

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu and JEREMY HARRIS, Mayor, City and County of Honolulu,

Respondents.

CASE NO. CE-01-473

DECISION NO. 429

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 21, 2001, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against CHERYL OKUMA-SEPE (OKUMA-SEPE), Director of Human Resources, City and County of Honolulu and JEREMY HARRIS (HARRIS), Mayor, City and County of Honolulu (collectively Respondents) alleging Respondents failed to comply with a March 13, 2001 agreement to "immediately" select arbitrators in all pending UPW grievances filed on behalf of bargaining unit 01 employees on and after January 31, 2000. The UPW contends that the Respondents thereby committed prohibited practices thereby violating Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (5). Board Exhibit (Bd. Ex.) 1.

On June 19, 2001, the UPW moved to amend its complaint to add an additional claim for relief that Respondents wilfully violated § 15.17 of the Unit 01 agreement (entered into on December 26, 2000) by failing to select arbitrators in pending UPW grievances within 14 calendar days after the Union's notification of its intent to proceed to arbitration in violation of HRS § 89-13(a)(8). Bd. Ex. 8. The Board granted the UPW's motion on June 21, 2001 (Bd. Ex. 9), and on June 22, 2001 the UPW filed its First Amended Prohibited Practice Complaint (Bd. Ex. 12). On June 21, 2001, Respondents filed a motion to dismiss the complaint on grounds of mootness (Bd. Ex. 11), and on June 22, 2001 Respondents filed a motion for reconsideration of the order granting the UPW's motion to amend the complaint (Bd. Ex. 14). Argument on both motions was heard on June 26, 2001. Transcript (Tr.) 6/26/01, pp. 16-17. Both motions were denied by the Board. Tr. 6/26/01, pp. 16, 34-35.

The Board conducted a hearing on the merits of the instant complaint on June 26 and July 5, 2001. The parties had full opportunity to present evidence and argument to the Board. On July 2, 2001, the parties filed a Stipulation of Facts (Stip.) and an offer of proof (Offer of Proof) with the Board. Thereafter on August 20, 2001, the parties filed simultaneous post-hearing briefs with the Board.

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

FINDINGS OF FACT

1. The UPW is an employee organization and was certified as the exclusive bargaining representative, as defined in HRS § 89-2, of all blue collar non-supervisory employees of the state and counties in bargaining unit 01 on October 20, 1971. Bd. Ex. 1.
2. HARRIS is the Mayor of the City and County of Honolulu and is a public employer within the meaning of HRS § 89-2.
3. OKUMA-SEPE was for all times relevant, the Director of Human Resources, City and County of Honolulu and as an individual who represents the public employer or acts in his interests in dealing with public employees, is a public employer within the meaning of HRS § 89-2.
4. Since 1972 approximately 12 successive collective bargaining agreements covering Unit 01 employees have been negotiated between the UPW and the various public employers, including the City and County of Honolulu. *Id.* Prior to a "new" Unit 01 agreement which was negotiated on or about December 26, 2000 (Tr. 6/26/01, pp. 190-91), blue collar non-supervisory employees were covered by a collective bargaining agreement for the period July 1, 1995 to June 30, 1999. Union (Un.) Ex. 1, p. 130. During negotiations over a new agreement the parties extended the previous contract to on or about January 31, 2000. Tr. 6/26/01, p. 193.
5. The Unit 01 agreement provides a three-step grievance procedure in § 15 which culminates in arbitration of contractual disputes. Un. Ex. 1, pp. 18-19. The parties recognize and acknowledge that complying with the time requirements of the agreement is "very important" in grievance handling and to proper contract administration. Tr. 6/26/01, pp. 42-43; Tr. 7/5/01, pp. 49-52; Declaration of Gary W. Rodrigues (Decl.) 6/22/01, ¶ 2. It takes approximately 61 days to exhaust the first two steps of the grievance procedure

before the Union provides a notice of intent to arbitrate at the third step. Tr. 7/5/01, p. 140.

