

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of) CASE NO. CE-10-523
UNITED PUBLIC WORKERS, AFSCME,) ORDER NO. 2177
LOCAL 646, AFL-CIO,) ORDER GRANTING UPW'S MOTION
Complainant,) FOR SUMMARY JUDGMENT
and)
TED SAKAI, Former Director, Department of)
Public Safety, State of Hawaii and EDWIN)
SHIMODA, Acting Director, Department of)
Public Safety, State of Hawaii,)
Respondents.)

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On January 13, 2003, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant or UPW) filed a prohibited practice complaint and motion for summary judgment with the Hawaii Labor Relations Board (Board) against Respondents TED SAKAI (SAKAI), Former Director, Department of Public Safety, State of Hawaii and EDWIN SHIMODA (SHIMODA), Acting Director, Department of Public Safety, State of Hawaii (collectively Respondents or Employer).

Complainant alleges that Respondents wilfully violated Section 15.09 of the collective bargaining agreement for Bargaining Unit (BU) 10 and wilfully breached their duty to bargain in good faith prohibited under Hawaii Revised Statutes (HRS) §§ 89-13(a)(8) and (5), respectively, by failing to provide information needed and requested for purposes of processing a class grievance filed on October 15, 2002.

On January 27, 2003, Respondents filed their answer to the prohibited practice complaint and a memorandum in opposition to UPW's Motion for Summary Judgment, without answering or opposing affidavits, on February 11, 2003.

On February 13, 2003, the Board conducted a prehearing conference and heard oral arguments on UPW's Motion for Summary Judgment.

Having considered the evidence and arguments presented, the Board found no genuine issues of material fact presented and the UPW was entitled to judgment as a matter

of law. The Board directed the Employer to submit a declaration that documents requested by Complainant on October 15, 2002 (for the Halawa facility) be provided to Complainant on or before February 20, 2003. The Board further directed the parties to stipulate to a date when the Employer would provide the documents requested for correctional facilities other than Halawa to Complainant.

On February 20, 2003, Respondents' attorney of record filed a declaration as directed by the Board, and the parties stipulated that Respondents would provide the remaining documents to UPW by March 10, 2003.

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

FINDINGS OF FACT

1. The UPW is the exclusive representative, as defined in HRS § 89-2, of Adult Corrections Officers (ACOs) employed by the State of Hawaii, Department of Public Safety, included in BU 10.
2. SAKAI was, for all times relevant, the Director of the Department of Public Safety, State of Hawaii, and a representative of the public employer as defined in HRS § 89-2.
3. SHIMODA was, for all times relevant, the Acting Director of the Department of Public Safety, State of Hawaii, and a representative of the public employer as defined in HRS § 89-2.
4. The UPW and the State of Hawaii are parties to a collective bargaining agreement (Contract) which covers all institutional, health, and correctional workers in BU 10.
5. The BU 10 Contract contains provisions relating to the filing and processing of grievances, training, and scheduling and assignment of posts.
6. On October 15, 2002, Laurie Santiago (Santiago), UPW's Assistant Division Director, Oahu Division, filed a Step 1 class grievance No. LS-02-72 on behalf of all affected ACOs employed by the State of Hawaii, Department of Public Safety, at the Halawa Correctional Facility for requiring ACOs assigned to Essential Posts to leave their posts in order to attend mandatory training on such topics as cardio pulmonary resuscitation, in violation of Sections 61, 26, and 46 of the BU 10 Contract.

7. On October 15, 2002, Santiago sent a written request to SAKAI for documents relating to the grievance No. LS-02-72.¹
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¹Santiago's request for grievance information stated, in part, as follows:

In order that the Union may investigate this matter, we request that you provide us with all the material that was considered in taking such action to reassign ACOs on Essential Posts. Most specifically, the documents requested include, but are not limited to, the following:

- a. A copy of all rules, regulations and policies relied upon by the Employer in its action.
- b. A copy of all records of consultation by PSD regarding training plans.
- c. A copy of all records of training conducted retroactive to Janaury/2002 (sic).
- d. A list of all ACOs in attendance at the training, including identification of all ACOs who were reassigned from Essential Posts in order to attend training, and identification of whether or not these post (sic) were backfilled, and by whom.
- e. Identification of when these ACOs assigned to Essential Posts were given notice to attend the training.
- f. Identification of all persons acting in behalf of the Employer who were responsible for requiring that ACOs on Essential Posts be reassigned to attend training.
 - 1. Name
 - 2. Address
 - 3. Phone Number
 - 4. Position or Title
 - 5. Date(s) of participation
 - 6. Basis for decision
- g. Any and all documents, notes and records used or related to the grievance.
- h. Records of all ACOs assigned to Essential Posts who were then required to attend training.
- i. Copies of all written statements, notes or memos from any Employer or Supervisor related to the grievance.

As stipulated in Section 15.09 of the Agreement, this information should be provided to the Union within 7 calendar days.

