STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii, Respondents.	CASE NO. CE-10-306 DECISION NO. 409 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii, Respondents.	CASE NO. CE-01-307

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 1, 1996, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed two prohibited practice complaints against BENJAMIN J. CAYETANO, Governor, State of Hawaii, and JAMES TAKUSHI (TAKUSHI), Director, Department of Human

Resources Development, State of Hawaii (collectively Employer or Respondents) with the Hawaii Labor Relations Board (Board) in Case Nos. CE-10-306 and CE-01-307, respectively. The UPW alleged that on or about June 1, 1996 and continuously thereafter, Respondents unilaterally promulgated a new Performance Appraisal System (PAS) for bargaining units 10 employees and 01 employees. The UPW contends that the new PAS system modifies, changes, and amends the prohibition against monitoring, counseling, and otherwise disciplining employees for the legitimate use of sick leave benefits and entitlements in violation of contract provisions, awards and court orders. Complainant also alleges that on or about June 21, 1996, Respondents wilfully refused to bargain in good faith over these changes in terms and conditions of employment. Complainant contends that Respondents wilfully violated §§ 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On July 17, 1996, the Board consolidated the proceedings in Case Nos. CE-10-306 and CE-01-307 because the issues and parties were the same in both cases and consolidation was conducive to the proper dispatch of business before the agency.

On August 12, 1996, Respondents filed a motion to dismiss the complaints for failure to state a claim for relief, untimely filing, and estoppel or waiver by the Complainant. The motion was heard on October 22, 1996 and denied by the Board on grounds that genuine issues of material facts were in dispute, and since claims accrued upon the implementation of PAS to bargaining unit employees the complaints were not time-barred.

Hearings were held on this matter on November 7, 1996, February 20, 1997, and October 1, 1997. Written memoranda were filed by the parties on November 5, 1997.

In Order No. 1766, dated September 10, 1999, the Board directed the Complainant to submit a proposed order to the Board reflecting the Board's ruling in the case. Complainant filed its proposed order with the Board on December 28, 1999. On February 1, 2000, Respondents filed their objections to the Complainant's proposed order with the Board.

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

FINDINGS OF FACT

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

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

Respondent JAMES TAKUSHI is the Director of the Department of Human Resources Development (DHRD), State of Hawaii, who represents the interest of the Governor and is a public employer as defined in § 89-2, HRS.

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

Prior to the adoption of Chapter 89, HRS, each department of the State of Hawaii was mandated to "establish and maintain a system of performance ratings for the purpose of appraising the service of employees in the civil service." Section 76-41, HRS, required a copy of each rating to be provided to the employee and transmitted to the director of personnel services, and authorized the denial of "step increments" to any employee whose ratings remained substandard for three months after written notification.

In 1961 the State of Hawaii standardized its process of performance ratings through its "Job Performance Report" (JPR). Employees were evaluated at the end of their probationary period and on a regular annual basis in four performance categories, i.e., (1) quality of work on the job, (2) quantity of work on the job, (3) work attitudes on the job, and (4) work habits on the job. Copies of the JPR's were filed and maintained in the official personnel files of employees.

On October 21, 1971 the UPW was certified as the exclusive representative of blue collar non-supervisory employees in bargaining unit 01.

On February 11, 1972 the UPW was certified as the exclusive representative of institutional, health, and correctional employees in bargaining unit 10.

Since on or after July 1, 1972 the UPW and the State of Hawaii have been parties to more than ten (10) successive collective bargaining agreements covering employees in bargaining units 01 and 10. The collective bargaining agreements contain various provisions relating to the handling of grievances,

discipline and job security, retention and removal of personnel records, and other terms and conditions of employment.

Under § 15 of the respective Units 01 and 10 agreements, disputes arising under the substantive terms of the collective bargaining agreements are subject to a grievance procedure which culminates in final and binding arbitration. Section 15.02 defines a grievance as follows:

> The term grievance as used in this Agreement shall mean a complaint filed by a bargaining unit employee covered hereunder, or on an employee's behalf by the Union, alleging a violation, misinterpretation, or misapplication, of a specific provision of this Agreement occurring after its effective date. (Emphasis added).

In 1984 Arbitrator Ted T. Tsukiyama held that a probationary employee who was terminated by the State of Hawaii for an unsatisfactory JPR during her probationary period had standing "to grieve and to arbitrate" the termination. In the Matter of the Arbitration between State of Hawaii, Waimano Training Home and United Public Workers, Local 646 (Re Grievance of B. T.) (5/10/84, Tsukiyama).

