementation of disciplinary penalties for employees with positive drug and alcohol test results.

Based upon the foregoing facts, the Board finds that CHUN-CARMICHAEL was duly authorized by the City to negotiate with Rodrigues on CDL drug and alcohol testing matters. CHUN-CARMICHAEL and Rodrigues agreed that the City would not unilaterally

discipline employees for positive alcohol and drug tests pending the completion of multi-employer negotiations. During the pendency of the multi-employer negotiations, the State of Hawaii and Maui and Hawaii Counties implemented interim disciplinary policies for employees with positive test results. The UPW filed a prohibited practice complaint with the Board against these employers but did not file a complaint against the City and Kauai County because of the agreements not to unilaterally discipline employees for positive test results. On January 12, 1996, the Board in that case issued an interlocutory order prohibiting the affected employers from disciplining employees with positive test results pending the negotiation of an agreement with the UPW.

Thereafter, however, the City's appointing authorities terminated six employees for positive drug and alcohol tests in mid-1996. One employee resigned and the appointing authority rescinded the dismissal letters sent to Clyde Zukemura and George Zuttermeister by letter dated November 15, 1996. On December 19, 1996, the UPW filed a prohibited practice complaint against the City in Case No. CE-01-340 contesting the unilateral disciplinary actions taken against the employees.

CHUN-CARMICHAEL admits that the unilateral discharge of Amoy, Paia, and Salas violated the earlier agreement made with the Union. CHUN-CARMICHAEL and Rodrigues then agreed that three employees, Amoy, Paia, and Salas would be reinstated. Letters rescinding the dismissals were sent to each of the three employees on February 28, and March 6, 1997. On April 1, 1997, EBESU transmitted the drafts of the settlement agreements for Rodrigues' review and approval. The Settlement Agreements are premised on the

resolution of the Union's complaint filed with the Board contesting the Employer's unilateral disciplinary actions. Rodrigues reviewed the agreements and notified CHUN-CARMICHAEL that he agreed with them on April 9, 1997. At approximately the same time, the City and the UPW entered into the Stipulations and Order in Case No. CE-01-340, dated April 9, 1997, where the City agreed to cease and desist from unilaterally imposing disciplinary penalties against its employees for positive drug and alcohol tests. The Stipulations and Order resolved the UPW's prohibited practice complaint alleging that the City had taken improper unilateral disciplinary action against employees.

The City did not present evidence that the Health Fund and the Retirement Systems were impediments to the finalizing of the Settlement Agreements. Rather, the record establishes that the employees were not immediately restored to work or provided treatment services despite the efforts of the employees, because Straub refused to provide services for the three employees due to its concerns over liability without a written agreement with the City providing for indemnification. During this time, there is no evidence that SAP services were completely terminated for other City employees. The three employees called Straub, as well as the Employer and the Union to inquire as to their status. The Employer's representatives repeatedly and consistently told the employees to "wait." In February 1998, after the written agreement was entered into between Straub and the City, the City or Straub still failed to notify the employees as promised that the SAP services were available.

In January 1998, CHUN-CARMICHAEL sent Rodrigues new draft settlement agreements which required, inter alia, drug clearance before the terminations of Amoy, Paia, and Salas were rescinded and denied backpay to the three employees during the delay from April 9, 1997. In comparing the terms of the Settlement Agreement drafts, the Board finds that the 1998 draft is more stringent and disadvantageous to the employees. The 1998 Settlement Agreements are nevertheless premised on the filing of the 1996 complaint with the Board, and the agreement to settle the claim. CHUN-CARMICHAEL did not speak to Rodrigues about the specific changes in the settlement agreements and at the hearing, did not offer any justification for the requested changes. According to CHUN-CARMICHAEL, a meeting was scheduled in the spring of 1998 with Nakanelua which he later cancelled. The UPW filed the instant complaint on May 29, 1998, and according to CHUN-CARMICHAEL, she was instructed by EBESU that she was no longer authorized to settle the cases.

Based upon these facts, the Board finds that the City discharged Amoy, Salas, and Paia in violation of the agreement not to unilaterally discipline employees with positive test results during the pendency of the multi-employer negotiations. Thereafter, the City violated the agreement underlying the Order to reinstate the employees in exchange for the withdrawal of the complaint before the Board. The City's refusal to honor its commitment to the Union, in view of the Union's withdrawal of the complaint, constitutes a refusal to bargain in good faith.