6. The process which leads to the selection of an arbitrator is set forth in relevant portions of the agreement as follows:

15.16 Step 3 ARBITRATION.

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer with thirty (30) calendar days after receipt of the Step 2 decision.

15.17 Selection of the Arbitrator.

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

15.17a. By mutual agreement from names suggested by the parties. (Emphasis added.)

Un. Ex. 1, p. 19.

7. On and after January 31, 2000 the UPW filed and processed a total of 39 grievances on behalf of Unit 01 employees with the City and County of Honolulu through Step 3 of the grievance procedure.
8. Twenty-nine (29) of the 39 grievances involved disciplinary actions taken against Unit 01 employees. Stip. Five grievances involved discharges of Unit 01 employees. Stip. ¶¶ 5, 11, 12, 18, 36; Tr. 7/5/01, p. 148. Soon after notification of the Union's intent to arbitrate the cases was provided to the employer in all cases, UPW's counsel routinely wrote to the Director of Human Resources requesting that a City representative contact him to select an arbitrator within 14 calendar days. See, e.g., Stip. ¶¶ 1a, 2a, 3a, 4a, etc.
9. However, on or about August 15, 2000 and thereafter then Director of Human Resources Sandra McFarlane notified the UPW that the employer did not consider grievances filed after January 31, 2000 to be arbitrable under § 15.20(b)(5) of the Unit 01 agreement. Un. Exs. 12-6, 14-6, 16-6, 17-4, etc. Section 15.20(b)(5) states:

A grievance occurring between the termination date of this Agreement and the effective date of a new Agreement shall not

be arbitrable except when the Agreement is extended by mutual agreement between the Union and the Employer. (Emphasis added.)

Un. Ex. 1, p. 20.

10. The employer declined to respond to UPW's counsel's requests to select arbitrators for any of the 39 grievances based on the foregoing provision. Tr. 7/5/01, p. 50.
11. On November 13, 2000, the UPW filed a prohibited practice complaint in Case No. CE-01-455 alleging that the employer had committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8). Un. Ex. 3.
12. Resolution of the new Units 01 and 10 agreements was reached through the bargaining process on December 26, 2001. Tr. 6/26/01, pp. 190-91, 212. Tentative agreements (TAs) were drafted and transmitted to all employers, including the City and County of Honolulu, on or about December 21, 2001. Tr. 6/26/01, pp. 211-12, 220, 222. The TAs included a "notation" to change § 15.20b which stated:

Pending grievances occurring after January 31, 2000 that have been submitted to arbitration by the Union, shall be arbitrated.

Un. Ex. 37, p. 2.

13. A meeting of the employer group was held on December 26, 2001 to go over the entire resolution. Tr. 6/26/01, p. 219-20. Voting took place on all items within the employer group, including the "notation" to § 15.20b. Tr. 6/26/01, pp. 212, 221, and 233. Cynthia Bond (Bond), Deputy Director of Human Resources for the City and County of Honolulu (Tr. 6/26/01, p. 224), was present at the meeting. Tr. 6/26/01, pp. 213, 233. Bond informed Chief Negotiator Davis Yogi (Yogi) that she had no authority from Mayor HARRIS to vote on the issues. Tr. 6/26/01, pp. 205, 233-34. A formal vote was taken on the "notation" to § 15.20b in the presence of City representatives (Tr. 6/26/01, pp. 192-93, 221); and they did not ask for additional time before a vote was taken. Tr. 6/26/01, pp. 221-23. A majority of employers, including Maui County, which initially had some concerns about the "notation" (Tr. 6/26/01, pp. 212-13), voted in favor of the item. Tr. 6/26/01, pp. 212, 221. Even without the vote of the City, a majority of employers approved all items to the new agreements. Tr. 6/26/01, p. 212. No objections were raised on December 26, 2001 by City representatives, specifically with Yogi. Tr. 6/26/01, p. 205.

