

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-366
)	
UNITED PUBLIC WORKERS, AFSCME,)	ORDER NO. 1827
LOCAL 646, AFL-CIO,)	
)	ORDER GRANTING, IN PART,
Complainant,)	RESPONDENTS' MOTION TO DIS-
)	MISS COMPLAINT AND GRANTING
and)	COMPLAINANT'S MOTION FOR
)	SUMMARY JUDGMENT
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii and KATHLEEN)	
SATO, Deputy Attorney General,)	
Department of the Attorney)	
General, State of Hawaii,)	
)	
Respondents.)	

ORDER GRANTING, IN PART, RESPONDENTS'
MOTION TO DISMISS COMPLAINT AND GRANTING
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

On September 12, 1997, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against BENJAMIN J. CAYETANO, Governor, State of Hawaii and KATHLEEN SATO, Deputy Attorney General, State of Hawaii (Respondents) with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondents failed to select an arbitrator in a timely manner as required by § 15.22 of the collective bargaining agreement covering employees in bargaining unit 10 (contract). Complainant contends that Respondents' refusal to meet and select an arbitrator within ten days of the receipt of the notice to arbitrate a grievance constitutes a wilful violation of §§ 89-13(a)(1), (7), and (8), Hawaii Revised Statutes (HRS).

On October 1, 1997, Respondents filed a motion to dismiss the prohibited practice complaint with the Board for failure to state a claim upon which relief can be granted. Respondents contend that the employer rightfully sought clarification from the Union about the grievance because the causes of action were similar to those made in Case No. CE-10-327 and the Union had previously argued that the selection of an arbitrator waived the employer's arbitrability defense. Respondents contend that the Union never responded to the Employer's request for additional information. In addition, Respondents contend that SATO should be dismissed from the instant complaint because she is not a public employer within the meaning of Chapter 89, HRS.

On October 3, 1997, Complainant filed a motion for summary judgment and for assessment of attorney's fees with the Board. Complainant contends that the legal issues presented in this case are similar to those involved in a prior matter involving the same parties, United Public Workers, AFSCME, LOCAL 646, AFL-CIO, 5 HLRB 570 (1996), which is dispositive of this case.

A hearing was held on both motions on November 26, 1997. The parties were afforded a full opportunity to present evidence and argument to the Board. By Order No. 1774, dated September 16, 1999, the Board directed the UPW to submit a proposed order to the Board reflecting the Board's ruling as contained in the Order. The UPW filed the proposed order with the Board on November 17, 1999. No objections were filed by Respondents with the Board.

Based upon a thorough review of the record, the Board hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The UPW is an employee organization and the exclusive representative, as defined in § 89-2, HRS, of employees in bargaining unit 10.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer as defined in § 89-2, HRS.

Respondent KATHLEEN SATO was, for all times relevant, a deputy attorney general of the State of Hawaii.

The UPW and the State of Hawaii are parties to a multi-employer collective bargaining agreement covering institutional, health, and correctional workers in the State who are in bargaining unit 10, including but not limited to adult correctional officers of the Department of Public Safety, State of Hawaii.

At all relevant times herein the terms and provisions of the Unit 10 contract were in effect and binding on the parties herein.

On May 16, 1997, the UPW filed a class action grievance in Case GWR-97-5 at Step Two of the grievance procedure with Keith Kaneshiro, Director of the Department of Public Safety, alleging that the employer violated, inter alia, §§ 1.04, 14.01, 16.06c, and 16.07 of the Unit 10 contract by unilaterally changing promotional policies applicable to adult correctional officers.

On May 30, 1997, the UPW filed an appeal to Step Three of the grievance procedure with James Takushi, Director of the Department of Human Resources Development (Takushi).

By letter dated June 10, 1997, Takushi denied the grievance at Step Three of the grievance procedure contending that the matter was non-grievable and that the Unit 10 contract had not been violated.

By letter dated June 19, 1997, the UPW notified Takushi of its intent to proceed to arbitrate the grievance and requested that the employer's representative contact UPW's counsel regarding the selection of an arbitrator pursuant to § 15.22 of the Unit 10 contract.

Section 15.22 of the Unit 10 contract provides in relevant portions as follows:

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 and select an arbitrator.

By letter dated June 23, 1997, UPW's counsel, Herbert Takahashi, requested Takushi to have a representative of the employer contact him and meet for the purpose of selecting an arbitrator for grievance GWR-97-5.

By letter dated June 23, 1997, Takushi informed the UPW that he had requested assistance from the Attorney General and that

counsel assigned to the case would contact UPW's counsel to select an arbitrator.

By letter dated July 3, 1997, SATO informed UPW's counsel that Respondents were unable to proceed with the selection of an arbitrator because the employer lacked sufficient information to determine whether the subject grievance was arbitrable.

Section 15.26 of the Unit 10 collective bargaining agreement states in relevant portions:

15.26 If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

By letter dated July 12, 1997, UPW's counsel informed SATO that Complainant considered the failure to select an arbitrator to be in violation of § 15.22 of the Unit 10 contract and urged her to reconsider her position. UPW's counsel also indicated that if the Union did not hear from SATO within ten days of the letter, the Union would proceed to file a prohibited practice complaint with the Board.

