

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of ) ) UNITED PUBLIC WORKERS, AFSCME, ) LOCAL 646, AFL-CIO, ) ) Complainant, ) ) and ) ) ROBERT WATADA, Chairperson, Wai'alaie ) School Board, Wai'alaie Elementary School, ) State of Hawaii; WAI'ALAE ELEMENTARY ) SCHOOL, State of Hawaii; and JONATHAN A. ) SWANSON, Deputy Attorney General, State of ) Hawaii, ) ) Respondents. )	CASE NO. CE-01-558  ORDER NO. 2264  ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT
---	--

---

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

On March 24, 2004, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against Respondents ROBERT WATADA (WATADA), Chairperson, Wai'alaie School Board, Wai'alaie Elementary School, State of Hawaii, WAI'ALAE ELEMENTARY SCHOOL, State of Hawaii (WAI'ALAE SCHOOL), and Deputy Attorney General JONATHAN SWANSON (SWANSON), for repudiating and refusing to sign a March 3, 2004 Memorandum of Agreement resolving Case No. CE-01-550.

On April 19, 2004, the UPW filed a Motion for Summary Judgment in the instant case and on April 27, 2004 Respondents filed a memorandum opposing UPW's motion. A hearing was held on the motion on May 13, 2004 and the parties had full opportunity to present oral arguments and evidence to the Board. After full consideration of the evidence in the record and the arguments of the parties, the Board hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW is the certified exclusive representative as defined in Hawaii Revised Statutes (HRS) § 89-2, of blue collar nonsupervisory employees in bargaining unit 01.

2. WAI'ALAE SCHOOL is a public charter school within the Hawaii State Department of Education (DOE), and as such is the designated representative of the public employer within the meaning of HRS § 89-2. WATADA is the Chairperson of the School Board of WAI'ALAE SCHOOL.
3. On December 23, 2003 the UPW filed a prohibited practice complaint in Case No. CE-01-550 against WATADA, WAI'ALAE SCHOOL, the DOE, and its Superintendent Patricia Hamamoto (Hamamoto). The complaint challenged WAI'ALAE SCHOOL's decision to discontinue cafeteria services and the impact on Unit 01 members employed at WAI'ALAE SCHOOL working in the DOE cafeteria.
4. SWANSON is a Deputy Attorney General assigned to represent WATADA and WAI'ALAE SCHOOL in Case No. CE-01-550. SWANSON is neither a public employer nor designated representative of the public employer within the meaning of HRS §§ 89-2 and 89-13.
5. On December 30, 2003, WATADA called and faxed Dayton Nakanelua (Nakanelua), the UPW's State Director, expressing a willingness to meet on the matter.
6. On January 16, 2004, the Board conducted an evidentiary hearing on UPW's Motion for Interlocutory Relief in Case No. CE-01-550. On that same day in an effort to settle Case No. CE-01-550, negotiations were held between WAI'ALAE SCHOOL, as represented by WATADA and its principal Annette Masutani (Masutani), the UPW, as represented by Nakanelua and other personnel, and the DOE, as represented by DOE personnel specialists Solette Perry and Leonard Agor. A second meeting was held on January 28, 2004.
7. On February 4, 2004, the Board, having denied the UPW's Motion for Interlocutory Relief, held a hearing on Respondents' Motion to Dismiss. SWANSON represented WATADA and WAI'ALAE and Deputy Attorney General Kathryn-Jean Taniguchi (Taniguchi) represented the DOE. After the Board announced its inclination to deny said motion, Taniguchi requested that further hearings in the case be continued to afford the parties an opportunity to negotiate a resolution. The Board was further requested to be available to mediate the dispute, if necessary.
8. Negotiations resumed on February 5, 2004 in the Board's hearing room. Also present was Hamamoto. Negotiations that day were suspended to permit WATADA to obtain formal authority from the Wai'alaie School Board.
9. Further bargaining sessions were held on February 2 through 12, 16, 17, and March 1, 2004.

