

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-01-230
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	ORDER NO. 1242
LOCAL 646, AFL-CIO,	)	
	)	ORDER GRANTING UPW'S MOTION
Complainant,	)	FOR SUMMARY JUDGMENT
	)	
and	)	
	)	
STEPHEN YAMASHIRO, Mayor, County	)	
of Hawaii,	)	
	)	
Respondent.	)	

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ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On August 11, 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). The UPW alleged that it filed a class grievance challenging the County of Hawaii Department of Public Works' implementation of a late shift and the assignment of two Equipment Operator III's to the new late shift. The UPW further 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. The 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 25, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that Respondent, in its answer filed on August 22, 1994, indicated that the Unit 01 agreement expired on June 30, 1993 and the County has not agreed to any extension of the agreement. Thus, Respondent indicated that the agreement does not apply to the present case. Based upon the Respondent's representations in its answer, the UPW contends 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 Order No. 1090, in Case No. CE-01-204, United Public Workers, AFSCME, Local 646, AFL-CIO, which is presently pending before the Board, that pursuant to § 89-6(b), HRS, a simple majority of the public employers or their designated representatives may bind the entire employer group for the purposes of negotiations. In that case the Board held that the extensions of the Unit 01 agreement, effective from July 1, 1989 - June 30, 1995 (Contract), entered into by a majority of public employers was valid. Thus, UPW contended that since the same parties and issues are involved in this case, Respondent is estopped from contending that the Unit 01 Contract has not been validly extended.

Based upon the foregoing, 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 § 15.22 of the Unit 01 Contract.<sup>1</sup>

On September 20, 1994, Respondent filed a memorandum in opposition to Complainant's motion for summary judgment. Respondent contends that the Board does not have jurisdiction over this complaint because the underlying grievance was untimely. In addition, Respondent contends 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

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<sup>1</sup>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.

which 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 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-01-228, CE-01-229, 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.<sup>2</sup>

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, set forth in § 15 of the Contract. C's Ex. 6.

On May 15, 1994, the Department of Public Works, Solid Waste Division, County of Hawaii assigned two Equipment Operator III's to the new late shift. On or about June 3, 1994, the UPW filed a class action grievance at Step 1 in behalf of the affected employees under Unit 01 contract. C's Ex. 7. As there was no response at Step 1, the Union filed the grievance at Step 2, by letter dated June 15, 1994. C's Ex. 8. By letter dated June 29, 1994, Chief Engineer Donna Fay Kiyosaki denied the grievance stating that there was no bargaining unit agreement and therefore no violations of such agreement. C's Ex. 9. By letter dated

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<sup>2</sup>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.

June 24, 1994, the Union filed the grievance at Step 3. C's Ex. 10. By letter dated July 7, 1994, Director of Personnel Michael R. Ben stated that since there was no Unit 01 collective bargaining agreement in effect covering the County employees, there was no violation of the Contract. Ben also stated that the December 4, 1992 Settlement Agreement was also not in effect. Moreover, 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. 11. By letter dated July 26, 1994, the UPW notified Respondent of its intent to arbitrate the grievance. C's Ex. 12. According to the UPW, the UPW never received a response to its request to arbitrate.

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; in Order No. 1237, in Case No. CE-01-227, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1238, in Case No. CE-01-228, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1239, in Case No. CE-01-229, 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.

Under the facts of this case, the Union filed its grievance on or about June 3, 1994, during the period of the retroactive contract. The County failed to respond to the UPW's request for arbitration but previously indicated in the grievance procedure that the County did not recognize the validity of the Contract. 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 issue of timeliness, the County contends that the subject grievance, dated June 3, 1994, arises from an incident which occurred on or about May 15, 1994. The County also contends that the grievance was submitted to the Employer on June 7, 1994, outside the contractual time limits. The

County cites to the grievance language of the Unit 01 contract and contends that under §§ 15.07<sup>3</sup> and 15.11<sup>4</sup> of the Contract, the Employer need not consider grievances which are not filed within the contractual time limits, i.e., fourteen (14) days of the alleged violation.

However, in Order No. 1236, in Case No. CE-01-226, supra, the Board held that the County's refusal to arbitrate the grievance on the grounds that the grievance was untimely was improper as the Contract provides that the Arbitrator should determine whether the matter is arbitrable under the Contract. The Board relied on Decision No. 79, State of Hawaii Organization of Police Officers, 1 HPERB 715 (1977), where the Board held that under applicable contractual provisions, the decision of procedural arbitrability was for the Arbitrator to make. The Board held that the Employer's unilateral refusal to submit the matter to arbitration on the basis that the grievances were untimely was a prohibited practice in

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<sup>3</sup>Section 15.07 of the Contract provides, in part:

The specific time limits and procedures as hereinafter provided shall be followed in processing all grievances. Any grievance not filed in accordance with such procedure or within the time limits specified within each step need not be considered by the Employer.

<sup>4</sup>Section 15.11 of the Contract provides, in part:

The grievance shall be presented to the division head or his designee in writing within fourteen (14) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within fourteen (14) working days after the alleged violation first became known or should have become known to the employee involved; . . . .



violation of § 89-13(a)(8), HRS. Thus, again in this case, the Board finds that the Employer's refusal to submit the matter to arbitration based upon the alleged untimely filing of the grievance constitutes a prohibited practice in violation of § 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.

As set forth above, the Board concludes that the contract with the retroactive effective date of July 1, 1993 was valid. 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 respond to the UPW's request to arbitrate because there was no valid contract in effect, 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 Unit 01 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 this order, post copies of the 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.

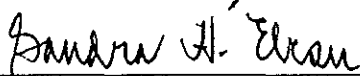
The Employer shall notify the Board within thirty (30) days of the receipt of this order of the steps taken by the Employer to comply herewith.

DATED: Honolulu, Hawaii, October 26, 1995.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
SANDRA H. EBESU, Board Member

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. STEPHEN  
YAMASHIRO; CASE NO. CE-01-230  
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Copies sent to:

Herbert R. Takahashi, Esq.  
Ted H.S. Hong, Assistant Corporation Counsel  
Joyce Najita, IRC