STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and TED H.S. HONG, Assistant Corporation Counsel and STEPHEN YAMASHIRO, Mayor, County of Hawaii, Respondents.	CASE NO. CE-01-210 ORDER NO. 1190 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On March 16, 1994, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against TED H.S. HONG, Assistant Corporation Counsel (HONG) and STEPHEN YAMASHIRO, Mayor, County of Hawaii (YAMASHIRO or Employer) (collectively Respondents) with the Hawaii Labor Relations Board (Board). The UPW alleged that Patricia Brown (Brown), a bargaining unit 01 employee, was notified by the County of Hawaii (County), by letter dated December 6, 1993, that she would be terminated effective December 24, 1993. On December 22, 1993, the UPW filed a grievance with the County on Brown's behalf challenging her discharge as being without just cause.

The UPW further alleged that the County considered and denied the Brown grievance at the various steps of the grievance procedure. On February 25, 1994, the UPW indicated its desire to arbitrate the grievance. Thereafter, on March 2, 1994, counsel for

UPW requested that Respondents select an arbitrator pursuant to the grievance procedure of the Unit 01 collective bargaining agreement.

By letter dated March 14, 1994, HONG indicated to UPW's counsel that the County considered the Unit 01 collective bargaining agreement dated July 1, 1989 - June 30, 1993 (Contract) to be null and void. Thus, the County considered the grievance to be nonarbitrable.

Based upon the foregoing, the UPW alleged that Respondents wilfully violated the Unit 01 Contract, unlawfully interfered with employee rights, and violated Chapter 89, HRS, thereby violating §§ 89-13(a)(1), (7) and (8), HRS.

Thereafter, on March 30, 1994, UPW filed two similar prohibited practice complaints with the Board in Case Nos. CE-01-213 and CE-01-214. These complaints are also based upon the County's refusal to recognize and arbitrate the UPW's respective grievances and raise identical legal issues to the case at bar.

On March 31, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that Respondents admitted in their answer that they refused to arbitrate Brown's discharge grievance on the grounds that there was no Unit 01 contract in effect. The UPW contends that there is no genuine issue of material fact presented in this case and the UPW is entitled to judgment as a matter of law.

The UPW argued that the Board already held in Decision No. 347, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 239 (1994), which has been appealed on other grounds, that the Contract had been extended twice, most recently to

January 15, 1994. UPW argues that the doctrines of res judicata and collateral estoppel preclude the relitigation of the validity of the Unit 01 Contract extensions. Therefore, the UPW argues the County's refusal to arbitrate the aforementioned grievances constitutes a prohibited practice because of the Employer's noncompliance with Section 15.22 of the Unit 01 Contract.[1]

The UPW filed similar motions for summary judgment in Case Nos.: CE-01-213 and CE-01-214.

On April 22, 1994, the UPW filed another prohibited practice complaint with the Board against the Respondents in Case No. CE-01-219. The UPW alleged that on April 19, 1994, HONG stated that the County would not select an arbitrator in another grievance because the County did not recognize the extensions of the Unit 01 contract and, therefore, the grievance was not arbitrable.

On April 25, 1994, Respondents filed a motion to consolidate the hearings on the UPW's motions for summary judgment in Case Nos.: CE-01-213 and CE-01-214 because the legal issues and defenses raised in the complaints were the same, the parties were the same and consolidation of the hearings would promote the proper

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[1]Section 15.22 of the Unit 01 Contract provides for the arbitration of grievances and states in pertinent part:

> 15.22 Step 4. Arbitration. If the matter is not satisfactorily settled at Step 3, and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or his representative of its desire to arbitrate within thirty (30) calendar days of receipt of the decision of the Employer or his designated representative.
>
> Within ten (10) calendar days after the receipt of the notice of arbitration by the Employer, the parties shall meet to select an arbitrator as provided in Section 15.24.

dispatch of the Board's business and the ends of justice. On April 26, 1994, the UPW filed a statement with the Board indicating that the Union did not oppose consolidation of Case Nos.: CE-01-210, CE-01-213 and CE-01-214 for the purpose of hearing the Union's motions for summary judgment. On May 11, 1994, the UPW filed a motion for summary judgment raising similar issues in Case No. CE-01-219.

