

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-406
)	
UNITED PUBLIC WORKERS, AFSCME,)	DECISION NO. 405
LOCAL 646, AFL-CIO,)	
)	FINDINGS OF FACT, CONCLU-
Complainant,)	SIONS OF LAW, AND ORDER
)	
and)	
)	
JEREMY HARRIS, Mayor, City and)	
County of Honolulu; SANDRA)	
EBESU, Director, Department of)	
Personnel, City and County of)	
Honolulu; JONATHAN K. SHIMADA,)	
Director, Department of Facil-)	
ity Maintenance, City and)	
County of Honolulu; and)	
KENNETH E. SPRAGUE, Director,)	
Department of Environmental)	
Services, City and County)	
of Honolulu,)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 14, 1998, the 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; SANDRA EBESU, Director, Department of Human Resources, City and County of Honolulu; JONATHAN K. SHIMADA, Director, Department of Facility Maintenance, City and County of Honolulu; and KENNETH E. SPRAGUE, Director, Department of Environmental Services, City and County of Honolulu (collectively Respondents or Employer) with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondents improperly denied the UPW's request for paid leaves for Union negotiating committee members

Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë to participate in collective bargaining activities as authorized in § 89-8(c), Hawaii Revised Statutes (HRS), and discriminated in regard to the terms and conditions of employment of UPW negotiating committee members to discourage participation in protected activities. Complainant contends that Respondents thereby wilfully violated §§ 89-13(a)(1), (3), and (7), HRS.

Also on August 18, 1998, the UPW filed a similar complaint against Linda Lingle, Mayor, County of Maui; Raymond Kokubun, Director, Department of Personnel Services, County of Maui; and Henry Oliva, Director, Department of Parks and Recreation, County of Maui with the Board in Case No. CE-01-405. Thereafter in Order No. 1663 dated September 1, 1998, the Board consolidated the proceedings on these complaints. On September 17, 1998, the respective parties settled Case No. CE-01-405 and on September 18, 1998, in Order No. 1670, the Board granted Complainant's Motion to Withdraw its Complaint in Case No. CE-01-405.

On September 24, 1998, the Board conducted a hearing in this matter in Honolulu, Hawaii. All parties were afforded a full opportunity to present witnesses, exhibits, and arguments before the Board. During the hearing the parties stipulated that Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë were City employees who attended a meeting of the UPW negotiating committee which convened on August 7, 1998, and that said meeting was held during their regular working hours. It was further stipulated that the meeting was held to sign the recently

negotiated Unit 01 collective bargaining agreement and to discuss proposals for a new agreement, and that Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë sustained a loss of regular wages when Respondents denied Complainant's request for paid leaves of absence for participation in the collective bargaining process. Id. Respondents further stipulated to reimburse Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë for their lost wages. The UPW filed its post-hearing memorandum on October 5, 1998 and Respondents filed their post-hearing memorandum on October 9, 1998.

In Order No. 1764 dated September 10, 1999, the Board directed the UPW to submit a proposed order to the Board providing, inter alia, that the Respondents violated §§ 89-13(a)(1), (3), and (7) [§ 89-3], HRS. On November 19, 1999, the UPW filed its Proposed Findings of Fact, Conclusions of Law and Order with the Board. Thereafter, on December 10, 1999, Respondents filed objections to UPW's proposed order and in addition, filed its Proposed Findings Fact, Conclusions of Law, and Order with the Board.

Based upon a thorough review of the record, the Board renders the following findings of fact, conclusions of law, and order.¹

¹After considering Respondents' objections to the proposed order submitted by Complainant, 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 Complainant accordingly.

FINDINGS OF FACT

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

Respondent JEREMY HARRIS is the Mayor of the City and County of Honolulu and a public employer as defined in § 89-2, HRS.

Respondent SANDRA EBESU is the Director of Human Resources of the City and County of Honolulu who represents the interest of the Mayor and is a public employer as defined in § 89-2, HRS.

Respondent JONATHAN K. SHIMADA is the Director of the Facilities Maintenance Department of the City and County of Honolulu who represents the interest of the Mayor and is a public employer as defined in § 89-2, HRS.

Respondent KENNETH E. SPRAGUE is the Director of the Department of Environmental Services of the City and County of Honolulu and who represents the interest of the Mayor and is a public employer as defined in § 89-2, HRS.