8. Section 15.09, Information, of the BU 10 Contract provides that:

The Employer shall provide all information in the possession of the Employer which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:

15.09 a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or

15.09 b. Make the material requested available to the grieving party and/or the Union within seven (7) calendar days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that the grieving party and/or the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

9. By letter dated December 23, 2002, to Diana Kaapu, Acting Director of the State of Hawaii Department of Human Resources Development, from Peter L. Trask, UPW Administrator, the Employer was informed that grievance case No. LS/02/72 was proceeding to arbitration and the selection of an arbitrator, and that the matter was referred to legal counsel Herbert Takahashi, Esq.
10. By letter dated December 31, 2002, from Santiago to Employer's representative Colleen Miyasato, the UPW informed the Employer that no grievance information had been provided as requested on October 15, 2002 and the matter was referred to counsel. The UPW informed the Employer that "if the Department fails to provide a full and complete response to the October 15, 2002 information request (a copy of which is again enclosed) by 12 noon on January 6, 2003, the UPW has no alternative but t (sic) file a prohibited practice complaint for a willful violation of Section 15.09."
11. On January 13, 2002, the UPW, through its legal counsel, filed the instant prohibited practice complaint alleging that Respondents wilfully violated Section 15.09 of the collective bargaining agreement for BU 10 and wilfully breached its duty to bargain in good faith prohibited under HRS §§ 89-13(a)(8)

The information requested is necessary and needed for the proper investigation, processing and review of the grievance.

- and (5), respectively, by failing to provide information needed and requested for purposes of processing a class action grievance filed on October 15, 2002.
12. The Board finds that the information requested by UPW on October 15, 2002 related to the class grievance case No. LS/02/72 and is necessary for the Union to investigate and process the grievance.
 13. The Employer failed to provide the relevant grievance information requested on October 15, 2002 within the seven calendar days, as required under Section 15.09 of the BU 10 Contract.
 14. The Board finds that the natural consequence of the Employer's nonresponsiveness to UPW's repeated requests for information relevant and necessary to investigate the grievance frustrated the grievance process.

DISCUSSION

The UPW submits that it is entitled to judgment as a matter of law because there is no dispute that the Employer failed to comply with the applicable time frame under Section 15.09 of the BU 10 Contract and breached its duty to bargain in good faith by failing to provide information needed by the Union to process a class grievance filed on October 15, 2002, prohibited under HRS §§ 89-13(a)(8) and (5). The Board agrees.

"It is well settled that summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. In other words, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." State of Hawai'i Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai'i Chapter, 83 Hawai'i 378, 397, 927 P.2d 386, 389 (1996).

The UPW has shown that there is no dispute as to the material facts as to whether the Employer wilfully violated Section 15.09 of the BU 10 Contract, when it failed to provide the UPW with documents which it needed to investigate the class grievance filed on October 15, 2002 within the time frame required.

On October 15, 2002, the UPW filed a class grievance and requested information pursuant to Section 15.09 of the BU 10 Contract. Section 15.09 gives the Employer seven calendar days in which to provide the grievance information. Based on a review of the class grievance filed by the UPW, information requested on October 15, 2002 was relevant and necessary in order for the Union to process the grievance No. LS/02/72.

By letter dated December 31, 2002, the UPW informed the Employer of its failure to comply and again asked that the information be provided by January 6, 2003.

Because the Employer failed to respond to UPW's requests for information relating to the class grievance, the UPW, on January 13, 2003, through its legal counsel, filed the instant prohibited practice complaint and moved for summary judgment alleging that Respondents wilfully violated Section 15.09 of the collective bargaining agreement for BU 10 and wilfully breached its duty to bargain in good faith as prohibited under HRS §§ 89-13(a)(8) and (5), respectively, by failing to provide information needed and requested for purposes of processing a class action grievance filed on October 15, 2002.

At the hearing on UPW's motion for summary judgment, UPW stipulated that Respondents partially complied after the seven day deadline by submitting items (d) and (e) listed in its October 15, 2002 request for information relating to the Halawa Correctional Facility. Respondents, however, made no showing that any grievance information was provided to UPW as requested on October 15, 2002 within the seven day time frame required under Section 15.09 of the BU 10 Contract.

Under subsection (c) of Rule 56, Hawaii Rules of Civil Procedure (HRCP), once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, the burden then shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial. Arimizu v. Financial Sec. Ins. Co., 5 Haw.App. 106, 679 P.2d 627 (1984).

Respondents argue that UPW's motion for summary judgment should fail because: 1) "there is a genuine dispute as to whether the requested documents have already been provided to UPW;" 2) "the underlying grievance associated with the document request has been resolved, leaving a material dispute as to any adverse impact of untimely document production;" and 3) there is a genuine dispute as to whether Respondents committed any wilful violation, based on information and belief that the untimely production was inadvertent and that UPW voluntarily waived strict adherence to the document production deadlines" in the BU 10 Contract.

