STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii; ANN MORIMOTO, Department of Human Resources Development, State of Hawaii and SOLETTE PERRY, Department of Human Resources Development, State of Hawaii, Respondents.	CASE NOS.: CE-01-374a CE-10-374b DECISION NO. 404 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On November 13, 1997, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against Respondents JAMES TAKUSHI, Director, Department of Human Resources Development (DHRD), State of Hawaii (TAKUSHI); ANN MORIMOTO, DHRD, State of Hawaii (MORIMOTO); and SOLETTE PERRY, DHRD, State of Hawaii (PERRY) with the Hawaii Labor Relations Board (Board). The UPW alleged that the Respondents wilfully interfered with the administration of the UPW by rendering aid and support to Frank Hirazumi (Hirazumi), a declared candidate for the office of UPW State Director in 1997. The UPW also alleged that Respondents' actions were undertaken to oust Gary Rodrigues (Rodrigues), with whom Respondents have had long-standing disagreements and disputes.

The UPW also alleged that Respondents' actions interfered with, restrained, and coerced employees covered by Chapter 89, Hawaii Revised Statutes (HRS) in the exercise of their rights under § 89-3, HRS. The UPW thus alleged that the Respondents committed prohibited practices in violation of §§ 89-13(a)(1), (2), and (7), HRS.

On November 28, 1997, Respondents, by and through their counsel, filed a Motion for Particularization of Prohibited Practice Complaint with the Board contending, inter alia, that the allegations or charges were so vague and ambiguous that Respondents could not reasonably frame an answer thereto. On December 1, 1997, Complainant filed a Memorandum in Opposition to Respondents' Motion for Particularization with the Board.

On December 10, 1997, the Board issued Order No. 1565, Order, Granting, in Part, and Denying, in Part, Respondents' Motion for Particularization directing the UPW to specify the actions each Respondent took which constituted the alleged prohibited practices. On December 15, 1997, Complainant filed its Response to the Board's Order Requiring Particularization of Complaint. On December 24, 1997, Respondents filed their Answer to Prohibited Practice Complaint with the Board. Additionally, Respondents filed a Motion to Strike Complainant's Response and renewed their Motion for Particularization with the Board, which was denied by the Board in Order No. 1577 issued on January 9, 1998.

On January 30, 1998, Respondents filed a Motion to Dismiss the Prohibited Practice Complaint with the Board claiming, inter alia, that political activities of State employees are

constitutionally protected and beyond the Board's jurisdiction and authority. On February 5, 1998, the UPW filed a Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint with the Board. Thereafter, on February 6, 1998, the UPW filed a Supplement to its Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint with the Board. Also on February 6, 1998, the Board conducted a hearing on Respondents' motion to dismiss complaint. The Board thereafter denied Respondents' motion to dismiss the complaint.

The Board conducted hearings on the instant complaint on February 26 and April 1, 1998. During the hearing on April 1, 1998, the Board granted Complainant's Motion to Revoke Subpoenas of Georgietta Carroll and Rodrigues because it determined that their testimonies were irrelevant. That same day, after Complainant rested its case-in-chief, Respondents orally moved to dismiss the complaint on the basis that Complainant failed to prove that Respondents committed a prohibited practice under § 89-13, HRS. The Board granted the motion to dismiss the complaint as to Respondents TAKUSHI and MORIMOTO. Specifically, the Board ruled:

> With regard to the renewal of the Respondents' motion to dismiss, the Board will grant the motion to dismiss as to Respondents Takushi and Morimoto based on the evidence received. The Board does not see any evidence that they were personally involved or somehow encouraged Ms. Perry to engage in any kind of activity on behalf of Frank Hirazumi.
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> Insofar as the case against Solette Perry, the Board will take that matter under advisement. We understand, the Board's understanding of this case is this, whether or not by virtue of her position as a labor relations specialist in DHRD whether somehow that should preclude her from engaging in any

campaign activity on behalf of any person engaged in a union election.

(Transcript [Tr.] 4/1/98, at 68-69)

On May 1, 1998, the parties filed post-hearing briefs with the Board.

On September 10, 1999, the Board issued Order No. 1767 directing Respondent to submit a proposed order to the Board reflecting the Board's ruling, inter alia, that the Union failed to establish that PERRY was acting as a representative of the Employer in assisting the candidacy of Frank Hirazumi and therefore failed to prove violations of §§ 89-13(a)(1), (2), and (7), HRS.

On November 26, 1999, Complainant filed objections to Respondent's Proposed Findings (sic) Fact and Conclusions of Law with the Board.

