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 and DONNA FAY KIYOSAKI, Chief Engineer, Department of Public Works, County of Hawaii, Respondents.	CASE NO. CE-01-235 ORDER NO. 1246 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On September 21, 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 and DONNA FAY KIYOSAKI, Chief Engineer, Department of Public Works, County of Hawaii (County or Employer) with the Hawaii Labor Relations Board (Board). The UPW alleged that it filed a grievance on June 23, 1994 on behalf of Jeffrey Tomas regarding his two-day suspension without pay by the County of Hawaii's Department of Public Works. Thereafter, Respondent DONNA FAY KIYOSAKI indicated that since there was no binding bargaining unit agreement there could be no violation of the agreement.

The UPW alleged that the Director of Personnel also indicated that there was no Unit 01 contract in effect covering the County of Hawaii employees at the time the matter first arose

hence, no contract violation occurred. Thereafter, the UPW indicated its intent to arbitrate the grievance. Thus, the UPW contends that the Respondents wilfully violated §§ 89-13(a)(1), (7) and (8), Hawaii Revised Statutes (HRS).

On October 10, 1994, Complainant UPW filed a motion for summary judgment with the Board. The UPW contended that Respondents, in their answer filed on September 30, 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, Respondents indicated that the agreement does not apply to the present case. Based upon the Respondents' representations in their 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, Respondents are estopped from contending that the Unit 01 Contract has not been validly extended.

Based upon the foregoing case, 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.[1]

On October 14, 1994 Respondents filed a memorandum in opposition to Complainant's motion for summary judgment. Respondents contend that neither the Board nor the parties can retroactively legitimize a prior prohibited practice. Respondents also contend that the Complainant must establish that the parties

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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.

intended to retroactively reinstate the grievance procedure and that the intent of the parties is a question of fact which precludes summary adjudication. Respondents also argue that collateral estoppel and res judicata do not apply because Order No. 1090, supra, is not a final order.

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-01-230, CE-01-231, CE-01-232 and CE-01-233. 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.

Respondent KIYOSAKI is the Chief Engineer of the Department of Public Works, County of Hawaii and represents the public employer's interests with respect to departmental employees. As such, KIYOSAKI 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. 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.

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 June 2, 1994, Acting Division Chief Laurence E. Capellas notified Jeffery Tomas that he would be suspended for two days because of an altercation with his temporarily assigned supervisor. C's Ex. 7. By letter dated June 23, 1994, the UPW filed a grievance at Step 2. C's Ex. 8. By letter dated June 30, 1994, Chief Engineer KIYOSAKI responded that

since there was no bargaining unit agreement, there were no violations of the agreement. C's Ex. 9. KIYOSAKI indicated however, that attempts were made to arrange for a meeting but the UPW business agent was unavailable. Id. By letter dated July 7, 1994, the UPW filed the grievance at Step 3. C's Ex. 10. By letter dated August 3, 1994, Personnel Director 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 nor any recognizable status for the UPW to raise such allegations. C's Ex. 11. Further, as his review of the department's actions revealed no violations of law or rules, Ben stated that no further action was necessary. Id. By letter dated August 18, 1994, the UPW informed the County that the UPW was submitting the instant grievance to arbitration. C's Ex. 12. By letter dated August 18, 1994, counsel for UPW requested Respondent YAMASHIRO to select an arbitrator within ten days as required by § 15.22 of the Contract. C's Ex. 13. Respondents have not responded to the Union's request to select an arbitrator.

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; 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; Order No. 1239, in Case No. CE-01-229, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1242, in Case No. CE-01-230, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1243, in Case No. CE-01-231, United Public Workers, AFSCME, Local 646, AFL-CIO; Order No. 1244, in Case No. CE-01-232, United Public Workers, AFSCME, Local 646, AFL-CIO; and Order No. 1245, in Case No. CE-01-233, 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 23, 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.

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, November 1, 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

Copies sent to:

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