

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-01-345a
)	CE-10-345b
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	ORDER NO. 1886
)	
Complainant,)	ORDER GRANTING, IN PART,
)	AND DENYING, IN PART,
and)	COMPLAINANT'S MOTION FOR
)	SUMMARY JUDGMENT
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii and JAMES)	
TAKUSHI, Director, Department)	
of Human Resources Development,)	
State of Hawaii,)	
)	
Respondents.)	
)	

ORDER GRANTING, IN PART, AND DENYING,
IN PART, COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

On February 12, 1997, the 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 JAMES TAKUSHI (TAKUSHI), Director, Department of Human Resources Development, State of Hawaii (collectively Employer) with the Hawaii Labor Relations Board (Board). The UPW alleges that on January 15, 1997, it filed class action grievances with TAKUSHI in Case Nos. GWR97-1 and GWR97-2 regarding violations of §§ 36.08 and 37.03 of the respective Units 01 and 10 collective bargaining agreements (contracts). In addition, on January 15, 1997, the UPW requested that TAKUSHI provide information needed to process or investigate the grievances. The UPW contends that TAKUSHI failed to provide any response to the Union's request and in a letter dated January 30, 1997, TAKUSHI indicated that the information was

not relevant to the grievances filed. The UPW thus contends that the Employer violated § 15.09 of the respective Units 01 and 10 contracts, thereby violating §§ 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On March 6, 1997, the UPW filed a Motion for Summary Judgment with the Board. Complainant submits that there are no genuine issues of material fact in dispute and that the Union is entitled to judgment as a matter of law.

The Board conducted a prehearing conference on the instant complaint on March 12, 1997. The Board scheduled a hearing on the UPW's Motion for Summary Judgment on April 1, 1997 and the hearing on the merits, if necessary, on April 16, 1997.

On March 18, 1997, UPW filed a Motion to Preclude the Late Filing of Counter-Affidavits by Respondents with the Board. The UPW contends that at the prehearing conference held on March 12, 1997, the Board scheduled the UPW's motion for summary judgment for hearing on April 1, 1997 and Respondents failed to request additional time to file counter-affidavits to Complainant's motion. As Administrative Rules § 12-42-8(2)(C)(iii) provides that answering affidavits to motions must be filed within five working days, the UPW contends that any late filing of answering affidavits by the Respondents should be precluded.

On March 25, 1997, Respondents filed a Cross-Motion for Summary Judgment, or in the Alternative, Motion to Dismiss; Memorandum in Opposition to Complainant's Motion for Summary Judgment/Memorandum in Support of Respondents' Cross-Motion for Summary Judgment, or in the Alternative, Motion to Dismiss with the

Board. In its cross-motion for summary judgment, Respondents contend that they are entitled to judgment as a matter of law because the information requested by the UPW must be relevant to the processing of the underlying grievances. Respondents also contend that the relevance of the requested information is an issue of material fact and therefore, UPW's motion for summary judgment should be denied. Further Respondents move for summary judgment because the information requested by the UPW must be relevant to the processing of the underlying grievances. Alternatively, Respondents move to dismiss the instant complaint for failure to exhaust contractual remedies.

Also on March 25, 1997, Respondents filed a Motion to Consolidate for Hearing Respondents' Cross-Motion for Summary Judgment or in the Alternative Motion to Dismiss and Complainant's Motion for Summary Judgment with the Board. Respondents request consolidation of the hearing on the motions for summary judgment for judicial economy.

On April 1, 1997, the Board conducted a hearing on the instant motions. After a thorough review of the record and arguments presented at the hearing, the Board issues the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

