

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DEPARTMENT OF PUBLIC SAFETY,
State of Hawaii,

Complainant,

and

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

Respondent.

CASE NO. CU-10-248

ORDER NO. 2478

ORDER GRANTING UPW'S MOTION
TO DEFER TO CIRCUIT COURT'S
FINAL JUDGMENT AND/OR FOR
DISMISSAL OF THE COMPLAINT

ORDER GRANTING UPW'S MOTION TO DEFER TO CIRCUIT
COURT'S FINAL JUDGMENT AND/OR FOR DISMISSAL OF THE COMPLAINT

On March 8, 2006, Complainant DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (Complainant or Employer) filed a prohibited practice complaint (Complaint) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Respondent or Union), alleging, *inter alia*, that the Union violated certain provisions of Hawaii Revised Statutes (HRS) § 89-13(b), governing prohibited practices, when, during an unrelated prohibited practice hearing before the Board, it entered as an exhibit and questioned a witness on a copy of a Stipulated Arbitration Award that provided in relevant part, "[t]his Arbitration Award shall not constitute or be used as precedent of any kind in any other proceeding."

On March 13, 2006, the Union filed its Answer to the Complaint, and on October 15, 2007, the Union filed a Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint. On November 6, 2007, the Board held a hearing on the Union's motion; the hearing was attended by Richard H. Thomason, Deputy Attorney General, for the Employer, and Herbert R. Takahashi, Esq., for the Union.

For the reasons discussed below, the Board grants the Union's Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint, and dismisses the Complaint.

FINDINGS OF FACT

1. Employer was or is, at all times relevant to this proceeding, a public employer within the meaning of HRS § 89-2.¹
2. The Union was or is, at all times relevant to this proceeding, an employee organization within the meaning of HRS § 89-2.
3. At all relevant times to this proceeding, the Employer and Union were or are parties to the Unit 10 collective bargaining agreement (CBA) that provides for a grievance procedure for grievances that arise out of alleged Employer violation, misinterpretation, or misapplication of the CBA. The final step of the grievance procedure is arbitration that may be invoked by the Union.
4. On or about June 16, 2004, the Union filed a grievance pursuant to the CBA's grievance procedure on behalf of a Union member in Case No. LK-04-12. The grievance was not resolved at Step 1, and the Union demanded arbitration. Paul Aoki, Esq. (Aoki), was subsequently appointed as the arbitrator.
5. The parties thereafter entered into negotiations to settle the grievance on mutually agreeable terms, and eventually agreed to the issuance of an arbitration award based upon those negotiated and mutually agreed-upon terms.
6. Arbitrator Aoki subsequently entered a Stipulated Arbitration Award (Award) on January 3, 2006. Among the terms of the Award were the following (emphasis added):

The Employer's agreement to withdraw charges and to take no action does not constitute an admission of any error or liability on the part of the Employer and is made only for the purposes of compromise and settlement.

¹HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

* * *

9. The arbitrator makes no finding other than that the terms of this agreement are fair and reasonable.
 10. **This Arbitration Award shall not constitute or be used as precedent of any kind in any other proceeding.**
7. On January 23, 2006, in S.P. No. 06-1-0021, the Union filed a Motion to Confirm Arbitrator Aoki's Award with the circuit court, and requested entry of judgment in favor of the Union pursuant to the Award. The Employer objected to the Union's apparent assertion that it was a "prevailing party" and its request for judgment in its "favor."
 8. The circuit court granted the Union's motion to confirm, directed the Union to draft an Order and Judgment in a form adopted by Judge Sabrina McKenna in a previous case where the issue of the form of the judgment for a stipulated award had already been litigated between the same parties, and denied costs. On March 3, 2006, the circuit court entered its Order Granting Union's Motion to Confirm Arbitrator Paul S. Aoki's Stipulated Arbitration Award, and stated in part:
 3. The January 3, 2006 Stipulated Award is "Final and Binding" on the parties, and Employer and Union are hereby ordered to comply with the remedial terms of said Stipulated Award.
 9. The circuit court also entered judgment on March 3, 2006, pursuant to its Order Granting Union's Motion to Confirm Arbitrator Paul S. Aoki's Stipulated Arbitration Award. There has been no appeal from the circuit court's judgment or order.²
 10. On February 28, 2006, the Employer filed a prohibited practice complaint against the Union in Case No. CU-10-247, asserting that the actions by the Union relating to the motion to confirm the Award constituted a wilful

