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, et al., Respondents.	CASE NO. CE-01-260 ORDER NO. 1277 ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii, et al., Respondents.	CASE NO. CE-10-273
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii, et al., Respondents.	CASE NO. CE-01-274

ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF

On December 7, 1995, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union), filed a motion for interlocutory relief in these consolidated cases with the Hawaii Labor Relations Board (Board). The UPW contends that Respondents unilaterally implemented alcohol and drug testing of Units 01 and 10 employees represented by the UPW prior to reaching impasse in ongoing multi-employer negotiations over various mandatory subjects of bargaining. The UPW moved the Board to enjoin Respondents from (1) suspending, discharging or otherwise disciplining bargaining units 01 and 10 employees due to a positive alcohol or drug test or other violation of U.S. Department of Transportation (DOT) rules (except to remove employees from safety sensitive functions) and (2) refusing to fully compensate or pay bargaining units 01 and 10 employees wages and compensation because of violations of Respondents' alcohol and drug policies.

The Board conducted a hearing on Complainant's motion for interlocutory relief at the close of the proceedings on December 28, 1995. Counsel for UPW moved the Board for an order prohibiting the Respondents from disciplining or denying compensation from employees based on positive drug test results, except for removal from safety sensitive functions. At the hearing, the UPW amended its motion to exclude post-accident drug or alcohol testing from the scope of the Board's order. All parties were represented and had full opportunity to present evidence and argument to the Board. After reviewing the record and

the arguments presented, the Board hereby grants Complainant's motion.

Complainant UPW is the exclusive representative of employees in Units 01 and 10, as defined in § 89-6, Hawaii Revised Statutes (HRS).

Respondent BENJAMIN CAYETANO is the Governor of the State of Hawaii and thus, is the public employer as defined in § 89-2, HRS, of employees of the State of Hawaii who are included in Units 01 and 10.

Respondent JAMES TAKUSHI (TAKUSHI) is the Director of the Department of Human Resources Development, State of Hawaii, and represents the Governor of the State of Hawaii and as such is a public employer as defined in § 89-2, HRS.

Respondent LINDA CROCKETT-LINGLE is the Mayor of the County of Maui and thus, is the public employer as defined in § 89-2, HRS, of employees of the County of Maui who are included in Units 01 and 10.

Respondent RAYMOND KOKUBUN is the Director of the Department of Personnel Services, County of Maui and represents the public employer and as such is a public employer as defined in § 89-2, HRS.

Respondent STEVEN YAMASHIRO is the Mayor of the County of Hawaii and thus, is the public employer as defined in § 89-2, HRS, of employees of the County of Hawaii who are included in Units 01 and 10.

Respondent MICHAEL R. BEN (BEN) is the Director of the Department of Personnel Services, County of Hawaii and represents

the public employer and as such is a public employer as defined in § 89-2, HRS.

The UPW and the public employers are parties to collective bargaining agreements, effective July 1, 1993 to June 30, 1995, respectively. The agreements were extended through January 31, 1996 pursuant to Memoranda of Agreement, dated June 29, 1995, respectively.

In 1991, Congress enacted the Omnibus Transportation Employee Testing Act. Thereafter, the DOT promulgated Alcohol and Drug Testing rules which provide, inter alia, for the testing of employees who operate commercial motor vehicles and perform safety sensitive functions. The rules provide that each year at least twenty five percent (25%) of the commercial licensed motor vehicle drivers must be randomly tested for alcohol misuse and fifty percent (50%) of the drivers must be tested for drug use.

On January 6, 1995, the UPW submitted a written demand for negotiations on the impact of the implementation of the DOT rules pertaining to drug and alcohol testing of employees occupying safety sensitive positions. The public employers designated Robin Chun Carmichael, Chief, Labor Relations Division, Department of Civil Service, City and County of Honolulu as their spokesperson on or about January 27, 1995 and the parties began bargaining on January 30, 1995, in a multi-employer setting. The parties agreed that they would seek to negotiate a uniform policy with all jurisdictions on alcohol and drug testing mandated by the DOT rules. Bargaining sessions were held on June 13, 1995, July 3, 1995, October 3, 1995 and November 7, 1995.

The public employers submitted their initial written bargaining proposal on July 3, 1995. On August 8, 1995, the UPW submitted a counter-proposal. At the bargaining session on October 3, 1995, Robin Chun Carmichael ceased being the spokesperson for the public employers and on November 7, 1995, Manabu Kimura, Chief Negotiator, State Office of Collective Bargaining submitted a new proposal from the employers. There is no dispute that no impasse has been reached in the bargaining over the instant subject matter.

With respect to Hawaii County, on June 21, 1995, BEN announced that the County would implement its own policies effective July 15, 1995. On June 30, 1995, the UPW objected to Hawaii County's actions and requested the County to cease and desist from taking unilateral action. The policy provides a schedule of discipline resulting from positive test results for drug and alcohol testing. On October 25, 1995, Hawaii County suspended Adolph Bartels who tested positive after he was required to undergo drug testing in connection with an application for promotion.