In Order No. 1056 issued on May 11, 1994, the Board consolidated Case Nos.: CE-01-210, CE-01-213 and CE-01-214 for the purpose of hearing the motions for summary judgment pursuant to Respondents' motion. In addition, the Board, on its own motion, consolidated the hearing on the motion for summary judgment filed in Case No. CE-01-219 because the motions involved substantially the same parties and issues.

The Board held a hearing on the motions for summary judgment on May 23, 1994. All parties had full opportunity to present evidence and argument to the Board. The Board took the motions under advisement.

Thereafter on October 14, 1994, the UPW, by and through its counsel, filed a supplemental affidavit in support of the UPW's Motion for Summary Judgment. The UPW submitted Order No. 1090, dated August 11, 1994, issued in Case No. CE-01-204, United Public Workers, AFSCME, Local 646, AFL-CIO, which is presently pending before the Board, where the Board held that the contract extensions at issue in this case were valid and binding upon the County.

In addition, the UPW submitted excerpts from a Memorandum of Agreement between the public employers and the UPW which

constitutes the settlement on all sections of the collective bargaining agreement for Unit 01. The Memorandum of Agreement includes a retroactive effective date of July 1, 1993 and extends to June 30, 1995. The Memorandum of Agreement provides that the terms and conditions of the Contract which existed on June 30, 1993 were incorporated without change in the new Agreement except for certain provisions which were specifically set forth. The Memorandum of Agreement does not modify the applicable provisions of the Grievance Procedure, § 15, of the Contract.

Based upon a thorough review of the record, the Board makes the following findings.

The UPW is the exclusive representative of the employees of the County of Hawaii who are included in Unit 01.

STEPHEN YAMASHIRO is the Mayor of the County of Hawaii and is the public employer of the County employees who are included in Unit 01.

TED H.S. HONG is the Assistant Corporation Counsel and legal counsel for the County of Hawaii representing the County in the above-mentioned grievances.

The public employers and the UPW executed the four-year Contract for bargaining unit 01 employees on June 27, 1989 covering the period July 1, 1989 through June 30, 1993. Exhibit attached to UPW's Motion for Summary Judgment filed on March 31, 1994 (C's Ex.) 2. The public employers, except for YAMASHIRO, and the UPW executed a Memorandum of Agreement, dated June 4, 1993, extending the terms of the Contract from July 1, 1993 through August 31, 1993. C's Ex. 3. Thereafter, the same parties executed another

Memorandum of Agreement, dated August 27, 1993, extending the Contract from September 1, 1993 through January 15, 1994. C's Ex. 4. The same parties executed a third Memorandum of Agreement, dated January 14, 1994, extending the terms of the Contract from January 16, 1994 through April 1, 1994. C's Ex. 5. Subsequently, the public employers, including YAMASHIRO, and the UPW executed a Memorandum of Agreement, dated June 21, 1994, which provides that the Contract remains in effect unless modified therein. The Memorandum of Agreement provides that the agreement is effective from July 1, 1993 until June 30, 1995. C's Ex. 15 attached to Supplemental Affidavit of Herbert R. Takahashi in Support of UPW's Motion for Summary Judgment filed on October 14, 1994.

By letter dated December 9, 1993, County Chief Engineer Donna Fay K. Kiyosaki sent a letter to Patricia Brown terminating her effective December 17, 1993. C's Ex. 6. Kiyosaki indicated in the letter that since there was no contract in effect, that Brown could appeal the termination through the departmental grievance procedure. Id. By letter dated December 13, 1993, Kiyosaki changed Brown's termination date to December 24, 1993. C's Ex. 7. UPW filed a grievance on Brown's behalf on December 9, 1993. C's Ex. 8. By letter dated January 3, 1994, Kiyosaki indicated that the grievance was inappropriate because it was filed under the terms of an expired agreement, but nevertheless, sustained the termination action. C's Ex. 9. The UPW, by and through its representative, filed a Step 3 grievance on Brown's behalf by letter dated January 10, 1994. C's Ex. 10. By letter dated February 10, 1994, YAMASHIRO responded to UPW's representative that