²Pursuant to HRS § 658A-28, appeal from an order confirming or denying confirmation of an award, or from a final judgment entered pursuant to Chapter 658A, shall be taken as from an order or judgment in a civil action. In turn, Hawaii Rules of Appellate Procedure (HRAP) Rule 4(a) provides that, in civil cases, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.

repudiation of a negotiated collective bargaining agreement, and therefore a prohibited practice.

11. On March 3, 2006, the Union filed a Motion to Dismiss in Case No. CU-10-247.
12. On March 6, 2006, the Union and Employer appeared before the Board in an unrelated case, Case No. CE-10-605. The Union introduced as an exhibit the Award by Arbitrator Aoki, and questioned a witness about the Award. The witness was questioned about various other arbitration awards as well; the Union asserted that the awards were relevant to show that the consideration provided to certain employees relating to Case No. CE-10-605 was inadequate when compared to past settlement amounts. The Employer objected to use of the Award, and cautioned the Union that attempts to utilize the Award in Case No. CE-10-605 would constitute a violation of the Award; nevertheless, the Board allowed the Award as an exhibit.
13. The Award has since been withdrawn as an exhibit in Case No. CE-10-605, and testimony relating to the Award has been stricken from that record.
14. On March 8, 2006, the Employer filed the instant Complaint against the Union, alleging, *inter alia*, that the Union's use of the Award in Case No. CE-10-605 constituted a repudiation of the settlement agreement and wilful violation of HRS §§ 89-13(b)(2), (4), and (5).³
15. On March 13, 2006, the Union filed a motion to consolidate the present case with Case No. CU-10-247, and a motion to dismiss the present case. The

³HRS § 89-13 provides in relevant part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

* * *

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

Board heard both motions on May 25, 2006 and announced its inclination to deny both motions. Transcript of hearing (Tr.) in Case No. CU-10-247, 5/25/06, p. 10 (motion to consolidate); Tr. Case No. CE-10-248, 5/25/06, p. 23 (motion to dismiss). On February 23, 2007, the Board granted the Union's Motion to Dismiss, filed on March 3, 2006, in Case No. CU-10-247 in Order No. 2431.

16. On March 28, 2006, in S.P. No. 06-1-0021, the Employer filed a "Motion to Enforce Judgment and Order Entered March 3, 2006 Confirming Paul S. Aoki's Stipulated Arbitration Award Dated January 3, 2006; to Enjoin UPW from Further Violations, for Sanctions and for Civil Contempt."
17. On August 7, 2006, the circuit court filed its Order Granting in Part and Denying in Part Employer's Motion to Enforce Judgment and Order Entered on March 3, 2006 Confirming Paul S. Aoki's Stipulated Arbitration Award Dated January 3, 2006 to Enjoin UPW from Further Violations, for Sanctions and for Civil Contempt, Filed on March 28, 2006. The circuit court found, inter alia, that it had subject matter jurisdiction to hear the matter, and that the Union's subsequent utilization of the Award in hearings before the Board in Case Nos.: CE-01-605(a) and CE-10-605(b) was in violation of Article II, Section 10 of the Award and consequently of the circuit court's March 3, 2006, Order requiring both parties to comply with the remedial terms of the agreement. The circuit court granted Employer's request for injunctive relief, granted Employer's request for reasonable attorney's fees, and denied without prejudice Employer's request for additional sanctions and for civil contempt. On July 20, 2007, the circuit court filed its Order Granting UPW's Motion for Reconsideration Filed on August 17, 2006, which vacated that portion of the August 7, 2006, Order to exclude the award of attorney's fees against the Union. On September 7, 2007, the circuit court entered its final Judgment in S.P. No. 06-1-0021.
18. On October 15, 2007, the Union filed in the present case a Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint.
19. On October 23, 2007, the Employer filed its Memorandum in Partial Support and Partial Opposition to UPW's Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint. On November 2, 2007, Employer filed a Supplemental Memorandum Responding to UPW's Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint. On November 5, 2007, the Union filed a Supplemental Memorandum in Support of Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint.