However, Respondents' Memorandum in Opposition to Motion for Summary Judgment, does not set forth by way of answering affidavits² any "specific facts showing that there is a genuine issue for trial." Rule 56(e), HRCP.³ A party opposing a motion for

²Under the Board's rules of practice and procedure, answering affidavits, if any, shall be served on all parties, in accordance with Hawaii Administrative Rules § 12-42-8(g)(3)(C)(iii).

³Rule 56(e), HRCP, provides, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere

summary judgment has an obligation to file a response by affidavits or otherwise, setting forth the specific facts showing that there is a genuine issue for trial. Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n., Inc., 2 Haw.App. 316, 631 P.2d 600 (1981), rev'd on other grounds, 65 Haw. 598, 655 P.2d 863 (1982). Facts alleged by unverified statements in a memorandum in opposition to a motion for summary judgment are not properly before the court on the motion. Freitas v. City and County of Honolulu, 58 Haw. 587, 574 P.2d 529 (1978). Unverified statements of fact in counsel's memorandum or representations made in oral argument cannot be considered in determining a motion for summary judgment. Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981), motion for partial reconsideration denied, 63 Haw. 263, 626 P.2d 173 (1981).

Absent specific facts to support Respondents' memorandum in opposition and based on the Complainant's pleadings and affidavit, the Board finds no genuine issue of material fact in dispute. The Employer failed to provide the relevant grievance information requested on October 15, 2002 within the seven calendar days, as required under Section 15.09 of the BU 10 Contract in violation of HRS § 89-13(a)(8).

Furthermore, the Board has previously recognized in State of Hawaii Organization of Police Officers, 3 HPERB 25 (1982), that the failure to provide information relevant to a grievance filed by the union constitutes a violation of the employer's duty to bargain in good faith. Accordingly, based on the record, the Board concludes that the Employer also violated HRS § 89-13(a)(5), by its failure to provide the grievance information requested.

On the issue of wilfulness, in United Public Workers. AFSCME. Local 646. AFL-CIO, 3 HPERB 507 (1984), the Board, while acknowledging its previous interpretation of "wilful" as meaning "conscious, knowing and deliberate intent to violate the provisions of Chapter 89, HRS" nevertheless stated that "wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions." Id., at 514. Based upon the record, the Board finds that the natural consequence of the Employer's nonresponsiveness in UPW's repeated requests for information relevant and necessary to investigate the grievance frustrated the grievance process. Thus, the Board finds that the Employer's nonresponsiveness in this case was wilful.

Finally, the Union moves for attorney's fees and costs because Respondents have shown no justification or remorse for their repeated violations of Section 15.09. However, the UPW failed to show that the Employer's nonresponsiveness within the time

party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

frame provided under Section 15.09 was so egregious as to warrant attorney's fees and costs. See, Jo DesMarets, 5 HLRB 620 (1996). Accordingly, the Board denies the UPW's request.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. As the moving party, the UPW met its burden in showing that it is entitled to judgment as a matter of law because the Employer failed to comply with the applicable time frame under Section 15.09 of the BU 10 Contract and breached its duty to bargain in good faith by failing to provide information needed by the Union to process a class grievance filed on October 15, 2002, prohibited under HRS §§ 89-13(a)(8) and (5).
3. Respondents failed to show by way of answering affidavits any specific facts showing that there is a genuine issue for trial. Absent specific facts to support Respondents' memorandum in opposition and based on the Complainant's pleadings and affidavit, the Board finds no genuine issue of material fact in dispute.
4. The UPW failed to show that the Employer's nonresponsiveness within the time frame provided under Section 15.09 was so egregious as to warrant an award attorney's fees and costs.

ORDER

Based upon the foregoing, the Board hereby orders the following:

1. On or before February 20, 2003, Respondents shall submit directly to Complainant documents listed in paragraphs (a) through (c) and (f) through (i), with respect to the Halawa Correctional Facility requested by the UPW on October 15, 2003.
2. On or before February 20, 2003, Respondents shall submit a declaration to the Board that documents requested by Complainant on October 15, 2002, with respect to the Halawa Correctional Facility were provided to the UPW.
3. Respondents have stipulated to and shall provide the UPW with the documents, identified in paragraphs (a) to (i), requested in the

October 15, 2002 request for grievance information from correctional facilities other than Halawa Correctional Facility on or before March 10, 2003.

4. If Respondents fail to provide Complainant with the requested information by the deadlines set, the Board will entertain a motion for sanctions in the form of reasonable attorneys fees and costs against Respondents.
5. Respondents shall within 30 days of the receipt of this order, post copies of this order on its website and in conspicuous places on the bulletin boards located in every office statewide where employees of bargaining unit 10 assemble and leave such copies posted for a period of 60 days from the initial date of posting.
6. Respondents shall notify the Board within 30 days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, March 6, 2003.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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