

arguments on the motion.¹ After a thorough review of the evidence and arguments made by the parties, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. UPW is the exclusive representative, as defined by HRS § 89-2, of employees in Unit 01 composed of blue collar non-supervisory employees.
2. KUSAKA is the Mayor of Kauai and the employer, as defined by HRS § 89-2, of employees of the County of Kauai.
3. HRS § 89-11(a) provides as follows:

A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance.

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

¹On October 15, 2001, KUSAKA filed a Petition for Declaratory Ruling with the Board, Case No. DR-01-86, seeking a ruling reaffirming an employer's ability to reclassify and reallocate positions within one of its departments as a management right which was not subject to the grievance and arbitration process of the collective bargaining agreement. KUSAKA alleged that on or about August 27, 2001, the UPW had requested the arbitration of a class grievance challenging the reallocation of three Pipe Fitter Helper positions to the class of Pipe Fitter and on September 27, 2001, the Employer requested that the UPW withdraw its request for arbitration.

On October 31, 2001, the Employer filed a Motion to Consolidate DR-01-86 and CE-01-480 in Case No. DR-01-86. At the hearing on the instant motion for summary judgment, the Board indicated it was inclined to deny the motion because the County of Hawaii had petitioned to intervene in Case No. DR-01-86 on October 30, 2001 and the potential parties to the cases differed.

5. Section 15 of the Agreement provides in relevant part:

15.16 STEP 3 ARBITRATION.

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

15.17 SELECTION OF THE ARBITRATOR.

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

15.17 a. By mutual agreement from names suggested by the parties.

15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:

1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.
2. Subsequent decisions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

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15.19 ARBITRABILITY.

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15.19b. In the event the Employer disputes the arbitrability of a grievance the Arbitrator shall determine whether the grievance is arbitrable prior to or after hearing the merits of the grievance. If the Arbitrator decides the grievance is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on the merits.

6. On or about June 27, 2001, the UPW filed a class grievance challenging the reallocation of three pipe fitter helpers in the Department of Water Supply, County of Kauai. The grievance was processed through the steps of the grievance procedure without resolution.

7. By letter dated August 27, 2001, the UPW notified KUSAKA that it was submitting the grievance to arbitration and requested that the Arbitrator be selected as provided in Section 15.17 of the Unit 01 Agreement. The UPW informed KUSAKA that Peter Trask (Trask) was legal counsel in the case and suggested 16 arbitrators for KUSAKA's consideration or her immediate submission of a list of arbitrators.
8. KUSAKA did not respond to the UPW's request to select an arbitrator within 14 calendar days.
9. By letter dated September 27, 2001, KUSAKA's counsel wrote to Trask to notify him that he was retained as counsel and that he declined to select an arbitrator from the list provided by the UPW. KUSAKA's counsel stated:

I have reviewed the list of names of prospective arbitrators and after consulting with my client, I must respectfully decline to select any of them. I will contact the Hawaii Labor Relations Board to provide a list of potential arbitrators.

Additionally, please note that I am in the process of preparing a Petition for Declaratory Ruling from the Hawaii Labor Relations Board. I share my client's concern that this matter is not arbitrable. First, the UPW has alleged a violation of Section 76-1, HRS and the County of Kauai's Civil Service Rules and Regulations. As you know, the Unit 1 collective bargaining agreement does not permit us to arbitrate these types of matters. Second, reallocation is a management right under Section 89-9(d), HRS. Accordingly, we have no obligation to arbitrate this matter.

Because there is no legal or contractual basis to arbitrate this matter, please consider withdrawing the present request for arbitration and underlying grievance. If I do not receive a written response withdrawing this request for arbitration and underlying grievance by October 5, 2001, at 3:30 p.m., I will assume that you and your client desire to proceed with this matter.

10. The Employer conceded that the UPW's request for arbitration was unilaterally ignored due to concerns about arbitrability.

DISCUSSION

The UPW contends that there are no material facts in dispute and it is entitled to judgment as a matter of law. KUSAKA argues that the evidence in the record shows that the underlying grievance involves the reclassification and reallocation of three positions and it would be illegal to resolve the grievance through the contractual grievance and arbitration process. KUSAKA contends that when viewed in the light favorable to her, there is a genuine issue of material fact whether she was prohibited from submitting the underlying reallocation to the grievance and arbitration process by the Agreement and the law.

