

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. CE-01-229 |
| |) | |
| UNITED PUBLIC WORKERS, AFSCME, |) | ORDER NO. 1239 |
| LOCAL 646, AFL-CIO, |) | |
| |) | |
| Complainant, |) | ORDER DENYING RESPONDENTS' |
| |) | MOTION TO DISMISS COMPLAINT |
| and |) | AND GRANTING COMPLAINANT'S |
| |) | MOTION FOR PARTIAL SUMMARY |
| |) | JUDGMENT; NOTICE OF PREHEAR- |
| STEPHEN YAMASHIRO, Mayor, County |) | ING CONFERENCE AND HEARING ON |
| of Hawaii; MICHAEL BEN; DONNA |) | PROHIBITED PRACTICE COMPLAINT |
| FAY K. KIYOSAKI; and LAURENCE E. |) | |
| CAPELLAS, |) | |
| |) | |
| Respondents. |) | |
| |) | |

ORDER DENYING RESPONDENTS' MOTION TO DISMISS
COMPLAINT AND GRANTING COMPLAINANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; NOTICE OF PREHEARING
CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

On August 8, 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; MICHAEL BEN; DONNA FAY K. KIYOSAKI; and LAURENCE E. CAPELLAS (collectively County or Employer) with the Hawaii Labor Relations Board (Board). The UPW alleged that it filed grievances challenging the written reprimands of Adan Rodrigues and Raymond Mattos for refusing to perform overtime work. The UPW alleged that Respondent MICHAEL BEN indicated that the department rescinded the disciplinary actions. The UPW contends that Respondents thereafter refused to comply with the settlement of the grievance and repudiated the settlement. Thus, the UPW charges that Respondents

violated §§ 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On August 22, 1994, Respondents, by and through their counsel, filed a motion to dismiss complaint on the basis that the case is moot. Respondents contend that on August 4, 1994, the Complainant was notified that the written reprimands at issue had in fact been removed from the personnel files of the employees concerned. Respondents' (Rs') Exhibits (Exs.) 1 and 2 attached to Rs' Motion to Dismiss Complaint Filed on August 8, 1994 (Rs' Motion). The letters to the two employees are identical and state, in part:

This letter is to rescind your written reprimand dated February 24, 1994, regarding overtime refusal.

Please be advised that our action in this case should not be construed that the employee may refuse overtime; we maintain the right to assign and direct employees to work overtime as the need arises. At such times, your refusal to work overtime may be cause for discipline.

Respondents allege that Respondent BEN, by letter dated August 9, 1994, transmitted copies of the rescission notices to Complainant. Rs' Ex. 3 attached to Rs' Motion. Respondents contend that the case is moot since the relief requested has already been granted and this complaint should be dismissed.

On August 25, 1994, Complainant filed a Memorandum in Opposition to Motion to Dismiss Complaint with the Board (C's Memo). UPW alleges that on February 24, 1994, Adan Rodrigues and Albert Mattos were issued written reprimands for being "insubordinate". C's Exs. 2 and 11 attached to C's Memo. On

March 15, 1994, the UPW filed grievances on behalf of Rodrigues and Mattos challenging the written reprimands as being without just and proper cause. C's Exs. 3 and 12 attached to C's Memo. There was no response at the first step and the Union filed grievances at Step 2 on March 29, 1994. C's Exs. 4 and 13 attached to C's Memo.

By letter dated April 4, 1994, Respondent KIYOSAKI refused to consider the grievance and advised the Union that "there is no bargaining unit agreement." C's Exs. 5 and 14 attached to C's Memo. The Union filed a third step appeal to Respondent YAMASHIRO on April 13, 1994. C's Exs. 6 and 15 attached to C's Memo. By letter dated April 18, 1994, the Union also requested information relevant and necessary to the underlying grievance. C's Exs. 7 and 16 attached to C's Memo. By letter dated April 21, 1994, Respondent KIYOSAKI refused to comply with the request, again referring to the absence of a bargaining unit agreement. C's Exs. 8 and 17 attached to C's Memo.

By letter dated May 13, 1994, Respondent BEN responded to the third step appeal stating, inter alia, that there were no contract violations because there was no bargaining unit agreement in effect. BEN also stated that he understood that the department had rescinded the disciplinary actions. C's Exs. 9 and 18 attached to C's Memo. However, Respondent KIYOSAKI denied that any rescission had occurred at a meeting held on June 16, 1994. C's Ex. 20 attached to C's Memo. By letter dated June 16, 1994, UPW requested "written notification to the grievants of the rescission and removal of the written reprimand from their personnel file." C's Ex. 21 attached to C's Memo. Thereafter, by letter dated

August 4, 1994, Rodrigues and Mattos received letters indicating that the written reprimands were rescinded. Rs' Exs. 1 and 2.

The Union contends that the letters from Respondent KIYOSAKI dated August 4, 1994, rescinding the written reprimands contain a form of disciplinary warning which will remain in the personnel files of the employees. UPW contends that KIYOSAKI's letter threatens future discipline for refusing overtime, similar to the first written reprimand. Thus, the UPW contends that the County has not completely rescinded the written reprimands and further, the dispute is not moot because Respondents have also refused to comply with the Union's request for information.

