



## FINDINGS OF FACT

The following facts are undisputed:

1. The UPW is an employee organization which represents blue collar, non-supervisory employees in bargaining unit 01 (Unit 01).
2. The Union was certified by the Board's predecessor, the Hawaii Public Employees Relations Board, as the exclusive bargaining agent of Unit 01 on October 1, 1972. There are approximately 9,000 bargaining unit employees statewide, including more than 200 in refuse collection positions employed by the City and County of Honolulu (City).
3. Since July 1, 1972 to the present, the UPW and the City have been parties to more than 13 successive collective bargaining agreements covering Unit 01 employees. Each of the agreements contain provisions relating to union recognition (in Section 1) and refuse collection task work or "uku pau" (in Section 51).
4. Section 1.05 of the Unit 01 agreement (since 1972) provides, in part, as follows:

No changes in wages, hours, or other conditions of employment contained herein may be made except by mutual consent.  
[Emphasis added].
5. There have been approximately 36 arbitration awards in which employers have been found to violate Section 1.05. (Exhibit [Ex.] 4). City officials are very familiar with the obligations under Section 1.05 for they have violated its provisions many times in the past by unilaterally changing notification requirements for absences for work in Section 7 (Ex. 5), temporary assignment pay when training under Section 16 (Ex. 6), sick leave benefits for legitimate use of illnesses under Section 37 (Ex. 7), disciplinary procedures and requirements under Section 11 (Ex. 8), and overtime and pay requirements for bulky item pick ups in the City's refuse operations under Section 51. (Ex. 9).
6. Historically, residential refuse collection on the island of Oahu has been performed by manual refuse crews assigned to pre-determined routes from baseyards located in Honolulu, Kapaa, Pearl City, Wahiawa, Waialua, Laie, and Waianae under the "uku pau" or task work system which pre-dates collective bargaining. Nakanelua Decl. ¶5. The work practices, wages, hours, and other terms and conditions of work are set forth in the 1973 "Policies and Procedures on Task Work for Refuse Collection," which have been

incorporated into the Unit 01 agreement through Section 51. (Ex. 10). With every major change in refuse collection operations over the years the parties have amended the uku pau policies and procedures through the process of negotiations and mutual consent. (Exhs. 11, 12, 13, 17, 18, and 19).

7. Many of the manual refuse crews on Oahu were converted and modernized to an automated refuse collection process following a demonstration project on automation in the early 1990's. (Exhs. 11 & 12). All phases of the changes relating to automation were negotiated between City and Union representatives under Section 1.05 and implemented between 1994 and 1999. Nakanelua Decl. ¶ 5a; Ex. 12. The final terms of the agreement on automated refuse collection were contained in a March 2, 1998 memorandum of agreement (MOA). (Ex. 12). Paragraph "u" of the MOA states:

Modifications of this Memorandum of Agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement. [Emphasis added].

8. In 1999, City officials were found in violation of Section 1.05 when they unilaterally implemented changes in their bulky item collection operations. The award resulted in a back pay for loss of overtime work opportunity in the amount of approximately \$900,000. Nakanelua Decl. ¶ 4b. Pursuant to the award City and Union representatives negotiated the terms and conditions applicable to bulky item collection on or about April 18, 2000. (Ex. 13). The agreement states in Section 7 as follows:

Section 7. Modification.

- a. Modification to this Memorandum of Agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement. (Emphasis added). (Ex. 13-5).
9. The Agreement on Islandwide Curbside Recycling. In 2003 City Officials initiated a proposal to implement curbside recycling on Oahu. Nakanelua Decl. ¶ 6. Both parties recognized that such a program could not be implemented without significant and major changes in wages, hours of work, workday, routes, and other terms and conditions of employment of refuse collection employees. Id. Accordingly, the parties negotiated on or about November 6, 2003 a supplemental agreement for a curbside recycling pilot project. (Ex. 17). In relevant portions the supplemental agreement limited the period of the pilot project and specified that phase II of the project would be implemented through the process of negotiations as follows:

The parties agree to the following:

- b. The pilot project shall begin on November 1, 2004 and shall terminate on January 31, 2004, unless mutually extended by the parties.

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- d. The Union and the Employer shall meet bi-weekly to evaluate the pilot project's progress and make any necessary adjustments to the routes/boundaries due to unanticipated or increased participation by residents in the curbside recycling pilot program.

- e. The parties agree to continue to meet, discuss, and agree upon the terms and conditions of the proposed Phase II of the project. (Emphasis added).