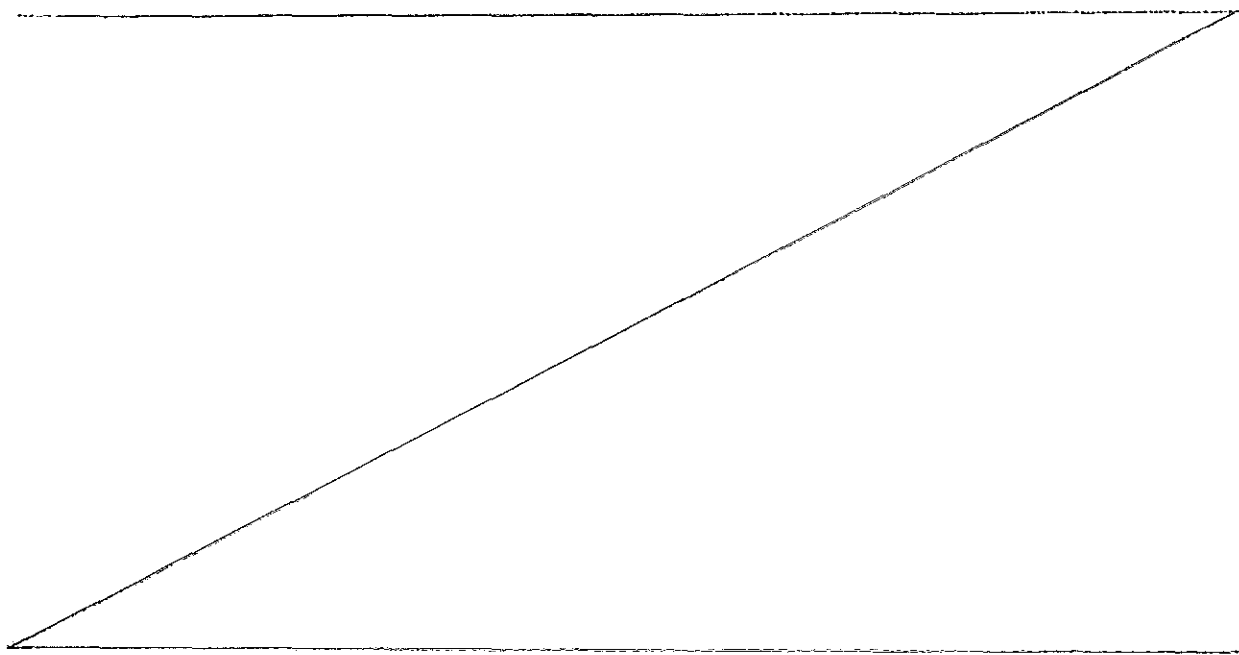
The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees in bargaining units 01 and 10.

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

TAKUSHI, was for all times relevant, the Director of the Department of Human Resources Development, State of Hawaii, and a representative of a public employer as defined in § 89-2, HRS.

The UPW and the State of Hawaii are parties to existing agreements applicable to Unit 01 and 10 employees.

According to Gary Rodrigues (Rodrigues), UPW State Director, in late 1996 during proceedings before the Board, he was provided a copy of a document indicating that various State employees had been overpaid wages. Rodrigues contends that based on an investigation of the overpayment issue, he determined that the problem was due in large measure to the State's failure to monitor the use of vacation and sick leave benefits and its failure to provide annual accounts of vacation and sick leave benefit credits. Thus, he filed class action grievances for Units 01 and 10 employees, respectively, and sought information from the State to determine the extent of the overpayment and remedial issues raised in the grievances.



The class action grievances were filed on or about January 15, 1997, alleging violations of §§ 36.08¹ and 37.03² of the contracts covering bargaining units 01 and 10. GWR-97-1 is a class grievance on behalf of employees in Unit 01 which states in part:

- b. On December 27, 1996, during a Hawaii Labor Relations Board hearing on cases CE-01-320 and CE-10-321, the Union became aware that the State of Hawaii, throughout all of its executive branches were not providing BU-1 employees with their sick leave and vacation leave balances on an annual basis pursuant to Section 36.08 and 37.03.
- c. It is evident that the State and its executive branches are not maintaining current and accurate sick leave and vacation leave balances for BU-1 employees. Furthermore, the State's failure to maintain current and accurate records of BU-1 employees sick leave and vacation leave balances have resulted in overpayments to employees, and in some cases a loss of annual vacation leave

¹Section 36.08 of the applicable contracts provides:

Vacation leave shall be administered on a calendar year basis and recorded at the end of each calendar year. In order to facilitate the scheduling of annual vacations, the Employer may require its employees to submit their vacation preference. However, no employee will be required to submit annual vacation preference without first receiving information on the number of his accumulated vacation days from the Employer. Each employee shall be given an annual statement of his accumulated leave.

