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-01-508 DECISION NO. 448 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 7, 2002, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against CHERYL OKUMA-SEPE (OKUMA-SEPE), Director, Department of Human Resources, City and County of Honolulu and JEREMY HARRIS, Mayor, City and County of Honolulu (collectively City, Employer or Respondents) for failing to select an arbitrator in UPW grievance CZ-02-12 within 14 calendar days after the Union's notification of its intent to proceed to arbitration. The Union contends that said failure violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (8).

On August 9, 2002, the UPW filed a Motion for Summary Judgment in this case. On August 19, 2002 Respondents filed its Memoranda in Opposition to the Motion for Summary Judgment. And on August 20, 2002 the UPW filed its replies thereto. On August 23, 2002, the Hawaii Labor Relations Board (Board) held a hearing on the motions.[1] Thereafter, the Board issued Order No. 2119, Order Consolidating Cases to Dispose of the Instant Motions and Granting, in Part, and Denying, in Part, UPW's Motions for Summary

[1]At the hearing, the parties agreed not to consolidate this case with Case No. CE-01-509 for disposition. However, in reviewing the record, the Board found that the same parties were involved and similar issues were presented for consideration, and thus contemporaneous consideration of the summary judgment motions was conducive to the proper dispatch of these issues. Accordingly, the Board, on its motion, consolidated these proceedings with those of Case No. CE-01-509 for the purposes of the motion for summary judgment pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(13).

Judgment on September 30, 2002. In its Conclusions of Law, the Board concluded that Respondents violated the collective bargaining agreement between Complainant and Respondents and granted summary judgment in favor of the Complainant. In Order No. 2119, the Board stated:

> 4. In the instant cases, the Board finds that the Employer was responsible for the tardy appointment of arbitrators in excess of 14 days and was thus in violation of the collective bargaining agreement.
>
> 5. However, the actions of the Employer in each case raise material issues of fact regarding whether the City proceeded in derogation or indifference to its obligations and wilfully violated the agreement.
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> ORDER
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> Based on the foregoing, the Board hereby grants summary judgment in favor of the UPW to the extent that the Board concludes that the Employer violated the contract. The issue of whether Respondents wilfully violated the collective bargaining agreement remains for further hearing.

On October 23, 2002 and November 6, 2002, the Board held a hearing on the issue of wilfulness.

After full and fair consideration of the evidence in the record and the arguments of the parties, the Board hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW was certified as the exclusive bargaining representative of nonsupervisory blue collar employees of the State and counties in bargaining unit 01 on October 20, 1971.

2. OKUMA-SEPE is the Director of the Department of Human Resources with the City and County of Honolulu and is a representative of the Mayor and an employer within the meaning of HRS § 89-2.

3. 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.

4. The Unit 01 agreement provides a three-step grievance procedure in Section 15 which culminates in arbitration of contractual disputes. The Union provides a notice of intent to arbitrate at the third step.

5. 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 within thirty (30) calendar days after receipt of the Step 2 decision.
>
> **15.17 SELECTION OF THE ARBITRATOR.**
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> 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.]

6. On or about May 9, 2002, the UPW filed a class action grievance alleging violations of Sections 11 and 46 in Grievance No. CZ-02-12 for the failure to implement appropriate training on workplace violence in the Department of Facility Maintenance, City and County of Honolulu.

7. The grievance was processed through Steps 1 and 2 of Section 15 without resolution.

8. On June 14, 2002, the UPW filed its notice of intent to arbitrate Grievance No. CZ-02-12.

9. On or about June 18, 2002, the UPW submitted a proposed list of arbitrators to the Employer.

10. On or about June 24, 2002, the Employer rejected the Union's proposed arbitrators and submitted a proposed list of its own.

11. On or about July 1, 2002, the UPW requested a list of arbitrators from the Board.

12. On or about July 11, 2002, the Board provided a list of arbitrators.

13. On either July 17 or 18, 2002, Gary Rodrigues (Rodrigues), then UPW State Director, spoke by phone with Robin Chun-Carmichael (Chun-Carmichael), Division Head of the Labor Relations and Training Division, Department of Human Resources, City and County of Honolulu, regarding the subject grievance. Rodrigues asserts that the conversation was for the purpose of selecting an arbitrator and that Chun-Carmichael was unprepared to proceed and said that she would get back to him. Chun-Carmichael asserts that she subsequently called the UPW on July 18, 2002 and advised that she would be on leave until the end of July 2002.

14. On July 19, 2002, Duane Pang (Pang), Deputy Corporation Counsel, wrote to UPW's counsel Herbert Takahashi (Takahashi) to advise that he had been assigned the subject grievance and asked to be called so as to proceed with the selection of an arbitrator. The Board finds that the Deputy Corporation Counsel's attempt to select an arbitrator was an earnest and responsible attempt to comply with the collective bargaining agreement. Rather than constituting evidence of indifference or derogation to its collective bargaining obligation, it was a communication to the Union's agent that the City stood ready and willing to proceed.

15. On that same day, Takahashi wrote back to advise Pang that arbitrator selection was done by Rodrigues, the State Director, and that Pang should contact Rodrigues directly.[2]

16. On or about July 24, 2002, Rodrigues sent a letter to OKUMA-SEPE seeking to initiate arbitrator selection from the Board list.

17. On August 7, 2002 the UPW filed the instant complaint.

18. On August 8 and 12, 2002, Chun-Carmichael left messages for Rodrigues asking that the parties select an arbitrator. On August 12, 2002, Chun-Carmichael reiterated the request in a letter.

