STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Complainant,<br><br>and<br><br>LILLIAN KOLLER, Director, Department of Human Services, State of Hawaii; MARK J. BENNETT, Attorney General, State of Hawaii, and LINDA LINGLE, Governor, State of Hawaii,<br><br>Respondents. | CASE NO. CE-10-548<br><br>ORDER NO. 2235<br><br>ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT |

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

On November 10, 2003, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board), alleging that Respondents LILLIAN B. KOLLER (KOLLER), Director, Department of Human Services (DHS), State of Hawaii (SOH), MARK J. BENNETT (BENNETT), Attorney General, SOH, and LINDA LINGLE (LINGLE), Governor, SOH, violated Hawaii Revised Statutes (HRS) §§ 89-9(a), 89-13(a)(5) and (7), by failing to provide information requested by the Union in the course of a grievance.

Also on November 10, 2003, the UPW filed a Motion for Summary Judgment with the Board. The UPW alleged that there were no genuine issues of material fact in dispute and that it was entitled to judgment as a matter of law.

On December 4, 2003, Respondents filed a Memorandum in Opposition to Complainant's Motion for Summary Judgment Filed on November 10, 2003.

On December 11, 2003, the Board held a hearing on the UPW's Motion for Summary Judgment. Respondents objected to UPW's filing of its motion for summary judgment on the same day as its complaint thereby potentially denying counsel the opportunity to properly address the motion. In addition, Respondents contended that there were genuine issues of material fact as to the essential elements of the commission of a prohibited practice under the facts presented in the complaint. Respondents further contended that the motion

should be denied because the complaint was moot in light of the production of the requested materials.

After due consideration of the arguments made at the hearing, the Board noted that its rules do not establish a threshold for the filing of summary judgment motions similar to Rule 56(a) Hawaii Rules of Civil Procedure (HRCP) which provides for summary judgment motions to be filed twenty days after commencement of the action. Thus, there was no basis to strike the UPW's motion for summary judgment. Moreover, while the Board was sympathetic to Respondents' arguments that if such motion practice is permitted, Respondents may be unable to effectively respond to the motion in this case, the Board notes that Respondents in this case filed a responsive memorandum on December 4, 2003 and the hearing was scheduled approximately 30 days after the complaint and motion were filed. In addition, Respondents were free to but did not file a motion to extend the time within which to respond or to continue any hearing to assure adequate preparation and response. Thus, while the Board does not encourage the UPW's motion practice, the Board finds no prejudice by the filing of the instant motion in this case.

With respect to the substantive issues presented, other than the nonresponse from BENNETT and LINGLE, the record was devoid of the requisite "substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations." Dec. No. 429, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 215, 221 (2001). In addition, Nose's request for an extension and subsequent production suggested good faith compliance. Thus, the Board found that the record raised material issues of fact regarding Nose's compliance and compliance by BENNETT and LINGLE. The Board announced its inclination to deny the motion for summary judgment and set deadlines of January 9, 2004 for Respondents to file any motion to dismiss, January 20, 2004 as the hearing date to hear any motions to dismiss, and February 3, 2004 as the evidentiary hearing date for the case-in-chief.

On January 9, 2004, Respondents filed Respondents' Motion to Dismiss Prohibited Practices Complaint and/or for Summary Judgment. Respondents alleged that the Board should decline jurisdiction of what is essentially a grievance discovery dispute and defer to the authority of the arbitrator to hear the grievance. Alternatively, Respondents contended that the Board should dismiss the instant complaint for mootness as the DHS has already complied with the document request.

On January 20, 2004, the Board held a hearing on Respondents' motion to dismiss and/or for summary judgment. The UPW opposed Respondents' motion and also requested the Board grant a Cross-Motion for Summary Judgment. Respondents objected to UPW's oral cross-motion. Both counsel also advised the Board that Arbitrator Russell Higa, Esq. had been appointed to arbitrate the underlying grievance and that the employer had denied arbitrability based upon the untimely filing of the grievance.

With respect to the UPW's oral cross-motion for summary judgment, the Board found that the motion was not prohibited because it was in fact surplusage. Relief can be granted to the nonmoving party if the elements of this test are met in his favor. Flint v. MacKenzie, 53 Haw. 672, 501 P.2d 357 (1972). Thus, as Respondents' motion for summary judgment was before the Board, summary judgment could have been granted in either party's favor, if appropriate. In addition, since Complainant's arguments were confined to those contained in their opposition to Respondents' motion to dismiss and/or for summary judgment, there was no support for a claim of surprise or denial of notice of the oral motion resulting in undue prejudice to Respondents.

