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-01-228 ORDER NO. 1238 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On July 27, 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 County of Hawaii Department of Parks and Recreation's unilateral implementation of a procedure relating to time sheets without consultation or negotiation with the Union. UPW also alleged that the Director of Personnel responded that there was no Unit 01 agreement in effect covering the County of Hawaii employees and hence, no contract violations. Thereafter, the UPW indicated its intent to arbitrate the grievance and requested Respondent to select an arbitrator pursuant to the grievance procedure of the Unit 01 collective bargaining agreement. UPW further alleged that Respondent refused to select an arbitrator. Thus, UPW charges that

the Respondents violated §§ 89-13(a)(1), (7) and (8), Hawaii Revised Statutes (HRS).

On August 2, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that Respondent, by and through its counsel, indicated by letter dated June 28, 1994, that Respondent refused to process the grievance to arbitration because there is no valid extension agreement in effect. Thus, 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 Unit 01 collective bargaining agreement for the period July 1, 1989 to June 30, 1993 (Contract) 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 once a multi-employer unit has been formed for bargaining purposes, the multi-employer group becomes the "employer" for purposes of

bargaining and a public employer is not permitted to withdraw from the multi-employer unit for negotiations and act on its own. UPW thus contends 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 instant grievance constitutes a prohibited practice because of the Employer's noncompliance with Section 15.22 of the Unit 01 Contract.[1]

On September 20, 1994, Respondent filed a memorandum in opposition to Complainant's motion for summary judgment. Respondent argues that neither the Board nor the parties can retroactively legitimize a prior prohibited practice. Respondent also contends that the Complainant must establish that the parties intended to retroactively reinstate the grievance procedure and that the intent of the parties is a question of fact which

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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.

precludes summary adjudication. Respondent also argues that collateral estoppel and res judicata do not apply because Decision No. 327 and Order No. 1022, supra, are not final orders.

On October 12, 1994, Respondent filed a supplemental memorandum in opposition to Complainant's motion for summary judgment. Respondent contended that the extension of the Unit 01 collective bargaining agreement was invalid because it violated the State constitution with respect to home rule, the Hawaii County Charter because it was not approved by the County Council and the Mayor, the statutory mandate requiring the public sector collective bargaining agreements to expire in odd-numbered years, and exceeded the statutory guideline regarding the adopting of collective bargaining agreements by the multi-employer representatives. In addition, Respondent argued that the U. S. Supreme Court in Litton Financial Printing v. N.L.R.B., 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), ruled that the refusal to arbitrate is a contractual matter and cannot be imposed on a party.

The County contends that the Unit 01 Contract expired on June 30, 1993 and the County never agreed to extend the Contract. Thus, the County contends that the matter is not arbitrable due to the expiration of the Contract and the neglect and failure of the UPW's representatives to extend the grievance and arbitration provisions of the Contract.

On October 20, 1994, Respondent filed a second supplemental memorandum in opposition to the motion for summary judgment. The County contends that the extensions of the

collective bargaining agreement were invalid because it violated the public notice and open meeting requirements of Chapter 92, HRS.

On October 21, 1994, the Board conducted a hearing on the UPW's motion for summary judgment which was consolidated for the purpose of hearing with similar motions filed in Case Nos. CE-01-229, CE-01-230, CE-01-231, CE-01-232, CE-01-233 and CE-01-235. 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) Exhibit (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.[2]

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.

The UPW filed a class grievance, dated March 30, 1994, on behalf of Unit 01 employees challenging the County of Hawaii Department of Parks and Recreation's implementation of a new procedure which requires employees to complete their own time sheet and other time documents. C's Ex. 7. By letter dated April 14, 1994, the Union filed the grievance at Step 2 of the grievance procedure. C's Ex. 8. By letter dated April 27, 1994, the UPW filed the grievance at Step 3. C's Ex. 9. By letter dated May 26, 1994, Director of Personnel Michael R. Ben stated that since there was no Unit 01 collective bargaining agreement in effect covering

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[2]In an affidavit, Personnel Director Michael R. Ben alluded to a fourth extension of the Contract which may have been circulated to the employer representatives to review and sign. This extension, if executed, is not in the record before the Board.