Unsatisfactory ratings in JPR's or adverse actions due to unsatisfactory JPR's have been subject to challenge under the grievance procedure (§ 15) and arbitrated by the parties to the Unit 01 and Unit 10 agreements on behalf of probationary and regular employees. United Public Workers, Local 646 and City and County of Honolulu, Honolulu Police Department (Grievance of Raymond Baldes & William Rhoden) (3/31/86, Gilson); United Public Workers, Local 646, AFSCME, AFL-CIO and State of Hawaii Department of Health (Grievance of Alfred Wallace) (9/13/95, Najita).

A bargaining unit employee who was demoted from his or her regular position challenged the adverse action taken by an employer. In that case, the Arbitrator set aside the demotion because the employer relied upon a stale-dated medical report in determining that the employee would not be able to perform the duties and responsibilities of the position. In the Matter of the Arbitration Between the United Public Workers, Local 646, AFSCME and Department of Transportation, State of Hawaii (Grievance of Steven Franco, Jr.) (7/3/86, Rosehill).

Under § 11 of the respective Units 01 and 10 agreements bargaining unit employees may not be subject to reprimands, suspensions, and terminations unless the State of Hawaii establishes "just and proper cause." Section 11.01 provides in relevant portions as follows:

> Regular employees shall be subject to discipline by the Employer for just and proper cause. When such an employee is disciplined, he and the Union shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. When an employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the employee. In the event the need to impose discipline other than an oral warning or reprimand is immediate, the employee and the Union shall be furnished the reason(s) in writing within 48 hours after the disciplinary action is taken. All written notifications of disciplinary actions involving suspension and discharge shall include the following:
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> a. Effective dates of the penalties to be imposed and
> b. Details of the specific reasons.
>
> It is provided, however, that in the case of a discharge, such employee shall be granted an opportunity to respond to the

> charges prior to the effective date of discharge. (Emphasis added).

Adverse personnel actions based on unsatisfactory JPR's are arguably "disciplinary" in nature under the Units 01 and 10 agreements, and subject to challenge under §§ 11 (discipline), 14 (prior rights), 58 (bill of rights) and other provisions relating to job security and union recognition.

Under § 17 of the respective Units 01 and 10 agreements "derogatory" materials, notes, and records on bargaining unit employees may not be retained outside of the official personnel file of the employees. Sections 17.01 and 17.02 afford bargaining unit employees the right to examine, review and comment on such derogatory materials as follows:

> 17.01. An employee covered hereunder shall, on his request and by appointment, be permitted to examine his personnel file. An employee may be given a copy of any material in his file if it is to be used in connection with a grievance or a personnel hearing.
> 17.02. No material derogatory to an employee covered hereunder shall be placed in his personnel file unless a copy of same is provided the employee. The employee shall be given an opportunity to submit explanatory remarks for the record. (Emphasis added).

The use by the State of Hawaii of any "derogatory" information regarding a Unit 01 or Unit 10 employee which is not maintained in the official personnel file in accordance with § 17 has been strictly prohibited. In the Matter of the Arbitration Between United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Personnel Services (Class Grievance Re Use of Black Books). In S.P. 93-0162 in the Circuit Court of the First Circuit, the Court found the Department of Health in contempt for

noncompliance with Arbitrator Wayne Yamasaki's decision regarding the retention of "black books" and "secret files."

Under § 17.03 of the respective Units 01 and 10 agreements the State of Hawaii is also required to remove and destroy any "derogatory material" after two years. Section 17.03 states:

> An employee may request that any derogatory material not relevant to his employment be reviewed and destroyed after two (2) years. The employee's department head will determine whether the material is relevant and will decide whether the material will be retained or removed from his personnel jacket. Any decision to retain the material shall include reasons and shall be in writing. The employee's employment history record shall not be altered. The decision of the department head shall be subject to the provisions of Section 15. GRIEVANCE PROCEDURE, and be processed at Step 2. (Emphasis added).

