

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-507
)	
UNITED PUBLIC WORKERS, AFSCME,)	ORDER NO. 2115
LOCAL 646, AFL-CIO,)	
)	ORDER GRANTING, IN PART, AND
Complainant,)	DENYING, IN PART, UPW'S MOTION
)	FOR SUMMARY JUDGMENT; AND
and)	NOTICE OF PREHEARING CONFER-
)	ENCE AND HEARING
CHERYL OKUMA-SEPE, Director, Depart-)	
ment of Human Resources, City and County of)	
Honolulu and JEREMY HARRIS, Mayor, City)	
and County of Honolulu,)	
)	
Respondents.)	
)	

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

On August 6, 2002, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint, and superceding First Amended Prohibited Practice Complaint against CHERYL OKUMA-SEPE (OKUMA-SEPE), Director of Human Resources of the City and County of Honolulu, and JEREMY HARRIS (HARRIS), Mayor of the City and County of Honolulu (collectively Respondents, Employer, or City) for failing to select an arbitrator in UPW grievance CZ 01-38 within 14 calendar days after notification by the Union of its intent to proceed to arbitration. The Union alleges that said failure violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (8).

On August 7, 2002, the UPW filed a Motion for Summary Judgment. On August 14, 2002 Respondents filed their Memorandum in Opposition to the Motion for Summary Judgment. And on August 19, 2002, the UPW filed its Reply thereto. On August 23, 2002, the Hawaii Labor Relations Board (Board) held a hearing on the motion. All parties were provided a full and fair opportunity to argue their respective positions.

After full and fair consideration of the motion, memoranda and arguments, the Board hereby grants the UPW's Motion for Summary Judgment, in Part.

FINDINGS OF FACT

1. The UPW was certified as the exclusive bargaining representative, as defined in HRS § 89-2, of all blue collar non-supervisory employees of the State of Hawaii and counties in bargaining unit 01 on October 20, 1971.
2. OKUMA-SEPE is the Director of the Department of Human Resources, City and County of Honolulu and is a representative of the Mayor and an employer within the meaning of HRS § 89-2.
3. Since 1972 approximately 12 successive collective bargaining agreements covering Unit 01 employees have been negotiated between the UPW and the various public employers, including the City and County of Honolulu.
4. The Unit 01 agreement provides a three step grievance procedure in Section 15 which culminates in arbitration of contractual disputes. The Union provides a notice of intent to arbitrate at the third step.
5. The process which leads to the selection of an arbitrator is set forth in relevant portions of the agreement as follows:

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 with 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:

15.17a.By mutual agreement from names suggested by the parties. [Emphasis added.]

6. On or about November 8, 2001, the Department of Environmental Services suspended a Unit 01 employee for 30 days for failure to perform work as required.

7. On November 16, 2001, the UPW filed a Step 1 grievance in case no. CZ 01-38 challenging the suspension for lack of "just cause" and violation of the employee "bill of rights."
8. Section 15 of the agreement establishes a three-step grievance procedure (which provides for arbitration at Step 3) containing time limits for the issuance of decisions at each step, but authorizes the UPW to wait for a decision by the appointing or employer, or to proceed to the next successive step at its discretion.
9. On December 6, 2001, the UPW filed its Step 2 appeal to OKUMA-SEPE when the appointing authority failed to issue a timely decision.
10. On December 7, 2001, the appointing authority issued its Step 1 decision.
11. OKUMA-SEPE asserts that the Respondents properly issued the Step 2 decision on December 21, 2001 and that the UPW received the Step 2 decision on January 4, 2002. The UPW denies having received the Step 2 decision.
12. In January 2002 the Respondents and UPW began settlement discussions to attempt to resolve the grievance.
13. On July 24, 2002, the UPW submitted a letter notifying OKUMA-SEPE of its intent to arbitrate the dispute.
14. On July 30, 2002, OKUMA-SEPE, contending the dispute was not arbitrable, declined to proceed to arbitration.¹
15. The Unit 01 bargaining agreement addresses the issue of arbitrability as follows:

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.