²Section 37.03 of the contracts provides:

An employee may accumulate the sick leave he earns. The unused sick leave accumulated shall be credited to the employee's account for subsequent use in the event of a sickness. Each employee shall be given an annual statement of his accumulated sick leave.

exceeding over the ninety (90) day limitation.

d. The State of Hawaii, Department of Human Resources Development, through its Director James H. Takushi, has violated the following Sections of the Unit 1 Agreement:

1. Section 36.08 because the Employer and all its jurisdictions within the executive branch has failed to provide all BU-1 employees with an annual statement of their accumulated vacation.
2. Section 37.03 because the Employer and all its jurisdictions within the executive branch has failed to provide all BU-1 employees with an annual statement of their accumulated sick leave.

A similar grievance was filed on behalf of Unit 10 employees in GWR-97-2.

By letter dated January 15, 1997, which was received by the Employer on January 17, 1997, the UPW requested that TAKUSHI provide information to the Union pursuant to § 15.09 of the respective contracts. Rodrigues requested the following:

1. Please identify the names of all employees in bargaining units 1 and 10 who currently have an outstanding liability or obligations for a salary or wage overpayment with any executive branch within the State of Hawaii.
2. With respect to each of the named employees listed in response to question #1 above, please provide the following information:
 - (a) Name and address of the employee.
 - (b) Position of the employee.
 - (c) Date of hire.
 - (d) Department assigned.
 - (e) Bargaining unit of employee.
 - (f) Date(s) the overpayment in wages and salary was (were) made by the State of Hawaii by any of its executive branches.
 - (g) The amounts of each of the overpayments.

- (h) The reason for each overpayment.
 - (i) The benefit or leave with pay the employee inappropriately granted (e.g. as sick leave, vacation, other leaves of absence with pay) which resulted in overpayment.
 - (j) The aggregate amount due and owing.
3. With response (sic) to each of the overpayments made to the employees listed in response to request #2 above please provide the following information:
- (a) Name and position of State and/or Department official responsible for making the error in overpayment.
 - (b) The specific periods of time during which overpayments were made by such individual.
 - (c) The supervisor or person in charge of overseeing processing payments resulting in the current employee obligation.
4. A true and accurate copies (sic) of all notices of over payments given to bargaining unit 1 and bargaining unit 10 employees for current or past indebtedness by each employee listed in response to request #1.
5. A true and accurate description of all prior policies and procedures in effect in the State of Hawaii and/or any Department of the executive branch from January 1, 1970 to the present governing the recovery of salary and wage overpayments from State employees.

Sections 15.09 of both contracts are identical and state as follows:

Any information in the possession of the Employer which is needed by the grieving party to investigate and process a grievance, shall be photocopied and given to the grieving party within five (5) working days of the grieving party's request for such information, provided that the Employer shall have the option to (a) photocopy and give the material requested to the grieving party within the 5-working day period, or (b) make the material requested available to the grieving party within the 5-working day period for the purpose of photocopying or review by the grieving party for three (3) working days on the condition that the grieving party agrees to sign out and

be fully responsible for the material until it is returned.

The latest date which TAKUSHI should have provided the information under the contract was January 24, 1997. By letter dated January 30, 1997, TAKUSHI responded to the Step 3 grievances, respectively, stating that to his knowledge the various departments have been providing employees with an annual statement of their accumulated vacation and sick leave balances. In addition, the employer was willing to ask the departments to provide a confirming statement to the Union when the annual statements were completed. TAKUSHI suggested contacting the Employer group to negotiate an annual date to receive the balances since it was not raised during negotiations. With respect to the information regarding salary overpayments, TAKUSHI found that the UPW had already requested similar information from the Comptroller who responded to the Union that § 15.09 did not apply to the situation but would make information pertinent to the salary overpayment determination to the Union and the employee at the time of the prehearing conference prior to the hearing on salary overpayments. TAKUSHI indicated that he agreed with the Comptroller's response and further stated that the information on the salary overpayment was not relevant to the processing of the grievances which alleged failure to provide annual statements on leave balances. Accordingly, TAKUSHI denied the grievances.

