

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of  
MARYANNE KUSAKA, Mayor, County of  
Kauai,

Petitioner,

and

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO and COUNTY OF  
HAWAII,

Intervenors.

CASE NO. DR-01-86

ORDER NO. 2066

ORDER GRANTING UPW'S MOTION  
TO DISMISS

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On October 15, 2001, MARYANNE KUSAKA (KUSAKA), Mayor, County of Kauai filed a Petition For Declaratory Ruling with the Hawaii Labor Relations Board (Board). KUSAKA requests this Board to declare and reaffirm that the authority to reclassify and reallocate positions is exclusively a "Management Right" as defined under Hawaii Revised Statutes (HRS) § 89-9(d), and that such declaration is applicable to a UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) class grievance filed on or about June 27, 2001.

On October 29, 2001, UPW filed a petition for intervention with the Board. On October 30, 2001, the COUNTY OF HAWAII (HAWAII COUNTY) also filed a petition to intervene as a party respondent with the Board.

On October 31, 2001, KUSAKA filed Petitioner's Motion to Consolidate DR-01-86 and CE-01-480 with the Board.<sup>1</sup>

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<sup>1</sup>At the hearing on the UPW's motion for summary judgment held on November 2, 2001 in Case No. CE-01-480, the Board indicated it was inclined to deny the motion because HAWAII COUNTY had petitioned to intervene in the instant case on October 30, 2001 and the potential parties to the cases differed. Accordingly, the Board denies KUSAKA's motion to consolidate the cases.

On November 5, 2001, UPW filed UPW's Motion to Dismiss with the Board contending:

1. The petition is barred by the 90-day statute of limitations;
2. The Board has no authority to determine the arbitrability of a grievance;
3. The Board lacks authority to issue declaratory rulings on interpretations of contracts (as distinct from statutes or rules of the agency); and
4. Petitioner has failed to establish "good cause" for issuance of a declaratory ruling on a promotional dispute.

On November 5, 2001, the Board in Order No. 2044, granted UPW and HAWAII COUNTY's petitions for intervention. The Board also set a deadline to file responses to UPW's Motion to Dismiss and hearing date for arguments on the UPW's Motion to Dismiss.

On November 9, 2001, KUSAKA filed a Motion to Continue date of response and hearing on UPW's motion to dismiss filed on November 5, 2001. On November 14, 2001, the Board issued Order No. 2046, Order Denying Petitioner's Motion to Continue Date of Response and Granting Motion to Continue Hearing on UPW's Motion to Dismiss Filed on November 5, 2001.

On November 26, 2001, the Board held a hearing on the UPW's Motion to Dismiss. The parties were represented by counsel who fully argued the motion before the Board.

On December 5, 2001, UPW filed UPW's Motion to Dismiss Hawaii County as Intervenor.

Based on a thorough review of the record, and consideration of the arguments presented, the Board hereby makes the following findings of fact, conclusions of law and grants UPW's Motion to Dismiss.

#### **FINDINGS OF FACT**

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

3. HAWAII COUNTY represents the employer, as defined by HRS § 89-2, of employees of the County of Hawaii.
4. Since on or about July 1, 1972, the UPW and the Counties of Kauai and Hawaii have been parties to more than 12 successive multi-employer collective bargaining agreements covering Unit 01 employees.
5. On or about June 27, 2001, the UPW filed a grievance challenging the Department of Water, County of Kauai's failure to post promotional vacancies for three pipefitter positions.
6. 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.
7. KUSAKA did not respond to the UPW's request to select an arbitrator within 14 calendar days.
8. 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.

9. On October 1, 2001, the UPW filed a prohibited practice complaint with the Board in Case No. CE-01-480, alleging that KUSAKA failed to select an arbitrator for a class grievance within 14 calendar days of the UPW's request as required by Section 15.17 of the Unit 01 contract.<sup>2</sup> KUSAKA contended that the grievances involved reclassification and reallocation actions which were not arbitrable. In Order No. 2052 dated January 14, 2002, the Board granted UPW's motion for summary judgment and found that KUSAKA committed a prohibited practice in violation of HRS §§ 89-13(a)(1) and (5) by unilaterally ignoring the UPW's request for arbitration due to concerns about arbitrability. The Board stated:

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). (footnote omitted.) 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). (footnote omitted.) The Board therefore concludes that there is no genuine issue of material fact in dispute in this case and that the UPW is entitled to judgment as a matter of law.

...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

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<sup>2</sup>It is undisputed that the underlying grievance in Case No. CE-01-480 is the same grievance at issue in this case. In fact, KUSAKA filed a motion to consolidate the two cases on October 10, 2001, supra.

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 Board thereupon ordered KUSAKA to cease and desist from refusing or delaying to select an arbitrator for the class grievance.

10. The instant petition seeks a ruling as to whether the right to classify and reallocate positions is a management right and impacts upon the question of the arbitrability of the subject class grievance.

### DISCUSSION

Hawaii Administrative Rules (HAR) § 12-42-9 pertaining to Declaratory Rulings by the Board, provides, in part:

(f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can be reasonably be expected to exist in the near future.

(2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.

(3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.

(4) The matter is not within the jurisdiction of the board.

In Case No. CE-01-480, the Board held that KUSAKA had committed a prohibited practice by failing to select an arbitrator within 14 days of the UPW's request for arbitration of the grievance involving the pipefitters. The Board there recognized that the Unit 01 agreement provides that the arbitrator shall determine questions of arbitrability. As a consequence of the Board's Order, the issue of arbitrability over personnel actions involving reclassifications and reallocations raised by KUSAKA is properly for the arbitrator

and not this Board, to determine. The arbitrator's decision is final and binding and subject to scrutiny by the Circuit Court in accordance with HRS Chapter 658. Accordingly pursuant to HAR § 12-42-9(f), the Board has good cause to refuse to issue a declaratory order on the instant petition.

Having reached this conclusion, the Board need not address the UPW's Motion to Dismiss HAWAII COUNTY as an intervenor.

### CONCLUSIONS OF LAW

1. Pursuant to HAR § 12-42-9(f), the Board may decline to issue a declaratory order for good cause, including, but not limited to reasons enumerated in the rule.
2. The Board finds good cause not to issue a declaratory order in this case because the Board has previously ruled in Order No. 2052 that the issue of arbitrability of the instant grievance should be determined by the arbitrator. Thus, the Board will not substitute its judgment for that of the arbitrator selected to hear the instant grievance and declines to issue a ruling on the petition.

### ORDER

In accordance with the foregoing, the Board hereby grants the UPW's motion and dismisses the instant petition.

DATED: Honolulu, Hawaii, March 1, 2002

HAWAII LABOR RELATIONS BOARD

  
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BRIAN K. NAKAMURA, Chair

  
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CHESTER C. KUNITAKE, Member

  
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KATHLEEN RACUYA-MARKRICH, Member

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