20. On November 6, 2007, the Board held a hearing on the Union's Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint. The hearing was attended by Richard H. Thomason, Deputy Attorney General, for the Employer, and Herbert R. Takahashi, Esq., for the Union.
21. On November 7, 2007, Employer filed a Motion for Summary Judgment. On November 8, 2007, the Union filed a Motion to Extend Deadline to File Opposition to Complainant's Motion for Summary Judgment. On November 14, 2007, the Board granted the Union's Motion to Extend Deadline to File Opposition to Complainant's Motion Summary Judgment, until five business days following the Board's ruling on the Union's pending Motion to Defer to Circuit Court's Final Judgment and/or for Dismissal of the Complaint.
22. The issue of the breach of the terms of the Award was finally adjudicated by the circuit court in S.P. No. 06-1-0021; the circuit court granted Employer's request for injunctive relief, denied Employer's request for reasonable attorney's fees, and denied without prejudice Employer's request for additional sanctions and for civil contempt. The Board finds that the special proceeding before the circuit court provided the Employer with the opportunity for adequate protection against alleged violation of the terms of the stipulated arbitration award.

CONCLUSIONS OF LAW AND DISCUSSION

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See, Yamane v. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
2. When considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)], the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
3. The Intermediate Court of Appeals has noted:

A Rule 12(b)(6), [Hawaii Rules of Civil Procedure], dismissal is warranted only if the claim is “clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim.”

Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (quoting 2A J. Moore & J. Lucas, *Moore’s Federal Practice* ¶ 12.08, at 2271 (2d ed. 1982)).

4. The Complaint alleges violation of HRS §§ 89-13(b)(2), (4), and (5), which provides in relevant part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

* * *

- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

5. The Board has jurisdiction over prohibited practice complaints pursuant to HRS § 89-14, which provides:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9⁴; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders

⁴HRS § 377-9 governs the prevention of unfair labor practices.

of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

6. The Award at issue here was the result of a grievance arbitration process provided for in the CBA, and was confirmed by the circuit court pursuant to HRS Chapter 658A-22, which provides in relevant part:

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 658A-20 or 658A-24 or is vacated pursuant to section 658A-23.⁵

7. The circuit court found that it had subject matter jurisdiction over the Employer's Motion to Enforce Judgment and Order Entered March 3, 2006 Confirming Paul S. Aoki's Stipulated Arbitration Award Dated January 3, 2006 to Enjoin UPW from Further Violations, for Sanctions and for Civil Contempt.⁶ The types of relief contemplated by the circuit court included injunctive relief, which was granted; reasonable attorney's fees, which was initially granted and then denied after reconsideration; and additional sanctions and civil contempt, which was denied without prejudice.
8. In the present case, the Employer requests the following relief: declaratory relief; a cease and desist order; and other affirmative relief to ensure full and complete compliance with HRS Chapter 89. The Board concludes that the types of relief requested from the Board in this proceeding are similar in nature to the relief sought before the circuit court. Accordingly, the Board defers to the circuit court's Order Granting in Part and Denying in Part Employer's Motion to Enforce Judgment and Order Entered on March 3, 2006 Confirming Paul S. Aoki's Stipulated Arbitration Award Dated January 3, 2006 to Enjoin

⁵HRS § 658A-20 governs the change of an arbitration award by an arbitrator; § 658A-24 governs the modification or correction of an arbitration award by the court; and § 658A-23 governs the vacating of an arbitration award by the court.