14. According to Yogi all employers present at the December 26, 2001 meeting knew that the purpose of the "notation" on § 15.20b was to rejuvenate the terms of the prior contract for the purpose of pending grievances filed on and after January 31, 2000. Tr. 6/26/01, pp. 215-17.
15. On or about February 7, 2001 Yogi signed the final version of the TAs on behalf of all employers. Un. Exs. 2-5; Tr. 6/26/01, p. 190. A memorandum of agreement incorporating all changes to the new agreement was executed by Governor Cayetano, Mayor Apana, and Mayor Kusaka for the employers and by UPW negotiators soon thereafter. Un. Ex. 2-2; Tr. 6/26/01, p. 190. The "new" agreements which incorporated many of the prior non-cost items covered the period from July 1, 1999 to June 30, 2003.
16. The prohibited practice complaint filed on November 13, 2000 (Un. Ex. 3) by UPW in Case No. CE-01-455 was scheduled to be heard on March 13, 2001 before the Board's appointed hearings officer Valri Lei Kunimoto. Un. Ex. 6-3. Prior to the hearing, the attorneys representing UPW and the City reached a settlement of the dispute and exchanged letters which contained their respective understandings of the terms. Un. Exs. 4 and 5. The letters were included in the record (Un. Ex. 6-3) and the key provision was stated by counsel for the Union as follows:

Essentially what we are doing is that the City has agreed to proceed with the selection of arbitrators in these cases which have been filed after January 31, 2000 and to proceed with the arbitration of these matters. (Emphasis added.)

Un. Ex. 6-4. The attorney for the City confirmed that the statement of resolution on the key term was consistent with his "understanding." Un. Ex. 6-5.
17. OKUMA-SEPE authorized the settlement of March 13, 2001. Tr. 6/26/01, pp. 61-62, 150, 185-86. On the same date of the settlement OKUMA-SEPE was provided a copy of UPW counsel's version of the settlement terms, and was asked to select arbitrators "promptly" in a number of specific cases. Tr. 6/26/01, pp. 52, 64; Un. Exs. 12-7, 16-7, 17-8, 27-6.
18. OKUMA-SEPE was aware that the Union's version of the settlement terms stated in relevant portions as follows:

1. The City agrees to select arbitrators immediately and to proceed to arbitration on the merits and without reservation

in all pending UPW grievances which were filed after January 31, 2001. (Emphasis added).

Un. Ex. 4-1; Tr. 6/26/01, p. 64.

19. The City's labor relations branch chief Dennis Neufeld (Neufeld) was provided a copy of the March 13, 2001 settlement terms as written by UPW's counsel on March 14, 2001. Tr. 7/5/01, p. 10. Neufeld was informed "that the City had agreed to go ahead and arbitrate the cases from that point on." Tr. 7/5/01, p. 11. He was aware that the agreement covered all pending grievances which had been filed by UPW after January 31, 2001. Tr. 7/5/01, pp. 25-26.
20. On March 19, 2001, City attorney Paul T. Tsukiyama (Tsukiyama) wrote a letter to UPW's counsel reassuring the Union that arbitrators would be selected by City attorneys and labor relations specialists, and proposing a delay in cases involving disciplinary cases for sick leave abuse and unauthorized absences. Tr. 6/26/01, p. 65; Tr. 7/5/01, pp. 17-18.
21. Tsukiyama's letter triggered a prompt reply from Union's counsel regarding the applicable time deadlines and the need for City compliance. Tr. 6/26/01, p. 71.
22. On March 28, 2001 the City attorney who negotiated the March 13, 2001 settlement agreement with the UPW advised his client to proceed "immediately" with the selection of arbitrators in UPW cases. Tr. 7/5/01, pp. 18-19. The memo stated:

Attached is the UPW's response to my March 19, 2001 letter, in which I suggested that the parties refrain from the selection of arbitrators in the grievances involving the above-cited sections, due to upcoming or ongoing resolution of discussions with the UPW.

The UPW is not agreeing to hold these matters in abeyance, so we should begin the selection of arbitrators immediately. The hearings, however, should be held in abeyance until settlement talks have been exhausted. (Emphasis added).