On September 14, 1995, Maui County implemented its own interim policies regarding alcohol and drug testing. These policies were neither transmitted by County officials to the Union nor negotiated prior to implementation. Maui County's policy also provides a schedule of disciplinary suspensions and discharges for any infraction. However, in the hearing before the Board, counsel for Maui County represented that Maui County would not discipline any employee for testing positive on drug or alcohol tests until

the matter was negotiated or the parties reached an impasse in negotiations.

On October 1, 1995, the State of Hawaii implemented the State's policies relating to the drug testing. TAKUSHI admitted that the policies were not negotiated with the UPW prior to implementation. According to the State's policy, disciplinary actions will be invoked for any violations of the prohibitions contained in the Omnibus Transportation Employee Testing Act, State Drug and Alcohol Program and Policy and other federal and state laws pertaining to commercial motor vehicle drivers' drug use or alcohol misuse. Any discipline would be in accordance with applicable collective bargaining agreements, personnel rules and regulations and the federal statute and rules.

The Board has relied upon the analysis provided by the Hawaii Intermediate Appellate Court in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272 (1981), in considering whether interlocutory relief is appropriate. The three requirements for granting interlocutory injunctive relief are: 1) Is the party seeking relief likely to prevail on the merits? 2) Does the balance of irreparable damage favor issuance of injunctive relief? 3) Does the public interest support the granting of injunctive relief? The Court also noted that:

> The more the balance of irreparable damage favors the issuance of the injunction, the less the party seeking the injunction has to show likelihood of success on the merits. [Citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits the less he has to show that the balance of

> irreparable harm favors the issuance of the injunction.

Id. at 276.

Based on the Penn analysis, then, where the movant shows a great probability of succeeding on the merits, the less the movant has to show that the balance of irreparable harm favors the issuance of the injunction.

The record here clearly establishes that the public employers and the UPW were engaged in multi-employer bargaining over the implementation of the policies governing drug and alcohol testing. Thereafter, without reaching an impasse in negotiations, various public employers unilaterally implemented their own policies governing the testing. The DOT rules require that certain percentages of employees holding a commercial driver's license be tested for alcohol and drug use by the end of 1995. The UPW does not object to the implementation of the drug and alcohol testing as such testing is mandated in the federal regulations. However, the federal regulations only provide for an employee's removal from the safety sensitive function if the test result is positive. Therefore, upon examination, the Board finds that the policies implemented by Hawaii County, Maui County and the State exceed the federal rules requirement in that they address disciplinary penalties to be imposed in the event of a positive test result. These matters affect discipline, terms of employment and working conditions which are mandatory subjects of bargaining.

The Board has held in previous cases that compliance with federal statutes was not negotiable but that there was a distinction between negotiation over compliance and negotiation

over the implementation of the statutes. Hawaii Fire Fighters Association, 4 HLRB 164 (1987). The Board found that the duty to bargain applies where the employer has discretion under the federal law or regulations implementing the law. Id. The Board also held that where such discretion or latitude is reasonably apparent, the duty to bargain over issues of wages, hours, and working conditions affected in the process of implementation of federal mandates applies. Id. Thus, the Board has held that the only topics upon which bargaining was not required regarding implementation of the federal statutes were matters of mandatory or essential compliance.

The Board has also held that an employer did not refuse to bargain over the implementation of a federal statute since its promulgated policy merely implemented the essential terms of the statute. University of Hawaii Professional Assembly, 4 HLRB 689 (1990). The Board noted, however, that the implementation of the apparatus required for the execution of the mandates of the action may give rise to the duty to bargain.

Thus, it is clear from previous Board cases that where a federal statute requires compliance, the employer's promulgation of the essential terms of the federal statute and regulations promulgated thereunder does not give rise to a duty to bargain. However, where there is discretion in the implementation of the federal law, the Board recognizes that the duty to bargain may apply.

The Hawaii Supreme Court recently considered the appeal of the foregoing Board decision and recognized in University of Hawaii Professional Assembly v. Tomasu, 79 Haw. 154, 900 P.2d 161

(1995), that the employer had the discretion to choose the alternative means of compliance with the employee sanction requirements of the Act. The Court thus held that the duty to bargain applied to the employer's implementation of the federal statute's sanction provisions.

Based upon the foregoing cases and the evidence in the record before the Board, the Board finds there is a strong likelihood that the UPW will prevail on the merits of its complaint. The DOT rules require that when an employee tests positive for drugs or alcohol, the employee must be removed or prohibited from performing the safety-sensitive function. The rules do not set forth any other sanctions to be imposed against the employee. The Board finds that the employers' policies which provide that disciplinary action will be taken for positive test results and set forth schedules of disciplinary penalties exceed the federal mandate and affect terms of employment and conditions of work. The record also shows that there are proposals on the table involving whether there would be a loss of compensation to the affected employee who is removed from the safety sensitive function. The evidence shows that Respondents unilaterally implemented these policies while the parties were still negotiating over them. These matters should have been negotiated prior to implementation. Based upon the record before the Board, the Board finds that the evidence strongly supports a Board finding that the Respondents' unilateral implementation of the policies containing matters which are negotiable constitutes a refusal to bargain and a prohibited practice in violation of § 89-13(a)(5), HRS.