10. In the bargaining session held on February 17, 2004, WATADA represented to UPW that the School Board of WAI'ALAE SCHOOL had decided to resume food services from the DOE effective March 1, 2004. After he announced this decision, WATADA asked the UPW whether he needed to attend the continuing negotiations between the UPW and the DOE. Nakanelua indicated that WATADA did not need to attend the negotiation sessions. WATADA and Masutani did not attend bargaining sessions after February 17, 2004.
11. Relying on WAI'ALAE SCHOOL's decision to resume food service from the DOE, the DOE representatives continued to bargain with the UPW over the effects on Unit 01 employees impacted by WAI'ALAE SCHOOL's decision to discontinue cafeteria services that gave rise to a prohibited practice charge in Case No. CE-01-550. The UPW believed the DOE representatives had been delegated the necessary authority to resolve the matter.
11. On March 1 and 3, 2004, written proposals were exchanged, which resulted in a memorandum of agreement (MOA) between the DOE, WATADA and WAI'ALAE SCHOOL, and the UPW.
12. On March 4, 2004, the evidentiary hearing on Case No. CE-01-550 was scheduled to commence. After noting the appearance of counsel but before any testimony could be received, the following exchange took place:

The Chair: You want to make an opening statement, or---

Mr. Takahashi: No. We are asking you – we are offering into evidence Exhibit 57, which represents an agreement reached between the parties. Signatures are being circulated. This document is being circulated at the present time. We have the original documents with us for signatures by Superintendent, by Robert Watada and by Mr. Nakanelua.

The terms of the settlement are as specified in Exhibit 57-1 to 57-3. Exhibit 57-4 is the verification of acceptance of the final written terms of the memorandum of agreement.

Transcript of March 4, 2004 hearing in Case No. CE-01-500 (Tr.), p. 4; Exhibit 59 attached to UPW's Motion for Summary Judgment.

13. All parties were represented before the Board at the time, including WATADA and WAI'ALAE SCHOOL (through Deputy Attorney General SWANSON.) When the MOA was presented, the Board recessed the proceeding to afford those present an opportunity to review its contents.

14. The proffered Exhibit 51 was a document dated March 3, 2004 entitled "Memorandum of Agreement Between State of Hawaii Department of Education, the Waialae Elementary School, and the United Public Workers." Its terms detail action to be taken by the respective parties to settle Case No. CE-01-550. Paragraph 8 provides: "The parties shall notify the Hawaii Labor Relations Board of this Agreement as the basis for resolving the pending case."

15. When Board proceedings resumed all attorneys represented to the Board that based on the MOA, the case was considered resolved. Respective counsel stated:

Mr. Takahashi: I have a question for the attorneys for the other side. Am I to -- are our statements and representations correct?

Mr. Swanson: With the exception -- my understanding is that the parties agreed that this would resolve it, and you said it was subject to the Board's approval.

Mr. Takahashi: What I mean was we want to notify the Board pursuant to paragraph 8.

Board Member Racuya-Markrich: So the Board's been notified, so what? What does it do to this case?

Mr. Takahashi: It resolves this case.

Mr. Swanson: My understanding is we resolved this case.

\* \* \*

Ms. Taniguchi: Yes.

Tr., p. 6.

16. The MOA of March 3, 2004 was subsequently signed by Hamamoto and Nakanelua. The MOA states in relevant part as follows:

Whereby the United Public Workers filed a prohibitive (sic) practice with the Hawaii Labor Relations Board (CE 01-550) (sic) against the DOE and the Waialae Charter School Board regarding the closing of the Waialae School cafeteria;

Whereby the Waialae Charter School Board has agreed, effective March 1, 2004 to purchase from the State of Hawaii Department of Education school meals at an agreed upon price to include the

preparation of the meals at Anuenue School, delivery and assistance in the serving of said meals at Wai'ala'e Elementary School;

Any modifications to this agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement.<sup>1</sup>

17. On or about March 16, 2004 WATADA refused to sign the MOA, before "corrections and clarifications" were made as summarized by SWANSON,<sup>2</sup> which changed the terms of the agreement including the substitution of the third paragraph (as stated in Finding of Fact No. 16) beginning "Whereby the Wai'ala'e Charter School Board..." with the following language:

Whereby insofar as this dispute involves DOE employees who were assigned to work at Wai'ala'e School and have been reassigned by their employer to other venues of employment, Wai'ala'e has no further involvement in these employees' work assignments and wage or benefit payments.<sup>3</sup>

18. Contrary to SWANSON's characterization of the proposed "corrections and clarifications" as nonsubstantive, WATADA and WAI'ALAE SCHOOL wanted to limit its decision to purchase DOE school lunches to the 2003-2004 school year. The Unit 01 collective bargaining agreement provides a duration clause, which is a material term of the contract. Therefore, any changes by WAI'ALAE SCHOOL to modify the purchase of food services from the DOE as provided in the Stipulation and Order "shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement." This explains why on March 17, 2004, the UPW notified Respondents that the UPW would not renegotiate the terms of the MOA.