10. Duration of the "pilot" project was mutually extended in writing on February 20, 2004 and March 22, 2004. (Exs. 18 and 19). Under the terms of the supplemental agreement as amended, the pilot project was to terminate on March 31, 2004. (Exs. 17, 18, and 19).
11. Upon completion of the pilot project on March 31, 2004 the UPW submitted a request to negotiate over phase II of the islandwide curbside recycling project. (Ex. 20). The Union also requested information it needed in connection with bargaining over the subject matter.
12. On or about May 6, 2004 it was reported to the Union that City Officials had undertaken a unilateral course of conduct on and after April 1, 2004. Nakanelua Decl. ¶ 7a. The letter stated in relevant portions as follows:

Employees have recently reported that the City (without bargaining with UPW) has been continuing the project beyond March 31, 2004, in violation of paragraph "b" of the Supplemental Agreement, as amended.

We request that you cease and desist from the aforementioned conduct immediately and confirm in writing that the pilot project has been "terminated" within seven (7) days from this letter. Please call me upon receipt of this letter if what has been reported to the Union by the employees is inaccurate. (Emphasis added).

(Ex. 21-1).

Respondents DOYLE and SHIRAISHI did not respond to the foregoing request.

13. On June 23, 2004 the Union submitted a second request that City Officials cease and desist from unilaterally implementing the curbside recycling pilot project after March 31, 2004. (Ex. 22). The letter from Diann Berndt stated in relevant portions as follows:

In addition, in a letter dated May 6, 2004, the Union informed the Department that they were in violation of the original Pilot Project Supplemental Agreement and requested that the City cease the program immediately. The termination of the Pilot Program should have been as of March 31, 2004.

The Union believes that it would not be in the best interest of the Refuse Collection Automated Drivers of the Collective Bargaining Agreement, to consider any of the changes as proposed by the City and County Department of Environmental Services, Refuse Division at this time. (Emphasis added).

(Exs. 22-1 and 22-2).

The foregoing request was not responded to by Respondents DOYLE and SHIRAISHI.

14. On June 28, 2004 the Union submitted a third request that City officials confirm having terminated the pilot project, and to provide a full and complete response to the information request of the Union (of April 15, 2004). Nakanelua Decl. ¶ 7c; Ex. 23. City officials declined to cease and desist from their unilateral course of conduct, and submitted instead a proposal to extend the supplemental agreement. (Ex. 24). The City's unilateral course of conduct was a significant factor which prompted the Union to file its prohibited practice complaint on June 30, 2004.
15. By continuing the curbside recycling pilot project on and after April 1, 2004 (without negotiations and the mutual consent of the Union), City officials have unilaterally implemented changes in wages, hours, and other terms and conditions of employment of refuse employees and breached their duty to bargain with the Union. These actions also constitute violations of Section 1.05 of the Unit 01 agreement, various terms of the "uku pau" agreement, paragraph "u" of the March 2, 1998 MOA on automated refuse collection, and the terms and conditions of the November 6, 2003 supplemental agreement (and the extensions

thereafter). Id. As a result of the aforementioned conduct by Respondents, Unit 01 employees may have sustained injuries and should be made whole for any such losses in straight time and overtime pay and other benefits.

## DISCUSSION

In the instant motion, the Union contends there are no genuine issues of material fact in dispute and that summary judgment should be granted in its favor. The Union contends that the Employer violated HRS §§ 89-13(a)(5), (7), and (8)<sup>1</sup> by continuing the curbside recycling pilot project beyond the expiration date without negotiations. The UPW contends that the Employer breached its duty to bargain in good faith over curbside recycling in violation of HRS §§ 89-13(a)(5) and (7). The Union contends that the termination date for the pilot project was extended to March 31, 2004. Moreover, the subject was indisputably a mandatory subject of bargaining, and the Union's demands for bargaining on April 15, 2004 triggered an obligation upon City officials under HRS § 89-9(a). Thus, the Employer's unilateral change in the terms of the agreement by the continuance of the pilot project beyond the agreed upon expiration date constituted a refusal to bargain in good faith. Further, the Union contends that the Employer continued to implement the recycling pilot project despite repeated requests from the Union to cease and desist from the unlawful conduct, by ignoring the clear and express terms of the supplemental agreement and its amendments which require the pilot project on curbside recycling to terminate on March 31, 2004 and by ignoring the Union's repeated requests to cease and desist from continuing the pilot project on and after April 1, 2004. The UPW argues that City officials also failed to provide information to the Union as requested and to negotiate in good faith over phase II of the curbside recycling program. The Union alleges that the employees have sustained the loss of straight time and overtime pay as a consequence of the City's unlawful conduct.