On September 13, 1994, the County filed a reply memorandum in support of its motion to dismiss. The County contends, inter alia, that Complainant argues that the August 4, 1994 is a form of discipline and, as such, the Union should have grieved the matter with the Employer rather than filing the instant prohibited practice complaint. The County contends that the Union's failure to file a separate grievance on the rescission letters within the contractual time limits precludes the Board from considering the matter.

The Board conducted a hearing on Respondents' motion on October 21, 1994. The hearing was consolidated with the hearings on motions for summary judgment filed in Case Nos. CE-01-228, 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.

At the hearing, UPW's counsel acknowledged that he failed to file a motion for summary judgment in the instant case. The UPW argued, however, that the undisputed facts in each case under consideration before the Board established that the public employers and the UPW were parties to a collective bargaining agreement for Unit 01 employees which was effective from July 1, 1989 - June 30, 1993 (Contract). Thereafter, the Contract was extended by a majority of public employers, except YAMASHIRO, and the Union. Thereafter, the public employers unanimously entered into a collective bargaining agreement which provided that the terms of the Contract were applicable, if not modified by the Memorandum of Agreement, which was retroactive to July 1, 1993 and effective until June 30, 1995. Thus, Complainant argued that Respondents' refusal to consider the instant grievances because there was no collective bargaining agreement in effect constituted a violation of the agreement and § 89-13(a)(1), HRS.

At the hearing, Respondents' counsel stipulated that the UPW's arguments on its motions for summary judgment filed in the other cases could be considered in the instant case. Transcript of the hearing held on October 21, 1994 (Tr.) p. 8. The Board therefore takes notice of the motions for summary judgment filed by the UPW in the various cases and also Respondents' responsive memoranda filed with respect thereto. In addition, at the hearing Respondents' counsel objected to the amendment of the instant Complaint to add any additional charges. Tr. p. 23.

With respect to the Complainant's motions for summary judgment filed in the several cases, Complainant contends that the

County refused to process the instant grievances on the basis that there was no valid extension agreement in effect. The UPW contends therefore that there are no genuine issues of material fact in dispute, and it 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 contended that the doctrines of res judicata and collateral estoppel preclude the relitigation of the validity of the Unit 01 contract extensions.

Further, the UPW relied upon previous Board decisions in Dennis Yamaquchi, 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 § 15.22 of the Unit 01 Contract.¹

In response to these arguments, the County argued that neither the Board nor the parties can retroactively legitimize a prior prohibited practice. The County also contended 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 precludes summary adjudication. Respondents argued that collateral estoppel and res judicata do not apply because Decision No. 327 and Order No. 1022, supra, are not final orders.

Respondents further contended that the extension of the Unit 01 collective bargaining agreement was invalid because it violated the State constitution with respect to home rule; violated

¹Section 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.

the Hawaii County Charter because it was not approved by the County Council and the Mayor; violated 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, Respondents 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.

The County further 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.

Based upon a review of the record, the Board makes the following findings and conclusions with respect to the instant motions.

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.

Respondent BEN is the Director of Personnel, County of Hawaii and represents the interests of the public employer of Hawaii County employees. As such, BEN is a public employer as defined in § 89-2, HRS.

Respondent DONNA FAY K. KIYOSAKI is the Chief Engineer and the head of the Department of Public Works, County of Hawaii. As such, KIYOSAKI represents the interests of the public employer with respect to departmental employees and is a public employer as defined in § 89-2, HRS.

Respondent LAURENCE E. CAPELLAS is the Acting Division Chief in the Department of Public Works and represents the interests of the public employer with respect to departmental employees. As such, CAPELLAS is a public employer as defined in § 89-2, HRS.

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. 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. Thereafter, the same parties executed another Memorandum of Agreement, dated August 27, 1993, extending the Contract from September 1, 1993 through January 15, 1994. 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.

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.

UPW filed grievances, dated March 15, 1994, challenging the written reprimands issued to Adan Rodrigues and Raymond Mattos. Having received no response to the grievances, the Union filed grievances at Step 2 on March 29, 1994.

By letter dated April 4, 1994, Respondent KIYOSAKI refused to consider the grievances because there was no bargaining unit agreement. The Union filed a third step appeal to Respondent YAMASHIRO on April 13, 1994. By letter dated April 18, 1994, the Union also requested information relevant and necessary to the underlying grievance. By letter dated April 21, 1994, Respondent KIYOSAKI refused to comply with the request, again referring to the absence of a bargaining unit agreement. By letter dated May 13, 1994, Respondent BEN responded to the third step appeal, stating that there were no violations of the contract as alleged because

there was no Unit 01 collective bargaining agreement in effect covering employees. In addition, BEN stated that he understood that the department had rescinded the disciplinary actions. Respondent KIYOSAKI, however, thereafter denied that any rescission of the written reprimands occurred at a meeting held on June 16, 1994. By letter dated June 16, 1994, UPW requested "written notification to the grievants of the rescission and removal of the written reprimand from their personnel file." Thereafter, by letter dated August 4, 1994, Rodrigues and Mattos received letters indicating that the written reprimands were rescinded.

