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HAWAII LABOR  
RELATIONS BOARD

Attorneys for Respondents

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-01-630
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	AMENDED FINDINGS OF FACT,
LOCAL 646, AFL-CIO, et al,	)	CONCLUSIONS OF LAW AND ORDER
	)	GRANTING COMPLAINANTS' MOTION
Complainants,	)	FOR INTERLOCUTORY ORDER IN A
	)	PROHIBITED PRACTICE CASE;
and	)	CERTIFICATE OF SERVICE
	)	
CITY AND COUNTY OF HONOLULU and	)	
DEPARTMENT OF ENVIRONMENTAL	)	
SERVICES, City and County of	)	
Honolulu,	)	
	)	
Respondents.	)	
	)	

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER GRANTING COMPLAINANTS' MOTION FOR  
INTERLOCUTORY ORDER IN A PROHIBITED PRACTICE CASE


COME NOW Respondents CITY AND COUNTY OF HONOLULU and  
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF  
HONOLULU, by and through their attorneys, CLARK HIROTA and

JOHN S. MUKAI, Deputies Corporation Counsel, City and County of Honolulu, and respectfully submit these Findings of Fact, Conclusions of Law and Order Granting Complainants' Motion for Interlocutory Order in a Prohibited Practice Case.

DATED: Honolulu, Hawaii, October 5, 2006.

CARRIE K. S. OKINAGA  
Corporation Counsel

By

  
\_\_\_\_\_  
CLARK HIROTA  
JOHN S. MUKAI  
Deputies Corporation Counsel  
Attorneys for Respondents

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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)  
Respondents. )  
\_\_\_\_\_ )

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER GRANTING COMPLAINANTS' MOTION FOR  
INTERLOCUTORY ORDER IN A PROHIBITED PRACTICE CASE

On September 8, 2006, Complainants UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO ("Complainant UPW"), and BYRON "ONA" YOUNG ("Complainant Young"), filed a Prohibited Practice Complaint herein against Respondents CITY AND COUNTY OF HONOLULU and DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU ("Respondents"), its agents, and its principal, alleging that said Respondents violated their duty to bargain in good faith with Complainant UPW, by reneging on a verbal Settlement Agreement which resolved the grievance filed by

Complainant UPW against Respondents in this matter, namely the City and County of Honolulu, and Department of Environmental Services, City and County of Honolulu ("ENV"), its agents, and its principal. Complainants alleged that by doing so, Respondents violated Section 89-13(a)(5), Hawaii Revised Statutes ("HRS").

On or about September 8, 2006, Complainants also filed the instant Motion for Interlocutory Order in a Prohibited Practice Case.

On September 13, 2006, Respondents filed a Motion to Enlarge Time to File Responsive Memorandum to Complainants' (sic) Motion for Interlocutory Order, Continue Hearing Date on Complainants' Motion for Interlocutory Order and Enlarge Time to File Responsive Pleading to Complainants' (sic) Prohibited Practice Complaint, and the moving documents related thereto.

On September 14, 2006, the above-entitled Board heard Respondents' Motion to Enlarge Time and Complainants' Motion for Interlocutory Order.

On September 14, 2006, the above-entitled Board heard Respondents' Motion to Enlarge Time to File Responsive Memorandum to Complainants' Motion for Interlocutory Order, and granted the same to the extent that Respondents were afforded until the close of business on Friday, September 15, 2006 to



respond to said Motion for Interlocutory Order in a Prohibited Practice Case ("Motion for Interlocutory Order").

The Board also granted Respondents' Motion to Continue Hearing to the extent that the continuance of said hearing was extended until Monday, September 18, 2006.

Thereafter, on September 18 and 19, 2006, a hearing on the merits of said Motion for Interlocutory Order was held. Both parties were afforded the opportunity to call and cross-examine witnesses, submit exhibits and file briefs.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law and order granting the Motion for Interlocutory Order.

#### FINDINGS OF FACT

The UPW is the exclusive representative, as defined in Section 89-2, HRS, of employees in Unit 01, as defined in Section 89-6(a)(1), HRS.

The Mayor of the City and County of Honolulu and any individual who represents the Mayor or acts in his interest in dealing with public employees is an employer or public employer as defined in Section 89-2, HRS. Eric Takamura, the Director of the Department of Environmental Services, City and County of Honolulu ("Director Takamura"), is an individual who represents the Employer of employees of the City and County of Honolulu.

ENV discharged Complainant Young from his position of Equipment Operator effective April 20, 2005 for making threatening verbal comments towards another ENV employee on or about December 5, 2004.