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law. State of Hawai'i Organization of Police Officers v. Society of Professional Journalists - University of Hawai'i Chapter, 83 Hawai'i 378, 389, 927 P.2d 386, 397 (1996); Price v. Obayashi Hawaii Corp., 81 Hawai'i 171, 177, 914 P.2d 1364, 1370 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997); Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982). The evidence must be viewed in the light most favorable to the non-moving party (State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997) citing Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)) and the inferences must be drawn in the light most favorable to the party opposing the motion (State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 287-88, 965 P.2d 1284, 1287-88 (1998); Maguire, at 112, 899 P.2d at 395).

In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, V HLRB 573 (1996), the UPW filed nine complaints against the State employer alleging that the employer failed to contact the union within ten days of the filing of its notice to arbitrate the grievances. The Board held that the State employer violated Section 15.22 of the Unit 10 contract when it failed to have a representative with the authority to select an arbitrator contact UPW's counsel within ten calendar days of receipt of the union's notice of intent to arbitrate the grievance. The Board also held that the employer interfered with the rights of Unit 10 employees when it failed to abide by the timelines set forth in the contractual grievance procedure. The Board found that the employer's responsibility under the contract was clear and its repeated violations constituted prohibited practices. The Board stated:

The grievance procedure set forth in Section 15 of the contract which culminates in final and binding arbitration, provides for an efficient and informal process for resolving contractual disputes. Delays, where strict timelines are prescribed, serve only to frustrate the process.

Id., p. 584. The Board therefore found the employer committed prohibited practices in violation of HRS §§ 89-13(a)(1) and (8).

Recently, in Decision No. 429, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB ____ (October 10, 2001), the Board held that the City employer refused to bargain in good faith and violated HRS § 89-13(a)(5) by repudiating a settlement agreement which required the City to timely appoint arbitrators in 39 grievances. The Board discussed the description of the duty to bargain in good faith set forth in Decision No. 421, Benjamin J. Cayetano, 6 HLRB ____ (March 16, 2001) as follows:

The duty to bargain in good faith has been described as follows: The duty to bargain in good faith is an “obligation to...participate actively in the deliberations so as to indicate a present intention to find a basis for agreement...”

The Board also stated:

The obligation to “participate actively” permeates the collective bargaining relationship. The requirement implies open and effective communication regarding issues of mutual concern. The absence of such communication implies at least an indifference to, or avoidance of, a bargaining or bargained for, obligation. Accordingly, the Board finds that the failure of the Employer to meaningfully communicate with the UPW regarding the causes for delay in the appointment of arbitrators constitutes substantial evidence of indifference to its obligations under the Agreement thereby supporting the presumption that the violation was wilful.

In Decision No. 429, supra, the Board also discussed the wilfulness requirement in determining whether prohibited practices occurred. The Board stated:

In cases involving the missing of deadlines, the Board will presume wilfulness only when there is substantial evidence that a respondent’s failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations. In this case, the Board will presume wilfulness since a violation of the settlement agreement occurred as a natural consequence of the City’s failure to initiate the appointment of arbitrators.

In this case, KUSAKA did not respond to the UPW within 14 days from the Union’s August 27, 2001 notice of intent to arbitrate. On or about September 27, 2001, the

Employer rejected UPW's list of suggested arbitrators indicating that she would request a list of arbitrators from the Board. The Employer expressed her belief that the underlying grievance was not arbitrable and that she intended to file a petition for declaratory ruling before the Board. She further requested UPW to withdraw its request for arbitration by a date certain. Taken in the light most favorable to the Employer, one might infer that KUSAKA was willing to proceed to arbitration at some point in time. The Employer, however, conceded that she intentionally ignored UPW's August 27, 2001 request to select an arbitrator because she believed the matter was not arbitrable.

It is undisputed that the Employer failed to select an arbitrator within 14 days as provided by the contract. It is also undisputed that there is an arbitration agreement between the parties. Bateman Const., Inc. v. Haitzuka Bros., Ltd., 77 Hawai'i 481, 889 P.2d 58, reconsideration denied, 78 Hawai'i 421, 895 P.2d 172 (1995) (Bateman).² The Unit 01 Agreement clearly and unmistakably provides that the question of the arbitrability of a grievance shall be decided by the arbitrator. Under the relevant case law, the Board is persuaded that the question of arbitrability should be raised before the arbitrator. Bronster v. United Public Workers, AFSCME, Local 646, AFL-CIO, 90 Hawai'i 9, 975 P.2d 766 (1999); University of Hawaii Professional Assembly v. University of Hawaii, 66 Haw. 207, 659 P.2d 717 (1983) (UHPA).³ The Board therefore concludes that there is no genuine issue of

²In Bateman, the Hawaii Supreme Court held that the parties are free to agree among themselves to vest sole authority in an arbitrator to determine the issue of the arbitrability of a particular subject matter so long as they do so "clearly and unmistakably."

