STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and JEREMY HARRIS, Mayor, City and County of Honolulu; CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu; and FRANK DOYLE, Refuse Collection and Disposal Division Chief, Department of Environmental Services, City and County of Honolulu, Respondents.	CASE NO. CE-01-465 ORDER NO. 2020 ORDER GRANTING, IN PART, AND DENYING, IN PART, UPW'S CROSS-MOTION FOR SUMMARY JUDGMENT; NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

ORDER GRANTING, IN PART, AND DENYING, IN PART, UPW'S CROSS-MOTION FOR SUMMARY JUDGMENT; NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

On February 5, 2001, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant, Union, or UPW) filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents JEREMY HARRIS, Mayor, City and County of Honolulu, CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu, and FRANK DOYLE, Refuse Collection and Disposal Division Chief, Department of Environmental Services, City and County of Honolulu (collectively Respondents or City). Complainant alleges that the City violated the terms of its collective bargaining agreement with the Union by failing to complete route selection for refuse workers by February 1, 2001. Complainant further alleges that the City failed to provide necessary information on a timely basis and failed to bargain in good faith on the matter of a Master Pool Agreement.

At a prehearing conference before the Board on March 12, 2001, the parties agreed to resolve the dispute over route selection and to have the master pool issue addressed in mediation. The parties further agreed that if mediation did not result in the resolution of the master pool issue, cross-motions for summary judgment would be filed no later than April 19, 2001.

On April 18, 2001, Complainant filed the instant Cross-Motion for Summary Judgment. On that same day, Respondents filed a Motion for Extension of Deadline for Cross-Motions for Summary Judgment. On April 30, 2001, Respondents filed a Memorandum in Opposition to Complainant's Cross-Motion for Summary Judgment. And, on May 2, 2001, the Board denied Respondents' motion for an extension of the deadline for the filing of Cross-Motions for Summary Judgment.

On May 23, 2001, the Board conducted a hearing on Complainant's Cross-Motion for Summary Judgment. All parties were presented a full and fair opportunity to be heard. Based upon a review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW is an employee organization within the meaning of Hawaii Revised Statutes (HRS) § 89-2.

2. JEREMY HARRIS is the Mayor of the City and County of Honolulu, and at all relevant times herein is a public employer within the meaning of HRS § 89-2.

3. CHERYL OKUMA-SEPE is the Director of Human Resources of the City and County of Honolulu, and as a representative of the Mayor is a public employer within the meaning of HRS § 89-2.

4. FRANK DOYLE is the Refuse Collection and Disposal Division Chief of the Department of Environmental Services, City and County of Honolulu, and as a representative of the Mayor is a public employer within the meaning of HRS § 89-2.

5. The UPW was certified as the exclusive bargaining representative of blue collar non-supervisory employees in bargaining unit 01 on October 20, 1971.

6. Since on or about July 1, 1972, the UPW and the City and County of Honolulu have been parties to more than 12 successive multi-employer collective bargaining agreements covering Unit 01 employees.

7. At all relevant times herein the Unit 01 agreement has remained in full force and effect.

8. Historically, refuse collection on Oahu has been governed by the Unit 01 agreement and where applicable, the "Uku Pau Policies and Practices for

Refuse Collection" dated December 13, 1973, as amended thereafter in various memoranda of agreements entered by the parties thereto.

9. On or about July 1, 1991 the parties to the Uku Pau Policies and Practices for Refuse Collection agreed to a demonstration project for the implementation of the automated refuse collection operation on Oahu. The demonstration project was extended by agreement on May 19, 1993.

10. On or about June 1, 1994 the UPW and the City and County of Honolulu implemented phase 1 of the automated refuse collection operation on Oahu by entering into a Memorandum of Agreement pursuant to Section 1.05 of the Unit 01 agreement.

11. Automated refuse collection was fully implemented on Oahu in seven phases pursuant to memoranda of agreement entered into on August 12, 1995, March 14, 1996, September 26, 1997, March 2, 1998, and May 5, 1999.

12. Each and every stage of the automated refuse collection operation and the wages, hours, and other terms and conditions of employment of Unit 01 employees involved in the said operation have been negotiated and resolved by mutual consent under Section 1.05 of the Unit 01 agreement.

13. No change in wages, hours, and other terms and conditions of employment of those engaged in the automated refuse collection operation is permissible without "mutual consent" under Section 1.05 of the Unit 01 agreement.

14. Section "u" of the March 2, 1998 Memorandum of Agreement on Automated Refuse Collection Operations (MOA) states:

> Modification to this Memorandum of Agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 1 agreement.

15. Section 1.05 of the Unit 01 agreement provides in relevant portions:

> No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent. (Emphasis added.)