On April 8, 2005, the Union filed a Step 1 grievance (UPW Case No. PK 05-13) on behalf of Young alleging Employer's termination of Young violated Articles 1, 11, 14, 46, and 58 of the Unit 1 Collective Bargaining Agreement between the Union and the Employer.

During the months of November and December 2005, there was a meeting between Director Takamura and UPW State Director Dayton Nakanelua ("UPW State Director Nakanelua") to resolve the grievance the UPW had filed challenging the propriety of the discharge of Complainant Byron "Ona" Young. At this meeting, an agreement was made between said persons that in order to resolve the aforesaid grievance, the discharge of Complainant Young would be reduced to a written reprimand with Complainant Young being reinstated to his employment with the City as and <sup>OK</sup> <sub>SW</sub> Equipment Operator in ENV Refuse Division ("Refuse Division"), with Director Takamura and UPW State Director Nakanelua to work out the details of Complainant Young's reinstatement. Director Takamura and UPW State Director Nakanelua shook hands in recognition that such an agreement had been reached. Director

Takamura testified that he understood the parties' shaking of hands to mean that the aforesaid agreement had been reached. It was further agreed that Director Takamura and UPW State Director Nakanelua would work out the details of the Settlement Agreement.

During the months of November and December, 2005, Director Takamura and UPW State Director Nakanelua held a series of meetings in which the terms of the settlement of the aforesaid grievance were agreed to.

In January of 2006, the proposed Settlement Agreement was drafted by UPW State Director Nakanelua, via his attorney, and forwarded to Director Takamura.

Thereafter, on or about March 16, 2006, Director Takamura brought a copy of the proposed Settlement Agreement he received from UPW State Director Nakanelua to the meeting with UPW State Director Nakanelua to finalize the terms of the Settlement Agreement. At this meeting, Director Takamura and UPW State Director Nakanelua went over each and every paragraph of the proposed Settlement Agreement that was drafted by UPW State Director Nakanelua, with said individuals making corrections where necessary to the Settlement Agreement drafted by UPW State Director Nakanelua. These modifications were reflected by handwritten changes that UPW State Director Nakanelua made to



the draft Settlement Agreement Director Takamura brought to this meeting on or about March 16, 2006.

At this meeting on or about March 16, 2006, a final agreement was reached as to all of the terms of the Settlement Agreement to resolve the grievance regarding the discharge of Complainant Young.

UPW State Director Nakanelua testified that in this meeting on or about March 16, 2006, a final agreement had been reached between him and Director Takamura as to all terms of the Settlement Agreement between him and Director Takamura on behalf of the respective parties, to resolve the grievance of Complainant Young.

Director Takamura testified that the handwritten letters "OK" and the handwritten changes in Complainants Exhibit "A" accurately reflected the agreements reached between he and UPW State Director Nakanelua regarding the terms of the Settlement Agreement between Respondents and Complainant UPW to resolve the grievance concerning Complainant Young.

Director Takamura also testified that in his mind the terms of the Settlement Agreement had not been finalized because the Department of the Corporation Counsel still had to review the language in the proposed Settlement Agreement regarding the "last-chance" agreement contained in the Settlement Agreement,



and that Complainant Young's attendance of anger management classes be part of the Settlement Agreement.

On or about June 13, 2006, Director Takamura received a five (5) page memorandum dated June 9, 2006, from ENV Refuse Division Chief Frank Doyle to ENV Executive Assistant Timothy Houghton which alleged that Young had threatened fellow employees. Director Takamura testified that out of concern for employee safety, he initiated an investigation into the matter which, at the time of the instant hearing, had not been completed. Director Takamura did not consult with UPW State Director Nakanelua about the investigation into the alleged threats made by Complainant Young.

Complainant Young testified that he had been served a Complaint in Foreclosure filed on July 21, 2006, in the First Circuit Court of the State of Hawaii, which initiated foreclosure proceedings on his family/marital dwelling.

#### DISCUSSION

Section 12-42-48 of the Board's Rules provides that in prohibited practice cases, "pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders."

In determining whether to grant such interlocutory relief, this Board has applied the modern criteria for interlocutory relief that was enunciated in *Penn v. Transportation Lease Hawaii*, 2 Haw. App. 272, 276, 630 P.2d 646 (1981), namely:

- (1) Is the party seeking the interlocutory relief likely to prevail on the merits?
- (2) Does the balance of irreparable damage favor the issuance of interlocutory relief?
- (3) To the extent that the public interest is involved, does it support the granting of interlocutory relief?

In the present case, the Board holds that all three criteria have been met to grant interlocutory relief in favor of Complainant.