Based on the foregoing, it is undisputed that the UPW filed two grievances alleging violations of the contract by failing to provide employees annual leave balances for vacation and sick leave. The grievances indicate that the Union learned that the

State was not providing leave balances on an annual basis to the employees. Rodrigues indicated that the State's failure to maintain current and accurate leave balances resulted in overpayments. Thus, the Union requested, inter alia, information as to the identities of all employees with an outstanding liability of obligation for salary or wage overpayment and information regarding the amount of overpayment and reason. In addition, the Union requested the name and position of the official responsible for making the error in overpayment, the specific periods of time during which the overpayments were made, and the supervisor overseeing the processing of payments. The Employer denied the Union's request for information on the basis of relevance after the contractual time limits had expired.

After reviewing the grievance filed by the UPW, the Board finds that the identities of the employees who have been overpaid is relevant to the processing of the grievance as it identifies potential class members who were affected or prejudiced by the nonreceipt of the annual leave statements. The Board finds that item nos. 3, 4, and 5 request information which is not reasonably related to the grievance and therefore are not relevant to the scope of the grievances before the Board.

DISCUSSION

With regard to Complainant's Motion to Preclude the Late Filing of Counter-Affidavits by Respondents filed on March 18, 1997, the UPW contends that at the prehearing conference held on March 12, 1997 the Board scheduled the Union's motion for summary judgment for hearing and the Employer did not request an extension

to file answering affidavits with the Board. The UPW moreover contends that the Employer failed to indicate that it intended to file a cross-motion for summary judgment in this case. Since the Employer failed to comply with the five-working-day requirement for the filing of answering affidavits to motions provided by Administrative Rules § 12-42-8(2)(C)(iii), the UPW contends that Respondents seek to circumvent the Board's procedural rules by the filing of their cross-motion for summary judgment. The UPW thus contends that the Board should preclude the filing of the Respondents' motion.

On March 25, 1997, Respondents filed a Cross-Motion for Summary Judgment, or in the Alternative, Motion to Dismiss; Memorandum in Opposition to Complainant's Motion for Summary Judgment/Memorandum in Support of Respondents' Cross-Motion for Summary Judgment, or in the Alternative, Motion to Dismiss with the Board. Also on March 25, 1997, Respondents filed a Motion to Consolidate for Hearing Respondents' Cross-Motion for Summary Judgment or in the Alternative Motion to Dismiss and Complainant's Motion for Summary Judgment with the Board. Respondents requested the consolidation of the hearing on the motions for summary judgment for judicial economy.

After reviewing the arguments of counsel on these procedural motions, the Board is persuaded, in the interests of justice and economy, to deny the UPW's Motion to Preclude the Late Filing of Counter-affidavits by Respondents. Although the Employer failed to oppose the UPW's motion by filing answering affidavits within the time permitted by the Board's Administrative Rules, it

was clear to the Board and should have appeared clear to the Union's counsel at the prehearing conference that the Employer opposed the UPW's motion for summary judgment and would present argument at the scheduled hearing. In addition, the Union did not request additional time to respond to Respondents' cross-motion. Thus, the Board finds that the Union was not unduly prejudiced by the filing of the Employer's cross-motion for summary judgment and as the Board liberally grants extensions for the filing of documents, the Board therefore denies the UPW's motion to preclude Respondents' counter-affidavits.

As the Board heard arguments on all motions on April 1, 1997, Respondents' motion to consolidate for hearing its cross-motion for summary judgment was granted.

With respect to the UPW's motion for summary judgment, the Union contends that relevance is not a basis for not complying with an information request under § 15.09 of the contract. The Union contends that TAKUSHI received the UPW's information request and he refused to provide the information contending that the information was not relevant to the grievances thus wilfully violating the contract. As Respondents have previously been ordered to "cease and desist" from committing prohibited practices and to provide information requested by the union within the time limits provided, the UPW requests the assessment of attorney's fees and costs. The UPW contends that the Respondents violated §§ 89-13(a)(1), (5), (7), and (8), HRS.