In 1995 Arbitrator Ted T. Tsukiyama held that the State of Hawaii is required under § 17.03 to remove and expunge all entries and references to the past disciplinary actions (more than two years old) from SF-5 forms of a bargaining unit 01 employee, in addition to the removal of the disciplinary letters which the parties considered to be "derogatory materials." In the Matter of the Arbitration Between State of Hawaii, Department of Human Services and United Public Workers, Local 646 (Grievance of Dryden Kalaaukahi) (12/11/95, Tsukiyama). The Arbitrator discussed the understanding of the parties with respect to the term "derogatory materials" as follows:

> . . . the term "derogatory material" is defined neither in Section 17.03 nor in Personnel Rule 14-11-6 which speak to the matter. Employer's witness described the term "derogatory material" as "anything that's negative on the employee." The Union's

> spokesman testified "We felt derogatory was something that was to be considered negative that could cause harm to an employee for future employment, for promotion, for any type of gain through the merit system" and cited disciplinary action, negative JPR's, anonymous letters, complaints, criticism, and anything that could "be held against you." Apparently, Employer agreed that disciplinary suspensions constituted "derogatory material" since it was willing to remove/destroy the original disciplinary letters and the remarks describing the disciplined misconduct in Box #50 on the Form SF-5's in question. (Emphasis added).

On or about August 4, 1995, TAKUSHI transmitted to the State Director of the UPW, Gary Rodrigues, the first draft of a new PAS for consultation purposes. The draft had been developed by a "task force" in 1993, and implemented as a pilot project in bargaining units 03 and 04.

According to Diane Sumida of DHRD, PAS was designed to address certain "deficiencies" with the JPR system, i.e., (1) the spotty use of the JPR forms by supervisors and the need for simplification of the rating levels, (2) the absence of a clear statement of supervisory "expectations" prior to the commencement of the rating period, (3) the need for documentation of the basis for the evaluation by the supervisor over a 12-month period (for regular employees), and (4) the lack of emphasis on the importance of safety on the job.

By contrast to the JPR forms, the PAS forms provided additional space for supervisors to write out goals, projects and expectations, simplified the grading process by reducing the number of rating levels from five (5) to three (3), and changed certain performance categories to emphasize safety on the job and accountability of employees. In addition, the new system

established a form for "Supervisory Discussion Notes" to be utilized by supervisors during the evaluation periods to document "specific incidents of outstanding and/or substandard employee work performance."

Representatives of the UPW and the DHRD met in "consultation" on PAS on August 29, 1995. The UPW indicated its concern over various changes in terms and conditions of employment proposed by the State of Hawaii. The Union specifically objected to the use and retention of supervisory discussion notes outside of the official personnel file of bargaining unit employees, and inquired about the development of the "Supervisory Manual" which explained the changes under PAS.

On September 12, 1995, the DHRD transmitted "draft two" of the new PAS forms for further consultation to Gary Rodrigues of the UPW. The letter indicated that a "Supervisory Manual" was being developed by the Employer.

On December 1, 1995, the DHRD transmitted what it referred to as "final drafts" of the new PAS and a draft of the "Supervisory Manual" to Gary Rodrigues of the UPW.

On January 22, 1996 TAKUSHI informed the UPW through its State Director that the Employer intended to implement the PAS on a "phased-in basis." Respondent TAKUSHI also responded to some of the concerns and objections previously raised by the UPW during the consultation process. TAKUSHI also enclosed revised PAS forms and the Supervisory Manual which incorporated some of the changes suggested by the Union.

Most of the Units 01 and 10 employees were not subject to PAS until after July 1, 1996. Just four (4) bargaining unit

employees represented by the UPW were informed in April 1996 that PAS would be applicable to them.

On June 7, 1996 the UPW submitted a written bargaining request to Respondents TAKUSHI and CAYETANO. The request stated in relevant portions as follows:

> As the exclusive bargaining agent for employees in unit 1 and unit 10, the United Public Workers, AFSCME, Local 646, AFL-CIO hereby requests bargaining over the PAS. We further request that the State of Hawaii cease and desist from implementing the proposed changes to the performance appraisal evaluation process forthwith.
>
> In addition to establishing new terms and conditions of employment, the program modifies existing contractual requirements and violates arbitral awards and existing court orders.

On June 21, 1996 Respondent TAKUSHI informed the UPW through its State director that it considered PAS a subject for consultation, but not for bargaining under Chapter 89, HRS. Respondent TAKUSHI responded to the UPW's request for information and transmitted at that time a copy of the "Supervisory Manual" dated March 1996.

The implementation of PAS by the State of Hawaii changed certain specific working conditions for bargaining unit 01 and bargaining unit 10 employees.

Under PAS the State of Hawaii is permitted to demote, terminate, and take other forms of adverse personnel actions which are considered non-disciplinary in nature. As the Supervisory Manual indicates Employer makes a distinction between discipline for misconduct and adverse personnel action for "performance problems:"

Q37: Can the PAS be used as a disciplinary tool?