Un. Ex. 9. The entire staff of the labor relations division was provided a copy of the memo on March 28, 2001 (Tr. 7/5/01, p. 18), and all City officials were aware by this point in time that the City was obligated to select arbitrators "immediately."

23. By the end of March 2001 City representatives sent letters or contacted UPW's counsel in just 13 of the 39 pending grievances. Stip. ¶¶ 25, 18, 19, 22, 30, 7, 8, 9, 10, 13, 15, 27, 20; Offer of Proof ¶ 5. In 12 of the 13 cases, the City's response was not received within 14 calendar days of December 26, 2000 (the effective date of the agreement on the "notation" to § 15.20b) or the date of the UPW's notice of intent to proceed to arbitration.
24. Although the March 28, 2001 memo appeared to have resolved the issue of the City's obligation to select arbitrators, Respondents did not comply with either the March 13, 2001 settlement or the March 28, 2001 instructions of their own counsel to select arbitrators "immediately" in even the remaining 26 UPW grievance cases. Stip. ¶¶ 1, 2, 3, 4, 5, 6, 11, 12, 14, 16, 17, 21, 23, 24, 26, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39. City officials have offered a variety of "explanations" for their non-compliance.
25. First, according to OKUMA-SEPE non-compliance was due in part to a "misunderstanding" which existed over whether the March 13, 2001 settlement agreement applied to §§ 37.17 and 38.11 cases which the City wanted to discuss further before selecting an arbitrator. Tr. 6/26/01, pp. 130-31. OKUMA-SEPE initially believed that discussions on this issue were to occur directly between the UPW and the City. Tr. 6/26/01, p. 109.
26. On April 12, 2001 OKUMA-SEPE proposed a multi-employer meeting to be held on April 26, 2001 to the UPW. Er. Ex. F. On April 19, 2000 she then sent a letter to Yogi and employer representatives of the various counties proposing a meeting on May 3, 2001. Er. Ex. G. On April 26, 2001 Yogi requested that the meeting be "postponed" until background information was provided. Un. Ex. 35. The scheduled meeting with UPW on May 3, 2001 was postponed, and several meetings were held within the employer group. Tr. 6/26/01, pp. 113, 196, 210. After these meetings the City decided not to request a meeting with the UPW, and instead to simply "go forward with the arbitration" of the §§ 37.17 and 38.11 cases in spite of a prior agreement to have "good faith discussions" over these pending cases.
27. Second, according to Neufeld, non-compliance was due in part to settlement offers made to UPW counsel Peter Trask who purportedly did not insist on the prompt selection of arbitrators in five cases being discussed with Allison Murakawa. Er. Exs. E-39 and E-40; Tr. 7/5/01, pp. 52, 57, 63-64, 67, 71, 83. Neufeld did not have direct knowledge of the discussions between Trask and Murakawa. Tr. 7/5/01, p. 71. Neufeld also concedes that no agreement to extend the time to select arbitrators was ever entered into and Trask did not defer the appointment of an arbitrator pending settlement talks. Tr. 7/5/01, pp. 68, 116.

28. Third, according to Neufeld much of the delay in the selection of arbitrators was due to the City's failure to promptly resolve the issue of whether attorneys would be assigned to handle many of the cases. Tr. 7/5/01, p. 53. Meetings were held between representatives of the Human Resources Department and the Office of Corporation Counsel on April 17, 2001 and May 4, 2001 to resolve the issue internally. Offer of Proof ¶¶ 8 and 10. Until May 4, 2001 the matter was unresolved, and further delays in the selection of arbitrators resulted in many cases. Tr. 7/5/01, pp. 109-11; Er. Ex. E-1 amended.
29. On or around June 15, 2001, the City initiated the selection of an arbitrator in the last of the grievances.¹

¹UPW GRIEVANCES PENDING ARBITRATION (filed after January 31, 2000):