since no improprieties occurred regarding Brown's termination, no further action was being taken. C's Ex. 11. By letter dated February 25, 1994 to YAMASHIRO, UPW State Director Gary W. Rodrigues requested the arbitration of Brown's grievance. C's Ex. 12. Thereafter, by letter dated March 2, 1994, counsel for UPW requested that the parties proceed to select an arbitrator and to proceed to arbitration. C's Ex. 13.

By letter dated March 14, 1994, the Employer, by HONG, refused to arbitrate the grievance on the basis that no agreement existed. Ex. 1 attached to Prohibited Practice Complaint.

HONG's letter states in pertinent part:

> This letter is to inform you that we received a copy of your March 2, 1994 letter to Mayor Yamashiro concerning the above entitled grievance on March 7, 1994.
>
> I regret to inform you that the County of Hawaii considers the Unit 1 Agreement with the United Public Workers, AFSCME Local 646, AFL-CIO, July 1, 1989 - June 30, 1993 (hereinafter "Agreement") null and void. The County of Hawaii did not extend the Agreement in any manner after June 30, 1993. Accordingly, we do not recognize (1) your right to represent any of the County employees in this case, (2) your standing to raise the present grievance, and (3) that any of the alleged conduct violated the Agreement since no Agreement existed.
>
> As you know, Section 15.30 of the Agreement states:
>
> > Any grievance occurring during the period between the termination date of this Agreement and the effective date of a new Agreement shall not be arbitrable except by mutual extension of the Agreement.
>
> In your original grievance you allege that the violations occurred on or about December 16 - 19, 1993. Those dates are beyond the

> effective date of the Agreement. The Agreement between the UPW and the County of Hawaii expired on June 30, 1993. The County of Hawaii did not agree to an extension. **As a result, the above entitled matter is not arbitrable**.

Based upon the foregoing facts in the record, the Board finds that the expiration date of the Contract was June 30, 1993. Prior to the expiration date, the public employers, with the exception of YAMASHIRO, executed a Memorandum of Agreement extending the terms of the Contract from July 1, 1993 to August 31, 1993. Thereafter, the same parties executed another Memorandum of Agreement extending the Contract from September 1, 1993 to January 15, 1994. The Brown grievance arose in December 1993, during the period of the second extension of the Contract. The Employer admits that it considered the extensions of the Contract to be invalid because the County did not agree to any extension. Thus the Employer admits that it refused to select an arbitrator on the basis that the extensions were invalid and the grievance was not arbitrable. The Board concludes that there are no genuine issues of material fact in dispute between the parties.

The first issue presented in this case is whether an employer is bound by an agreement to extend the contract entered into by a majority of employers even though that employer refuses to sign the agreement. The second issue presented is whether an employer commits a prohibited practice by refusing to arbitrate a dispute arising during the contract extension period.

Procedural Matters

As to a preliminary matter, during the hearing held on UPW's motions for summary judgment on May 23, 1994, counsel for Employer objected to alleged procedural errors in the Board's Order No. 1056, Order Consolidating Cases for Hearing on UPW's Motions for Summary Judgment; Notice of Hearing dated May 11, 1994. Counsel contends that the hearing notice improperly indicated that the hearing was on the merits and also that the hearing was not held within 40 days of the filing of the complaint in accordance with Administrative Rules § 12-42-46. Employer's counsel thus argues that the Employer has been denied due process.

After reviewing the instant hearing notice, the Board finds that Order No. 1056 consolidates Case Nos.: CE-01-210, CE-01-213, CE-01-214 and CE-01-219 for hearing on the motions for summary judgment. The notice then indicates the Board will conduct a hearing on the instant motions pursuant to §§ 89-5(b)(4) and 89-14, HRS and Administrative Rules §§ 12-42-49 and 12-42-8(g)(3). The statutory sections cited refer to the Board's jurisdiction over prohibited practice complaints and the rules sections refer to the hearings on prohibited practice complaints and hearings on motions. Thus, the Board finds that the notice was reasonably clear in noticing the hearing as a hearing on the UPW's motions for summary judgment and that the Employer was not prejudiced by such notice.