The UPW and public employers, including the City and County of Honolulu, have been parties to ten successive collective bargaining agreements covering blue collar non-supervisory employees in bargaining unit 01 since July 1, 1972.

The latest collective bargaining agreement was entered into on or about June 21, 1994 and extended over the period from July 1, 1993 to June 30, 1995. Prior to the expiration of said agreement, the Union and public employers submitted their respective notices to modify and amend the agreement and while

negotiations were in progress extended said agreement through April 30, 1998.

The UPW notified the multi-employer group in 1997 of the members of the Union's negotiating committee. The committee consisted of approximately 16 members, including Darryle Makepa of the road division, Ronald Yamanaka of the building trades division, Joseph Rodrigues of the refuse division, and Andrew Kauanoe of the disposal division of the City and County of Honolulu.

The UPW and Respondent HARRIS maintained a "good working relationship" up to on or about March 16, 1998 when a dispute developed in connection with negotiations over the amended unit 01 agreement reached on or about March 10, 1998 in the multi-employer bargaining process.

In a complaint filed with the Board on April 3, 1998 in Case No. CE-01-390 the UPW alleged that Respondent HARRIS unlawfully repudiated the Unit 01 agreement as amended on March 10, 1998.

Hearings in Case No. CE-01-390 were held on April 29, and 30, 1998, May 7, 8, 11, and 29, 1998. On or about May 11, 1998 Board orally granted an interlocutory order requested by the UPW. On July 8, 1998 the Board granted the UPW's Motion for Interlocutory Relief which ordered Respondent HARRIS "to cease and desist from repudiating the Unit 01 contract negotiated by his representatives."

Respondent HARRIS indicated that the City would not comply with the Board's order in Case No. CE-01-390 and would appeal the Board's order.

On July 31, 1998 Gary Rodrigues, UPW State Director, wrote to Al Lardizabal, Acting Chief Negotiator, Office of Collective Bargaining, State of Hawaii to notify the public employers of an August 7, 1998 meeting of the Union's negotiating committee to sign the Unit 01 agreement. Rodrigues requested Lardizabal's assistance to arrange the release of negotiating committee members from their regular jobs with the State and counties. Lardizabal faxed the July 31, 1998 memorandum to all employers including Respondent EBESU soon after it was received.

It is customary for members of the Union's negotiating committees to sign the collective bargaining agreements, and their involvement in this way was a recognized aspect of the collective bargaining process. Before the dispute over the recent Unit 01 collective bargaining agreement, Respondents routinely approved the release of City and County of Honolulu employees on paid leave to participate in such collective bargaining activities. Previously, Respondents did not deny any request for release of negotiating committee members from their regular jobs on a paid leave to participate in this form of activity and other employee organizations were granted the release time consistently.

Soon after she received the July 31, 1998 memo from the UPW's State Director, Respondent EBESU requested the Department of the Corporation Counsel of the City and County of Honolulu for guidance on how to handle the Union's request in light of Respondent HARRIS' stated position on the Unit 01 agreement.

After conferring with legal counsel, Respondents decided to deny the UPW's request to release City and County of Honolulu

employees to attend the August 7, 1998 meeting of the UPW negotiating committee. The denial was based on Respondent HARRIS' refusal to recognize the existence of the Unit 01 agreement in spite of this Board's oral and written orders granting Complainant's motion for interlocutory relief directing HARRIS to cease and desist from repudiating the Unit 01 agreement.

Respondent EBESU requested labor relations division chief Robin Chun-Carmichael to inform Respondents SHIMADA and SPRAGUE of the decision and to also advise Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë of the decision denying the paid leave for the August 7, 1998 meeting.

The UPW proceeded with its meeting of the negotiating committee on August 7, 1998 which was held during the working hours of public employees. Among the items on the agenda was the signing of the Unit 01 collective bargaining agreement and discussion of proposals to amend the agreement slated for expiration on June 30, 1999, which were due for submission on August 30, 1998 pursuant to the durations provision of the Unit 01 agreement.

On August 7, 1998, Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë attended the negotiating committee meeting and sustained a loss of regular wages for their participation. Darryl Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauanoë signed the Unit 01 agreement on August 7, 1998, and also reviewed proposals to be submitted on August 30, 1998 to the public employers.