On and after July 12, 1997, Respondents declined to meet to select an arbitrator.

On September 7, 1997, the UPW filed the instant prohibited practice complaint with the Board.

On September 15, 1997, the Board issued a notice of the prohibited practice complaint to Respondents. The notice informed Respondents that the failure to file a timely answer to the

complaint may constitute an admission of the material facts alleged in the complaint and a waiver of a hearing.

Respondents did not file an answer to the complaint and instead filed their motion to dismiss the complaint.

DISCUSSION

This complaint presents an all too familiar issue regarding a public employer's obligation to meet and select an arbitrator in a timely manner as provided by the grievance and arbitration procedure of a collective bargaining agreement. United Public Workers, AFSCME, LOCAL 646, AFL-CIO, supra. The UPW contends that Respondents wilfully violated § 15.22 of the Unit 10 contract in violation of §§ 89-13(a)(1), (7), and (8), HRS. Section 89-13, HRS, provides in relevant portions as follows:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement; . . .

Section 15.22 of the Unit 10 contract provides that within 30 calendar days of the receipt of an unsatisfactory decision at Step Three the Union may serve the Employer or his representative with its notice of intent to arbitrate the grievance. The contract further provides that within ten calendar days after the receipt of the notice of arbitration, the parties

shall meet to select an arbitrator. The Unit 10 contract further provides that in the event that the parties are unable to select an arbitrator within 30 days after receipt of the notice to arbitrate, the parties may request a list of arbitrators from the Board.

There is no dispute in this case that Respondents, upon being notified of the Union's intent to arbitrate grievance GWR-97-5 on or about June 10, 1997, failed to meet with UPW's counsel and select an arbitrator within ten days. The employer's obligation under § 15.22 was triggered by the notice of intent to arbitrate submitted by the Union. In the present instance, the employer was requested and reminded thereafter to comply with its duty under § 15.22. Respondents declined to meet and select an arbitrator in violation of the clear and unambiguous provisions of the Unit 10 contract.

In its motion to dismiss the complaint, Respondents contend that the UPW failed to state a claim for relief since an employer is justified in declining to select an arbitrator to contest the arbitrability of a grievance based on a claim of management rights under § 89-9(d), HRS. However, under § 15.26, the public employers and the union have agreed to submit any and all disputes relating to the arbitrability of grievances under the Unit 10 agreement to an arbitrator. Clearly, the parties have "clearly and unmistakably" vested the authority to determine arbitrability to an arbitrator and under Hawaii law, this agreement is binding and effective. Bronster v. UPW, AFSCME, LOCAL 646, AFL-CIO, 90 Hawai'i 9, 14-15, 975 P.2d 766 (1999).

The Board has previously held that strict compliance with the timelines established for the submission of grievances to arbitration is intended by § 15 of the contract. United Public Workers, AFSCME, LOCAL 646, AFL-CIO, supra, at 584. The employer's actions have frustrated the procedures established under § 15 and interfered with the rights of employees and the Union to the prompt and expeditious presentation of disputes to an arbitrator in violation of §§ 89-13(a)(1) and (8), HRS. Moreover, the Board finds that the employer's violation of § 15.22 was wilful, given the repeated requests by the UPW to comply with the provisions of the agreement.

In the present context, the Board declines to find an attorney who represents an employer to be a public employer within the meaning of § 89-2, HRS, and a proper respondent. Accordingly, the Board grants Respondents' motion to dismiss the complaint, in part, as against SATO. In light of the foregoing determination the Board also declines to find a violation of § 89-13(a)(7), HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to §§ 89-5 and 89-13, HRS.

An employer commits a prohibited practice in violation of § 89-13(a)(1), HRS, by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89, HRS.

The Employer wilfully interfered with the rights of bargaining unit 10 employees when it failed to timely select an

arbitrator within the timelines set forth in the contractual grievance procedure.

An employer commits a prohibited practice in violation of § 89-13(a)(8), HRS, when it violates the terms of a collective bargaining agreement.

The Employer wilfully violated § 15.22 of the contract when it declined to have a representative, with authority to select an arbitrator, contact the UPW's counsel within ten calendar days of receipt of the Union's letter noticing its intent to arbitrate the grievance.

ORDER

The Employer is hereby ordered forthwith to meet with the Union's counsel and select an arbitrator and shall cease and desist from declining to select arbitrators under § 15.22 of the contract on grounds that it wishes to challenge the arbitrability of a grievance under § 15.26.


The Employer shall immediately post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit 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 of the steps taken by the Employer to comply herewith within thirty (30) days of receipt of this order.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and BENJAMIN J.
CAYETANO, Governor, State of Hawaii; et al.
CASE NO. CE-10-366
ORDER NO. 1827
ORDER GRANTING, IN PART, RESPONDENTS' MOTION TO DISMISS COMPLAINT
AND GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

DATED: Honolulu, Hawaii, December 13, 1999.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

Copies sent to:

Herbert R. Takahashi, Esq.
James E. Halvorson, Deputy Attorney General
Joyce Najita, IRC