The Union also argues that the City officials' decision to continue curbside recycling on and after April 1, 2004 constituted multiple violations of the collective bargaining agreement with the UPW, i.e., Section 1.05 which proscribes unilateral changes to existing terms and conditions and the supplemental agreement entered into on November 6, 2003, thereby violating HRS § 89-13(a)(8).

Summary 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. Gonsalves v. Nissan Motor Corp. in Hawai'i, Ltd., 100 Hawai'i 149, 158, 58 P.3d 1196 (2002); State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai'i Chapter, 83 Hawai'i 378, 927 P.2d 386 (1996); Price v. Obayashi Hawai'i Corp., 81 Hawai'i 171, 914 P.2d 1364 (1996). Judgment may be granted "where the facts are undisputed or are susceptible of only one reasonable interpretation." De Los Santos v. State, 65 Haw. 608,

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<sup>1</sup>At the hearing, the UPW withdrew its HRS § 89-13(a)(1) allegation. Transcript of hearing held on August 5, 2004, p. 33.

610, 655 P.2d 869, 871 (1982); Cordeiro v. Burns, 7 Haw.App. 463, 466, 776 P.2d 411 (1989); Leary v. Poole, 5 Haw.App. 596, 599, 705 P.2d 62 (1985). A party seeking summary judgment may discharge its burden by demonstrating that if the case went to trial, there would be no competent evidence to support a judgment for its opponent. First Hawaiian Bank v. Weeks, 70 Haw. 392, 772 P.2d 1187 (1989).

The function of a motion for summary judgment is “to determine whether an issue set forth in the pleadings is in fact in dispute and, if not, to eliminate any portion of the case for which a trial is not required.” Prince Hotel Waikiki Corp. v. City and County, 89 Hawai’i 381, 393, 974 P.2d 21 (1999). A motion under Rule 56 is said to “expedite matters” where there is no genuine issue as to any material fact. Flint v. MacKenzie, 53 Haw. 672, 501 P.2d 357 (1972); Jeffries v. Kent County Vocational Technical School District Board of Education, 743 A.2d 675, 677 (Del. 1999) (A matter “should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary.”)

The “construction and legal effect to be given a contract is a question of law to be decided by the court.” Reed & Martin, Inc. v. City & County, 50 Haw. 347, 348-49, 440 P.2d 526, 527 (1968); Clarkin v. Reimann, 2 Haw.App. 618, 638 P.2d 857 (1981). See also, Wright, Miller & Kane, Federal Practice & Procedure, Civil 3d § 2730.1 Contract Action. See also, Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108, 839 P.2d 10 (1992) (“Reasonableness” can constitute a question of law for the court “where upon all of the evidence, but one inference may reasonably be drawn, there is not issue for the jury.”)

At the hearing the City did not contest the applicability of the statutory duty to bargain with the Union regarding material changes in the terms and conditions of employment of effected employees, see HRS § 89-13(a)(5); the applicability of the contractual duty to achieve mutual consent for such changes, (See Sec. 1.05, UPW agreement) or to specifically negotiate and reach mutual consent in extending the pilot recycling project beyond March 31, 2004, (see supplemental agreement).<sup>2</sup> In admitting to extending the pilot program beyond the contractual

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<sup>2</sup>Respondents’ counsel stated at the hearing on August 5, 2004:

Mr. Tsukiyama: Mr. Chair, Members of the Board, I cannot say that I disagree with a lot of what [opposing] counsel says. And after discussing this whole matter with my clients, I think it’s – we would agree that this is not a matter that needs to go to hearing here.

Notwithstanding the technical arguments over the standards for summary judgment, I think it’s clear – Well, the refuse administration in this case, in contradiction to the terms of the agreement for the curbside project, needed to get mutual consent from the union.

Notwithstanding whatever notions that they had, that Mr. Shiraishi had after the refuse administrators had discussed with Mel Rodrigues, I think that after the May 6th letter from the UPW,

deadline the City does not claim to have satisfied any of these duties, instead it points only to a reliance upon a passing verbal reference to the Union's openness to month-to-month extensions without identifying how this in any way satisfied or mitigated its duties. There thus appears to be no genuine issues of material fact in dispute regarding the alleged contractual and statutory violations. In fact, to the City's credit, counsel appeared more interested in moving ahead toward an amicable settlement than engaging in further legalistic wrangling.

Based upon this record, the Board therefore concludes that the UPW is entitled to summary judgment.