At the hearing before this Board on September 24, 1998, Respondents agreed to make whole Darryl Makepa, Ronald Yamanaka,

Joseph Rodrigues, and Andrew Kauano for their loss of regular wages on August 7, 1998. Respondents stated that they learned only recently that the Union negotiating committee discussed proposals to modify the agreement slated for expiration on June 30, 1999, and on that basis were agreeable to paying employees for their losses.

DISCUSSION

The dispute in this case focuses on the question of whether Respondents improperly and for discriminatory and unlawful reasons denied a request by Complainant to release four negotiating committee members to attend an August 7, 1998 meeting of the Union's negotiating committee to sign a recently negotiated collective bargaining agreement. Complainant contends that Respondents' conduct was inherently destructive of employee rights under Chapter 89, HRS, and in wilful violation of §§ 89-13(a)(1), (3), and (7), HRS, and requests appropriate relief including, but not limited to an assessment of attorney's fees and costs against Respondents.

Section 89-13, HRS, provides, in part, 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;

* * *

- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any organization;

* * *

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

We begin our analysis with a review of §§ 89-8(c) and 89-2, HRS. Section 89-8(c), HRS, states in relevant part:

Employee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages.

Section 89-2, HRS, defines "collective bargaining" as follows:

§ 89-2 Definitions. As used in this chapter:

* * *

"Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession.

The foregoing statutory provisions were intended to afford public employees the right to freely participate in the "collective bargaining process" without loss of compensation. The statute clearly and unambiguously includes within its scope meetings at "reasonable times" to confer and negotiate in good faith over wages, hours and other terms and conditions of employment, as well as "to execute a written agreement" covering such subject matters.

Section 89-8(c), HRS, sets forth and defines the "rights of employees" as more generally stated in § 89-3, HRS. Its import

is clear from the plain and unambiguous language and we are duty bound to give it full force and effect. As stated in Hawaii Public Employment Relations Board v. United Public Workers, 66 Haw. 461, 667 P.2d 783 (1983):

In construing statutory language, "[t]he fundamental objective . . . is to ascertain and give effect to the intention of the legislature. . . . The intention of the legislature is to be obtained primarily from the language contained in the statute itself." In Re Hawaiian Telephone Co., 61 Haw. 572, 577, 608 P.2d 383, 387 (1980). Thus, the general rule is that "where the language of the law in question is plain and unambiguous, construction by this court is inappropriate and our duty is only to give effect to the law according to its plain and obvious meaning." Id. at 577-78, 608 P.2d at 387.

Id. at 469.

Respondents do not dispute that soon after July 31, 1998 they received the written request of the UPW to release employees of the City and County of Honolulu who were designated as members of the Union's negotiating committee for a meeting on August 7, 1998. The request stated that the meeting was for the purpose of "signing of the Unit 01 agreement." Respondent EBESU admits that the signing of a negotiated agreement is part of the "collective bargaining process," and such leave requests are routinely granted to negotiating committee members when submitted by exclusive bargaining representatives. Here, Respondents denied the leave requests because the Employer refused to recognize the validity of the Unit 01 agreement despite the fact that Respondent HARRIS was directed by this Board on May 11, 1998 and July 8, 1998 "to cease and desist from repudiating the Unit 01 contract negotiated by his representatives." The denial of paid leaves to members of the UPW

negotiating committee was a discriminatory act by Respondents to discourage employees of the City and County of Honolulu from engaging in protected concerted activity on behalf of the UPW and interfered with their rights under Chapter 89, HRS. It was also in direct contravention of Board Order No. 1643 in Case No. CE-01-390, granting Complainant's Motion for Interlocutory Relief.

Prior to the hearing on the merits of this complaint, the Respondents represented that they misunderstood the reason of the August 7, 1998 meeting and therefore would compensate the employees for their lost wages. Respondents represented that they recently learned that in addition to the signing of the Unit 01 agreement at the meeting held on August 7, 1998, the negotiating committee discussed proposals to modify the agreement which would expire on June 30, 1999. Respondents contend that their initial denial of paid leave was thus a misunderstanding rather than the product of alleged hostility on the part of HARRIS against the UPW. While Respondents offer to make the employees whole in recognition of their mistaken understanding of the purpose of the meeting, they nevertheless continue to refuse to recognize the existence of the Unit 01 agreement and that the negotiating committee members are entitled to paid leaves in order to sign the agreement.