With respect to the showing of irreparable harm, the Board notes that the loss of pay by an employee is compensable. However, the Union contends in this case that there would be irreparable harm to the ongoing negotiations process if the employers were permitted to discipline and sanction employees pursuant to the unilaterally implemented policies. The UPW argues that the employers are undercutting the ground rules of negotiations and the integrity of the bargaining process by implementing their policies while the parties are at the table attempting to negotiate the matter in good faith. The Union also contends that on balance there would be no harm to the employer group since one employer, the County of Maui, agrees that the law requires the employer to negotiate discipline and prohibits the employer from causing a loss of compensation pending negotiations to a point of impasse. Moreover, the evidence in the record suggests that the Respondents are in compliance with the federal requirements so as not to expose them to liability for civil or criminal violation under the federal law.

Upon the facts presented, the Board agrees with the Union that the Respondents have not convincingly established that the balance of irreparable harm tips in their favor. Given the position of the County of Maui which has agreed not to discipline employees pursuant to its policy until the matter is negotiated, the Board finds that the other Respondents will not be irreparably harmed by the issuance of this order.

Further, the Board agrees with the Union that there is irreparable harm to the integrity of the negotiating process where

one party unilaterally implements its policies while the subject matters are being negotiated. Moreover, as the Board has found that the UPW has shown a strong likelihood of prevailing on the merits of its complaint, the Board also finds, under the Penn analysis, that the Union has a lesser burden of establishing that the balance of irreparable harm favors the issuance of the interlocutory order.

With regard to the public interest, the Board finds, in keeping with the congressional intent, that the safety of the driving public is paramount. By its legislation, Congress attempted to ensure that holders of commercial driver's licenses are free from drugs and alcohol by requiring testing and the removal of the employee from the safety sensitive position if the test result is positive. This objective will not be affected by the Board's order.

However, the Board finds that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government, is furthered by the issuance of the subject order. Additionally, another policy underlying Chapter 89, HRS, is the uniformity of employment practices for public employees across jurisdictional lines. Therefore, Chapter 89, HRS, creates multi-employer bargaining and statewide bargaining units. The record in this case clearly establishes that the parties are engaged in multi-employer bargaining and are attempting to negotiate a statewide policy regarding drug and alcohol testing pursuant to the DOT rules. The issuance of this interlocutory order will assure that Respondents'

employees will be treated in the same manner across jurisdictional lines, in that a State or Hawaii County employee will be treated in the same manner as the Maui County employee for testing positive on drug or alcohol tests pending negotiations over this matter. Thus, the Board finds the public interest supports the issuance of this order to preserve the integrity of the bargaining process and the uniformity of employment practices. The Respondents should not be permitted to keep in place its unilaterally implemented policies which are subject to negotiations pending a final decision in this case.

Based on the foregoing, the Board hereby orders the Respondents to cease and desist from imposing discipline and from depriving employees of compensation as a result of positive test results obtained under the mandate of the federal law, except for removal from the safety sensitive functions. This prohibition does not apply to positive results from post-accident testing.

DATED: Honolulu, Hawaii, January 12, 1996.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

SANDRA H. EBESU, Board Member

OPINION, CONCURRING, IN PART AND DISSENTING, IN PART

In my view, the issue before this Board concerns those provisions in the various drug and alcohol testing policies which

set forth a schedule of penalties for positive drug or alcohol test results.

I concur with the Board majority that an interlocutory order should be issued with respect to implementation of those provisions which impose a schedule of penalties for positive test results, pending a final decision. The evidence supports a strong probability that the UPW will succeed on the merits of the case. It is clear that the parties were engaged in negotiations and the Respondents unilaterally implemented policies which went beyond the federal requirements that employees be removed from safety sensitive positions upon confirmation of positive drug and alcohol test results.

I disagree, however, with the majority as to the scope and breadth of the order. The interlocutory order appears to constitute a blanket prohibition on all forms of disciplinary action, with the exception of post-accident positive test results, pending a final decision by the Board.

In the absence of a negotiated agreement on provisions which impose a schedule of penalties for positive test results, management nevertheless retains the right to discipline employees, subject to the requirements of just and proper cause. Utilizing the contractual grievance procedure, the Employer must still meet this burden before an arbitrator, who is free to sustain or deny the grievance, or modify the penalty imposed on a case-by-case basis.

In my view the State's policy more properly reflects preservation of the status quo, and any disciplinary action imposed

by the State would be subject to challenge under the contractual grievance procedure.

RUSSELL T. HIGA, Board Member

Copies sent to:

Herbert R. Takahashi, Esq.
James E. Halvorson, Deputy Attorney General
Howard M. Fukushima, Deputy Corporation Counsel
Ivan M. Torigoe, Deputy Corporation Counsel
Joyce Najita, IRC