A37: No. The PAS is designed to improve performance and to promote communication between the employee and the supervisor; whereas, discipline is a corrective action taken as a result of a violation of a work rule or misconduct, (e.g., swearing at the supervisor). Additionally, the "Notice to Improve Performance" is not considered a disciplinary letter (see Supervisory Manual), Appendix F, page 53).

Q38: What's the difference between discipline and performance problems?

A38: Discipline-type problems exist when there is misconduct, the employee violates work rules, etc. Performance-type problems exist when an employee is unable to perform the duties and responsibilities of his/her job according to performance expectations. (Emphasis added).

The impact and consequence of a non-disciplinary demotion or termination are however equally severe to the affected bargaining unit employee as a "disciplinary" demotion or termination.

Under the Units 01 and 10 collective bargaining agreements "failure to perform work as required" subjects a bargaining unit employee to disciplinary actions, including demotions, terminations, and suspensions. Since such actions are considered "disciplinary" in nature, they may be subject to challenge by the affected employee or union under the grievance procedure. PAS changes the foregoing conditions of work.

Under PAS supervisors are permitted to record and retain "derogatory" information on specific incidents of outstanding and/or substandard work performance of employees in the Supervisory Discussion Notes form, i.e., outside of their official personnel files during the period of the performance appraisal through the

use of "Supervisory Discussion Notes." This represents a change in §§ 17.01 and 17.02 of the respective Units 01 and 10 collective bargaining agreements.

Under PAS "derogatory materials" which are recorded in "Supervisory Discussion Notes" may also be maintained indefinitely in the official personnel files of a bargaining unit employee. This represents a change in § 17.03 of the Units 01 and 10 collective bargaining agreements.

DISCUSSION

We are once again asked to revisit the question of the scope of an employer's obligation to negotiate over policies and procedures established for the evaluation of public employees. In University of Hawaii Professional Assembly, 3 HPERB 562 (1984), we held that an employer is not required to negotiate over a decision to establish an evaluation policy for BOR appointees designed to improve the efficiency of government operations, unless the policy modifies or changes existing conditions under the express or implied terms of a collective bargaining agreement. In this case, we find that the PAS implemented by Respondents does not change working conditions and is therefore not subject to negotiations, except that the system permits adverse personnel actions to be taken against employees, such as termination, and be considered non-disciplinary. In addition, the Board finds the maintenance of supervisory discussion notes outside of the employee's personnel file and for a period exceeding two years violates § 17 of the Units 01 and 10 agreements.

PAS modifies the performance categories and the rating system utilized since 1961 by the State of Hawaii under the Job Performance Report (JPR) system. The changes were intended merely to simplify the rating procedure, place new emphasis on job safety and employee accountability, and to ensure uniform application by supervisors and managers. PAS forms provide additional space for supervisory "expectations" to be written out at the commencement of each rating period. However, these modifications did not change working conditions of bargaining unit employees who continue to be evaluated at the end of their six-month probationary period and on a regular annual basis. Under § 76-41, HRS, employees receive a copy of their performance ratings and as Respondents correctly point out, substandard performance no longer results in a loss of "step increments." Administrative Rules § 14-11-2 affords employees written notice of substandard performance and an opportunity "to bring the employee's performance to a satisfactory level within three months." Accordingly, as to the foregoing aspects of PAS we find that Respondents properly consulted with UPW before implementing the changes to the JPR system.

We are unable to agree with Respondents, however, that other changes brought about by PAS as more fully described in the March 1996 Supervisor's Manual and as testified to by State officials merely required consultation with UPW. As observed more than 20 years ago in Hawaii Nurses Association, 2 HPERB 218 (1979), the duty to consult and the duty to negotiate under Chapter 89, HRS, are distinctly different and separate concepts. Changes in wages, hours, and working conditions relating to performance evaluations are mandatory subjects and require bargaining in good

faith by Respondents. Forest Preserve District of Cook County v. Illinois Local Labor Relations Bd., 546 N.E.2d 675 (Ill. 1989); Northeast Community School District v. Public Employment Relations Board, 408 N.W.2d 46 (Iowa, 1987).

In the present case Respondents made three significant changes in working conditions under PAS without compliance with their bargaining obligations.