Grievance Number	Arbitrator	Date Selection Initiated by City
CZ-00-38	Kuriyama	5/18/01
CZ-00-37	Kuriyama	5/18/01
CZ-00-39	Kuriyama	5/18/01
ES-00-39	Kuriyama	5/18/01
ES-00-59	Kuriyama	5/18/01
ES-00-18	Kuriyama	5/18/01
CZ-00-14	Kuriyama	3/28/01
CZ-00-19	Kuriyama	3/28/01
CZ-00-29	Aoki	3/28/01
LS-00-48	Kuriyama	3/28/01
ES-00-06	pending	5/18/01
ES-00-30	Kuriyama	5/18/01
CZ-00-12	pending	3/28/01
ES-00-29	pending	5/18/01
CZ-00-28	Kuriyama	3/28/01
CZ-00-42	Aoki	5/18/01
CZ-00-43	Aoki	5/18/01
MR-00-13	Ikeda	3/15/01
MA-00-51	Sandra Wong	3/15/01
CZ-00-36	Ed King	3/31/01
DB-00-19	pending	5/29/01
CZ-00-08	completed	
CZ-00-26	pending	4/19/01
ES-00-19	Aoki	5/24/01
CZ-00-40	Hunter	1/10/01
CZ-00-33	Aoki	6/13/01
DB-00-23	Kuriyama	4/6/01
DB-00-05	pending	5/29/01
LS-00-76	Aoki	6/15/01
DB-00-23A	Aoki	3/27/01
DB-00-08	Aoki	5/30/01
DB-00-25	Aoki	5/30/01
MA-00-41	Aoki	6/8/01
CZ-00-11	Kuriyama	5/8/01
ES-00-68	pending	4/19/01

DISCUSSION

The UPW asserts that the City's failure to timely initiate the appointment of arbitrators for the 39 grievances which is the subject of this action constituted prohibited practices inasmuch as the City's tardiness violated both a settlement agreement before the Board and the applicable collective bargaining agreement.

The City argues that no violation can be found because the complaint is moot since the arbitrators have been appointed in all cases, and that the City did not act with the requisite wilfulness.

Mootness

It is uncontested that arbitrators have been appointed for each of the grievances at issue in this case. The City argues that since the Union has already been afforded the relief it seeks, the case is moot.

Under the doctrine of mootness, a tribunal will not retain jurisdiction over a case when "events have so affected the relationship between the parties that the two conditions for justiciability... – adverse interest and effective remedy -- have been compromised." Application of Thomas, 73 Haw. 223, 226, 832 P.2d 253 (1992) (citations omitted.) The City argues that the appointment of arbitrators resolves any controversy between the parties so that there are no longer matters at issue between the parties and no meaningful relief which can be provided by the Board. Indeed, the City's initial promise of March 13, 2001 to appoint arbitrators led to its arguing that the first Union complaints on this matter were moot, and the Union's withdrawal of those complaints in reliance upon the promises.

Because of the City's subsequent failure to appoint arbitrators, the Union filed the instant complaint on May 21, 2001. On or around June 15, 2001, the City initiated the appointment of arbitrators in the last such grievances. This does not, however, necessarily put an end to this matter:

There is an exception to this precept [mootness], however, that occurs in cases involving a legal issue which is capable of repetition, yet evading review. The phrase, "capable of

(cont'd)	Grievance Number	Arbitrator	Date Selection Initiated by City
	ES-00-66	McConnell	4/23/01
	ES-00-54	Aoki	6/19/01
	ES-00-04	Aoki	6/14/01
	DB-01-01	Frank Yap	5/22/01

repetition, yet evading review,” means that “a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.”

Id., at p. 226.

At issue in this case is the alleged failure of the City to timely satisfy its obligations under a settlement agreement and bargaining agreement. If the tardy satisfaction of its obligation is found to moot the case, the City can forever control the justiciability of the issue and adjudication can be avoided indefinitely. In effect, deadlines can be ignored with impunity, and responsibilities satisfied only in the shadow of adjudication, forever avoiding full review.² The issue is thus “capable of repetition yet evading review” and therefore, not moot.