#### LIKELIHOOD OF SUCCESS ON THE MERITS

In *In the Matter of UPW and Akana, Mayor of the County of Hawaii*, V HRLB 177, Case No. CE-01-121 (1993), the Board held that the breach or renegeing of an oral agreement to settle a grievance that arose under a collective bargaining agreement that was entered into between a public employer and an exclusive representative of a bargaining unit of its employees is a refusal by that public employer to bargain in good faith with that exclusive representative, and thus constitutes a prohibited practice within the meaning of Section 89-13(a)(5), HRS.

In the present case, there is a likelihood that Complainants will establish that Respondents breached or reneged upon an oral agreement to settle the grievance filed by Complainant UPW against Respondents which alleged a breach of Section 11 of the collective bargaining agreement in effect between Complainant UPW and Respondent City and County of Honolulu covering Bargaining Unit 01.

It is undisputed that UPW State Director Nakanelua and Director Takamura agreed to resolve Complainant UPW's foregoing grievance concerning Complainant Young by reducing the discharge of Complainant Young from his employ with ENV to a written reprimand, with UPW State Director Nakanelua and Director Takamura charged with working out the details of the settlement. UPW State Director Nakanelua and Director Takamura shook hands over that agreement.

It is also undisputed that on or about March 16, 2006, UPW State Director Nakanelua and Director Takamura met to finalize the draft Settlement Agreement that Complainant UPW proffered to Respondent City and County of Honolulu in January, 2006.

At the meeting on or about March 16, 2006, it is undisputed that UPW State Director Nakanelua and Director Takamura reviewed the proposed Settlement Agreement paragraph by paragraph, and

either approved the paragraphs or made modifications to the paragraphs that were mutually agreed upon.

Complainant UPW contends that a final Settlement Agreement was reached between UPW State Director Nakanelua and Director Takamura to resolve the grievance over Complainant Young's discharge. Respondents contend that no final agreement was reached at the meeting on or about March 16, 2006, because the City's attorneys had to approve the last chance agreement contained in the Settlement Agreement, and an agreement for Complainant Young to attend anger management courses needed to be incorporated into the Settlement Agreement.

The Settlement Agreement did not state that review of the Settlement Agreement was a condition precedent to the Settlement Agreement's viability.

The evidence in the record does not indicate that the parties intended that a clause requiring Complainant Young to attend anger management courses must be incorporated into the Settlement Agreement, before the Settlement Agreement would become final.

Furthermore, the verbal agreement reached between Complainant UPW and Respondents to adopt the terms of the initial draft of the Settlement Agreement, as agreed to and modified by Complainant UPW's agent, UPW State Director



Nakanelua, and Respondents' agent, Director Takamura, contains an agreement that all the terms of the settlement are set forth in said modified Settlement Agreement terms. Since the term of Complainant Young seeking anger management classes was not part of said modified Settlement Agreement, it was not part of the agreement to return Complainant Young to work.

Moreover, the testimony of Director Takamura which indicated that during the negotiations to finalize the terms of the Settlement Agreement, UPW State Director Nakanelua's position was that Complainant Young's attendance of anger management classes shall be separate and apart from the Settlement Agreement, indicate that there was no agreement between the parties to insert a requirement of attendance of anger management classes into the modified Settlement Agreement.

The new issue of supposed allegations made by co-workers against Complainant Young, which surfaced in a memorandum dated June 9, 2006 to Timothy Houghton, constituted a new issue and clearly was not part of the verbal settlement agreement between Complainant UPW and Respondents. Such a new issue did not constitute a valid reason for Respondents to breach their verbal settlement agreement between Complainant UPW and Respondents to resolve the pending grievance concerning the discharge of Complainant Young.

BALANCE OF IRREPARABLE DAMAGE

In the present case, Complainants have demonstrated that Complainant Young will suffer irreparable damage absent the issuance of interlocutory relief by the Board. In *Fujiwara v. Clark*, 477 F. Supp. 794 (D. Hawaii, 1978), the U.S. District Court for the District of Hawaii issued a preliminary injunction to reinstate a terminated employee, finding that there was irreparable damage in the termination of the employee. Moreover, in *Branti v. Finkel, et al.*, 445 U.S. 507 (1980), the U.S. Supreme Court, in affirming that an employee's discharge from employment with a governmental entity constituted a violation of that employee's constitutional rights, it was acknowledged that the U.S. District Court in that case issued a temporary injunction reinstating the plaintiffs to employment, with the U.S. District Court apparently finding that the discharge from employment constituted irreparable damage to the plaintiffs.

In the present case, Complainant Young's discharge from employment constitutes irreparable damage to him. Moreover, the taking of Complainant Young's marital home and the realty that the home sits upon constitutes irreparable damage.

