STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and STEPHEN YAMASHIRO, Mayor, County of Hawaii, Respondent.	CASE NO. CE-01-227 ORDER NO. 1237 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On July 6, 1994, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against STEPHEN YAMASHIRO, Mayor, County of Hawaii (County or Employer) with the Hawaii Labor Relations Board (Board). UPW alleged that it filed a grievance challenging the work performance rating of Dayton Tioganco, a tree trimmer/heavy truck driver employed by the County of Hawaii Department of Parks and Recreation for the period 1/29/93 to 1/28/94. The County denied the grievance at Step I indicating that there was no Unit 01 collective bargaining agreement in effect with the County of Hawaii.

Thereafter, the Union indicated its intent to arbitrate the aforementioned grievance on June 16, 1994 and by letter dated June 20, 1994, counsel for UPW requested that Respondent select an arbitrator pursuant to the grievance procedure of the Unit 01 agreement. On June 28, 1994, Respondent, by its counsel, refused

to select an arbitrator and indicated that the County considered the Unit 01 collective bargaining agreement dated July 1, 1989 - June 30, 1993 (Contract) to be null and void. The County contended that it did not extend the Contract and since the grievances arose after the expiration of the Contract, the matter was not arbitrable.

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

On August 2, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that the County admitted in its answer that it has not consented to nor agreed to any extension of the Contract. Further, the County refused to process the Tioganco work performance rating grievance to arbitration because there is no valid extension agreement in effect. The UPW contends therefore that there are no genuine issues of material fact in dispute, 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 for the period July 1, 1989 to June 30, 1993 had been extended twice, most recently to January 15, 1994. Thus, UPW argues that the Respondent is estopped from contending that the Unit 01 contract has not been validly extended.

In addition, the UPW contended that in Order No. 1022, in Case No. CU-01-95, County of Hawaii, which is presently on appeal, the Board held that pursuant to § 89-6(b), HRS, any decision by the public employer group requires a simple majority of its members. Thus, UPW contended that the extension of the Contract is valid even if one County did not agree to the extension.

Based upon the foregoing cases, the UPW argued that the doctrines of res judicata and collateral estoppel preclude the relitigation of the validity of the Unit 01 contract extensions.

Further, the UPW relies upon previous Board decisions in Dennis Yamaguchi, 2 HPERB 656 (1981); State of Hawaii Organization of Police Officers, 3 HPERB 71 (1982); and Robert Burns, 3 HPERB 114 (1982) in arguing that the County's refusal to arbitrate the Tioganco grievance constitutes a prohibited practice because of the Employer's noncompliance with Section 15.22 of the Unit 01 Contract.[1]

On August 8, 1994, Respondent filed a cross-motion for summary judgment with the Board. Respondent agrees with the UPW that there are no genuine issues of material fact but contends that

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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.
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> 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.

the UPW failed to state a claim upon which relief can be granted. Respondent also contends that the UPW failed to bring the action within the appropriate limitations period, that any extension of the Unit 01 collective bargaining agreement is invalid and the refusal to arbitrate is permitted under the expired agreement.

On August 11, 1994, the Board conducted a hearing on the cross-motions for summary judgment which were consolidated for the purpose of hearing with Case No. CE-01-226. All parties had full opportunity to present evidence and argument to the Board. The Board took the motions under advisement. Based upon a review of the record, the Board makes the following findings and conclusions.

Complainant UPW is the exclusive representative, as defined in § 89-2, HRS, of the employees of the County of Hawaii who are included in Unit 01.

Respondent YAMASHIRO is the Mayor of the County of Hawaii and is the public employer, as defined in § 89-2, HRS, of the County employees who are included in Unit 01.

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. Complainant's (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 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. C's Ex. 6.

By letter dated April 7, 1994, Juliette Tulang, Deputy Director of Parks and Recreation, County of Hawaii transmitted an annual job performance report to Dayton Tioganco. C's Ex. 7. Tioganco's job performance rating was marked "less than satisfactory" in every category. Id. Tulang's letter also invited Tioganco to submit any rebuttal remarks which would be forwarded to the Civil Service Department and attached to the report. Id.

On May 2, 1994, the UPW filed a grievance alleging that the overall work performance rating imposed on Tioganco was not for just and proper cause. C's Ex. 8. By letter dated May 11, 1994, Parks Superintendent Glenn Sadayasu informed the UPW that he would not respond to the grievance because there was no Unit 01 agreement in effect with the County. C's Ex. 9. By letter dated May 23, 1994, Tulang indicated that she would not respond to the grievance

because that there was no collective bargaining agreement in effect with the County. C's Ex. 10. By letter dated May 27, 1994, the UPW, by Business Agent Roland Kadota, filed the grievance at Step 3. C's Ex. 11. Thereafter, by letter dated June 9, 1994, the Employer, by Michael R. Ben, Director of Civil Service, stated, inter alia, that there was no Unit 01 collective bargaining agreement in effect covering the County employees. C's Ex. 12. As such, there was no alleged violation of the Agreement nor any status for the UPW to raise the allegations. Id. Thus, Ben stated that he would not take any action on the UPW's letter of May 27, 1994. Id.