⁶The Hawaii Supreme Court has held that the circuit court has inherent authority to enforce its judgments. See, e.g., State ex rel. Office of Consumer Protection v. Honolulu University of Arts, Sciences and Humanities, 110 Hawai'i 504, 514, 135 P.3d 113, 123 (2006) (circuit court had the inherent authority to enforce stipulated judgment).

UPW from Further Violations, for Sanctions and for Civil Contempt, Filed on March 28, 2006.

9. The Employer cites to prior Board decisions, United Public Workers AFSCME, Local 646, AFL-CIO v. Bernard Akana, 5 HLRB 177, 185 (1993), United Public Workers, AFSCME, Local 646, AFL-CIO v. Jeremy Harris, 6 HLRB at 41 (1999), and United Public Workers, AFSCME, Local 646, AFL-CIO v. William Takaba, Decision No. 469 (2007), for the proposition that repudiation of the terms of a grievance settlement agreement constitutes a prohibited practice such that the Board should afford relief.
10. Two of the decisions (Akana and Harris), however, did not involve an arbitration award that was confirmed by the circuit court, and thus are distinguishable. The violation of a settlement agreement that did not result in an arbitration award presumably cannot be enforced in the circuit court pursuant to HRS Chapter 658A, and therefore relief before the Board via a prohibited practice proceeding may be proper in such a case, provided the specific facts of the case establish the Board's jurisdiction and there are no legal or policy reasons to defer to another forum.
11. In the Takaba case, the arbitrator's award was confirmed by the circuit court. In that case, the arbitrator held that the county, by unilaterally amending the position description forms of groundskeeper I Union members, breached certain provisions of the CBA between the Union and the county, in that the county failed to engage in collective bargaining regarding this change which affected working schedules, job descriptions, and other conditions of employment. When the county took similar unilateral action to once again contract out the services, the Union alleged a prohibited practice and violation of the terms of the arbitrator's award. The Board held that the County wilfully

violated HRS § 89-10.8(a)⁷ and Section 15.20b⁸ of the CBA, and thereby committed prohibited practices in violation of HRS §§ 89-13(a)(7) and (8).⁹

12. Accordingly, the underlying dispute in Takaba was a refusal to bargain before unilaterally contracting out golf cart maintenance services by Unit 01 employees at the Hilo Municipal Golf course. That refusal was characterized as a violation of the arbitration award, and thus a prohibited practice for violating the terms of a collective bargaining agreement and failure to comply with HRS § 89-10.8(a). Nevertheless, the underlying dispute – the employer’s refusal to bargain before taking unilateral action – may have been an issue that, for policy reasons, the Board believed was properly brought before it. By contrast, the alleged violation of the arbitration Award in the present case involves the improper use of the Award as evidence in an administrative proceeding. Such action is not germane to collective bargaining fundamentals, and does not implicate important collective bargaining issues such that the Board should provide a forum for relief beyond what is available before the circuit court.

⁷HRS § 89-10.8 provides in relevant part:

Resolution of disputes; grievances.

(a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable[.]

⁸Section 15.20b of the Unit 10 agreement provides in relevant part:

The award of the Arbitrator shall be final and binding provided, the award is within the scope of the Arbitrator’s authority[.]

⁹HRS § 89-13(a) provides in relevant part:

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

* * *

- (7) Refuse or fail to comply with any provision of this chapter; or
- (8) Violate the terms of a collective bargaining agreement[.]