With respect to the noncompliant cases consisting of employees who were discharged or forced to resign because they did

not comply with the treatment protocol, the terminations of noncompliant employees occurred in September and December 1997. The instant complaint, however, was filed on May 29, 1998 well beyond the 90-day statute of limitations for the filing of prohibited practice complaints as provided in Section 377-9, HRS. This is unlike the situation of Amoy, Salas, and Paia, who were given continuous assurances and led by the City to believe that they would be reinstated. Thus, the Board lacks jurisdiction over the allegations concerning the noncompliant employees because their terminations occurred more than 90 days before the complaint was filed.

If the Board had jurisdiction over the allegations regarding the noncompliant employees, based on the evidence, the Board would find that the City agreed to provide the UPW with verification and documentation of the noncompliance to assure that the due process rights of the employees were protected. The City agreed to provide employees with notice of their noncompliance, give the employee the opportunity to correct him or herself, and provide proof of repeated noncompliance thereafter. The UPW in turn agreed not to contest the discharge if the City provided the documentation.

The UPW contends that if the conditions were not met, the employee could not be discharged, and backpay would be due. According to the UPW, at least three of the individuals in the group had been discharged and had their discharges rescinded.

Here, CHUN-CARMICHAEL concedes that Rodrigues wanted documentation of the notice issued to the employees. Although she believed that the departments were complying with the

documentation, the evidence in the record shows that the City failed to provide the documentation requested by Rodrigues in effectuating the discipline. However, the record also establishes that the City representatives and Rodrigues discussed disciplinary penalties to be imposed on the noncompliant employees. In one instance, Rodrigues disputed the termination of an employee and the City reduced the discharge to a suspension. Thus, the Board would find based upon the record, that Rodrigues participated in meaningful discussions with the City regarding the discipline imposed on the noncompliant employees. Based on this record, the Board is unable to find that the City unilaterally disciplined these employees. Although it appears that the City did not provide the documentation to verify noncompliance with the foregoing understanding, the Board finds that the City's actions cannot be viewed as unilateral in imposing discipline and was therefore not violative of the Order which prohibited further unilateral action.

DISCUSSION

The UPW contends that the Employer has left a "trail of broken promises" by their unilateral course of conduct of disciplining employees with positive test results. The UPW argues that the Employer's unilateral actions constitute a breach of the duty to bargain in good faith and a violation of the collective bargaining agreement and should be overturned. The UPW argues that the Employer should live up to their commitments even if they are oral. The UPW contends that the Employer committed prohibited practices in violation of Sections 89-13(a)(1), (5), (7), and (8), HRS.

Section 89-13(a), HRS, provides in part:

> 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;
>
> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement; . . . .

The UPW contends that the first promise the City made was in 1995 not to unilaterally implement any disciplinary or other actions for positive tests results. The UPW argues that the City officials concede the commitment. However, in spite of this commitment, the City's appointing authorities dismissed Salas on May 24, 1996; Paia on June 6, 1996; Charles Canipe on August 29, 1996; Amoy on September 16, 1996; Zukemura on November 6, 1996, and Zuttermeister on November 6, 1996. The UPW contends that the dismissals violated the promise made.

Thereafter, in 1996, the UPW contends the City and Union reached another understanding where no one would be subject to discharge for repeat positives regardless of the number of recurrences. The UPW contends that CHUN-CARMICHAEL and Rodrigues came to an understanding as to the disciplinary criteria to be applied where a second positive would result in a ten-day

suspension, a 20-day suspension for a third positive and all positives thereafter. Notwithstanding this understanding, Paia was discharged on June 19, 1996 (after the second positive); Amoy was discharged on December 16, 1996 (third positive); Salas was discharged on March 6, 1996 (second positive); Charles Canipe was discharged on August 26, 1996 and Zukemura and Zuttermeister were discharged on November 6, 1996. When CHUN-CARMICHAEL learned of the discharges, she knew the City had violated the commitments to the Union and instructed the appointing authorities to rescind the actions. This however, was not done, with respect to Amoy, Salas, and Paia.