the County employees, there was no violation of the Contract and the County did not recognize the UPW's status in representing the employees' concerns. Further, as Ben's review of the department's actions revealed no violations of laws or rules, Ben stated that no further action was necessary. C's Ex. 10. By letter dated July 8, 1994, the UPW notified Respondent of its intent to arbitrate the grievance. C's Ex. 11. By letter dated July 12, 1994, UPW's counsel requested Respondent to select an arbitrator. C's Ex. 12. By letter dated June 22, 1994, Respondent, by and through his attorney, refused to arbitrate the matter on the grounds that the circumstances giving rise to the allegations occurred when "no agreement existed." C's Ex. 1 attached to the complaint. The County further 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.
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> 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, (3) that the above listed matter is arbitrable under the Unit 1 contract, and (4) 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.

The Agreement between the UPW and the County of Hawaii expired on June 30, 1993. The alleged incidents from which this grievance 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; Order No. 1228, in Case No. CE-01-219, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1236, in Case No. CE-01-226, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1237, in Case No.

CE-01-227, 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 submit the cases to arbitration.

In the foregoing cases, the County raised the identical legal challenges regarding the alleged violations of the State Constitution, the Hawaii County Charter, the state statute regarding the uniformity in expiration dates and the case law. The Board in the foregoing cases found the arguments to be without merit. With respect to Respondent's contentions that the employers violated the Sunshine law by failing to hold an open meeting to vote on the extensions, the Board finds those arguments also to be without merit.

Section 92-2(1), HRS, defines "Board" within the meaning of Chapter 92, HRS, as:

> any agency, board, commission, authority, or commission of the State or its political

> subdivisions which is created by constitution, statute, rule or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

In this case, § 89-9(a), HRS, provides that the employer and the exclusive representative shall meet and negotiate in good faith. Since the law requires the employer and the exclusive representative to meet, the Board concludes that the employer bargaining group does not constitute a board or agency within the meaning of Chapter 92, HRS. Moreover, with respect to the effect of the failure to comply with the Chapter 92, HRS, open meeting requirements, the statute provides in § 92-11, HRS:

> Any final action taken in violation of sections 92-3 and 92-7 shall be voidable upon proof of wilful violation. A suit to void any final action shall be commenced within ninety days of the action.

Section 92-12, HRS, provides, in part, with respect to enforcement as follows:

> (a) The attorney general and the prosecuting attorney shall enforce this part.
> (b) The circuit courts of the State shall have jurisdiction to enforce provisions of this part by injunction or other appropriate remedy.
> (c) Any person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of this part or to determine the applicability of this part to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and costs to the prevailing party in a suit brought under this section.

Upon consideration of Respondent's arguments, the Board concludes that it is not the proper forum to determine whether the

action taken by the public employers is voidable as § 92-11, HRS, states that a suit should be filed within ninety days of the action taken. Thus, it appears that the proper forum to consider Respondent's arguments is the circuit court. Likewise, § 92-12, HRS, provides that any person may commence a suit in the circuit court to require compliance or to determine the applicability of the chapter to actions of the public body. In addition, § 92-13, HRS, provides that the penalty for a wilful violation of the relevant statutes is that the person shall be guilty of a misdemeanor and upon conviction, may be summarily removed from the board. These matters are clearly beyond the jurisdiction of this Board. Carried to its logical conclusion, Respondent would have this Board find that the public employers' action in extending the Contract is violative of the Sunshine law and wilful in order to void the extension. Thereafter, such finding would subject them to criminal proceedings and summary removal from their participation in multi-employer bargaining. The Board does not agree with Respondent's arguments and finds them to be without merit.

Under the facts of this case, the Union filed its grievance on March 30, 1994, during the period of the third extension of the Contract. The County refused to consider the grievance and further, refused to arbitrate the grievance on the grounds that there was no collective bargaining agreement in effect. In addition, the instant grievance arose during the period of the agreement which was retroactive to July 1, 1993. 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.

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.

As set forth above, the Board concludes that the Contract extensions are valid, as well as the contract with the retroactive effective date of July 1, 1993. The Board concludes that these contracts bind the County to recognize the grievances filed during the affected time period in which the instant grievance arose. The Board therefore, finds, based upon the County's refusal 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 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 and the contract with the retroactive effective date. 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 23, 1995.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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