13. To the extent the Employer is arguing that the Takaba case stands for the proposition that any breach of any stipulated arbitration award that is confirmed in the circuit court would constitute a refusal to bargain in good faith, a refusal or failure to comply with the terms of HRS Chapter 89, or a violation of a collective bargaining agreement, constituting a prohibited practice, the Board rejects that position.
14. The Board does not view the violation of the Award that occurred here as a refusal to bargain or negotiate in good faith with the public employer, or as a violation of the terms of a collective bargaining agreement. With respect to the argument that HRS § 89-10.8(a) requires the parties to enter into a written agreement setting forth a grievance procedure culminating in a “final and binding” decision, such obligation was fulfilled when the existing grievance procedure was negotiated into the CBA. With respect to the argument that violation of the Award constitutes violation of a collective bargaining agreement, or a refusal to “bargain” in good faith, the Board notes that in the present case, whatever settlement terms were reached between the parties were reduced to a grievance arbitration award¹⁰ pursuant to HRS Chapter 658A, by mutual agreement of the parties.
15. Finally, the Board notes that the circuit court found that it had jurisdiction to award relief for violation of the terms of the Award. The Board is hesitant to provide another forum in which to seek relief for an essentially identical claim, in light of the circuit court’s ruling that it has jurisdiction to hear such a controversy. The practice of “forum shopping” should be discouraged as “inimical to sound judicial administration.” Moss v. American Intern. Adjustment Co., Inc., 86 Hawai’i 59, 65, 947 P.2d 371, 377 (1997) (citing Jordan v. Hamada, 64 Haw. 446, 448, 643 P.2d 70, 72 (1982)).

¹⁰Some arbitration decisions may constitute collective bargaining agreements, such that a violation of the award would constitute a violation of a collective bargaining agreement within the jurisdiction of the Board. For example, “interest arbitration” provided for in HRS § 89-11(e) involves the submission of disputes over the terms of a new collective bargaining agreement to an independent third party who determines what the terms of the new collective bargaining agreement will be. Because an interest arbitration award results in a written collective bargaining agreement, such award may be effectively viewed by the Board as collective bargaining agreements subject to the Board’s jurisdiction. However, the present case involves a grievance arbitration - which involves the submission of disputed interpretations of an existing collective bargaining agreement to an independent third party who determines what construction the existing term should be given - and which is distinguishable from interest arbitration. See, e.g., American Postal Workers Union v. Runyon, 185 F.3d 832, 834, n.2 (1999); International Ass’n of Machinists and Aerospace Workers, AFL-CIO v. M & B Railroad, L.L.C., 65 F. Supp.2d 1234, 1238 (M.D. Ala. 1999); Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers’ Ass’n, 853 F.2d 506, 509 n. 6 (7th Cir.1988).

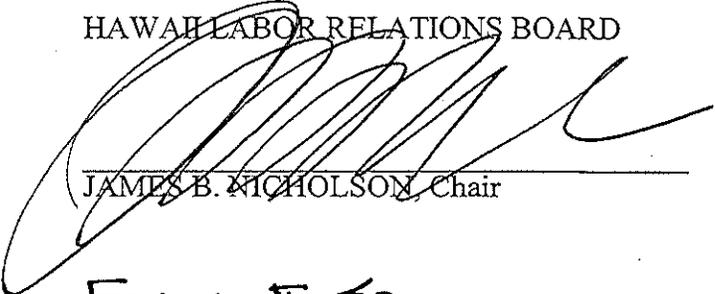
16. Accordingly, the Board concludes that the special proceeding before the circuit court provided the Employer with the opportunity for adequate protection against alleged violation of the terms of the stipulated arbitration award; that improper use of the Award as evidence in an administrative proceeding is not germane to collective bargaining fundamentals, and does not implicate important collective bargaining issues such that the Board should provide a forum for relief beyond what is available before the circuit court; that violation of the arbitration Award is not a refusal to bargain or negotiate in good faith with the public employer, a violation of the terms of a collective bargaining agreement, or a violation of HRS § 89-10.8(a); and that the Board is hesitant to provide another forum in which to seek relief for an essentially identical claim, in light of the circuit court's ruling that it has jurisdiction to hear such a controversy.

ORDER

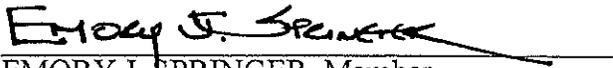
For the above-discussed reasons, the Board hereby grants the Union's Motion to defer to the circuit court's final judgment and/or for dismissal of the Complaint, and dismisses the Complaint.

DATED: Honolulu, Hawaii, December 5, 2007

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH K. HIRAKAMI, Member

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