With respect to the Employer's objection to the hearing on the motion not being held within 40 days of the filing of the complaints, the Board finds that such delay in this case was

unavoidable and that a further delay was at the request of Employer's counsel.

Administrative Rules § 12-42-46 refers to the notice of hearing in prohibited practice complaints and provides in pertinent part:

> (b) The hearing shall be held not less than ten nor more than forty days after filing of the complaint or amendment thereof.

In this case, UPW filed the instant complaint on March 16, 1994. Thereafter, UPW filed a Motion for Summary Judgment on March 31, 1994. By Notice issued on April 5, 1994, the Board scheduled a hearing on UPW's Motion for Summary Judgment on April 22, 1994. However, during this time, the Board was conducting essential worker investigations for bargaining units 03, 04 and 13. According to Administrative Rules § 12-42-86, preliminary investigations to establish health and safety requirements in the event of a public worker strike shall be given priority over all other cases except cases of like character. Hence, the hearing scheduled on April 22, 1994 on UPW's motion for summary judgment was taken off the Board's calendar due to the pending essential worker proceedings which terminated in early May 1994. In addition, counsel for Employer by letter dated April 19, 1994, advised the Board that he would be on vacation from April 25, 1994 through May 9, 1994 and specifically requested that the Board schedule the hearing in this matter after his return to Hilo. Thereafter, the Board held the hearing on the motions on May 23, 1994, in a timely fashion after Employer's counsel's return from his vacation. Thus, the Board finds

Employer's arguments objecting to the Board's conduct of the hearing to be without merit.

HONG is Not a Proper Respondent

Also, at the outset the Board dismisses the allegations against HONG as a Respondent in this case. The UPW contends that HONG is a designated representative of the public employer and, as such, is a proper party to this case. HONG argues that he is legal counsel for the County and not an employer representative within the meaning of § 89-2, HRS.[2]

In Order No. 954, Order Granting Respondents' Motion to Dismiss, dated July 26, 1993, issued in Case No. CE-01-186, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 239 (1994), the Board considered the identical issue raised, i.e., whether the County's legal counsel was properly named as a respondent in a prohibited practice complaint. The Board in that case held that the Corporation Counsel was not an individual who represented one of the employers or acted in their interest in dealing with public employees. Thus, the Board dismissed legal counsel as a respondent from the proceedings.

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[2]Section 89-2, HRS, defines "Employer" or "public employer" and provides in pertinent part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the city and county of Honolulu and the counties of Hawaii, Maui, and Kauai, the board of education in the case of the department of education, and the board of regents in the case of the University of Hawaii, and any individual who represents one of these employers or acts in their interest in dealing with public employees. (Emphasis added.)

Likewise in this case, the record indicates that HONG signed the letter to Rodrigues refusing to select the arbitrator in his capacity as legal counsel to the Employer. The Board notes that HONG is not named as a respondent with respect to any actions taken against the employees of the Office of the Corporation Counsel as an Employer representative. Hence, the record establishes that HONG is not an Employer representative in this case within the meaning of § 89-2, HRS, and the Board hereby dismisses HONG as a respondent.

Validity of the Contract Extensions

With respect to the validity of the contract extensions, the County contends that the extension of the contract violates Article VIII, Section 2 of the Constitution of the State of Hawaii. In its memorandum opposing the motions for summary judgment, the County argues that the extension of the Unit 01 contract was invalid because it violates the State Constitution with respect to home rule; violates the Hawaii County Charter because it was not approved by the County Council and the Mayor; violates the statutory mandate requiring public sector collective bargaining contracts to expire in odd-numbered years; and exceeds the statutory guideline regarding the adoption of contracts by the multi-employer representatives. In addition, the County argues that the U.S. Supreme Court has ruled that the refusal to arbitrate is a contractual matter and cannot be imposed on a party. Finally, the County argues that collateral estoppel does not apply because the matter has not been fully litigated.