Under the Units 01 and 10 collective bargaining agreements adverse personnel actions including terminations based on unsatisfactory JPRs have previously been considered disciplinary in nature and subject to challenge by way of the grievance procedure under §§ 11 (discipline), 14 (prior rights), 58 (bill of rights) and other provisions relating to job security and union recognition. A probationary employee who is terminated has standing through the UPW "to grieve and to arbitrate" his or her separation from employment. In the Matter of the Arbitration between State of Hawaii, Waimano Training Home and United Public Workers, Local 646 (Re Grievance of B. T.) (5/10/84, Tsukiyama). Unsatisfactory ratings in JPRs have been subject to challenge under the grievance procedure (§ 15) and arbitrated by the parties to the Unit 01 and Unit 10 agreements on behalf of probationary and regular employees. United Public Workers, Local 646 and City and County of Honolulu, Honolulu Police Department (Grievance of Raymond Baldes & William Rhoden) (3/31/86, Gilson); United Public Workers, Local 646, AFSCME, AFL-CIO and State of Hawaii Department of Health (Grievance of Alfred Wallace) (9/13/95, Najita). However, while Respondents characterize the PAS as being a non-disciplinary tool, Respondents are permitted to demote,

terminate, and take other forms of adverse personnel actions which State officials consider "non-disciplinary" in nature for "performance problems" without recourse to the contractual grievance procedure. Such a material change in working conditions modifies the job security provisions of the Unit 01 and Unit 10 agreements under which a regular employee who fails "to perform work as required" is subject to separation for "just and proper cause" only, and a probationary employee may grieve his or her separation for an "improper termination." National Licorice Co. v. NLRB, 309 U.S. 350, 6 LRRM 674 (1940); Michael J. Malone & Bob Burkheimer, 266 NLRB 350, 112 LRRM 1358 (1983).

In addition, under § 17 of the Units 01 and 10 collective bargaining agreements "derogatory" materials, notes, and records may not be retained outside of the official personnel files of employees. Sections 17.01 and 17.02 afford bargaining unit employees the right to examine, review and comment on all derogatory or negative remarks by supervisors and managers which must be made available for review at all times in official personnel files of the employees. The use of "derogatory" information not maintained in the official personnel files is strictly prohibited. Under PAS, however, Respondents allow state officials to record and retain derogatory information in "Supervisory Discussion Notes" which during the period of performance evaluations are kept outside of the official personnel files of employees. This is a material change in working conditions as set forth in the Unit 01 and Unit 10 agreements which Respondents were obligated to negotiate with the UPW. Unified School District 501 Sec. of KDHR, 235 Kan. 968,

685 P.2d 874, 118 LRRM 2116 (1984); Board of Education v. NEA Goodland, 246 Kan. 137, 785 P.2d 993, 134 LRRM 2723, 2725 (1990).

Moreover, under § 17.03 of the Units 01 and 10 agreements Respondents are required to remove "derogatory materials" after two years from the official personnel files of bargaining unit employees. Under PAS while the supervisor's notes should only be kept during the period of performance evaluations, negative remarks contained in Supervisory Discussion Notes may be retained indefinitely. Such a provision represents a material change to the applicable collective bargaining agreements which must be negotiated with UPW. Unified School District 501 Sec. of KDHR, supra (proposal that derogatory materials be kept outside of the employee's personnel file is a mandatory subject).

To the extent that the Respondents permit the retention of supervisor's discussion notes containing derogatory disciplinary actions or materials outside of the official personnel file and for a period exceeding two years, the PAS modifies § 17 of the contract and requires negotiation of any change with the UPW.

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)(5), HRS, by wilfully refusing or failing to negotiate in good faith over a mandatory subject of bargaining.

Respondents wilfully violated § 89-13(a)(5), HRS, by refusing to negotiate with the UPW over changes to terms and

conditions of work relating to (1) the non-disciplinary termination and other adverse personnel actions for substandard performance, (2) the maintenance of supervisory discussion notes outside of the employee's personnel file, and (3) the retention of supervisory discussion notes containing derogatory materials for a period exceeding two years.

ORDER

Based on the foregoing findings and conclusions, the Board directs and orders Respondents:

(1) To cease and desist from refusing to negotiate with the UPW over changes to conditions of work relating to (a) the non-disciplinary termination and other adverse personnel actions for substandard performance, (b) the maintenance of supervisory discussion notes outside of the employee's personnel file, and (c) the retention of supervisory discussion notes containing derogatory materials for a period exceeding two years.

(2) To post copies of this decision in conspicuous places at its worksites where employees of the bargaining units assemble within 30 days hereof, and leave such copies posted for a period of 60 consecutive days from the initial date of posting; and

(3) To notify the Board of the steps taken by Respondents to comply with this order within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, May 5, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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