Settlement Agreement

The UPW asserts that the failure of the City to timely appoint arbitrators for the grievances at issue violated the terms of the settlement reached before the Board to settle Case No. CE-01-455 and consequently violated HRS §§ 89-13(a)(1) and (5).

It is uncontested that the settlement agreement announced to the Board’s hearings officer on March 13, 2001 contemplated the appointment of arbitrators for each of the grievances at issue. The UPW asserts that “immediate” appointment was contemplated and the City counsel’s memo of March 28, 2001 confirms this element of the agreement. It is also uncontested that the City initiated the appointment of arbitrators for the last of the grievances on or around June 15, 2001, more than three months after the agreement. What remains to be determined is what part of “immediate” the City could not understand or implement and if these failures excuse delay. The City argues that any such failures were in good faith thereby depriving the claim of the requisite element of wilfulness.

²The possibility of repetition while evading review is demonstrated by the fact that in Case No. CE-01-323 these same parties were involved in a dispute regarding the City’s failure to timely select an arbitrator under the then applicable bargaining agreement. The City selected an arbitrator one month after the filing of that complaint by the UPW, and the Board in Order No. 1457 dismissed the case as moot. The Board warned however, that “further violations of the provisions of § 15.22 of the Agreement will warrant the Board’s finding of a prohibited practice.” While this warning is not dispositive of the instant case, the fact that this case is virtually identical demonstrates the necessity to address the merits of cases that might be avoided indefinitely by post hoc compliance which limits administrative relief.

In Decision No. 337, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 177 (1993), the Board held that because “the process of grievance adjustment is part and parcel of the collective bargaining process,” Id., at 182, the wilful repudiation of an oral settlement agreement constituted a violation of HRS § 89-13(a)(5).³

The Board can find no reason why a similar conclusion would not follow from the violation of a settlement agreement affecting 39 grievances.

In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583 (1996), the Board discussed the element of “wilfulness”:

...[T]he Board, while acknowledging its previous interpretation of “wilful” as meaning “conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS” nevertheless stated that “wilfulness can be presumed where a violation occurs as a natural consequence of a party’s actions.” [citations omitted, emphasis added.]

In that case, the Board applied this understanding of wilfulness to circumstances very similar to the instant proceeding, the failure of an employer to abide by a contractual requirement that parties meet to select an arbitrator within ten days of the union’s notice of intent to arbitrate. The Board concluded:

Thus, based on the evidence before this Board, the Board finds that the natural consequence of the Employer’s actions in failing to contact UPW’s counsel to select an arbitrator constitutes a delay and frustration of the grievance process. Thus, the Board finds that the Employer’s actions in these cases were wilful violations of the contract.

Id.

In the instant case, the Board will similarly presume wilfulness since a violation of the settlement agreement occurred as a natural consequence of the City’s failure to initiate the appointment of arbitrators.

³HRS § 89-13(a)(5) provides as follows:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(5) Refuse to bargain in good faith with the exclusive representative as required in section 89-9....

This is not to say that the missing of any contractual or bargaining deadline will be presumed to constitute a wilful violation of HRS § 89-13. For to do so would be to reduce them to strict liability offenses in contravention of the Legislature's probable intent regarding state of mind. Therefore, in cases involving the missing of deadlines, wilfulness will henceforth be presumed only when there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations.

In its post-hearing brief, the City acknowledges certain inefficiencies and aptly summarizes its purported reasons for its delays in moving forward with the appointment of arbitrators:

The city acknowledges that the selection process should have been handled more efficiently....

* * *

A review of the record indicates that confusion by City Human Resources personnel over terms and obligations arising from the March 13 agreement largely contributed to the delay in selecting arbitrators for a number of cases. Internal City discussions regarding representation of the City in these grievances also contributed to delayed responses to request for arbitration.

Employer's Post-Hearing Brief at 15, 18-19. The City's "confusion" and internal delegation process may have indeed contributed to the delays. But what is striking to the Board is that little⁴ or no effort was expended in trying to resolve the "confusion" or otherwise communicate with the Union regarding the delays.