With regard to the contract extensions, the Board finds, based upon the record and the arguments presented, that the contract extensions are valid. The Board finds that § 89-6(b), HRS, is applicable and provides in pertinent part:

> For the purpose of negotiations, . . . the governor shall be entitled to four votes and the mayor of each county shall each have one vote, which may be assigned to their designated representatives. Any decision to be reached by the applicable employer group shall be on the basis of a simple majority.

The foregoing section clearly states that a simple majority of the public employers can bind the employer group in negotiations. The Board concludes that the statutory scheme embodied in Chapter 89, HRS, does not permit one dissenting County employer to jeopardize the decision of the majority of the employers. If the Board were to hold otherwise, employment practices would vary from jurisdiction to jurisdiction depending upon each employer representative's vote at the negotiating table. The underlying theme of the uniformity of employment practices across statewide bargaining units embodied in Chapter 89, HRS, would therefore be lost.

The record indicates that all of the public employers, except YAMASHIRO, signed the Memorandums of Agreement which extended the terms of the Contract for the periods July 1, 1993 to August 31, 1993; September 1, 1993 to January 16, 1994; and January 17, 1994 to April 1, 1994. Thus pursuant to § 89-6(b), HRS, the Board concludes that a majority of the public employers was sufficient to bind all public employers to the contract extensions and the contract extensions were valid.

While Personnel Director Michael Ben states in an affidavit that the public employers did not formally vote to extend the contract, the record clearly indicates that the extensions were signed by the other public employer designees. The Board finds that Ben's statement does not create a factual issue because there is no dispute that the other public employer designees signed the extensions. Thus, regardless of whether a formal vote was taken or not, the issue is whether YAMASHIRO is bound by the concerted action of the other public employers in extending the Unit 01 agreement.

In addition, the public employers, including YAMASHIRO, and the UPW executed a Memorandum of Agreement which had a retroactive effective date of July 1, 1993. Hence, the grievance provisions of the Contract were applicable during the period in which the instant grievance arose and the Employer should have proceeded to arbitration.

With respect to the home rule issue, the County argues that the home rule provisions of Hawaii's Constitution, Article VIII, Section 2 would be violated by the Board's application of Chapter 89, HRS, to the dispute in question. That provision states:

> **Section 2. Local Self-Government; Charter.** Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by the general law. Such procedures, however, shall not require the approval of a charter by a legislative body.
>
> Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions,

> subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.
>
> A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section. (Emphasis added.)

The UPW contends that the County ignores the provisions of Article VIII, Section 6, which provides that the Article on Local Government "shall not limit the power of the legislature to enact laws of statewide concern." The UPW argues that Chapter 89, HRS, like the civil service laws, is a law of general applicability and any conflicting Charter provisions are nugatory. The UPW relies upon HGEA v. County of Maui, 59 Haw. 65, 576 P.2d 1029 (1978), where the Court held that the charter provisions are subject to the laws of general applicability. There, the Court concluded that the merit system embodied in the civil service law was a policy of statewide application and that its uniformity was "essential to its success." 59 Haw. 87.

The UPW argues that similar to the civil service law, the success of Chapter 89, HRS, depends upon the uniform application of the law by the counties and the state.

In City and County v. Ariyoshi, 67 Haw. 412, 689 P.2d 757 (1984), the Court considered whether the compensation of certain county officials was a matter of statewide concern or local self-government. The Court reviewed a statute which increased the salaries of certain officials and froze the salaries of other officials. The Court discussed the interplay between Section 2 and Section 6 of Article VIII of the State Constitution and held that provisions of a charter or ordinance of a political subdivision of

the State will be held to be superior to legislative enactments only if the charter provisions relate to a county government's executive, legislative or administrative structure and organization. Personnel matters, including civil service and compensation matters, remain subject to legislative control.