### DISCUSSION

The UPW asserts that the Respondents' refusal to execute the March 3, 2004 MOA constituted a repudiation of the settlement agreement that resolved Case No. CE-01-550, evidencing a refusal to bargain in good faith violative of HRS §§ 89-13(a)(1), (5),

---

<sup>1</sup>See, Exhibit 60 attached to the UPW's Motion for Summary Judgment.

<sup>2</sup>SWANSON's fax transmittal to UPW's counsel, first suggested revising the agreement by eliminating WAI'ALAE SCHOOL as a signatory to the MOA altogether. In the alternative, SWANSON identified eleven points that needed correction and clarification, characterized as "not substantive." See Exhibit 61 attached to UPW's Motion for Summary Judgment.

<sup>3</sup>See, Exhibit 61 attached to the UPW's Motion for Summary Judgment.

and (7). Respondents assert that the MOA was neither binding nor conclusive as to them because the negotiators for the DOE lacked the authority to bind WATADA or WAI'ALAE SCHOOL.

### Summary Judgment

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 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). 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).

It is axiomatic the an employer's failure to sign a bargaining agreement that has been agreed to by authorized negotiators representing the parties is conclusive evidence of a refusal to bargain in good faith. The UPW argues that the agreement of DOE negotiators Perry and Agor on behalf of WAI'ALAE SCHOOL and WATADA to the terms of the agreement bound WATADA and WAI'ALAE SCHOOL because they possessed either the expressed or implied authority to negotiate for the charter school. Respondents WATADA and WAI'ALAE SCHOOL contest the authority of the DOE to negotiate on their behalf and support their assertion with affidavits by WATADA, Perry and Agor to that effect. The UPW concedes that if the issue were dispositive of the motion, the affidavits would create a material issue of fact. But the Union argues that summary judgment is nonetheless required because Respondents are estopped from repudiating the MOA under principles of judicial estoppel.

The doctrine of judicial estoppel as articulated by the Hawaii Supreme Court in Torres v. Torres, 100 Hawai'i 397, 408, 60 P.3d 798 (2002) provides that:

Moreover, under the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him [or her], at least where he [or she] had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his [or her] action. (citations omitted.)

The UPW contends that the representation of SWANSON, as WATADA and WAI'ALAE SCHOOL's counsel, to the Board that the MOA resolved the dispute ("My understanding is we resolved this case.") was necessarily impliedly binding as to the parties and stands in direct contradiction to the position asserted herein that they are under no legal

obligation to sign the MOA. The UPW argues that Respondents WATADA and WAI'ALAE SCHOOL should therefore be estopped from maintaining the latter inconsistent position.

Respondents argue that estoppel cannot lie for lack of any detrimental reliance. And such reliance is indeed an element of judicial estoppel. In Roxas v. Marcos, 89 Hawai'i 91, 124, fn. 19 (1998), the Hawaii Supreme Court stated:

However the doctrine of judicial estoppel does not apply unless the changed argument *prejudices* the opposing party. Rosa, 4 Haw.App. at 218, 664 P.2d at 751. "To constitute this sort of estoppel[,] the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position or by reason thereof the rights of other parties must have intervened." Yuen, 40 Haw. at 230. (citation and internal quotation signals omitted.) In other words, a party is free to "plead[] inconsistent claims or defenses within a single action," but "[a] party is precluded from subsequently repudiating a theory of action [that has been] *accepted and acted upon by the court*" or that has otherwise detrimentally affected the opposing party. Rosa, 4 Haw.App. at 220, 664 P.2d at 752 (emphasis added).

The Board finds that the necessarily detrimental reliance is present here. In the bargaining session held on February 17, 2004, WATADA represented to UPW that the School Board of WAI'ALAE SCHOOL had decided to resume food services with the DOE effective March 1, 2004. After he announced this decision, WATADA asked the UPW whether he needed to attend the continuing negotiations between the UPW and the DOE. Nakanelua indicated that WATADA did not need to attend these negotiation sessions. WATADA and Masutani did not attend bargaining sessions after February 17, 2004. Relying on WAI'ALAE SCHOOL's decision to resume food service from the DOE, the DOE representatives continued to bargain with the UPW over the effects on Unit 01 employees impacted by WAI'ALAE SCHOOL's initial decision to discontinue cafeteria services that gave rise to the prohibited practice charge in Case No. CE-01-550.

