STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and LARRY J. LEOPARDI, Chief Engineer, Director, Department of Facility Maintenance, City and County of Honolulu; CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu; JEREMY HARRIS, Mayor, City and County of Honolulu; THOMAS LENCHANKO, District Road Superintendent, Waianae District, Division of Road Maintenance, Department of Facility Maintenance, City and County of Honolulu; and CYNTHIA JOHANSON, Department Coordinator, Department of Facility Maintenance, City and County of Honolulu, Respondents.	CASE NO. CE-01-538 ORDER NO. 2227 ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF SECOND PREHEARING CONFERENCE

ORDER DENYING RESPONDENTS' MOTION
TO DISMISS COMPLAINT AND COMPLAINANT'S MOTION FOR
SUMMARY JUDGMENT; AND NOTICE OF SECOND PREHEARING CONFERENCE

On July 11, 2003, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). The complaint alleges that LARRY J. LEOPARDI, Chief Engineer, Director, Facility Maintenance, City and County of Honolulu, CHERYL OKUMA-SEPE, Director, Department of Human Resources, City and County of Honolulu, and JEREMY HARRIS, Mayor, City and County of Honolulu (collectively Employer) violated the provisions of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (7), and (8), when they (1) refused to reinstate Gregory Ortiz (Ortiz) into his former position, (2) refused to restore his seniority, (3) unilaterally and unlawfully ordered him to be subjected to alcohol and controlled substances testing as a condition to his placement within Unit 01, and (4) refused to restore him as an employee in good standing with the City and County of Honolulu unless he passed an alcohol and controlled substance test, all in violation of an Arbitrator's award.

On July 25, 2003, the Employer filed with the Board Larry J. Leopardi, Chief Engineer, Director, Facility Maintenance, City and County of Honolulu, Cheryl Okuma-Sepe, Director, Department of Human Resources, City and County of Honolulu, and Jeremy Harris, Mayor, City and County of Honolulu's Answer to Prohibited Practice Complaint Filed on July 11, 2003 and Counterclaim. The counterclaim alleges that the conduct of UPW interferes with Section 63 of the Unit 01 collective bargaining agreement and, thus, violates HRS §§ 89-13(b)(4) and 89-13(b)(5).

On July 28, 2003, the UPW filed UPW's Motion to Strike "Counter-Claim" or in the Alternative for Particularization of the Claim and Additional Time to Answer. The motion was filed because affiant was unable to find a provision in the administrative rules of the Board which allows for a "counterclaim." See Hawaii Administrative Rules (HAR) §§ 12-42-41 through 12-42-51.

On August 8, 2003, the UPW filed UPW's Motion to Amend Complaint. The amendment seeks to add Thomas Lenchanko, District Road Superintendent Department of Facility Maintenance, City and County of Honolulu and Cynthia Johanson, Department Coordinator, Department of Facility Maintenance, City and County of Honolulu as Respondents in this matter.

On August 27, 2003 the Board held a hearing on the motions. The parties were afforded full opportunity to argue their motions. After due deliberation of the arguments, the Board granted the UPW's motion to file an amended complaint. The Board further ruled that it would not allow the counterclaim as there were no guidelines on the filing of counterclaims and to allow a counterclaim to be filed would be confusing and possibly prejudicial.

On August 27, 2003, the UPW filed a First Amended Prohibited Practice Complaint. In addition to naming the two additional Respondents, the UPW alleged that the Employer failed to obey an Arbitrator's award when it unilaterally changed the terms and conditions of employment by requiring Ortiz to undergo pre-employment drug testing contrary to the requirements of Section 63.04 of the Unit 01 agreement; refusing to reinstate Ortiz in his former or equivalent position unless he passed a drug and alcohol test; involuntarily placing Ortiz on administrative leave from June 23, 2003 to June 30, 2003, on sick leave from July 1, 2003 to July 15, 2003; and suspending Ortiz from July 16, 2003 to August 16, 2003. The UPW's allegations of statutory violations remained the same.

On September 12, 2003, the UPW filed the Union's Motion for Summary Judgment. The UPW submits that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.

On September 30, 2003, the Employer filed Respondents' Motion to Dismiss. In its motion to dismiss, the Employer states that the Board should dismiss HRS § 89-13(a)(8) claims as the UPW has failed to exhaust contractual remedies, and HRS §§ 89-13(a)(1) and (7) claims as they derive solely from the subsection (8) claims. Likewise, the allegations of

Respondents' purported failure to comply with the decision and award issued by Arbitrator Paul S. Aoki on June 10, 2003, are matters solely within the province of the circuit courts.

On October 6, 2003, the UPW filed Union's Reply Memorandum in Support of Motion for Summary Judgment.