The Court stated, in part, at page 421:

> The rationale of section 34 is that "a schedule of integrated, equitable, and reasonable salaries among top-level officers of all jurisdictions is necessary to provide for more efficient and effective government." Act 129, § 34, 1982, Haw. Sess. Laws 193, 211. The legislature found "that this section concerns purely personnel matters within the powers of the legislature and does not intrude upon the executive or administrative structure or organization of any county. The legislature further [found] that this section is a law of statewide concern and interest and is necessary to provide for more efficient and effective government for the people of Hawaii." (Cite omitted.)

Thus, the Court found the state statute governing the compensation of public officers to be constitutionally valid.

In addition, UPW contends that public sector collective bargaining is a constitutional right provided by Article XII, Section 2, and that the enactment of Chapter 89, HRS, preempts any municipal attempt to regulate the matter. Further, the UPW argues that § 89-19, HRS, provides:

> This chapter takes precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county of any department or agency thereof including the departments of personnel services or the civil service commission.

Thus, UPW argues that the collective bargaining laws have a higher standing than even the civil service laws which prevail over claims of municipal home rule.

The Board refrains from addressing the claims raised by the County as to whether the application of Chapter 89, HRS, is unconstitutional since the issue should be decided by an appropriate court rather than an administrative agency. However, the Board agrees with the UPW's arguments that Chapter 89, HRS, is similar to the civil service law embodied in Chapter 76, HRS, and is likewise a statute of general application throughout the state on a matter of statewide concern and interest. The concept of multi-employer bargaining with exclusive representatives of employees included in statewide bargaining units is the cornerstone of Chapter 89, HRS. The underlying policy of uniformity in the administration of collective bargaining contracts and the uniformity of benefits enuring to the employees across jurisdictional lines is the essence of collective bargaining in Hawaii. Thus, the Board concludes that the home rule provisions are not abrogated by Chapter 89, HRS, which is a law of general application under § 50-15, HRS. As such, the Board concludes that the County's arguments regarding the violation of Charter provisions are without merit.

§ 89-10, HRS, Is Not Violated By the Extensions

Additionally, the County contends that § 89-10, HRS, provides that collective bargaining agreements should end in odd-numbered years. Thus, the County argues that the extension

agreements violate § 89-10, HRS, because the extensions result in the Contract terminating in an even-numbered year.

Section 89-10(c), HRS, provides as follows:

> (c) Because effective and orderly operations of government are essential to the public, it is declared to be in the public interest that in the course of collective bargaining, the public employer and the exclusive representative for each bargaining unit shall by mutual agreement include provisions in the collective bargaining agreement for that bargaining unit for an expiration date which will be on June 30th of an odd-numbered year.
>
> The parties may include provisions for the reopening date during the term of a collective bargaining agreement provided that such provisions shall not allow for the reopening of cost items as defined in section 89-2, HRS.

UPW argues that § 89-10(c), HRS, was never intended to prohibit the extension of a multi-employer agreement. According to the UPW, the provision was enacted in 1988 to permit greater flexibility for the parties to collectively bargain to determine contractual terms. Previously, all of the exclusive representatives and the public employers had to agree on a uniform expiration date for all collective bargaining agreements. The provision in question was enacted to allow the employer and exclusive bargaining representative for each bargaining unit to agree to different expiration dates so long as the expiration date was June 30th of an odd-numbered year. The UPW argues that it would be improper for a provision designed to foster flexibility to be interpreted in a manner which would restrict the parties from entering into temporary extensions while negotiations are in progress.

The Board agrees with the UPW that § 89-10, HRS, does not prohibit extensions of collective bargaining agreements. If the Board were to interpret the statutory provision in the manner proposed by the County, the master contract would expire in the odd-numbered year and there could be no extension of the contract into the next year even during continuing good faith negotiations. The result would be chaos and instability caused by the uncertainty in the rights and benefits to be accorded the employees after the expiration of the contract. Hence, the Board finds the County's contention that § 89-10, HRS, is violated by the contract extensions to be without merit because it is a strained application of the statute which leads to an absurd result.