The Board finds based on the record that Respondents knowingly and deliberately interfered with the employees in the exercise of their rights guaranteed under Chapter 89, HRS, and discriminated against the employees to discourage their participation in the collective bargaining process. The Board concludes that Respondents wilfully violated the rights of the UPW

employees as provided in §§ 89-8(c) and 89-3, HRS, which constitutes prohibited practices in violation of §§ 89-13(a)(1), (2), and (7), HRS.

In addition, the UPW contends that the Board should award the Union attorney's fees and costs in this case because the Respondents engaged in unlawful conduct in contravention of an existing Board order. The Union contends that an award of fees is appropriate because of the inherently destructive nature of Respondents' conduct and their discriminatory and unlawful purpose. The UPW argues that the Board should award fees to the Union to undo the effects of the prohibited practices committed by Respondents in order to restore "the situation as nearly as possible, to that which would have obtained but for the illegal discrimination" and is consistent with the basic purpose of Chapter 89, HRS. Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

In Decision No. 145, Dennis Yamaguchi, 2 HPERB 656 (1981), the Board recognized that attorney's fees have been awarded by the National Labor Relations Board (NLRB) in duty of fair representation cases where the NLRB ordered the union to arbitrate a grievance and provide the grievant with reasonable fees to obtain counsel for the arbitration proceedings. The Board also stated:

The Board recognizes that an award of attorney's fees and litigation costs is an extraordinary remedy. Nevertheless, as remedies must be fashioned on a case-by-case basis, it believes that the serious and unusual nature of the violations in this case warrants the extraordinary remedy and this award *should not* be construed as a precedent for similar claims in the future. The Board's policy with respect to retrospective

attorney's fees and litigation costs is to deny such awards unless the violations are so flagrant or unusual that traditional remedies prove to be inadequate. Furthermore, there must be a direct nexus between the violation and such awards.

Id. at p. 679.

This case is distinguished from the Yamauchi case because it does not involve a duty of fair representation case where the union has been found to have violated its duty to represent its member and where the member has or will incur attorney's fees to pursue his or her claims. In addition, while the Board finds that the Respondents wilfully violated the rights of the negotiating committee members, the Board finds that the reimbursement of the employees' lost wages and the issuance of a cease and desist order is sufficient as a remedy in this case. The Board does not find that the violations are so flagrant or unusual that the Board's traditional remedies have been shown to be inadequate. Accordingly, the Board denies the UPW's request for attorney's fees and costs.

CONCLUSIONS OF LAW

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

An employer commits a prohibited practice in violation of § 89-13(a)(3), HRS, by discriminating in regard to the hire,

tenure, or other terms or conditions of employment of its employees to discourage membership in any employee organization.

The Employer wilfully interfered with the rights of bargaining unit 01 employees when it denied the UPW's request for paid leaves for Union negotiating committee members Darryle Makepa, Ronald Yamanaka, Joseph Rodrigues, and Andrew Kauano to participate in collective bargaining activities as authorized in § 89-8(c), HRS, and wilfully discriminated in regard to the terms and conditions of employment of UPW negotiating committee members to discourage their participation in protected activities.

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

The Employer wilfully violated §§ 89-3 and 89-8(c), HRS, when it declined the UPW's request for paid leaves for Union negotiating committee members to sign the Unit 01 collective bargaining agreement at a meeting held on August 7, 1998.

ORDER

Respondents are hereby ordered to cease and desist from denying paid leaves of absences to designated members of the UPW's negotiating committee to participate in the collective bargaining process.

Respondents 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.

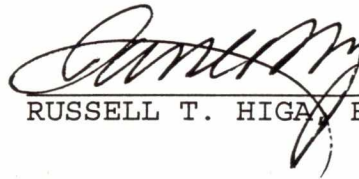
Respondents shall notify the Board of the steps taken by the Employer to comply herewith within thirty (30) days of receipt of this order.

DATED: Honolulu, Hawaii, March 10, 2000.

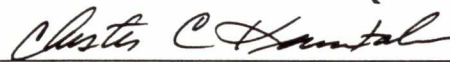
HAWAII LABOR RELATIONS BOARD



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