¹By letter dated July 30, 2002, OKUMA-SEPE informed Gary Rodrigues, "Since the arbitration request was not filed within the thirty calendar day contractual requirement, it is the City's position that the case is not arbitrable. Therefore, I am unable to agree to your request to proceed to arbitration for the above grievance." Union's Exhibit (Ex.) 8

16. On August 6, 2002 the UPW filed the instant prohibited practice complaint.

DISCUSSION

In this case it is undisputed that the Employer did not proceed to select an arbitrator within 14 days of the Union's demand for arbitration. The Union argues that this failure, coupled with an express repudiation of any obligation to proceed to arbitration, constituted a prohibited practice. The Board has repeatedly recognized that an Employer's failure to appoint arbitrators within the contractually required time frame may constitute a prohibited practice. See e.g., United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB ____ (Dec. No. 429 10/10/2001); United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570 (1996). Thus, subject to the requisite finding of wilfulness, a prohibited practice will be found unless the Employer is somehow excused from its contractual obligation.

The Employer argues that no prohibited practice occurred because the Union failed to request arbitration within the time required by the collective bargaining agreement so that the grievance was not arbitrable.² This dispute over the grievance's arbitrability does not, however, excuse the employer of its obligation to proceed with the naming of an arbitrator. See, Order No. 2052, Order Granting UPW's Motion for Summary Judgment, dated 1/14/02, United Public Workers, AFSCME, Local 646, AFL-CIO, where the Board held when collective bargaining agreement provides that question of arbitrability is to be decided by an arbitrator, it is a prohibited practice for the employer to refuse to select an arbitrator because of a dispute regarding arbitrability. Thus, the Employer's failure to comply with the contractual deadline is unexcused.

Wilfulness

In order to find a violation of a collective bargaining agreement constitutes a prohibited practice, the Board must conclude that the violation was wilful.³ In Decision

²At the hearing on the motion, Respondent further argued that no violation occurred because they did not become aware of any dispute regarding arbitrability until after the filing of the instant complaint and thereafter immediately agreed to proceed with arbitration. Respondents assert that under these circumstances the 14-day period should not begin to run until they were aware of the actual factual controversy regarding arbitrability. The Board can find no basis for so tortuously interpreting the 14-day requirement. See fn 4, infra, and accompanying text.

³HRS § 89-13, Prohibited practices; evidence of bad faith, provides in part:

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

* * *

No. 429, supra, the Board identified the standard that is to be applied in finding wilfulness in cases such as this:

In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583 (1996), the Board discussed the element of “wilfulness”:

...[T]he Board, while acknowledging its previous interpretation of “wilful” as meaning “conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS” nevertheless stated that “wilfulness can be presumed where a violation occurs as a natural consequence of a party’s actions.” [citations omitted, emphasis added.]

In that case, the Board applied this understanding of wilfulness to circumstances very similar to the instant proceeding, the failure of an employer to abide by a contractual requirement that parties meet to select an arbitrator within ten days of the union’s notice of intent to arbitrate. The Board concluded:

Thus, based on the evidence before this Board, the Board finds that the natural consequence of the Employer’s actions in failing to contact UPW’s counsel to select an arbitrator constitutes a delay and frustration of the grievance process. Thus, the Board finds that the Employer’s actions in these cases were wilful violations of the contract. Id.

In the instant case, the Board will similarly 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.

This is not to say that the missing of any contractual or bargaining deadline will be presumed to constitute a wilful

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

violation of HRS § 89-13. For to do so would be to reduce them to strict liability offenses in contravention of the Legislature's probable intent regarding state of mind. Therefore, in cases involving the missing of deadlines, wilfulness will henceforth be presumed 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. [Emphasis added.]

Respondents argue that the record at summary judgment is devoid of the requisite "substantial evidence...of [its] conscious derogation of, or indifference to, its contractual or bargaining obligations," so that summary judgment must be denied. The Respondents further argue that they cannot be held responsible for the delay in selecting an arbitrator because it was not aware until after the filing of this complaint that the Union contested its conclusions regarding arbitrability. Upon learning of the instant complaint on August 19, 2002, Respondents agreed that the matter must proceed to arbitration. Respondents suggest that this evidences their good faith and further asks that the Board rule that the 14-day appointment requirement began to run only upon learning of the UPW's contesting their conclusion.

The UPW argues, however, that OKUMA-SEPE's letter of July 30, 2002, fn. 1, refusing to proceed to arbitration on the grounds of contested arbitrability, constituted the requisite "substantial evidence" in that the refusal in itself was a violation or repudiation of an unambiguous contractual requirement.