³In the UHPA case, the Court considered a contract provision similar to the one before the Board which provided that if the University disputes the arbitrability of any grievance, the Arbitrator shall first determine whether he has jurisdiction to act and if he finds no such power, the grievance shall be referred back to the parties without decision or recommendation on the merits. The Court stated at p. 210, 659 P.2d at 719:

Where the agreement calls for the arbitrator to decide the issue of arbitrability, the court should compel arbitration. United Merchants & Manufacturers v. American Textile Co., 512 F.Supp. 757 (S.D.N.Y. 1981). For a court to decide the issue of whether a particular grievance arises under the agreement or not would take away completely the power that the parties agreed to give the arbitrator. The arbitration process may only be used when the grievance involves the violation of a provision of the agreement. Thus the questions of arbitrability and whether the agreement is involved are one and the same. The University would have the court decide arbitrability by casting the issue in a different light, that of what the agreement covers. We would thereby decide all disputes of arbitrability, which is the very issue the parties agreed to submit to the arbitrator. This issue, therefore, should be decided in arbitration.

material fact in dispute in this case and that the UPW is entitled to judgment as a matter of law.

In Decision No. 429, *supra*, the Board presumed wilfulness on the City's part since the violation of the settlement agreement occurred as a natural consequence of the City's failure to initiate the appointment of arbitrators. The Board stated that in future cases involving the missing of deadlines, the Board will presume wilfulness only where there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations. Here, the Board finds that the Employer was consciously indifferent to her contractual obligations to select an arbitrator within 14 days of the UPW's request and in conscious derogation of the rights of the affected Unit 01 employees to have their grievance arbitrated within the time frame agreed to by the parties. The Board concludes therefore that KUSAKA wilfully violated the Unit 01 agreement and interfered with the rights of the employees. Accordingly, the Board concludes that KUSAKA committed a prohibited practice in violation of HRS §§ 89-13(a)(1) and (8).

The UPW further contends that the Board should award attorney's fees and costs to the UPW as a make whole remedy because the Employer's actions are egregious. Assuming that the Board has authority to grant fees, the Board hereby denies the UPW's request for fees because there has been no showing of malice or egregious conduct by the Employer.

Having reached this conclusion, the Board need not address UPW's Motion for Order Granting Summary Judgment in Favor of the UPW in Absence of Timely Opposition by Respondent.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. The employer violates HRS § 89-13(a)(1) by interfering, restraining, or coercing any employee in any right guaranteed under this chapter. HRS § 89-10(a) provides that the collective bargaining agreement may contain a grievance procedure culminating in final and binding arbitration which shall be valid and enforceable when entered into in accordance with provisions of this chapter. The contractual grievance procedure sets forth clear timelines for the processing of the grievance.
3. The employer violates HRS § 89-13(a)(8) by violating the terms of a collective bargaining agreement.

4. KUSAKA wilfully violated HRS §§ 89-13(a)(1) and (5), by interfering with the rights of the affected employees to have their grievance processed in a timely manner and violating the contract when it failed to select an arbitrator for a grievance within the contractual time limits.


ORDER

In accordance with the above, the Board sustains UPW's prohibited practice complaint, and orders that:

1. The Employer shall cease and desist from committing prohibited practices by refusing or delaying to select an arbitrator for the instant class grievance.
2. The Employer shall within 30 days of the receipt of this order, post copies of this order on its website and in conspicuous places on the bulletin boards located where employees of Unit 01 assemble and leave such copies posted for a period of 60 days from the initial date of 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, January 14, 2002.

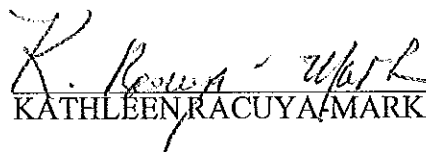
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Copies sent to:

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