The Board orders declaratory and injunctive relief prohibiting Respondents from interfering with employee rights, refusing to bargain over a mandatory subject, failing to comply with their statutory obligation under chapter 89, and from continuing to violate the Unit 01 and other memoranda of agreement with UPW. The Employer is further ordered to cease and desist from continuing to implement the curbside recycling pilot program on and after April 1, 2004 unless there is mutual consent following negotiations. Finally, the Board orders that the City make whole any employees who have sustained losses in wages (in the form of straight time and overtime pay) and benefits as a result of their unilateral conduct on and after April 1, 2004 due to the continuation of the pilot program. The Little Rock Downtowner, Inc., 168 NLRB 107, 108 (1967), enforced, 414 F.2d 1084 (1968); Ogle Protection Services, 183 NLRB 682, 76 LRRM 1715 (1970), enforced, 444 F.2d 502 (6th Cir. 1971) (Respondents should not be permitted to "benefit from their own unfair labor practices.")

The back pay should be calculated in terms of the difference in hours of work and the workday which employees were required to perform as a consequence of engaging in curbside recycling from April 1, 2004 forward, payable to affected employees at the overtime rate of pay. (Exhs. 17-1, 19-23). There is ample legal basis for such an order. In United Public Workers. AFSCME, Local 646, AFL-CIO, 6 HLRB 32, 41-42 (1999) the Board found as follows:

The Board finds that the UPW relied upon Chun-Carmichael's agreement to reinstate the employees pursuant to the Settlement Agreements and the representations in the letters to the employees in exchange for resolving the complaint against the City. The UPW and the three employees relied upon the instructions and continued assurances from the City.

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any apparent authority that Mr. Rodrigues may have had I think dissipated at that point.

So in essence, there was a failure to negotiate over an extension in this case. I don't believe that we should have to go to hearing on that. Tr. pp. 17-18.

## CONCLUSIONS OF LAW

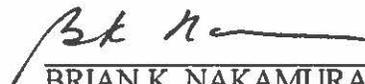
1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 14.
2. An employer violates HRS § 89-13(a)(5) by refusing to bargain in good faith with the exclusive representative as required in HRS § 89-9.
3. HRS § 89-9(a) provides that the employer and exclusive representative shall negotiate in good faith with respect to, inter alia, wages, hours, and other terms and conditions of employment which are subject to collective bargaining.
4. The curbside recycling pilot project was previously negotiated between the parties and is a mandatory subject of bargaining.
5. Respondents violated HRS §§ 89-13(a)(5) and (7) by unilaterally extending the curbside recycling pilot program beyond the term agreed to between the parties thereby ignoring the clear terms of the supplemental agreement and its amendments and ignoring the Union's repeated requests to cease and desist from continuing the project.
6. Respondents' unilateral change in the terms of the agreement by the continuance of the pilot project constituted a refusal to bargain in good faith in violation of HRS § 89-13(a)(5).
7. Respondents' refusal to bargain over curbside recycling further violated its obligations in HRS § 89-9(a) thereby constituting a violation of HRS § 89-13(a)(7).
8. An employer commits a prohibited practice in violation of HRS § 89-13(a)(8) when it violates the terms of a collective bargaining agreement.
9. Respondents violated Section 1.05 of the Unit 01 agreement which proscribes unilateral changes to existing terms and conditions of the agreement and the supplemental agreement entered into on November 6, 2003 and thereby violated HRS § 89-13(a)(8).
10. The Board concludes that the Respondents wilfully committed the foregoing prohibited practices because of their continued ignorance of the Union's demands for bargaining and repeated requests to cease and desist from committing the prohibited practices.

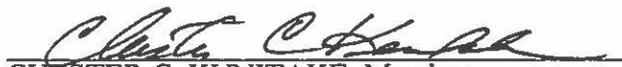
ORDER

1. The Board orders Respondents to cease and desist from committing the instant prohibited practices by unilaterally continuing the curbside recycling pilot project without reaching agreement with the Union after good faith negotiations.
2. The Board orders the Respondents to make whole affected employees, if any, who have sustained losses in wages (in the form of straight time and overtime pay) and benefits as a result of their unilateral conduct on and after April 1, 2004 in extending the curbside recycling pilot program.
3. The Board orders Respondents to immediately post copies of this decision in conspicuous places at its work sites where employees of Unit 01 assemble and congregate, and on the Respondents' respective websites for a period of 60 days from the initial date of posting.
4. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, November 17, 2004.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
CHESTER C. KUNITAKE, Member

  
KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.  
Paul T. Tsukiyama, Deputy Corporation Counsel  
Joyce Najita, IRC