The UPW believed the DOE representatives had been delegated the necessary authority to resolve the matter. Neither the UPW nor the DOE have repudiated the MOA and, having executed and implemented the agreement in reliance on Respondents WATADA and WAI'ALAE SCHOOL's commitments and participation, presumably remain bound by its terms. And if Respondents WATADA and WAI'ALAE SCHOOL are excused from executing the tripartite agreement notwithstanding the commitment of their representative, the MOA might be found to be an illusory agreement thereby wasting the parties' and the Board's time, efforts, and resources spent on negotiation, consideration and implementation to date.

Moreover, Respondents represented before the Board that a final agreement had been negotiated between the parties in Case No. CE-01-550 and that the resultant MOA disposed of the case. They now want to reopen negotiations and claim not to be bound by the terms of the agreement. Contrary to SWANSON's characterization of the proposed "corrections and clarifications" as nonsubstantive, WATADA and WAI'ALAE SCHOOL wanted to limit its decision to purchase DOE school lunches to the 2003-2004 school year. The Unit 01 collective bargaining agreement provides a duration clause, which is a material term of the contract. Therefore, any changes by WAI'ALAE SCHOOL to modify the purchase of food service from the DOE as provided in the Stipulation and Order "shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement." This explains why on March 17, 2004, the UPW notified Respondents that the UPW would not renegotiate the terms of the MOA.

The UPW and DOE relied upon Respondents WATADA and WAI'ALAE SCHOOL's initial position to their detriment. The Board therefore concludes that Respondents are estopped from maintaining a position contrary to their representations before the Board on March 4, 2004. Accordingly, the Board grants summary judgment in favor of the Complainants and WATADA and WAI'ALAE SCHOOL are hereby ordered to execute and implement the MOA of March 3, 2004.

At the hearing, SWANSON's counsel urged the Board to dismiss the complaint as to SWANSON because he was acting only as the employers' counsel and did not and could not exercise any authority and control over the affected public employees. The UPW did not object to such a dismissal. Accordingly, the complaint is dismissed as to SWANSON.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. 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.
3. Under the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, or previously assumed by him [or her], at least where he [or she] had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his [or her] action. Torres v. Torres, supra.
4. The Board finds that the necessarily detrimental reliance under the facts of this case. Neither the UPW nor the DOE have repudiated the MOA and, having



executed the agreement in reliance on Respondents WATADA and WAI'ALAE SCHOOL's commitments and participation, they presumably remain bound by its terms. If Respondents are excused from executing the tripartite agreement notwithstanding the commitment of their agent, the MOA might be found an illusory agreement thereby wasting the parties' and the Board's time, efforts, and resources spent on negotiation, consideration and implementation to date.

5. The UPW and DOE relied upon Respondents WATADA and WAI'ALAE SCHOOL's initial position to their detriment. The Board therefore concludes that Respondents WATADA and WAI'ALAE SCHOOL are estopped from maintaining a position contrary to their representations before the Board on March 4, 2004.
6. As Complainant did not oppose dismissing SWANSON as a Respondent in this matter because he was not a public employer, SWANSON is hereby dismissed as a Respondent in this case.

ORDER

1. WATADA and WAI'ALAE SCHOOL shall cease and desist from repudiating the MOA of March 3, 2004 and are hereby ordered to execute and implement the MOA of March 3, 2004.
2. Respondents shall immediately post copies of this decision in conspicuous places at work sites where employees of Unit 01 assemble and congregate, and on the Respondents' website for a period of 60 days from the initial date of posting.
3. Respondent shall notify the Board of the steps taken to comply herewith within 30 days of the receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, June 30, 2004

HAWAII LABOR RELATIONS BOARD

  
\_\_\_\_\_  
BRIAN K. NAKAMURA, Chair

  
\_\_\_\_\_  
CHESTER C. KUNITAKE, Member

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. ROBERT WATADA, et al.  
CASE NO. CE-01-558  
ORDER NO. 2264  
ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

  
\_\_\_\_\_  
KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.  
Ryan W. Roylo, Deputy Attorney General  
Joyce Najita, IRC