Third, the UPW contends there was a promise to rescind the unilateral dismissals and reinstate Amoy, Paia, and Salas upon their cooperation with the SAP referral process which was contained in the settlement agreements transmitted on April 1, 1997 and agreed to by Rodrigues on April 9, 1997. This agreement was premised on the resolution of the complaint before the Board which occurred on April 10, 1997. While the settlement agreements did not provide for backpay prior to April 9, 1997, the UPW contends that the parties expected that all three employees would be promptly referred to an SAP. Although the employees called the SAP and the departmental contact, they were told to wait from February and March 1997. CHUN-CARMICHAEL told Rodrigues that Straub wanted a written contract with the City for services but even after the agreement was executed in February 1998, approximately one year after the employees had been notified that they would be reinstated, the employees were never contacted by either Straub or

the City. Moreover, in June 1998, HARRIS ultimately instructed EBESU not to bring the three employees back.

The UPW also contends that the City promised to give all noncompliant employees a notice of noncompliance, an opportunity to correct the noncompliance, and documentary verification of these actions to the UPW before discharging anyone for noncompliance. The UPW contends that nine employees were discharged in violation of the agreement between CHUN-CARMICHAEL and Rodrigues and the City's failure to provide the necessary documentation precludes the dismissals.

In addition, the UPW contends that contrary to the City's proposals in negotiations, the multi-employer group and the UPW agreed that the CDL MOA would be prospectively applied. The UPW contends that the MOA became effective on October 1, 1997 and discharges were not permitted. Discharges prior to that time were subject to the Order which prohibited unilateral discharges. The UPW contends that the City violated the Order and the MOA by unilaterally discharging James Wong on September 12, 1997, Gary Grance on September 26, 1997, Ryan Domingo, George Zuttermeister and Clyde Zukemura on September 30, 1997, and Fidel DeSoto on December 31, 1997.

The UPW contends that all of these broken promises represent recurring violations of the basic commitment made in the Order of the Board on April 10, 1997 which prohibits unilateral disciplinary actions by the Employer. The UPW argues that the City thereby breached its duty to bargain in good faith and as a remedy for the breach, the Union requests that the Board require HARRIS to sign the April 9, 1997 settlement agreements and comply with it

retroactively. The Union requests the City reinstate Amoy, Paia, and Salas with backpay to April 9, 1997. The Union also requests that all employees who were improperly terminated and injured by the actions of Respondents should be made whole for their loss of compensation, benefits, and service credit. The Union argues that the employees were not at fault for the delay in their reinstatement. The UPW further contends that the Board should award attorney's fees in this case since the parties agreed to such a remedy in the Order and that an award of fees and costs is appropriate because Respondents' conduct in violating the Board's Order is nothing less than outrageous, persistent, and pervasive. The UPW also requests that the Respondents be ordered to cease and desist from repudiating all prior agreements and stop interfering with the reinstatement of the adversely affected employees.

In response, the City contends that it fully complied with the Board's Order in Case No. CE-01-340. The City contends that the Order prospectively imposed two basic conditions on the Employer, to cease and desist from unilaterally disciplining Unit 01 employees and to negotiate backpay where appropriate. The City contends that the record is clear that the negotiations with regard to the reinstatement and backpay of Amoy, Paia, and Salas began even before the Board's Order was issued. The City alleges that the contract between the City and Straub was an obstacle to the finalizing of the settlements for many months. The City argues that CHUN-CARMICHAEL had informal discussions with Rodrigues and Nakanelua throughout 1997 to settle the case and that CHUN-CARMICHAEL attempted to meet with Nakanelua to finalize the settlements and Nakanelua cancelled the meeting. The City contends

that it attempted to negotiate in good faith pursuant to the Board's Order but the City's efforts were rejected by UPW. Thus, the City contends that the Respondents did not violate the Board's Order in failing to negotiate with regard to the three employees.

