STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu and JEREMY HARRIS, Mayor, City and County of Honolulu, Respondents.	CASE NO. CE-01-508 ORDER NO. 2119 ORDER CONSOLIDATING CASES TO DISPOSE OF THE INSTANT MOTIONS AND GRANTING, IN PART, AND DENYING, IN PART, UPW'S MOTIONS FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu and JEREMY HARRIS, Mayor, City and County of Honolulu, Respondents.	CASE NO. CE-01-509

ORDER CONSOLIDATING CASES TO DISPOSE OF THE INSTANT MOTIONS AND GRANTING, IN PART, AND DENYING, IN PART, UPW'S MOTIONS FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING

On August 7 and 8, 2002, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed two separate prohibited practice complaints against CHERYL OKUMA-SEPE (OKUMA-SEPE), Director, Department of Human Resources, City and County of Honolulu, and JEREMY HARRIS, Mayor, City and County of Honolulu (collectively City, Employer or Respondents) for failing to select an arbitrator in UPW grievances CZ-02-12 and CZ-02-11 within 14 calendar days after the Union's notification of its intent to proceed to arbitration. The Union alleges that said failure was in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (8).

On August 9, 2002, the UPW filed Motions for Summary Judgment. On August 19, 2002 Respondents filed its Memoranda in Opposition to the Motion for Summary Judgment. And on August 20, 2002 the UPW filed its replies thereto. On August 23, 2002, the Hawaii Labor Relations Board (Board) held consecutive hearings on the motions.[1] All parties were provided a full and fair opportunity to argue their respective positions.

After full and fair consideration of the motions, memoranda and arguments, the Board hereby grants, in part, and denies, in part, the UPW's respective Motions for Summary Judgment.

FINDINGS OF FACT

1. The UPW was certified as the exclusive bargaining representative of all nonsupervisory blue collar employees in the state and counties in bargaining unit 01 on October 20, 1971.

2. OKUMA-SEPE is the Director of the Department of Human Resources with the 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 within thirty (30) calendar days after receipt of the Step 2 decision.

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[1]At the hearing, the parties agreed not to consolidate these cases for disposition. However, in reviewing the record, the Board finds that the same parties are involved and similar issues are presented for consideration, and thus contemporaneous consideration of these motions is conducive to the proper dispatch of these issues. Accordingly, the Board, on its motion, consolidates these proceedings for the purposes of this motion pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)13).

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.]

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6. On or about May 9, 2002, the UPW filed a class action grievance alleging violations of Sections 11 and 46 in Grievance No. CZ-02-12 for failure to implement appropriate training on violence in the workplace in the Department of Facility Maintenance, City and County of Honolulu.

7. The grievance was processed through Steps 1 and 2 of Section 15 without resolution.

8. On June 14, 2002, the UPW filed its notice of intent to arbitrate Grievance No. CZ-02-12.

9. On or about June 18, 2002, the UPW submitted a proposed list of arbitrators to the Employer.

10. On or about June 24, 2002, the Employer rejected the Union's proposed arbitrators and submitted a proposed list of its own.

11. On or about July 1, 2002, the UPW requested a list of arbitrators from the Board.

12. On or about July 11, 2002, the Board provided a list of arbitrators.

13. On either July 17 or 18, 2002, Gary Rodrigues (Rodrigues), UPW State Director, spoke by phone with Robin Chun-Carmichael (Chun-Carmichael), Division Head of the Labor Relations and Training Division, Department of Human Resources, City and County of Honolulu, regarding the subject grievance. Rodrigues asserts that the conversation was for the purpose of selecting an arbitrator and that Chun-Carmichael was unprepared to proceed and said that she would get back to him. Chun-Carmichael asserts that she subsequently called the UPW on July 18, 2002 and advised that she would be on leave until the end of July 2002.

14. On July 19, 2002, Duane Pang (Pang), Deputy Corporation Counsel, wrote to UPW's counsel Herbert Takahashi (Takahashi) to advise that he had been assigned the subject grievance and asked to be called so as to proceed with the selection of an arbitrator.

15. On that same day, Takahashi wrote back to advise Pang that arbitrator selection was done by the State Director (Rodrigues) and that Pang should contact Rodrigues directly.[2]

16. On or about July 24, 2002, Rodrigues sent a letter to OKUMA-SEPE seeking to initiate arbitrator selection from the Board list.

17. On August 7, 2002 the UPW filed the instant complaint.

18. On August 8 and 12, 2002, Chun-Carmichael left messages for Rodrigues asking that the parties select an arbitrator. On August 12, 2002, Chun-Carmichael reiterated the request in a letter.

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19. On or about April 9, 2002, the UPW filed grievance CZ-02-11 on behalf of a Unit 01 member who had been suspended for four days .

20. Steps 1 and 2 of the grievance process were completed on or about May 21, 2002 and on May 29, 2002 the Union issued a notice of intent to arbitrate the grievance and proposed a list of arbitrators.

21. On or about June 27, 2002, the Employer proposed alternative arbitrators.

22. The Employer represents that it does not know what occurred during the period between the notice of intent to arbitrate and its response with a list of proposed arbitrators.

23. On or about July 1, 2002, the UPW requested that the Board provide a list of arbitrators. The Board provided the list on or about July 11, 2002.