Council Approval Was Not Required

The County further contends that the Mayor did not agree to extend the Unit 01 Contract and the County Council did not approve of the extension in accordance with County Charter provisions. The County argues that according to § 13-13 of the Hawaii County Charter, all written contracts must be authorized by the Council by resolution if legislative action is necessary to implement the contract.

The UPW contends that Council action was not required to approve the extension agreements since there were no new appropriations sought and thus no cost implications which required legislative approval. In addition, the UPW argues that under § 50-15, HRS, a County charter provision cannot be implemented so as to abrogate a general law of statewide applicability such as the collective bargaining law.

The Board finds that the County failed to establish that the extension agreements required Council approval. According to § 89-10(b), HRS, all cost items are subject to appropriations by the legislative bodies. There is no suggestion made by the County that salaries and benefits paid during the extension period were somehow illegal because the Council or the Mayor did not approve or authorize such payments. In this regard, no additional monies were sought from Council to fund the extensions since there were no additional cost items involved. Thus, even under § 13-13 of the County Charter, the Board concludes that Council approval of the extensions was not specifically required because legislative action was not necessary to extend the provisions of Contract. Additionally, the Board finds, under the cases cited above, that the charter provision should not be implemented in a manner which would abrogate the collective bargaining law. Thus, the Board concludes that the extensions of the Contract were valid and Council approval was not required.

The Contract Extensions Are Part of the Negotiations Process

In addition, the County contends that the extension of the Contract was not part of the "negotiations" for a new Contract. The County contends rather that the Contract was extended to avoid a strike or other punitive measures. The County submits that the degree to which the State and other counties and the UPW intended to include the contract extensions as part of the negotiating process for the new UPW contract is a genuine issue of material fact.

The Board finds the County's argument to be unsupported by the record. The agreements specifically state that the extension will permit the continuance of good faith negotiations of the successor agreement. Thus, the Board finds the County's arguments distinguishing the negotiations over the extensions of the Contract and the negotiations over the successor agreement to be without merit.

The Cases Cited by the County Are Distinguishable

The County further contends that the refusal to arbitrate the underlying action is a contractual matter and not a prohibited practice. The County relies upon Litton Financial Printing v. N.L.R.B., 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), where the U.S. Supreme Court reversed the National Labor Relations Board's order requiring arbitration of a dispute which occurred after the expiration of the collective bargaining agreement. In that case, the union filed grievances on behalf of employees who were laid off after the collective bargaining agreement had expired and before a new agreement had been negotiated. The Court held that the layoff dispute did not arise under the agreement and thus the employer was not required to arbitrate the dispute. The Court also stated that absent an explicit agreement that certain benefits continue past the expiration of the contract, a post-expiration grievance arises under the contract only where it involves facts and occurrences that arise before expiration, where post-expiration action infringes rights that accrued or vested under agreement, or where, under normal principles of contract interpretation, disputed

contract rights survive the expiration of the remainder of the agreement.

The facts of the Litton case are significantly different from the case before the Board. In this case, there were explicit agreements to extend the terms of the Contract for certain periods of time pending negotiation of a successor agreement. In addition, the instant grievance arose during the period which the Contract was extended. Thus, the Contract provision regarding the arbitration of grievances was enforceable and the Board concludes that the Litton case is inapplicable here.

The County also relies upon Gibraltar School District v. Gibraltar MESPA-Transportation, et al., 505 N.W.2d 214 (1993), where the Michigan Supreme Court held that the arbitration clause of the collective bargaining agreement does not survive the expiration of the agreement. The Court in that case found that the contract provisions were not automatically renewed because a new bargaining agent was certified. Hence, the Court found that there was no showing the parties intended the arbitration clause to survive beyond the expiration of the agreement.

In this case, the Board has found that the majority of public employers and the UPW intended that the Contract provisions apply during the negotiation of the successor agreement. Hence, the Board finds the Gibraltar case to be distinguishable on its facts.

Violations of §§ 89-13(a)(1) and (8), HRS

The Board previously held in Decision No. 194, United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984),

that the unlawful refusal to arbitrate grievances constitutes prohibited practices in violation of §§ 89-13(a)(1) and (8), HRS.