In Decision No. 337, United Public Workers, 5 HLRB 177 (1993), the Board found that Mayor Bernard Akana violated Section 89-13(a)(5), HRS, by breaching an oral agreement to settle a grievance by promoting an employee. The Board in that case found that the process of grievance adjustment is part and parcel of the collective bargaining process. The employer argued that the oral agreement was tentative pending the execution of formal documents. The Board there departed from a holding that all oral agreements are tentative until memorialized in formal written documents executed by the parties. The Board stated that such a holding would hamper orderly and harmonious collective bargaining as neither party would ever be confident that a negotiated settlement would not be rejected prior to execution of formal documents. The Board there relied upon Mine Workers v. Peggs Run Coal Co., 343 F.Supp. 68, 80 LRRM 2736 (W.D. Pa. 1972), where the U.S. District Court enforced an agreement to settle a grievance where the agreement was not reduced to writing.

With respect to the three employees, Amoy, Paia, and Salas, the Board finds that the City agreed that it would not unilaterally discipline employees for positive drug and alcohol tests pending the negotiation of the CDL MOA. This agreement is recognized in the Order. In 1996, several employees were discharged and two were unconditionally reinstated in November 1996. The unilateral discharges prompted the UPW to file

the prohibited practice complaint in Case No. CE-01-340 in December 1996.[2] CHUN-CARMICHAEL admitted that the discharges violated the oral agreement between the City and the UPW and CHUN-CARMICHAEL and Rodrigues agreed to the reinstatement of the three employees. In February and March 1997, the appointing authorities sent letters to the three employees stating that their terminations would be rescinded provided the employees returned to the SAP and complied with the treatment protocol. The department heads indicated that if the employees completed the program and passed a drug and alcohol screen, they would be reinstated to the date of dismissal. CHUN-CARMICHAEL sent the settlement agreements to Rodrigues and he approved them and withdrew the prohibited practice charge against the City.

Each employee followed the instructions in the letters and contacted Straub for treatment. Straub, however, refused to treat the three employees. Ironically, Straub and the City had also been operating under an oral agreement to provide SAP services. The employees then contacted their departmental representatives who told them to "wait."

The City argues that the draft settlement agreements were conditional because EBESU indicated that the documents needed to be reviewed by the Health Fund and the Retirement System. However, the City failed to establish that either agency objected to or were impediments to the execution of the settlement agreements. The fact is that Straub refused to treat the employees and the City did

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[2]Clearly, an agreement resolving a complaint before the Board is as part of the collective bargaining process as is an agreement reached in the grievance adjustment process.

not provide alternative services for the employees pending the negotiation and execution of a written agreement with Straub.

The City representatives continued to provide assurances to the employees when asked and the employees waited. Thereafter, CHUN-CARMICHAEL modified the settlement agreements and sent them to the Union without explaining the reason for the changes or getting Rodrigues' consent to the changes. When the contract with Straub was reached, the City did not refer the employees for treatment. The anxious employees waited because the City told them to wait. CHUN-CARMICHAEL scheduled a meeting with Nakanelua to discuss the new drafts and Nakanelua cancelled the meeting. Thereafter, the City refused to reinstate the employees.

The Board finds that the conduct of the City with respect to the three employees culminating in its refusal to reinstate the employees is unreasonable and unacceptable in a labor relations context. In the Board's view, the refusal to reinstate these employees because of the cancellation of the meeting to review the settlement agreements given the fact that implementation was delayed for at least a year through no fault of the employees or the Union, is outrageous. The Union withdrew its prior charge against the City based upon the agreement to reinstate the employees and take no further unilateral disciplinary actions. The City gave continued assurances to the employees and the Union for months, then refused to reinstate the employees because the Union allegedly cancelled the meeting to discuss the settlement agreements which the City had unilaterally modified. The City's technical objections to the validity of the settlement agreements indicate its unfortunate failure to recognize the importance of

honoring a commitment made during the course of the bargaining relationship. The City's actions here not only disadvantaged its employees but hurt the bargaining relationship with the Union.

Although the Order is prospective and does not specifically provide for the reinstatement of employees who were improperly suspended and discharged, the Order recognizes that since December 1995 Unit 01 employees have been discharged for positive alcohol and drug test results. The City agreed to cease and desist from implementing unilateral discipline and to pay the employees backpay pursuant to negotiations with the UPW. The Settlement Agreements expressly state that they are the basis for the resolution of the prohibited practice complaint before the Board. Taken in this light, the Board finds that the City's oral promise to reinstate the three discharged employees and the City's promise to cease and desist from taking further unilateral disciplinary action in the order are intertwined and constitute the quid pro quo for the UPW's withdrawal of the complaint.