There is no dispute that the UPW alleged various contract violations in its complaint. Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in a final and binding decision . . . ." (Emphasis added.) HRS § 89-10.8(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representative via its authority to adjudicate prohibited practices complaints. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process. ("It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HPERB 253, 261 (1972) (HSTA). Thus the Board has deferred to the contractual grievance process except where there exists countervailing policy considerations, or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant access to the grievance process. See e.g, HSTA, supra (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); Hawaii Government Employees' Association, Local 152, HGEA AFSCME, AFL-CIO, 1 HPERB 641 (1977) (subject not covered by contract).

While the instant alleged contractual violations could have been a subject of another grievance, the Board concluded that deferral was not required in this instance. Another original grievance regarding the Governor and Attorney General's failure to provide information as required by the contract would undoubtedly be accompanied by another request for production. A similar failure to produce would be grounds for yet another such grievance which would be accompanied by another production request. Potentially this cycle could continue ad infinitum. Eventually the jurisdiction of the Board would be requested and exercised. Administrative economy and common sense dictated that the Board's jurisdiction be invoked now rather than later.

In addition, relying on the subpoena authority of the Arbitrator might have indeed resolved the practical problem of compelled production. But the Arbitrator's decision of whether or not to issue subpoenas would almost certainly not address any alleged contractual violations in the previous alleged nonproduction. And any ignoring or contesting of any

subpoenas issued to the Governor and Attorney General may result in a litigation loop of a grander scale than discussed above. The Board therefore concluded that deferral to the arbitrator's subpoena authority was not appropriate.

Respondents renewed their claim that the complaint was moot due to the compliance of KOLLER. Respondents supplemented their arguments with the claim that since the Governor and Attorney General do not employ, supervise or control the employees at issue they are not "employers" within the meaning of the production provisions of the contract. The Union countered with the argument that any such claim was disposed of by the Hawaii Supreme Court in Bronster v. UPW, AFSCME, Local 646, AFL-CIO, 90 Hawai`i 9, 15-16, 975 P.2d 766 (1999) (Bronster). The Board concurred with the UPW and adopted the interpretation of the Court in Bronster as follows:

> However, Bronster claims that the Department of the Attorney General is not a party to the agreement. If she is correct, then she could not have "bargained for" the arbitrator's judgment" with respect to the question of arbitrability. *Cf. Bateman,* 77 Hawai`i at 485-86, 889 P.2d at 62-63 (noting, with respect to the parties in the case, that, "[a]fter all, it was [the arbitrator's] judgment that they had bargained for, not a court's" (quoting *Morrison-Knudsen Co. v. Makahuena Corp.,* 66 Haw. 663, 670, 675 P.2d 760, 766 (1983) (brackets in original)). In other words, while the parties may contractually excise the court from the determination of the second question articulated in *Koolau, supra,* no agreement can divest the court of the authority to address the first. Accordingly, the question of whether the Department of the Attorney General is a "party" to the agreement poses a preliminary issue for the court to decide.
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> With respect to that issue, Bronster argues that her department is not a party to the agreement because it (1) is not expressly enumerated therein, (2) employs no institutional, health, or correctional workers, and (3) is statutorily assigned the role of "counsel to Employer" by HRS § 26-7 (1993). [footnote omitted.] She further asserts that, "in accordance to the terms of the [agreement, the UPW] should have filed its grievance against the Dept. of Public Safety, not against the Attorney General." Bronster's arguments are unconvincing.
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> As noted *supra* in section I.A, the agreement expressly states in its preamble that the term "the Employer" means "the STATE OF HAWAII, THE CITY AND COUNTY OF HONOLULU, THE COUNTY OF HAWAII, the COUNTY OF MAUI, AND THE COUNTY OF KAUAI[.]" The agreement was

> signed on behalf of the State by the governor, among others. Accordingly, the agreement establishes by its plain language that the parties thereto are (1) the UPW, (2) the City and County of Honolulu, (3) the Counties of (a) Hawai'i (b) Kauai, and (c) Maui, and (4) the State as a whole--*not* merely those agencies or departments of the State that directly employ "Unit 10" employees. HRS § 26-7, upon which Bronster relies, merely establishes that the Department of the Attorney General is, along with many others, a "department" or instrumentality of the State. Inasmuch as the UPW's grievance was against a department of the State, it was therefore against "the State of Hawaii"--a party to the agreement. Bronster does not argue that the agreement was invalid, or that Governor Waihee lacked the authority to obligate the State to act through the Department of the Attorney General with respect to its agreement with the UPW. *See* Haw. Const. art. V, §§ 1 ("The executive power of the State shall be vested in a governor.") and 6 ("Each principal department shall be under the supervision of the governor[.]"")[.]") (1978). Accordingly, the first *Koolau* question must be answered, as a matter of law, in favor of the UPW.