19. Relevant City officials handling the instant grievances (Okuma-Sepe, Chun-Carmichael, Neufeld and Lau) each were aware of the applicable contractual deadlines.

20. The City kept a computerized database of BU 01 grievances but the database contained no contractual deadlines. Nor did the City maintain any other uniform system or procedures in which to keep track of grievance procedure deadlines.

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[2]Pang represented during argument that he did not subsequently contact Rodrigues because of ethical concerns regarding direct contact with a represented litigant. Takahashi responded that his letter was intended as a waiver of any such prohibition.

21. With respect to the 14-day appointment of arbitrator provision, historically in most cases the City does not strictly comply with the requirement.

22. Such noncompliance is the result of: 1) the UPW never before insisting on compliance; 2) a policy favor negotiated settlement whenever possible; 3) a policy and comity and cooperation between respective counsel; and 4) the practical impossibility of developing and exchanging any counter-offered list within the timeframe.

23. Within two months of processing the instant grievances, appointment of arbitrators was made more difficult by a policy adopted by the UPW that only Rodrigues was empowered to consent to the appointment of arbitrators, and an understanding by Chun-Carmichael that Rodrigues would communicate only with her on such appointments.

24. In the instant case, it was the City's understanding of the UPW's policy that prevented employees other than Chun-Carmichael from calling Rodrigues regarding the appointment of an arbitrator.

DISCUSSION

In Board Order No. 2119, the Board granted UPW's motion for summary judgment with regard to the Respondents' contractual violation. The Board, however, denied the motion with respect to whether the violations constituted prohibited practices because there remained issues of fact regarding whether the contractual violations were wilful. In reaching this conclusion the Board relied on its ruling in Decision No. 429, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 215 (2001) (Okuma-Sepe I), to the effect that "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." So the only issue remaining in the proceeding is whether there is the necessary substantial evidence of conscious derogation or indifference to contractual obligations to constitute a wilful violation and a prohibited practice.

Wilfulness

In order to find that a violation of a collective bargaining agreement constitutes a prohibited practice, the Board must conclude that the violation was wilful.[3] In Decision

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[3]HRS § 89-13 provides in part as follows:

No. 429, Okuma-Sepe I, supra, the Board identified the standard to be applied in finding wilfulness in cases involving the missing of deadlines:

> 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

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HRS § 89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(8) Violate the terms of a collective bargaining agreement; . . . .

> as a natural consequence of the City's failure to initiate the appointment of arbitrators.
>
> 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. [Emphasis added.]

Id., at pp. 220-21.

Respondents argue that the record at summary judgment is devoid of the requisite "substantial evidence...of [its] conscious derogation of, or indifference to, its contractual or bargaining obligations," such that summary judgment must be denied.

The Union argues that the Employer has engaged in a pattern of wilfully failing to meet its contractual obligation with respect to the appointment of arbitrators. The Board in Okuma-Sepe I, supra, found a prohibited practice with respect to 39 such failed appointments by the City. In Order No. 2115, September 6, 2002, United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CE-01-507 (Okuma-Sepe II), supra, the Board found a violation where the Employer refused to proceed to arbitration because of a contested issue of arbitrability. In both cases, the Board concluded that there existed substantial evidence of at least an indifference to the Employer's contractual obligations which supported a presumption of wilfulness. The Union argues that the City's failure to appoint arbitrators in the instant cases constitute a part of a continued indifference or hostility so that wilfulness can be similarly presumed.

Based upon the evidentiary hearing in this case, the Board concludes that the record is devoid of the requisite "substantial evidence...of [its] conscious derogation of, or indifference to, its contractual or bargaining obligations," with regard to the appointment of an arbitrator. Upon being assigned the case, the Deputy Corporation Counsel contacted UPW's counsel for the purpose of selecting an arbitrator. The Union's counsel then advised the Deputy that the selection was to be done by the State Director and advised him to contact Rodrigues directly. Based upon prohibitions imposed by the Code of Professional Responsibility, the City's counsel did not directly contact the State Director and returned the case to Human Resources.

The Board finds that the Deputy Corporation Counsel's attempt to select an arbitrator was an earnest and responsible attempt to comply with the collective bargaining

agreement. Rather than constituting evidence of indifference or derogation to its collective bargaining obligation, it was a communication to the Union's agent that the City stood ready and willing to proceed. Arguably the ball was then in the Union's court. Thus the Board finds a failure of the requisite element of wilfulness and dismisses the instant complaint.

CONCLUSIONS OF LAW

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

2. In Order No. 2119, the Board found that the Employer violated the contractual provision requiring the selection of an arbitrator within 14 days of the Union's notice to arbitrate the grievance.

3. However, 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. Okuma-Sepe I, supra.

4. Based upon the evidence presented, the Board concludes that the Employer's counsel contacted the Union's counsel to select an arbitrator and was told to contact the UPW's State Director. The Employer's counsel referred the matter to the Department of Human Resources because of concerns of possible ethical violations. The Board concludes on these facts therefore that the Employer's failure to select the arbitrator within the contractual time requirements was not made in conscious derogation of or indifference to its contractual obligations.

5. The Board concludes that the violation of the contractual provision in this case was not wilful and does not constitute a prohibited practice in violation of HRS §§ 89-13(a)(1) and (8).

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, June 15, 2004.

HAWAII LABOR RELATIONS BOARD

BK Na

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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