16. On or about November 13, 1999 representatives of the UPW and the City and County of Honolulu met to negotiate over various changes to the March 2, 1998 MOA.

17. City officials in said meeting proposed that the March 2, 1998 MOA be amended to establish a refuse division master pool to resolve the problem of excess staffing in the Pearl City yard that resulted from the implementation of automated refuse collection and permit the City greater flexibility and increased efficiency in operations.

18. On or about January 21, 2000, the City transmitted a written master pool proposal to the UPW. The proposal provided, inter alia, for the creation of an island-wide master pool consisting of employees from the Pearl City, Kapaa and Wahiawa baseyards and the transfer of a worker in the pool to another temporary workplace or baseyard with prior notice.

19. On or about February 24, 2000, the UPW objected to a provision in the City's master pool proposal which required master pool employees not assigned to refuse collection duties to work an eight-hour day.

20. On or about June 19, 2000, the City informed the Union that excess employees would be involuntarily transferred from Pearl City to the Honolulu yard. The Union objected to the plan and threatened legal action. The City resorted to hiring temporary workers to remedy the shortage of staff and reduce overtime costs at the Honolulu baseyard.

21. City Refuse Collection Administrator Ron Shiraishi (Shiraishi) represents that in the summer of 2000, UPW employees Dayton Nakanelua (Nakanelua) and Diann Berndt (Berndt) said that a master pool should be implemented in conjunction with route selection for the following year.

22. On or around November 13, 2000, the City received a Master Pool Agreement counterproposal from the UPW. Revised counterproposals were subsequently transmitted to the City on November 30 and December 1, 2000.

23. On December 5, 2000, the City faxed a copy of UPW's last counterproposal with handwritten notations to the UPW. The fax cover sheet contained the following:

> these changes are minor as we have reached agreement on the major issues, if okay, please send final document for signature.

24. On or around December 13, 2000, the UPW suspended negotiations on the master pool issue because of the City's alleged failure to resolve pending lawsuits regarding the privatization of refuse collection and because of the City's alleged attempts to undermine ongoing Unit 01 negotiations by petitioning to have refuse workers declared essential employees in the event

of a Unit 01 strike. The UPW alleged that these actions were a clear indication of bad faith.

25. On December 14, 2000 the UPW, by Berndt, advised City officials that it expected route selection to be implemented by no later than February 1, 2001.

26. Section g.2.b) of the March 2, 1998 MOA required route selection be implemented "no later than February 1st of each year."

27. The December 14, 2000 letter to City officials also requested information the UPW believed was needed to implement the route selection process by February 1, 2001.[1]

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[1]The December 14, 2000 letter from the UPW requested the following:

To assist the union in its review and consideration of the proposed route maps, we request that any information in your possession used to formulate the proposed routes including but not limited to the below specified data be provided no later than Wednesday, December 27, 2000.

1. The names and job titles of individuals who prepared the proposed route maps for each baseyard/workplace.
2. The names and job titles of individuals who approved the proposed route maps for submission to the union.
3. The existing route maps (Year 2000) for all baseyards/ workplaces.
4. The number of container units for each automated route presently assigned.
5. The number of container units for each automated route that is the result of the proposed routes.
6. The monthly tonnage reports for calendar year 2000 for each manual collection route including the Masterpool Routes (6 AM ROUTES, 44 TO 49A) in the Honolulu baseyard/ workplace.
7. The monthly tonnage reports for calendar year 2000 for each automated collection route.
8. Division seniority list of employees by job class for employees in each baseyard/workplace subject to route selection.
9. Class and baseyard/workplace seniority lists of Refuse Collection Equipment Operators.
10. Route maps for front end loader operations in the Honolulu, Kapaa, and Pearl City baseyards/workplaces including the

28. On January 29, 2001 Respondents announced their intent to unilaterally implement changes to the March 2, 1998 MOA in connection with "the Refuse Division Master Pool" without the mutual consent of UPW.

29. On February 1, 2001 the UPW requested that Respondents cease and desist from their unilateral course of conduct and to proceed with route selection as required by the March 2, 1998 MOA. In that same communication the UPW indicated that it "remains willing and able to negotiate in good faith" regarding the proposed Master Pool Agreement.

30. On and after February 1, 2001 the City declined to implement route selection.

31. On February 5, 2001, the UPW filed the instant complaint.

32. On or about February 13, 2001, the City advised the UPW that the 2001 route selections could not be completed until the master pool issue is resolved. It further advised that, "[I]f we don't hear from you by February 23, 2001, we will ask that an impasse be declared and proceed with implementation."