On October 8, 2003, the Employer filed Respondents' Motion to Strike Union's Reply Memorandum in Support of Motion for Summary Judgment Filed October 6, 2003. The Employer states it is unable to find any provision in the Board's Rules of Practice and Procedure which allows for the filing of a reply memorandum. The motion to strike was accordingly filed based on the Board's prior ruling with respect to Complainant's Motion to Strike Counterclaim or in the Alternative for Particularization of the Claim and Additional Time to Answer.

On October 29, 2003, the Board heard arguments on all of the pending motions in the case and the parties had full opportunity to argue the motions before the Board. After due consideration of the record and all arguments, the Board issues the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. The UPW is an employee organization and is the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 01 composed of blue collar nonsupervisory employees,

2. The Employer is a public employer or the representative of a public employer as defined in HRS § 89-2.

3. For all relevant times, Ortiz was a Heavy Truck Driver employed by the City and County of Honolulu and a public employee as defined in HRS § 89-2. Ortiz was included in bargaining unit 01. As a Heavy Truck Driver, Ortiz is required to possess a Commercial Drivers License (CDL)

4. The UPW and the Employer are parties to a collective bargaining agreement for Unit 01 employees that contains a grievance procedure that culminates in final and binding arbitration. The Agreement also contains a section on drug and alcohol testing.

5. Effective September 4, 2002, Ortiz was terminated from employment. The UPW filed a grievance on his behalf. After processing the grievance through the steps of the grievance procedure, the UPW took Ortiz's case to arbitration. Paul S. Aoki was selected as an arbitrator and on June 10, 2003, he issued an arbitration award which was confirmed by the Circuit Court on August 20, 2003. The arbitration

award provided that Ortiz be reinstated to the same or equivalent position without backpay and with seniority and rights as they existed on the date of his termination.

6. On June 23, 2003, Ortiz reported to work. The Employer required that he be subject to a "pre-employment" drug test. Ortiz was placed on paid administrative leave and as a result of the drug test, was subject to a ten-day suspension and placed on sick leave.

DISCUSSION

The parties in this case have filed competing motions to dismiss and motions for summary judgment. The Employer has filed a motion to dismiss arguing that the Board must defer jurisdiction in favor of the contractual grievance arbitration process, including court enforcement of the confirmed arbitration award. The Union argues that summary judgment is required because the Employer wrongfully and unilaterally imposed a condition of a pre-employment drug test upon the Arbitrator's final and binding order of reinstatement.

Motion to Dismiss

The Board has not had the opportunity to address with specificity the circumstances under which deferral to an arbitration award is appropriate. The National Labor Relations Board has established the following tests which are hereby adopted by the Board:

> Where the subject of an unfair labor practice has been decided in an arbitration proceeding, the Board continues to determine deference to the arbitration award under its *Spielberg*[1] [footnote omitted] doctrine. Under *Spielberg* and its progeny there are four standards which must be satisfied before the Board will defer to the decision of the arbitral tribunal: (1) the unfair labor practice issue must have been presented to and considered by the arbitral tribunal; [footnote omitted] (2) the arbitral proceedings must "appear to have been fair and regular"; (3) all parties to the arbitral proceedings must have "agreed to be bound"; and (4) the decision of the arbitral tribunal must not be "clearly repugnant to the purposes and policies of the Act." [footnote omitted.]

Charles J. Morris, The Developing Labor Law, Second Edition, Volume 1, p. 957 (footnotes omitted.)

Spielberg principles are also applied to cases of deference to court enforcement of arbitration awards when " 'direct Court enforcement of arbitrators' awards can provide more

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[1]Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

prompt and effective action' than can the various steps of the Board's unfair labor practices procedures." Id., at 983.

No party to the instant proceeding questions the finality or adequacy of the arbitral judgment. But the defenses raised by the Employer takes this case outside of the scope of Spielberg. The City asserts that its subjecting of Ortiz to a pre-employment drug test was not a repudiation or violation of the Arbitrator's award because: (1) it did in fact reinstate Ortiz as required by the award, (2) the test was provided for in the collective bargaining agreement, and/or (3) the test was pursuant to a federal regulation so that any state law to the contrary is preempted. None of these issues were among the issues "presented and considered by the arbitral tribunal" so deferral would be contrary to the first step of the Spielberg test.

Grievance Arbitration Deferral

The Employer also argues that dismissal of the claims of contractual violations must be deferred to the grievance process contained in the collective bargaining agreement. Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in a final and binding decision . . . ." (Emphasis added.) HRS § 89-10.8(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representative via its authority to adjudicate prohibited practices complaints. HRS § 89-13(a)(8), HRS § 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process. ("It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, where appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HLRB 253, 261 (1972) (HSTA). Thus the Board has deferred to the contractual grievance process except where there exists countervailing policy considerations, or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant access to the grievance process. See e.g, HSTA, supra. (arbitration fruitless and parties waive arbitration; Hawaii State Teachers Association, 1 HLRB 442 (1974) (speed); Hawaii Government Employees Association, 1 HLRB 641 (1977) (subject not covered by contract).