The City does not contest that Section 15.19(b) requires that the issue of arbitrability be decided by an arbitrator. It therefore, in effect, concedes that it erred in refusing to proceed to arbitration, and consequently failing to appoint an arbitrator, on the grounds of a unilateral conclusion of nonarbitrability.⁴ The City's refusal to proceed with arbitration as required by the collective bargaining agreement was thus justified with what was almost certainly another contractual, and potential statutory, breach. The Board finds that an attempt to justify a contractual violation with yet another contractual violation

⁴No express concession was made. Rather, Respondents asserted that because they did not know until the initiation of this proceeding that the Union contested receipt of a Step 2 decision, it could not know that the issue of arbitrability was contested, and consequently had no duty to proceed to arbitration on what it believed was an undisputedly nonarbitrable grievance. The City did admit that upon learning of the contest regarding arbitrability it had a duty to proceed to arbitration. The contract, however, does not condition arbitration upon any party's knowledge or consent. Arbitrators are clearly and unambiguously to be appointed within 14 days of demand and arbitrability clearly and unambiguously shall be decided by an arbitrator. The City is not, and was never, in a position to determine arbitrability. Any suggestion to the contrary was simply in contravention of the plain language of the contract.

constitutes substantial evidence of at least indifference to the City's contractual obligations. Accordingly, the Board concludes that the City's contractual violation was wilful and grants Complainant's Motion for Summary Judgment with respect to an alleged violation of HRS § 89-13(a)(8).⁵

Costs and Fees

UPW's requested relief includes an assessment of attorney's fees and costs. In Decision No. 429, supra, the Board, in denying a similar request, identified the standard to be applied:

The Union further argues that the City's violation was egregious and that attorneys fees should be awarded pursuant to Decision No. 379, Jo desMarets 5 HLRB 620 (1996) (desMarets). In desMarets, the Board concluded that the award of fees was in order because "the evidence establishes that the Employer deliberately and wilfully sought to destroy the spirit and reputation of one of its employees without any justification for the actions or remorse on its part." Id., at 635. The Board thus awarded fees when it was established that the employer's conduct was motivated by malice. No such motivation having been established in the instant case, the request for fees is denied. [footnote omitted.]

Although the Board has here concluded that the undisputed facts regarding Respondents' conduct was sufficient to establish the wilfulness of the violation, the undisputed facts do not establish that the City's violations were motivated by hostility, anti-union animus, or with the intention of depriving Union members of their rights under the collective bargaining agreement. Any such proof must therefore be adduced at trial and the UPW's motion for summary judgment is denied in this regard.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. The employer violated HRS § 89-13(a)(8) by wilfully violating the terms of a collective bargaining agreement.

⁵ Having so concluded the Board need not address the City's violation of HRS § 89-13(a)(1).

3. Respondents violated HRS § 89-13(a)(8) by wilfully violating the Unit 01 contract when they refused to select an arbitrator for a grievance within the contractual time limits. There is no genuine issue of material fact in dispute regarding this matter and the UPW is entitled to judgment as a matter of law.
4. The Board concludes the City's wilfully violated the Unit 01 agreement as there is substantial evidence of at least indifference to the City's contractual obligations.
5. The issue of whether the City should be assessed fees and costs because the City's violations were motivated by hostility, anti-union animus, or the intent to deprive Union members of their rights under the collective bargaining agreement remains for trial.

ORDER

Based on the foregoing, the Board issues the following interlocutory order:

1. Respondents shall cease and desist from committing prohibited practices by refusing to select an arbitrator for the instant grievance.
2. Respondents shall within 30 days of the receipt of this order, post copies of this order on its website and in conspicuous places on 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. Respondents shall notify the Board within 30 days of the receipt of this order of the steps taken to comply therewith.

NOTICE OF PREHEARING CONFERENCE AND HEARING

NOTICE IS HEREBY GIVEN THAT the Board, pursuant to HRS § 89-5(b)(4) and Hawaii Administrative Rules (HAR) § 12-42-47, will conduct a prehearing conference on the above-entitled prohibited practice complaint on September 27, 2002 at 9:30 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

NOTICE IS ALSO GIVEN that the Board will conduct a hearing, pursuant to HRS §§ 89-5(b)(4) and 89-14, and HAR §§ 12-42-49 and 12-42-8(g) on October 4, 2002 at 9:30 a.m. in the Board's hearing room. The purpose of the hearing is to receive evidence and arguments on the issues remaining before the Board. The hearing may continue from day to day until completed.

DATED: Honolulu, Hawaii, September 13, 2002.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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