33. On March 13, 2001, the Board conducted a prehearing conference on the instant complaint. At the conference, the parties agreed to defer a scheduled hearing on the merits because of agreements that had been reached. As memorialized by UPW's counsel (to which exception has not been taken by the City), the agreements were in relevant part as follows:

> 1. Respondents will provide the UPW by the end of this week (March 18, 2000) a response to the information request dated December 14, 2000 needed in connection with route selection.
>
> 2. Respondents will commence route selection by no later than the end of this week. The process will take approximately 30 days to complete.
>
> 3. The UPW and Respondents agree to refer the master pool issue to mediators Peter Char and Ted Tsukiyama.
>
> 4. If the parties are unable to resolve the master pool issue in mediation, cross motions for summary judgment will be filed by no later than April 19, 2001. Pending the

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geographic area and number of container units services each workday.

ruling on said motions status quo shall be maintained by the parties.

32. Between February 15, 2001 and March 20, 2001, the City transmitted tonnage and route map information to UPW. The record does not reflect that the City transmitted information requested regarding seniority.

33. On March 20, 2001, Shiraishi met with Nakanelua to discuss route selection. At that meeting Shiraishi inquired as to whether route selection could proceed with employees being apprised that master pool proposals might be subsequently implemented. Nakanelua responded that he doubted that UPW Executive Director Gary Rodrigues would agree to such a procedure.

34. On March 28 and 30, 2001, Shiraishi met with shop stewards, UPW staff and other personnel to discuss route selection. No further meetings have been held.

35. Mediation meetings were held April 10 and 17, 2001. Further meetings were scheduled.

DISCUSSION

In its complaint, the UPW identified three alleged prohibited practices, first, the City's failure to complete route selection for refuse workers by February 1, 2001 as required by the March 2, 1998 MOA; second, the City's failure to provide information requested as necessary to proceed with route selection; and third, the City's failure to bargain in good faith on the subject of a Master Pool Agreement which it sought to negotiate as a supplement to the collective bargaining agreement between the parties as demonstrated by its conduct with regards to refuse privatization lawsuits and essential worker petitions.

In the Memorandum in Support of its Cross-Motion for Summary Judgment, the UPW argued that the alleged prohibited practices were compounded by the failure of the City to comply with an agreement presented to the Board at a prehearing conference on March 13, 2001. And, at oral argument, the theory of the UPW included an alleged prohibited practice based upon the City's conditioning of route selection upon resolution of the master pool issue.

The City argues in its defense that, first, the UPW is estopped from alleging prohibited practices because the Union, by unilaterally terminating negotiations on master pool, failed to bargain in good faith; second, the master pool issue is inextricably related to route selection; third, information requests have been satisfied; and fourth, the master pool

The Union asserts, and the City does not deny,[2] that the negotiated provision controlling route selection is section g.2.b) of the March 2, 1998 MOA requiring route selection be implemented "no later than February 1st of each year." It is also uncontested that the UPW insisted upon this deadline and, notwithstanding this foreknowledge, the City did not comply. It is also inferred that the City has conditioned route selection upon a Master Pool Agreement. Thus, it is uncontested that the City is in violation of its bargaining agreement. Absent excuse, estoppel, or waiver, the Board must therefore order compliance.

The City alleges that the UPW cannot now insist on enforcement of the February 1, 2001 deadline because the Union's failure to bargain in good faith on the master pool issue estops it from enforcement of the route selection provision. The UPW's conduct in the course of master pool negotiations may well rise to a failure to bargain in good faith, but it has not been suggested that any detrimental reliance upon the UPW's master pool representations had any bearing upon the City's ability to proceed with route selection. Indeed, in the agreement presented to the Board on March 13, 2001 the City agreed to proceed with route selection while concurrent negotiations proceed on master pool. Accordingly, any estoppel effect that attaches to the UPW's conduct on master pool will not apply to route selection.

The City similarly alleges that by its conduct with regard to the master pool negotiations, the UPW waived the February 1 route selection provision. In Board Decision No. 242, Hawaii Fire Fighters Association, 4 HLRB 164 (1987), the Board discussed the law applicable to an analogous waiver of bargaining rights:

> Case law indicates that waivers must be strictly construed; to find a waiver, a union must clearly and unmistakably waive rights to bargain. Before a waiver can be found, the union must be offered a meaningful opportunity to bargain. Thus the union must be given a sufficient opportunity to bargain. The union must be put on notice of employer's plans before a waiver can be found.

Id. at 203, citations omitted.

The Board finds this test to be applicable to any alleged waiver of contractual provisions. And because there are no facts to support a finding that the UPW clearly and unmistakably waived its rights to a February 1 route selection, no waiver is found.