Section 89-13(a), provides in part:

§89-13 Prohibited practices; evidence of bad faith. (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;

* * *

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement; . . .

Respondents argue that the information requested by the Union concerning employees who were overpaid is not needed to process a grievance alleging that the Employer violated the contract by not providing annual sick and vacation leave balances to employees. The Employer contends that relevance of the information request must be considered and that the UPW failed to show that the information is relevant to its processing of the grievance.

In Decision No. 406, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB ____ (March 17, 2000), the Board considered the relevance of the Union's request for information under § 15.09. In that case, the employer had not objected to the Union's information request on the basis of relevance, but the Board held that it may consider the scope of the Union's request in determining whether the employer committed the prohibited practices alleged. In that case the Board found that:

[n]otwithstanding the pending grievances arising from disciplinary actions, the UPW's blanket requests for SF-5 forms and disciplinary letters for employees dating back 25 years to January 1, 1975 in each department is overly broad in scope and not related to the specific grievances being investigated or processed. While the Board appreciates the Union's argument that past disciplinary actions proved to be significant in recent arbitrations to establish disparate treatment, there must be some nexus or factual connection with either the type of misconduct involved and the degree of discipline imposed. Here, the Board finds that the UPW's blanket request for forms and disciplinary letters in personnel files dating back 20-25 years for unspecified misconduct was too broad and the Employer did not commit a prohibited practice by not complying with the Union's request.

In the case before the Board, in reviewing the UPW's information request, the Board finds that the information request as it relates to item no. 1, the names of the employees who have an outstanding liability for salary overpayment and other identification in item no. 2, is relevant on its face to determine members of the class who had not received annual leave statements and as a result, may have been overpaid. The Board finds that the Employer's refusal to provide the information within the time limits of the contract was a wilful violation of § 15.09 of the contract. The natural consequence of the Employer's refusal to provide the information requested by the Union was an interference with the grievance process.

However, the Board finds that item nos. 3, 4, and 5 are not relevant to the contract violation alleged. These items have no apparent nexus to the grievance issues as framed and are therefore overly broad. Accordingly, the Board finds that the Employer did not commit a prohibited practice by refusing to

provide information pursuant to item nos. 3, 4, and 5 on the basis of relevance.

The Board thus grants the Complainant's motion for summary judgment, in part and denies the motion, in part. As the Union only argued that the Respondents violated § 15.09 of the contract and § 89-13(a)(8), HRS, the Board hereby dismisses the UPW's allegations of §§ 89-13(a)(1), (5), and (7), HRS, violations.

The UPW also requested that attorney's fees and costs be assessed against Respondents for a frivolous defense. In Case No. CU-01-113, Michael L. Last, Order No. 1865 (May 16, 2000), the Board declined to follow the National Labor Relations Board's Tiidee Products, 194 NLRB 12334, 1236-37, 79 LRRM 1175 (1972) line of cases. Moreover, in the instant case, the Board concluded that the Respondents' objections to the relevance of certain information requested was justified. Accordingly, the Board concludes that the Respondents did not assert a frivolous defense and therefore should not be assessed fees and cost. The UPW's motion is therefore denied.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaints under §§ 89-5 and 89-14, HRS.

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

The Employer violated § 15.09 of the contract by refusing to provide information necessary for the Union to process its grievance within the time limits of the contract.

ORDER

Based on the foregoing, the Board hereby orders the following:


(1) The Employer shall cease and desist from failing or refusing to provide information requested by the Union necessary for the processing of grievances within the time limits provided under relevant contract provisions and shall forthwith provide the information requested by the UPW in its letter of January 15, 1997 with respect to item nos. 1 and 2.

(2) The Employer shall immediately post copies of this order in conspicuous places at its work sites where employees of the bargaining units assemble and leave such copies posted for a period of 60 consecutive days from the date of initial posting.

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

DATED: Honolulu, Hawaii, June 19, 2000.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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