On November 30, 1999, Respondent filed her Proposed Findings of Fact, Conclusions of Law and Order with the Board.

Based upon a thorough review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.[1]

FINDINGS OF FACT

The UPW is an employee organization and the exclusive representative, as defined in § 89-2, HRS, of employees in Units 01 and 10.

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[1]After considering Complainant's objections to the proposed order submitted by the Respondent, the Board has adopted those proposed findings of fact and conclusions of law which support its decision in this case and has modified the proposed order submitted by Respondent accordingly.

Respondent PERRY is a Personnel Management Specialist IV, Labor Relations Division, DHRD, State of Hawaii. (Tr. 2/26/98, at 11, 24)

As a Personnel Management Specialist, PERRY is assigned to grievances at Steps 1 or 2 and works with the departmental representative in reviewing the grievance. (Tr. 2/26/98, at 25) If the grievance is filed at Step 3, PERRY handles the meeting, except where the grievance is filed by the UPW. (Tr. 2/26/98, at 26, 33) If the grievance goes to arbitration, PERRY assists the Attorney General's Office in developing the case. (Tr. 2/26/98, at 26)

PERRY is not a manager or supervisor at DHRD. (Tr. 2/26/98, at 210-11)

PERRY does not have the authority to resolve grievances. The DHRD Director possesses the authority to resolve grievances. (Tr. 2/26/98, at 89)

PERRY previously was employed as a business agent with the UPW from July 1992 to July 1996. (Tr. 2/26/98, at 12-16)

During her employment with UPW, PERRY met Hirazumi, a painter and the chief steward at the University of Hawaii. (Tr. 2/26/98, at 40, 113)

In July 1997, at the direction of his campaign advisor Richard Mercado (Mercado), Hirazumi called PERRY and requested her assistance in his campaign for the UPW's State Director position. (Tr. 2/26/98, at 36-37; 4/1/98, at 52-53)

Being a long-time friend of both Hirazumi and Mercado, PERRY agreed to assist Hirazumi by performing various clerical

tasks for approximately three months. (Tr. 2/26/98, at 44-45, 96, 107, 111)

During the months of July, August and September 1997, PERRY performed basically clerical work for Hirazumi at home utilizing her own personal computer, as well as copying various documents at private copying companies. (Tr. 2/26/98, at 44, 76)

PERRY acknowledged editing Hirazumi's campaign newsletter and helping him to organize his campaign materials for distribution during her non-work hours. (Tr. 2/26/98, at 44, 76-78)

PERRY made three copies of campaign materials at a cost of less than one dollar at a private copying company. (Tr. 2/26/98, at 76)

No State resources or equipment were used to either edit or copy the campaign materials. (Tr. 2/26/98, at 76-78)

PERRY also met with Hirazumi's campaign committee, which included various other State employees on approximately five occasions at non-worksites, and received calls from these employees primarily at home. (Tr. 2/26/98, at 44-53)

All of the meetings with Hirazumi and the other State employees were held during non-work hours and were never held at PERRY's workplace. (Tr. 2/26/98, at 46-53)

PERRY made one or two telephone calls to Hirazumi's pager from her office over the three-month period. (Tr. 2/26/98, at 75-78) PERRY recalled paging Hirazumi from her office only once, but left a message on his pager to call her at her home. (Tr. 2/26/98, at 96-97)

PERRY also assisted Hirazumi by calling approximately five UPW members on the Big Island from her home to ask whether they would be interested in receiving Hirazumi's campaign materials. (Tr. 2/26/98, at 57-61, 99) PERRY telephoned the UPW members from her home during her non-work hours and she paid for the telephone charges. (Tr. 2/26/98, at 69, 98-99)

DISCUSSION

The UPW contends that PERRY rendered aid and support to Hirazumi for the purpose and object of ousting Rodrigues as UPW State Director and therefore interfered with, restrained, and coerced employees covered by Chapter 89, HRS in the exercise of their rights. The UPW also contends that PERRY's support of Hirazumi in the internal Union election constituted unlawful interference with the administration of the Union. Thus, the UPW alleges that PERRY violated §§ 89-13(a)(1), (2), and (7), HRS, which provide 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:
> (1) Interfere, restrain, or coerce any employee in the formation, existence, or administration of any employee organization;
> (2) Dominate, interfere, assist in the formation, existence, or administration of any employee organization;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; . . .