In that case, the employer contended that the grievances were null and void because the union failed to comply with the contractual time limits. The employer thus refused to arbitrate the grievances. The Board relied on its previous holding in Decision No. 79, State of Hawaii of Police Officers, 1 HPERB 715 (1977) (the SHOPO case), where the Board held that under applicable contractual provisions, the decision of arbitrability is for the arbitrator to make. The Board held in the SHOPO case that the employer could not unilaterally determine the arbitrability of the grievance. Thus, the failure to utilize the total grievance procedure was deemed a wilful violation of § 89-13(a)(8), HRS, and the Board ordered the dispute to be submitted to arbitration.

Similarly, in Decision No. 194, the Board found that the employer's treatment of the grievances as null and void evinced an intentional refusal to process them to arbitration. The wilfulness of the violation was presumed as it arose as a natural consequence of the employer's express refusal to arbitrate the grievances with no mitigating circumstances. The natural consequence of the action was to deprive the grievants of their right to have their grievances arbitrated. In addition, the Board in that case also found that the employer violated § 89-13(a)(1), HRS, by its refusal to arbitrate grievances. The Board stated at p. 517:

> While the right of an employee to pursue a grievance to arbitration through the collective bargaining agreement is not specifically provided in Chapter 89, HRS, Section 89-3, HRS, protects the employee's right to pursue "lawful, concerted activities

> for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." The employee's right to pursue and correct a grievance has been held to constitute lawful protected activity. Keokuk Gas Service, Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970).

The Board therefore found in Decision No. 194 that the employer's deliberate refusal to submit the grievances to arbitration interfered with and restrained the respective employees' rights to engage in the lawful, protected activity of pursuing their grievances thus violating rights implicitly guaranteed by Chapter 89, HRS.

The Board has also previously held that the employer's refusal to arbitrate a grievance concerning substantive arbitrability constituted a prohibited practice. State of Hawaii Organization of Police Officers and Patricia Sanderson, 3 HPERB 25 (1982).

As set forth above, the Board concludes that the contract extensions were valid and the Employer should have processed the Brown grievance in accordance with the applicable contractual provisions. In addition, the contract with the retroactive effective date of July 1, 1993 is also valid and binds the Employer to recognize grievances filed during the affected time period in which the instant grievance arose. The Board notes that the Unit 01 contract contains a similar provision as discussed in Decision No. 194 which provides that the arbitrator determines the question

of arbitrability.[3] The Board therefore finds based upon the County's admission that it refused to select an arbitrator for the instant grievance because the contract extensions were null and void, that the County committed prohibited practices in violation of §§ 89-13(a)(1) and (8), HRS.

Here, the Employer's deliberate refusal to submit the grievance to arbitration violated the contractual provision relating to arbitration and also interfered with and restrained the employee's right to engage in the lawful, protected activity of pursuing her grievance thus violating a right implicitly guaranteed by Chapter 89, HRS. The Board finds that the deprivation of statutory and contractual rights for the grievant occurred as a natural consequence of the County's actions and therefore, the County's actions were wilful in this case.

In accordance with the foregoing, the Board hereby concludes that the UPW is entitled to judgment as a matter of law and the Employer has committed prohibited practices by its refusal to arbitrate the subject grievance.

Finally, as Complainant failed to state a claim under § 89-13(a)(7), HRS, by failing to designate which provisions of

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[3]Section 15.26 of the Contract provides as follows:

> 15.26. If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

Chapter 89, HRS, were violated, the Board hereby dismisses such charge.

ORDER

The Board hereby orders the Employer to cease and desist from refusing to recognize the validity of the applicable Contract extensions. Affirmatively, the Board orders the parties to submit the subject dispute, in good faith, to arbitration.

The Employer shall, within thirty days of the receipt of the order, post copies of this order in conspicuous places on the bulletin boards at the worksites where Unit 01 employees of the County assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.

The Employer shall notify the Board within thirty (30) days of the receipt of this order of the steps taken by the Employer to comply herewith.

DATED: Honolulu, Hawaii, May 15, 1995.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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