With respect to Respondents' motion to dismiss, the UPW argues that the Employer's rescission of the reprimands does not render the case moot. The Union contends that the letters rescinding the written reprimands in this case constitute additional disciplinary actions. In addition, the UPW contends that the Employer failed to respond to several information requests. The Board, however, notes that there is no claim based upon the failure to respond to information requests in the Complaint. Hence, without a proper amendment to the Complaint, the Board will not consider these claims.

According to the complaint, the UPW contends that the County has repudiated a settlement agreement in violation of §§ 89-13(a)(1), (5), (7), and (8), HRS. As this claim has not been litigated, the Board hereby denies Respondents' motion to dismiss the complaint. While both parties agree that there was some type of settlement agreement to rescind the written reprimands in this case, the parties disagree as to whether the agreement was complied

with. The Board finds that there is insufficient evidence in the record to establish the terms of the settlement agreement between the parties. Thus, the Board is unable to determine at this stage whether the Respondents complied with such agreement. This matter will be set for hearing, infra.

With respect to Complainant's motion for summary judgment, the Board finds that this case raises identical legal issues to those raised and decided by the Board in Case No. CE-01-210, United Public Workers, AFSCME, Local 646, AFL-CIO; Case No. CE-01-213, United Public Workers, AFSCME, Local 646, AFL-CIO; Case No. CE-01-214, United Public Workers, AFSCME, Local 646, AFL-CIO; Case No. CE-01-219, United Public Workers, AFSCME, Local 646, AFL-CIO; Case No. CE-01-226, United Public Workers, AFSCME, Local 646, AFL-CIO; Case No. CE-01-227, United Public Workers, AFSCME, Local 646, AFL-CIO and Case No. CE-01-228, 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 Respondents' contention that the employers violated the Sunshine law by failing to hold an open meeting to vote on the extensions, the Board found in Order No. 1238, in Case No. CE-01-228, supra, that the Board is not the proper forum to enforce the provisions of the Sunshine law.

Under the facts of this case, the Union filed the instant grievances on March 14, 1994, during the period of the third extension of the Contract. The County refused to consider whether the grievances raised violations of the Contract because it again refused to acknowledge the existence of the Contract. In addition, the instant grievances 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 extensions as well as the retroactive contract were valid and the County was obligated to comply with the applicable grievance procedure and consider whether there was a violation of the Contract. While this case differs from the previous cases in that this case does not involve a refusal to arbitrate a grievance, the Board finds that the County's refusal to consider the grievances on the merits

constitutes a violation of § 15 of the Contract and § 89-13(a)(1), 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.

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 agreements bind the County to recognize the grievances filed during the affected time period in which the instant grievances arose. The Board, therefore, finds that the County's refusal to consider the grievances on their merits constitutes prohibited practices in violation of §§ 89-13(a)(1) and (8), HRS.

The Employer's deliberate refusal to consider the grievances violated the contractual provision relating to the grievance procedure and also interfered with and restrained the employees' right to engage in the lawful, protected activity of pursuing their grievances thus violating a right 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. Thus, the UPW is entitled to partial summary judgment on this issue.

The record establishes that while the County refused to recognize the validity of the grievance procedure, the parties nevertheless attempted to settle this matter. Thus, with respect to the foregoing finding of a prohibited practice, the Board finds that a cease and desist order is an appropriate remedy.

ORDER

The Board hereby denies Respondents' motion to dismiss.

The Board hereby grants Complainant's motion for partial summary judgment and orders the Employer to cease and desist from

refusing to recognize the validity of the applicable Contract extensions and the Unit 01 contract with the retroactive effective date. Grievances filed by the UPW during the applicable time frame should be considered on their merits.

YOU ARE HEREBY NOTIFIED that the Board, pursuant to § 89-5(b)(4), HRS and Administrative Rules § 12-42-47, will conduct a prehearing conference by conference call on the above-entitled prohibited practice complaint on November 9, 1995 at 9:00 a.m. The parties' representatives will be contacted at their respective telephone numbers on file with the Board. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties or their representatives shall file a Prehearing Statement with proof of service upon opposing parties which addresses the foregoing matters with the Board two days prior to the prehearing conference.


YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to §§ 89-5(b)(4) and 89-14, HRS and Administrative Rules §§ 12-42-49 and 12-42-8(g) on the instant complaint on November 17, 1995 at 9:00 a.m. in the Board's hearings room, Room 203, 550 Halekauwila Street, Honolulu, Hawaii 96813. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant, i.e., whether the Respondents repudiated the agreement to settle the instant grievances. The hearing may

continue from day to day until completed. The parties shall submit four copies of any exhibits identified and introduced into the record to the Board. Additional copies for opposing counsel shall also be provided.

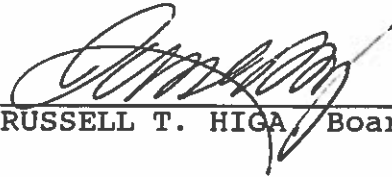
All parties have the right to appear in person and to be represented by counsel or other representative.

DATED: Honolulu, Hawaii, October 26, 1995.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

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