Respondent PERRY contends that the Board lacks jurisdiction to direct the actions of State employees taken in

their capacities as private citizens and in furtherance of their constitutional rights to free speech and assembly. Respondent also contends she is not in a position of authority to be considered an "employer" or its "designated representative" under § 89-13, HRS. In this regard, PERRY submits that the person must occupy, at the very minimum, a top-level managerial and administrative position in order to exercise sufficient authority and judgment to direct and influence employees and formulate and effectuate employer's policies. While PERRY is assigned to hear grievances at Step 3 of the grievance procedure, PERRY does not supervise or direct employees and she does not have the authority to implement any personnel decisions or policies. In addition, Respondent contends that the UPW failed to produce credible evidence that PERRY actually dominated or interfered with the administration of the Union. Respondent further contends that there is no nexus between the Respondent's actions and the workplace as there were no threats of reprisal or promise of benefits to employees; PERRY also argues that she was not involved in Hirazumi's campaign in her official capacity but because of her personal friendship with him. Respondent therefore urges the Board to dismiss the instant complaint.

Section 89-13(a)(1), HRS, provides that it is a prohibited practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Chapter 89, HRS. Section 89-3, HRS, guarantees employees the right to self organize, to form, join or assist labor organizations, to bargain collectively with the representatives of their own

choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employer conduct that interferes with, restrains, or coerces employees in the exercise of these rights violates § 89-13(a)(1), HRS. The test is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984).

The Board discussed § 89-13(a)(1), HRS, in Decision No. 50, Hawaii Federation of College Teachers, Local 2003, 1 HPERB 464 (1974). The Board considered whether an Assistant Vice Chancellor's encouragement of a "no representation" vote constituted a prohibited practice. The Board held that an employer had the right to express opinions and persuade its employees to join or not to join a union under the First Amendment as part of the exercise of his freedom of speech and freedom of assembly as long as the expression was not coupled with coercion. The Board stated:

> Section 89-13(a)(1), HRS, is patterned after Section 8(a)(1) of the National Labor Relations Act. Congress was dissatisfied with the NLRB's rulings in the free speech area based on Section 8(a)(1) and enacted more definitive language under Section 8(c) to clarify that an employee is interfered with, restrained or coerced when the employer expresses views, argument or opinion only if the expression contains a threat of reprisal or force or promise of benefit. Southwire Co. v. NLRB, 383 F.2d 235, 65 LRRM 3042 (5th Cir. 1967). More recently and more explicitly, the Supreme Court defined the scope of permissible employer communications. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

Id., at p. 471.

Thereafter, in Decision No. 211, Hawaii Government Employees Association, AFSCME LOCAL 152, AFL-CIO, 4 HLRB 4 (1986), the Board held that the employer did not violate § 89-13(a)(1), HRS, when the Civil Service Director published an article in a newsletter distributed to employees criticizing the union's pursuit of a comparable worth lawsuit. The Board found that the article contained language critical of the union and its leadership but did to rise to the level of interference with internal union processes, implied threats of reprisal or force, or promise or benefit.

Similarly, in this case the Board finds that the Union failed to establish that PERRY's actions in assisting Hirazumi interfered with the rights of employees under Chapter 89, HRS. Here, PERRY admits calling five UPW members attending the convention and sending them information about Hirazumi but there is no evidence to indicate that she interfered with their rights to choose their own candidate for Union office. The Board finds that PERRY did not threaten, coerce, or restrain the UPW members in the selecting the officer of their choice. PERRY also did not promise them any benefits or anything of value. Accordingly, the Board dismisses the charge of a § 89-13(a)(1), HRS, violation.

The UPW also contends that PERRY committed a prohibited practice as a "designated employer representative" who interfered or assisted in the formation, existence or administration of the Union. The UPW alleges that matters pertaining to internal union elections have long been recognized to be out of bounds for employers and those who act on their behalf. The Union cites NLRB v. Philamon Laboratories, Inc., 298 F.2d 176, 49 LRRM 2624 (2nd Cir.

1962), for the proposition that the mere presence of two supervisors when members of an employee committee were chosen violated § 8(a)(2) of the National Labor Relations Act. The Board notes however, that the Court in that case also found with respect to § 8(a)(2) that the employer had openly negotiated with a hastily constituted employee committee which the employer had given support and assistance to even though the union had requested recognition. The Court thereupon found, inter alia, that the employer violated § 8(a)(2).