The Board finds that the UPW relied upon CHUN-CARMICHAEL's agreement to reinstate the employees pursuant to the Settlement Agreements and the representations in the letters to the employees in exchange for resolving the complaint against the City. The UPW and the three employees relied upon the instructions and continued assurances from the City. Based upon the evidence in the record the Board finds that wilfulness can be presumed from the circumstances of this case because the violation occurred as the natural consequence of the City's refusal to bargain in good faith with the Union and its refusal to honor its prior agreements entered into with the Union. The Board concludes that the City's

refusal to reinstate the three employees therefore violates the oral agreement to reinstate the employees underlying the Order and further constitutes a prohibited practice under the terms agreed to therein by the parties. The Board concludes that the City's conduct constitutes a wilful refusal to bargain in good faith and a prohibited practice in violation of Section 89-13(a)(5), HRS.

Given the facts in this record, the Board orders that the City reinstate the three employees with backpay to April 10, 1997 under the terms of the original Settlement Agreements. The Board finds that the employees should have been reinstated to some type of work under the terms of the original Settlement Agreements near to that time. The delay in their reinstatement was because they were referred by the City to an unwilling and unavailable SAP. The City could have found alternate services or encouraged Straub to reach an agreement in a more timely manner.

With respect to the group of noncompliant employees, Respondents contend that the City did not violate the Order to cease and desist from unilateral implementation of discipline. Since the Board's Order of April 10, 1997, Respondents contend that no discipline has been imposed by Respondents without UPW's concurrence. Meetings regarding specific employees were documented in correspondence. The City contends that correspondence with the City indicates that UPW was apprised of the City's intent to terminate the noncompliant group of employees.

As stated infra, the discharges of the noncompliant employees occurred in September and December 1997. Section 377-9(1), HRS, which is applicable to the Board through Section 89-14, HRS, provides that "[n]o complaints of any specific

unfair labor practice shall be considered unless filed within ninety days of its occurrence." The instant complaint was filed with the Board on May 29, 1998, more than 90 days after the terminations occurred. Thus, the Board lacks jurisdiction over the remaining employees. Accordingly, the Board hereby dismisses the instant complaint against the City concerning the improper discharges of the noncompliant group of employees.

In view of the foregoing, the Board hereby declines to issue a ruling on the UPW's motion for interlocutory order as well as the UPW's allegations of Section 89-13(a)(1), (7), and (8), HRS, violations. Although the UPW requested an award of attorney's fees and costs in this case because the Order expressly provided for the payment of fees, if appropriate, the Board declines to issue an award in this matter. As discussed infra, while the City agreed to reinstate the three employees and had already issued letters to the employees indicating their reinstatement, the Order did not specifically provide for their reinstatement as perhaps it should have. The Board concludes that an award of fees in this case is not appropriate.

CONCLUSIONS OF LAW

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

An employer commits a prohibited practice in violation of Section 89-13(a)(5), HRS, when it wilfully refuses to bargain in good faith with the Union.

The Employer violated Section 89-13(a)(5), HRS, when it embarked on a course of conduct to repudiate agreements made with

the Union to remedy prior improper actions. In this case, the Employer refused to implement settlement agreements entered into to rescind the discharges of Paia, Amoy, and Salas, which were admittedly violative of prior agreements with the Union.

ORDER

Based on the foregoing, the Board orders the following:

(1) The Employer shall cease and desist from refusing to reinstate Amoy, Salas, and Paia to the date of their discharge and shall refer the employees to the SAP for treatment in accordance with the representations made by the department heads and as contained in the settlement agreements transmitted by EBESU on April 1, 1997;

(2) The Employer shall pay backpay to Amoy, Salas, and Paia from April 10, 1997;

(3) The Employer shall cease and desist from refusing to bargain in good faith with the Union;

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

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

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and JEREMY HARRIS, Mayor, City and County of Honolulu, et al.
CASE NO. CE-01-397
DECISION NO. 398
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, May 28, 1999.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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