By letter dated June 16, 1994, UPW State Director Gary W. Rodrigues informed YAMASHIRO that the UPW was submitting the grievance to arbitration. C's Ex. 13. By letter dated June 20, 1994, counsel for UPW requested that the Employer select an arbitrator pursuant to § 15.22 of the collective bargaining agreement. C's Ex. 14.

On June 28, 1994, the County advised the UPW that the Unit 01 collective bargaining agreement had expired on June 30, 1993 and there was no agreement in effect. C's Ex. 1 attached to the Complaint. Thus, the County considered the Contract null and void and the matter was not arbitrable. Further, the County did not recognize the UPW's standing to raise a grievance under the collective bargaining agreement. Id.

The County's response states in pertinent part:

> . . . Your letter only refers to the [sic] "the relevant collective bargaining agreement." As I am currently aware, the new Unit 1 Agreement has not been adopted or

executed by all the parties, and therefore is not in effect. Moreover, the circumstances that give rise to the present allegations occurred when no agreement existed. If I am mistaken, please contact me to clarify this matter.

Based on my analysis, 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 grievances, and (3) that the above listed matters are arbitrable under the Unit 1 contract, and (4) that any of the alleged conduct violated the Agreement since no Agreement existed.

As you know, § 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.

The Agreement between the UPW and the County of Hawaii expired on June 30, 1993. The alleged incidents from which these grievances arose occurred after the expiration date of the Unit 1 contract. The County of Hawaii did not agree to an extension. **As a result, the above entitled matter is not arbitrable.**

Please be advised that an appropriate remedy may be sought by the affected employee through internal procedures adopted by the Department of Parks and Recreation. Please contact Mrs. Julie Tulang, Deputy Director to request a copy of these internal procedures, and any other information that may assist you.

This case raises identical legal issues to those raised and decided by the Board in Order No. 1190, in Case No. CE-01-210, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1225,

in Case No. CE-01-213, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1226, in Case No. CE-01-214, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1228, in Case No. CE-01-219, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1236, in Case No. CE-01-226, United Public Workers, AFSCME, Local 646, AFL-CIO. The Board in those cases decided that Hawaii County was bound by the agreements reached between the majority of the public employers and the UPW to extend the terms of the collective bargaining agreement pending negotiations for a successor agreement. The Board held that grievances arising during the terms of the Contract extensions were valid and the County's refusal to arbitrate the grievances constituted a prohibited practice as violative of §§ 89-13(a)(5) and (8), HRS. The Board further held that the agreement entered into between the public employers and the UPW with the retroactive effective date also bound the parties to recognize grievances arising during the affected term, i.e., July 1, 1993 - June 30, 1995. Thus, the Board held that the County should have proceeded to arbitration on the grievances filed by the UPW and the Board ordered the County to take the cases to arbitration.

In the foregoing cases, the County raised the identical legal issues which are being raised here and the Board found them to be without merit. In this case, the County refused to arbitrate the Tioganco grievance on the grounds that there was no collective bargaining agreement in effect. The subject grievance arose after the Contract extensions had expired, but was covered by the agreement which was effective from July 1, 1993 - June 30, 1995.

Based upon the holding in the foregoing cases, the Board concludes that the retroactive contract was valid and the County was obligated to comply with the applicable grievance procedure and arbitrate the subject grievance.

With respect to the Employer's contention that the grievance was not timely filed, the Board finds that the timeliness issue should be presented to the arbitrator and not unilaterally determined by the Employer. In Decision No. 79, State of Hawaii Organization of Police Officers, 1 HPERB 715 (1977), the Board held that under applicable contractual provisions, the decision of procedural arbitrability is for the arbitrator to make. The grievances in that case were appealed to the third step and were denied by the Civil Service Director for failure to make a timely filing. The Board held that the Employer could not unilaterally determine the arbitrability of the grievances and therefore found that the Employer committed a prohibited practice by violating § 89-13(a)(8), HRS.

In Decision No. 194, United Public Workers, 3 HPERB 507 (1984), the Board held 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 County also raises concerns as to whether the unsatisfactory job performance evaluation constitutes discipline under the relevant contract provisions. 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, 3 HPERB 25 (1982). Thus, similar to the procedural arbitrability issue discussed supra, the Board finds that such issue should be presented to the arbitrator for determination.

As set forth above, the Board concludes that the contract with the retroactive effective date of July 1, 1993 is 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.[2] 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 its grievance, thus violating a right implicitly guaranteed by Chapter 89, HRS. The Board finds that the deprivation of statutory and contractual rights 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

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[2]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.

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 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 (30) 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, October 19, 1995.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

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Sandra H. Ebesu

SANDRA H. EBESU, Board Member

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