24. On either July 17 or 18, 2002, Rodrigues spoke by phone with Chun-Carmichael regarding the subject grievance. Rodrigues asserts that the conversation was for the purpose of selecting an arbitrator and that Chun-Carmichael was unprepared to proceed and said that she would get back to him. Chun-Carmichael asserts that she subsequently called the UPW on

[2]Pang represented during argument that he did not subsequently contact Rodrigues because of ethical concerns regarding direct contact with a represented litigant. Takahashi responded that his letter was intended as a waiver of any such prohibition.

July 18, 2002 and advised that she would be on leave until the end of July 2002.

25. On or around July 24, 2002, Rodrigues sent a letter to OKUMA-SEPE seeking to initiate arbitrator selection from the Board list.

26. On August 8, 2002, the UPW filed the instant complaint.

27. On August 12, 2002, Chun-Carmichael both called and wrote Rodrigues to request that the parties proceed with the selection of an arbitrator.

DISCUSSION

In these cases it is undisputed that the parties did not proceed to select an arbitrator within 14 days of the Union's demand for arbitration. The Union argues these failures were attributable to the Employer and 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 215 (2001) (Okuma-Sepe I); United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570 (1996) (Cayetano). Thus, if the delay was attributable to the employer, upon 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 delays could not be attributed exclusively to the Employer and any contractual violation was not wilful. In other cases in which a prohibited practice was found in the failure to appoint an arbitrator within a contractually designated period, employers either failed to respond in any way to a union's demand for arbitration, Okuma-Sepe I, supra, and Cayetano, supra; or simply refused to proceed to arbitration because of a contested issue of arbitrability, Order No. 2115, September 6, 2002, United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CE-01-507 (Okuma-Sepe II); Order No. 2052, January 14, 2002, United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CE-01-480 (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). In the instant cases, the City neither ignored nor disputed its duty to proceed with the appointment of arbitrators. Instead there were exchanges between the parties which appeared to represent attempts to move forward. Because of these apparent attempts, the City argues that culpability for any delays should be shared.

The Board agrees, that in each case some of the delay cannot be attributed to either party (e.g., time involved pending the receipt of the requested list of arbitrators from the Board), however, it is clear from the uncontested facts that in both cases, an amount of

time in excess of 14 days can be attributed to the Employer. In Case No. CE-01-508, it is uncontested that the Employer required nine days (6/14-24/02) to respond to the Union's demand for arbitration. Subsequent to the receipt of the list of arbitrators from the Board, the Employer required another 20 days (7/18-8/8/02) to make a substantive response to the Union's request to proceed.[3] In Case No. CE-01-509, 26 days passed before the City responded to the Union's notice of intent to arbitrate. Thus the Board concludes that, in each case, the Employer bears responsibility for the tardy appointment of arbitrators and was thus in violation of the collective bargaining agreement.

Wilfulness

In order to find that a violation of a collective bargaining agreement constitutes a prohibited practice, the Board must conclude that the violation was wilful.[4] In Decision No. 462, Okuma-Sepe I, 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

[3]An exchange of correspondence between counsel occurred during this period. However the exchange took place in the course of a single day one day after the Union's request to proceed and placed the onus back on the Employer. Even if the two days involved in the exchange are deducted from the period of Employer silence, the eighteen resultant days in themselves exceed the contractually required period.

[4]HRS § 89-13, Prohibited practices; evidence of bad faith, provides in part as follows:

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

* * *

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

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 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.]

The 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 Union argues that the Employer has engaged in pattern of wilfully failing to meet its contractual obligation with respect to the appointment of arbitrators. Okuma-Sepe I, supra, found a prohibited practice with respect to 39 such failed appointments by the City. In Okuma-Sepe II, supra, the Board found a similar violation. In both cases, the Board concluded that there existed substantial evidence of at least an indifference to the Employer's contractual obligations which supported a presumption of wilfulness. The Union argues that the City's failure to appoint arbitrators in the instant cases constitutes a part of a continued indifference or hostility so that wilfulness can be similarly presumed.

The Board agrees that the failure to conform its conduct to contractual requirements in a total of 42 arbitrations raises grave concerns regarding the City's willingness to meet its obligations. However, as pointed out by the Employer, in the instant cases efforts were made by the City to proceed with appointment. At the very least, the existence of these efforts raises material issues of fact regarding whether the City proceeded in derogation or indifference to its obligations. The motion for summary judgment must therefore be denied.

CONCLUSIONS OF LAW

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

2. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawai`i Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai`i Chapter, 83 Hawai`i 387, 389, 927 P.2d 386 (1996).

3. A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai`i, 85 Hawai`i 61, 937 P.2d 397 (1997).

4. In the instant cases, the Board finds that the Employer was responsible for the tardy appointment of arbitrators in excess of 14 days and was thus in violation of the collective bargaining agreement.

5. However, the actions of the Employer in each case raise material issues of fact regarding whether the City proceeded in derogation or indifference to its obligations and wilfully violated the agreement.

ORDER

Based on the foregoing, the Board hereby grants summary judgment in favor of the UPW to the extent that the Board concludes that the Employer violated the contract. The issue of whether Respondents wilfully violated the collective bargaining agreement remains for further hearing.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Board will conduct a hearing on the remaining issues raised in Case No. CE-01-508 on October 23, 2002 at 9:30 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The Board will conduct a hearing on the remaining issues in Case No. CE-01-509 immediately thereafter.

DATED: Honolulu, Hawaii, September 30, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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