It is true in the instant case that the alleged breaches of contract might be addressed through the grievance process. But the Board herein declines to defer jurisdiction because this case presents superceding policy considerations. The Union alleges that by imposing the unilateral condition of a pre-employment drug test prior to Ortiz's reinstatement the City has effectively repudiated its obligation arising from appropriate resort to the grievance process. The City denies any repudiation and argues that there are other bases, unrelated to the substance of the grievance or order, which justify its imposing of the test. The City thus raises collateral issues to the implementation of the Arbitrator's award.

The Board has recently been beset with prohibited practice complaints alleging employers' failing to comply with arbitrators' awards.[2] In each case that has not been settled employers raise some collateral defense to what the union argues is the direct consequence of an arbitrator's award. In each case the employer's refusal to act on the arbitration award might be subject to a grievance and thus deferrable by the Board, but any award resulting from the process might be subject to yet another collateral avoidance, and the cycle could continue ad nauseum. We therefore conclude the policy favoring arbitral finality compels the Board's assumption of jurisdiction.

Motion for Summary Judgment

The UPW has moved for summary judgment in its favor. Summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter, 83 Hawai`i 387, 389, 927 P.2d 386 (1996). 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). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

The UPW argues that summary judgment should be granted because the Employer unilaterally imposed the condition of pre-employment drug testing upon the arbitrator-ordered reinstatement of Ortiz. This allegedly offends the finality of the arbitral order and is contrary to the provisions of the collective bargaining agreement.

As noted above the Employer's defense includes claims that, (1) it did in fact reinstate Ortiz as required by the award, (2) the test was provided for the collective bargaining agreement, or (3) the test was pursuant to a federal regulation so that any state law to the contrary is preempted. It argues that each of these claims raise factual disputes which require the denial of summary judgment. The Board agrees. While each claim involves mixed questions of law and fact, the application or applicability of the testing rule, and the adequacy of steps taken toward the alleged reinstatement of Ortiz are factual issues that must be addressed and resolved.

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[2]See, e.g., United Public Workers, AFSCME, Local 646, AFL-CIO v. Kathleen Watanabe, et al., Case No. CE-01-527 (interdepartmental application); United Public Workers, AFSCME, Local 646, AFL-CIO v. William Takaba, et al., Case No. CE-01-532 (duration); Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. City and County of Honolulu, et al., Case No. CE-01-536 (settlement agreement); Harry Kim, et al., Case No. DR-01-90 (statutory interpretation); and United Public Workers, AFSCME, Local 646, AFL-CIO v. Sharon L. Agnew, et al., Case No. CE-10-541 (private implementation).

Consequently both the Employer's Motion to Dismiss and the UPW's Motion for Summary Judgment are denied.

CONCLUSIONS OF LAW

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

2. The Board adopts the doctrine regarding the deferral to the arbitration process set forth by the National Labor Relations Board in Spielberg. Under *Spielberg* and its progeny there are four standards which must be satisfied before the Board will defer to the to the decision of the arbitral tribunal: (1) the unfair labor practice issue must have been presented to and considered by the arbitral tribunal; (2) the arbitral proceedings must "appear to have been fair and regular"; (3) all parties to the arbitral proceedings must have "agreed to be bound"; and (4) the decision of the arbitral tribunal must not be "clearly repugnant to the purposes and policies of the Act."

3. The Board concludes that the instant case fails to fall within the parameters of Spielberg because the issues presented were not presented to and considered by the arbitrator in this case.

4. The Board has deferred alleged contractual violations to the contractual grievance process except where there exists countervailing policy considerations, or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant access to the grievance process. Here, the Board declines to defer the contractual claims to the grievance process because of superceding policy considerations, i.e., the policy favoring arbitral finality and alleged collateral avoidance of an arbitration award.

5. Summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. Here, the Board concludes that there are material issues of fact in dispute regarding, inter alia, the application or applicability of the testing rule, and the adequacy of steps taken toward the alleged reinstatement of Ortiz sufficient to defeat summary judgment.

NOTICE OF SECOND PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4) and (i)(5) and Hawaii Administrative Rules (HAR) § 12-42-47, will conduct a second prehearing conference on the above-entitled prohibited practice complaint on January 9, 2004 at 10:00 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. LARRY J. LEOPARDI, et al.
CASE NO. CE-01-538
ORDER NO. 2227
ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF SECOND PREHEARING CONFERENCE

DATED: Honolulu, Hawaii, December 29, 2003.

HAWAII LABOR RELATIONS BOARD

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CHESTER C. KUNITAKE, Member

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