Thus, the Board concluded that the Governor and the Attorney General are subject to the contract and their noncompliance with the information production provision continued to be a material issue of fact requiring denial of Respondents' motion. Complainant's cross-motion was denied for the same reasons its previous motion for summary judgment was denied.

Thereafter, on January 21, 2004, the UPW filed UPW's Amended Application for Issuance of Subpoenas. On January 26, 2004, Respondents filed Respondents' Motion to Revoke Subpoena Duces Tecum directed to BENNETT and LINGLE.

On January 30, 2004, the Board held a hearing on the motion to revoke subpoenas. After hearing the arguments, the Board indicated that it was inclined to reconsider its previous denial of the cross-motion for summary judgment and ordered additional briefing on the scope of the information provision requirement under the applicable contract.

On February 9, 2004, the Board held a hearing on the motion to revoke. At the hearing, Respondents reiterated their argument that the Governor and the Attorney General were not employers of the grievants for the purposes of the information requirements of the contract. This time, however, the arguments were supplemented by the identification of potential policy and practical problems which could arise from the unrestricted application of information and subpoena requirements to the Governor and Attorney General with regard to contractual grievances. Essentially, the literal application of the information provision to the Governor and Attorney General as employers of any employee of the State would conceivably

make them responsible to comply, within seven days, with information requests of any potential or actual grievant working for the State of Hawaii. This would appear to not only be administratively burdensome, but could interfere with the duties of both high ranking officials. Thus the issue of policy or administrative constraints to information requests to the Governor and Attorney General was before the Board. This being a question of potentially far-reaching impact which had not previously been briefed or thoroughly argued, the Board ordered the reopening of Respondents' motion to dismiss and memoranda on the issue.

On February 10, 2004, the Board reconvened the hearing on the motion to dismiss. At the hearing, the parties confirmed that on January 30, 2004, Arbitrator Higa had dismissed the underlying grievance as untimely. After argument, the Board advised the parties of its inclination to dismiss this case as moot. Based upon a review of the record and the arguments submitted, the Board hereby makes the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 10.

2. Respondent KOLLER is the Director of Human Services and a public employer, as defined in HRS § 89-2, of employees in bargaining unit 10 within DHS.

3. Respondent LINGLE is the Governor of the State of Hawaii and the public employer, as defined in HRS § 89-2, of State employees in bargaining unit 10.

4. Respondent BENNETT is the Attorney General of the State of the Hawaii and at times, a representative of the public employer, as defined in HRS § 89-2, of employees in bargaining unit 10.

5. The UPW and Respondents are parties to a collective bargaining agreement which contains a grievance procedure that ends in final and binding arbitration. The grievance procedure also requires the employer to provide information needed by the grieving party within seven calendar days of the request. Section 15A.05 Information, provides as follows:

> The Employer shall provide 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:
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> 15A.05a. Copy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or

15A.05b. 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 copying or review for five (5) calendar days on the condition that the grieving party and/or the union agrees to sign Exhibit 15A.05 and be responsible for the material until it is returned.

6. On October 27, 2003, the Board conditionally dismissed part of the complaint filed on September 4, 2003 in Case No. CE-10-541, United Public Workers, AFSCME, Local 646, AFL-CIO (Agnew). In Agnew, the UPW asserted that the Office of Youth Services (OYS), BENNETT, and LINGLE committed various prohibited practices and contract violations when BENNETT authorized and the OYS permitted an investigation of the Hawaii Youth Correctional Facility (HYCF) by the American Civil Liberties Union (ACLU) and LINGLE ratified and published its results. Respondents there filed a motion to dismiss on October 3, 2003 which was heard by the Board on October 27, 2003. In its motion to dismiss Respondents argued, inter alia, that the Board should voluntarily decline jurisdiction over the alleged contract violations in deference to the contractual grievance arbitration procedures. The Board agreed to defer to the arbitral process but, as there was a question as to the availability of that forum because of the passage of time, conditioned the dismissal on the Respondents' waiver of contractual time limits.

7. On or about October 28, 2003, the UPW filed a class grievance with KOLLER alleging numerous violations of contract arising from the ACLU's investigation of the HYCF and report and, inter alia, the employer's actions based upon its recommendations.

8. In a letter dated October 28, 2003, Dayton Nakanelua (Nakanelua), UPW State Director, requested, pursuant to Section 15A.05 of the Unit 10 Agreement, specific information and documentation relevant to the grievance from KOLLER, the Attorney General, and the Governor.