In Decision No. 421, Benjamin J. Cayetano, 6 HLRB ____ (March 16, 2001), the Board adopted the following description of the duty to bargain:

The duty to bargain in good faith has been described as follows:

⁴In support of its argument that some arbitrator appointments were being held pending conclusion of settlement discussions, the City points to a June 15, 2001 fax from a labor relations specialist to the Union attorney which can be read to infer that appointments were being held pending the resolution of settlement discussions. Fax from Murakawa to Peter Trask, City Ex. 38. This was, however, in an apparent response to a memo from the Union attorney dated May 30, 2001 that included the conclusion that "I suggest that all we are doing is wasting time, and reassert my demand for selection of arbitrators." Trask memo to Murakawa, City Ex. 39. The Board is of the opinion that post hoc inferential notification of a rationale for delay does not constitute open and effective communication.

The duty to bargain in good faith is an “obligation to...participate actively in the deliberations so as to indicate a present intention to find a basis for agreement...”

The obligation to “participate actively” permeates the collective bargaining relationship. The requirement implies open and effective communication regarding issues of mutual concern. The absence of such communication implies at least an indifference to, or avoidance of, a bargaining or bargained for, obligation. Accordingly, the Board finds that the failure of the City to meaningfully communicate with the Union regarding the causes for delay in the appointment of arbitrators constitutes substantial evidence of indifference to its obligations under the settlement agreement thereby supporting the presumption that the violation was wilful.

The Board therefore concludes that the City violated HRS § 89-13(a)(5) by its failure to timely appoint arbitrators as required by its settlement agreement of March 13, 2001.

Having determined that the City’s conduct violated HRS § 89-13(a)(5), the Board need not address the Union’s analogous allegations that the City’s conduct also violated HRS §§ 89-13(a)(1) and (8).

The Union further argues that the City’s violation was egregious and that attorneys fees should be awarded pursuant to Decision No. 379, Jo desMarets 5 HLRB 620 (1996) (desMarets). In desMarets, the Board concluded that the award of fees was in order because “the evidence establishes that the Employer deliberately and wilfully sought to destroy the spirit and reputation of one of its employees without any justification for the actions or remorse on its part.” Id., at 635. The Board thus awarded fees when it was established that the employer’s conduct was motivated by malice. No such motivation having been established in the instant case, the request for fees is denied.⁵

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. The selection of arbitrators for the grievances at issue does not render the case moot since the alleged violation of failing to timely appoint arbitrators is otherwise capable of repetition yet evading review.
3. The employer violates HRS § 89-13(a)(5) by refusing to bargain in good faith with the exclusive representative as required in HRS § 89-9. The duty to bargain in good faith is an obligation to participate actively in the deliberations

⁵This assumes, arguendo, the Board has authority to grant fees.

so as to indicate a present intention to find a basis for agreement. The process of grievance adjustment is part and parcel of the collective bargaining process and the wilful repudiation of a settlement agreement constitutes a violation of HRS § 89-13(a)(5).

4. In cases involving the missing of deadlines, the Board will presume wilfulness only when there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations. In this case, the Board will presume wilfulness since a violation of the settlement agreement occurred as a natural consequence of the City's failure to initiate the appointment of arbitrators.
5. The Board concludes that Respondents committed a prohibited practice by wilfully failing to select arbitrators in accordance with its settlement agreement thereby violating HRS § 89-13(a)(5).
6. The Board finds that Respondents' conduct was not motivated by malice and thus an award of attorneys fees is not warranted in this case.

ORDER

Based on the foregoing, the Board issues the following:

1. Respondents shall cease and desist from committing the instant prohibited practices and shall comply with the requirements of applicable settlement agreements.
2. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of the affected bargaining unit assemble, and leave such copies posted for a period of 60 days from the initial date of posting.
3. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, _____ October 10, 2001 _____.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. CHERYL OKUMA-SEPE,
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CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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