The Union also cites NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 115 LRRM 2321 (6th Cir. 1984) for the proposition that payment of expenses, loss [sic] wages and scheduling of union meetings were found to be unlawful. In that case, however, the Court found that the National Labor Relations Board (NLRB) was not warranted in finding § 8(a)(2) violations because the charge was not properly plead and the key element of an unlawful domination or assistance case, was whether the employer prevented or subverted the employees' freedom of choice. The Court stated:

> "The Board must prove that the employer's assistance is actually creating Company control over the Union before it has established a violation of Section 8(a)(2)." Modern Plastics Corp. v. N.L.R.B., 379 F.2d 201, 204, 65 LRRM 2600 (6th Cir. 1967). Not all cooperation and assistance between management and a union is proscribed by the Labor Act. The test of whether the employees are in fact being deprived of their freedom of choice. N.L.R.B v. Keller Ladders Southern, Inc., 405 F.2d 663, 667, 70 LRRM 2001 (5th Cir. 1968); Federal-Mogul Corp. v. N.L.R.B., 394 F.2d 915, 918, 68 LRRM 2332 (6th Cir. 1968); Coppus Engineering Corp. v. N.L.R.B., 240 F.2d 5564, 571-73, 39 LRRM 2315 (1st Cir. 1957); Chicago Rawhide Manufacturing Co. v. N.L.R.B.,

> 221 F.2d 165, 168, 35 LRRM 2665 (7th Cir. 1955); N.L.R.B. v. Sharples Chemicals, Inc., 209 F.2d 645, 652, 33 LRRM 2438 (6th Cir. 1954). . . .

Id., at 2328.

In Suburban Transit Corp. v. NLRB, 499 F.2d 78, 86 LRRM 2626 (3rd Cir. 1974), the Court held that a violation of § 8(a)(2) occurs when the employer's acts of assistance for a union interfere with the employees' right to choose their representative. The NLRB has also held that participation by an employer's officers and supervisors in the election of local union officers and certain committee members is unlawful interference with the internal administration of the affairs of the union, even if the supervisors are dues-paying members in good standing with the union. NLRB v. Employing Bricklayers' Asso., 292 F.2d 627, 48 LRRM 2460 (3rd Cir. 1961).

The Union argues that the federal precedents confirm that supervisory participation in internal union affairs can subject the employer to a charge of interference with the union administration even if the supervisory participation was conducted without the employer's encouragement and/or authorization. Local 636, Plumbers v. NLRB, 287 F.2d 354, 47 LRRM 2457 (D.C. App. 1961). The NLRB however, considers the nature of the supervisory position, how completely the responsibilities of the particular position identify the holder of that position with management, the apparent permanence of the position, how long it has been held, how high it is in the company's hierarchy of supervisors, and the extent to which the position is properly included or excluded from bargaining

in its determination whether supervisory participation is unlawful. Id.

The facts in this case clearly show that PERRY is not a supervisory employee who participated in the Union election. In addition, under the facts of this case, the Board finds that PERRY's degree of involvement in Hirazumi's campaign does not constitute a violation of § 89-13(a)(2), HRS. PERRY assisted Hirazumi by editing his newsletter, organizing some campaign literature, sending literature to five Union members, and copying some materials, costing less than one dollar. While she telephoned some members at her expense, she did not otherwise participate in the Union election. Accordingly, the Board dismisses the § 89-13(a)(2), HRS, charge filed by the UPW.

As the Union also failed to argue the basis of the § 89-13(a)(7), HRS, violation, the Board hereby dismisses that claim.

CONCLUSIONS OF LAW

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

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

An employer commits a prohibited practice in violation of § 89-13(a)(2), HRS, by dominating, interfering, or assisting in the formation, existence, or administration of any employee organization.

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

The Union failed to establish that Respondent PERRY was a supervisor or otherwise acting as a representative of the employer in assisting Hirazumi in his campaign for UPW State Director. The Union also failed to establish that PERRY as a supervisor or otherwise acting as a representative of the employer, interfered with the rights of Union members in selecting the Union official of their choice. The Union further failed to establish that PERRY's assistance to Hirazumi constituted unlawful domination or interference in the administration of the Union. The Board concludes that the Union failed to prove that PERRY violated §§ 89-13(a)(1), (2), and (7), HRS. The Board, however, cautions employees who represent management in the labor relations field to refrain from engaging in activities which may give the appearance of improper assistance or interference with internal union matters.

ORDER

The instant complaint is hereby dismissed.

DATED: Honolulu, Hawaii, March 3, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

Copies sent to:

Danny Vasconcellos, Esq.
James E. Halvorson, Deputy Attorney General
Joyce Najita, IRC
William Puette, CLEAR
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