9. On or about October 31, 2003, Ed Nose (Nose), DHS Personnel Officer received the request for production, dated October 28, 2003. On November 7, 2003, Nose attempted to contact Nakanelua and left a message requesting an extension of time to provide the requested information. Also on November 7, 2003, Nose contacted UPW's counsel's office and informed the person answering the call that Respondents would like a brief extension of time within which to respond to the document request. Nose was informed that Mr. Takahashi or another representative would return the call or respond to the request for extension.

10. Also on November 7, 2003, the UPW filed the instant complaint alleging Respondents wilfully violated the collective bargaining agreement pursuant to HRS § 89-13(a)(8). The UPW also alleged wilful interference with the exercise of rights under Chapter 89 in violation of HRS § 89-13(a)(1), and a wilful refusal to comply with the Chapter's provision in violation of HRS § 89-13(a)(7). On that same day, the UPW also filed a motion for summary judgment.

11. On or about November 14, 2003, Nose provided Nakanelua with copies of the requested materials in Respondents' possession.

12. On or about December 22, 2003, the parties selected Russell T. Higa (Higa) to arbitrate the class grievance. The employer there contended that the grievance was untimely and therefore not arbitrable.

13. On January 30, 2004, Arbitrator Higa ruled that the grievance was untimely and thus not arbitrable.

14. The dismissal of the grievance eliminated the actionable controversy between the parties which was the genesis of the information request at issue. With respect to the underlying grievance, the providing or withholding of information can have no meaningful effect. So despite the efforts and expenditure of resources that the parties and the Board have put into this question, as a matter of law, the case must be dismissed.

## DISCUSSION

Respondents contend that the instant case is moot because Arbitrator Higa ruled that the grievance was not arbitrable and this complaint arises from the alleged refusal to provide information within the context of the processing of the grievance.

Respondents contend that the case has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987) (Lyman). In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980) (Wong), the Court dismissed the action on grounds of mootness, stating:

> The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of the litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation remains properly fueled. The doctrine seems appropriate where events subsequent to the

> judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.

Id., at 394. See also, State v. Rogan, 91 Hawai`i 405, 984 P.2d 1231 (1999); State v. Fukusaku, 85 Hawai`i 462, 946 P.2d 32 (1997); AIG Hawaii Ins. Co. v. Bateman, 82 Hawai`i 453, 923 P.2d 395 (1996); In re Application of J.T. Thomas, 73 Haw. 223, 832 P.2d 253 (1992).

In this case, the Board finds that the conditions of justiciability have been compromised by the dismissal of the underlying arbitration and the issue regarding an information request arising in the context of the grievance is moot. However, there is a well-recognized exception to the mootness doctrine in cases involving questions that affect the public interest and are capable of repetition yet evading review. Okada Trucking Co., Ltd. v. Board of Water Supply, 99 Hawai`i 191, 53 P.3d 799 (2002) (Okada); CARL Corp. v. State, Dept. of Educ., 93 Hawai`i 155, 165, 997 P.2d 567, 577 (Carl II) (quoting In re Thomas, supra; accord Mahiai v. Suwa, 69 Haw. 349, 356, 742 P.2d 359, 365 (1987); Kona Old Hawaiian Trails Group v. Lyman, supra; Wong, 62 Haw. at 395-96, 616 P.2d at 204; Life of the Land v. Burns, 59 Haw. 244, 252, 580 P.2d 405, 409-10 (1978) (Burns); Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (Johnston). "Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." Okada, 99 Hawai`i at 196-97, 53 P.3d at 804-05. Johnston, 50 Haw. at 381, 441 P.2d at 140 (quoting In re Brooks' Estate, 32 Ill.2d 361, 205 N.E.2d 435, 437-438 (1965)). The phrase, "capable of 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." CARL II, 93 Hawai`i at 165, 997 P.2d at 577 (quoting Burns, 59 Haw. at 251, 580 P.2d at 409-10).

The issue presented in UPW's complaint is whether the Respondents violated the contract by failing to produce information pursuant to the UPW's request in the processing of its grievance. As the grievance has been found to be nonarbitrable, the Respondents' alleged failure to produce information is meaningless and the resolution of the issue has no meaningful effect. So despite the efforts and expenditure of resources that the parties and the Board have put into this question, as a matter of law, the case must be dismissed as moot because there is no actual controversy between the parties and there is no meaningful remedy that it could impose in this matter at this stage. Further, the Board is not persuaded that the issue raised will evade full review if repeated.

## CONCLUSIONS OF LAW

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

2. In view of the Arbitrator's ruling that the underlying grievance is nonarbitrable, the Board finds that the instant complaint arising from an information request in the context of the grievance is moot and does not fall within an exception to the mootness doctrine.

## ORDER

The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, March 9, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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