Thus, in the present case, the balance of irreparable damage tips in favor of issuing interlocutory relief in favor of Complainant Young.

PUBLIC INTEREST FAVORED

The public interest favors collective bargaining parties entering into binding settlement agreements thus avoiding the costly litigation that is entailed in adjudicating arbitration cases.

CONCLUSIONS OF LAW

The Board has jurisdiction over this Complaint and this motion pursuant to Sections 89-5 and 89-14, HRS.

It is likely that Respondents violated Section 89-13(a)(5), HRS, by making an oral agreement to settle the subject grievance by making an oral agreement to settle the subject grievance by converting Complainant Young's discharge to a written warning and agreeing to back pay and reinstatement, and by subsequently repudiating the Settlement Agreement.

The balance of irreparable damage, in the form of Complainant Young's discharge from employment, and loss of his marital dwelling, tip in favor of issuing interlocutor relief.

The public interest in resolving grievances short of arbitration favors the issuing of interlocutory relief.

SCOPE OF RELIEF ORDERED

The foregoing indicates that the following interlocutory relief is appropriately awarded to Complainant herein:

- 1) Effective retroactively to April 20, 2005  
Complainant Young shall be reinstated to the position of Equipment Operator that he was discharged from, on April 20, 2005, in accord with the Settlement Agreement that was agreed to on March 16, 2006; Complainant Young is hereby ordered to return to work on October 16, 2006.
  
- 2) In order to alleviate the irreparable damage of the loss of Complainant Young's marital dwelling, Respondents shall, by Sunday, October 15, 2006, deliver, via hand delivery, a check or other negotiable instrument payable to Complainant Young which constitutes the payment of one (1) year's worth of back pay, with tax calculations being done as if Complainant Young had been continuously employed from April 20, 2005 to the date the back pay payments are made, in order to avoid



Respondents having to deduct an inordinately  
large amount of Federal and State taxes.


DATED: Honolulu, Hawaii, October 6, 2006.

ORDER NO. 2402


HAWAII LABOR RELATIONS BOARD

  
BRIAN NAKAMURA, Chairman

  
EMORY SPRINGER, Board Member

  
SARAH HIRAKAMI, Board Member

APPROVED AS TO FORM:

  
CHARLES K. Y. KHIM  
Attorney for United Public Workers,  
AFSCME Local 646, AFL-CIO, et al

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of ) CASE NO. CE-01-630  
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Complainants, )  
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and )  
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CITY AND COUNTY OF HONOLULU and )  
DEPARTMENT OF ENVIRONMENTAL )  
SERVICES, City and County of )  
Honolulu, )  
)  
Respondents. )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a copy hereof was served upon the  
following by hand delivery on October 5, 2006:

CHARLES K. Y. KHIM, ESQ.  
Royal State Center  
819 South Beretania Street, Suite 207  
Honolulu, Hawaii 96813  
Attorney for Complainants

DATED: Honolulu, Hawaii, October 5, 2006.

CARRIE K. S. OKINAGA  
Corporation Counsel

By

  
\_\_\_\_\_  
CLARK HIROTA  
JOHN S. MUKAI  
Deputies Corporation Counsel  
Attorneys for Respondents

BENJAMIN J. CAYETANO  
GOVERNOR



BRIAN K. NAKAMURA, CHAIRPERSON  
CHESTER C. KUNITAKE, BOARD MEMBER  
KATHLEEN RACUYA-MARKRICH, BOARD MEMBER

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD  
830 PUNCHBOWL STREET, ROOM 434  
HONOLULU, HAWAII 96813  
TELEPHONE 586-8610

## ACKNOWLEDGMENT OF SERVICE

This will acknowledge receipt of the following document(s):

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OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU  
ORDER NO. 2402 - AMENDED FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER GRANTING COMPLAINANTS' MOTION FOR  
INTERLOCUTORY ORDER IN A PROHIBITED PRACTICE CASE;  
CERTIFICATE OF SERVICE

HLRB Case No. (3) CE-01-630

CHARLES K.Y. KHIM

Print Name

A handwritten signature in black ink, appearing to read "Charles K.Y. Khim", written over a horizontal line.

Signature of Person Receiving Document

Attorney for Complainants  
Title

October 6, 2006

Date



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DEPUTY CORP COUNSEL  
C&C OF HONOLULU  
530 S. KING ST, RM 110  
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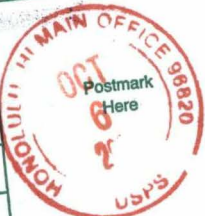
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**HAWAII LABOR RELATIONS BOARD**

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