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[2]At the hearing on the instant motion, the City suggested that both route selection and master pool were management rights and accordingly prohibited subjects of negotiation. However, inasmuch as the City has since 1995 entered into negotiated agreements identifying route selection deadlines, and since route selection clearly impacts hours and wages, the Board is unwilling on this record to acknowledge the use of a management rights rationale to allow the City to escape the enforcement of their own negotiated contracts.

Finally, the City argues that the master pool issue is so inextricably linked to route selection that resolution of the former is a necessary precondition of the latter. No such precondition occurs within the language of the applicable MOA. In order to uphold the City's position we must therefore conclude that the precondition is an interpretation of the express contract language consistent with the intent of the parties. See, Decision No. 138, University of Hawaii Professional Assembly, 2 HPERB 560 (1980) (contracts are to be interpreted pursuant to contract law and interpretation of terms depends upon the intent of the parties).

As its only evidence of the Union's concurrence with the City's interpretation, the City points to an excerpt from the UPW's letter of February 1, 2001in which UPW State Director Gary Rodrigues writes:

> The changes the City is now proposing regarding the "master pool" requires negotiations leading to mutual consent before the Employer can proceed with implementation because the master pool is part of route selection as provided in Section g.22. of the MOA of March 2, 1998. The UPW remains willing and able to negotiate in good faith on the proposed changes.

The Board does not find the foregoing to be a concession on the part of the Union that master pool is a precondition to route selection. Rather, it is an argument that the relation between the two issues requires that any changes to master pool be subject to the same mutual consent requirement that is applicable to route selection procedures.

Far more compelling are the facts that the Union, on December 13 and 14, 2000 terminated negotiations on master pool and nonetheless insisted on proceeding with route selection, that automated refuse route selection has proceeded since 1995 without preconditions, and that the agreement presented before the Board did not in any way condition route selection upon a Master Pool Agreement. The Board therefore cannot conclude that the parties to the agreement intended that any precondition existed with respect to route selection.

Accordingly, the Board concludes that the City's refusal to complete route selection by February 1, 2001 was a conscious and deliberate violation of Section g.2b) of the March 2, 1998 MOA that constituted a prohibited practice in violation of HRS § 89-13(a)(8).

The UPW further alleges that the City committed a prohibited practice by failing to provide information necessary to proceed with route selection. Having concluded that the City is under a duty to proceed with route selection, the Board must similarly conclude that all information necessary to proceed must be provided to the Union by the City. There is no dispute the City had ample time and opportunity to turn over all the information.

was in fact wrongful. Indeed, conditioning meaningful negotiations on matters outside of the scope of bargaining could itself be found to be bargaining in bad faith. Cf., Decision No. 24, Board of Education, 1 HPERB 278 (1972), conditioning meaningful negotiation upon term in contravention of contract found to be a failure to bargain in good faith. But the City has filed no complaint in this regard so whether the UPW may in fact have failed to bargain in good faith is not an issue before the Board.

The City threatened imposition of the Union's third counteroffer but has not proceeded with implementation. As to the unilateral implementation charge, the Board finds there are material issues of fact as to whether or not master pool is in fact a permissible subject for negotiation or whether the temporary transfer of employees is a management right, statutorily excluded from bargaining. See, HRS § 89-9(d). And it is equally an issue of fact whether implementation of the UPW's last offer would constitute unilateral implementation. If the last counteroffer remained valid and the City's actions are construed as acceptance, any requirement of "mutual agreement" may have been satisfied. Thus, the record does not support summary judgment against the City on this issue.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.

2. The City wilfully violated the express terms of the 1998 MOA by refusing to proceed to route selection by February 1, 2001 thereby violating HRS § 89-13(a)(8).

3. The City wilfully refused to provide all information requested by the UPW necessary for route selection thereby violating HRS § 89-13(a)(5).

ORDER

1. The Union's Cross-Motion for Summary Judgment is granted with respect to route selection and information and denied with respect to the Master Pool Agreement.

2. The City shall forthwith provide the UPW with the information requested and shall proceed to route selection.

NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing conference on the remaining issues in this complaint on July 31, 2001 at 9:30 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The parties shall submit a second prehearing statement identifying the relevant exhibits and witnesses for the hearing in this matter two days before the second prehearing conference.

NOTICE IS HEREBY GIVEN that the Board will conduct a hearing on the remaining issues in this complaint on August 15, 2001 at 9:30 a.m. in the above-mentioned hearing room.

Appropriate provisions of the notice issued on March 1, 2001 remain applicable.

DATED: Honolulu, Hawaii, July 19, 2001.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Paul T. Tsukiyama, Deputy Corporation Counsel
Joyce Najita, IRC