STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and KENNETH NAKAMATSU, Director, Department of Human Resources, City and County of Honolulu and MUFI HANNEMANN, Mayor, City and County of Honolulu, Respondents.	CASE NO. CE-01-627 ORDER NO. 2432 ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT, FILED ON AUGUST 4, 2006

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT, FILED ON AUGUST 4, 2006

On July 7, 2006, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW" or "Union") filed a prohibited practice complaint with the Hawaii Labor Relations Board ("Board") against KENNETH NAKAMATSU, Director, Department of Human Resources, City and County of Honolulu ("NAKAMATSU") and MUFI HANNEMANN, Mayor, City and County of Honolulu (collectively "CITY"). The UPW alleged that on or about July 11, 2003 the Union filed a prohibited practice complaint against the City and County of Honolulu in Case No. CE-01-538 which the Board sustained, in part, in Decision No. 452 issued on June 30, 2005, and ordered the Respondents to negotiate with the UPW. The UPW further alleges that thereafter the City and County of Honolulu appealed the Board's decision and upon the City and County of Honolulu's motion, the Circuit Court issued a stay pending appeal on or about October 24, 2005. On May 1, 2006, the Circuit Court affirmed Decision No. 452 and dissolved the stay pending appeal. The Court's written order was issued on June 1, 2006 and on June 7, 2006, the Union alleges that it submitted a written request to NAKAMATSU to negotiate pursuant to Decision No. 452, as modified by the Circuit Court, and also requested information needed by the Union for negotiations. The UPW contends that on and after June 22, 2006, Respondents failed to provide any information as requested by the Union and declined to respond to the UPW's bargaining request thereby wilfully breaching their statutory duty to negotiate in good faith and failing to comply with the remedial order in violation of Hawaii Revised Statutes ("HRS") §§ 89-13(a)(5) and (7).

On August 4, 2006, the UPW filed a Motion for Summary Judgment with the Board. The UPW contends that there are no genuine issues of material fact in dispute in this case and the Union is entitled to summary judgment as a matter of law. The UPW contends that Respondents have clearly violated Decision No. 452 by refusing to comply with the Board's remedial order pursuant to UPW's request to negotiate.

On August 11, 2006, the CITY, by its counsel, filed an opposition to the UPW's motion for summary judgment. The CITY contends, inter alia, that Decision No. 452 is not a final order because further appeals of the Circuit Court's decision have been taken by the CITY and the UPW to the appellate courts. The CITY also argues that the information requested by the UPW was not relevant to the scope of negotiations and that the Union failed to establish that the CITY's conduct was wilful.

Thereafter, on August 15, 2006, the UPW filed a Reply Brief in Support of Motion for Summary Judgment Filed on August 4, 2006 with the Board.

On August 16, 2006, the Board conducted a hearing on UPW's Motion for Summary Judgment where the parties were given full opportunity to present evidence and arguments to the Board.

Based upon a review of the record and consideration of the arguments presented, the Board majority indicated its inclination to grant UPW's motion for summary judgment. The Board majority found that the CITY had a duty to comply with the Board's previous order to bargain and while the CITY filed a motion for stay of the Board's order with the appellate court which would relieve the CITY's duty to comply, absent a court order, the CITY should comply with the Board's order to bargain. In addition, the Board majority found the information requested by the UPW was relevant to its request to bargain and absent any substantive objection, should have been produced.

Thereafter, on October 20, 2006, the UPW filed a Motion to Reopen the Record of Proceedings to accept a September 27, 2006 order entered by the Intermediate Court of Appeals denying the CITY's motion for stay and for timely relief. At the hearing on the UPW's motion held on November 3, 2006, the CITY represented that it had filed a motion for stay pending appeal in the First Circuit Court. The Board reopened the record to accept the Intermediate Court of Appeals order and indicate it would reschedule a hearing on appropriate relief after the November 27, 2006 hearing date of the CITY's motion in Circuit Court.

On December 14, 2006, the Board conducted a further hearing on appropriate relief. At the hearing, the CITY's counsel admitted that the CITY has not commenced bargaining or produced the information requested by the UPW. The CITY further indicated that a final order denying its motion for stay had not been issued by the Circuit Court and it would be filing a motion for stay in the Appellate Court. The Board thereupon directed the

UPW to submit proposed findings of fact and conclusions of law for its consideration, including addressing an appropriate remedy to be ordered in this case.

On December 28, 2006, the UPW filed its Proposed Findings of Fact, Conclusions of Law, and Order with the Board. The CITY filed its Objections to Complainant's Proposed Findings of Fact, Conclusions of Law, and Order.

On February 27, 2007, the Board conducted a hearing on the CITY's objections. After hearing the arguments presented, the Board Chair announced, inter alia, the inclination of the Board majority to grant the UPW's motion for summary judgment as to the issue of the information request only based upon a reading of the instant complaint. However, upon consideration of UPW's objections and a subsequent review of the record, including the complaint filed in this matter and the transcript of the hearing of August 16, 2006, the Board majority grants the UPW's motion for summary judgment as indicated in its statement of inclination at the hearing held on August 16, 2006 and as set forth, infra. Therefore, based upon a consideration of the record and the arguments presented, the Board majority hereby issues the following findings of fact, conclusions of law, and order.[1]

FINDINGS OF FACT

1. The UPW is an "employee organization" and the "exclusive representative" of Unit 01 within the meaning of HRS § 89-2.

2. NAKAMATSU is the Director of Human Resources, City and County of Honolulu, represents the interests of the Mayor of the City and County of Honolulu with respect to Unit 01 employees and is an "employer" within the meaning of HRS § 89-2.

3. MUFI HANNEMANN is the Mayor of the City and County of Honolulu and an "employer" within the meaning of HRS § 89-2.

4. On June 30, 2005, the Board issued Decision No. 452 in Case No. CE-01-538, United Public Workers, AFSCME, Local 646, AFL-CIO, sustaining the prohibited practice complaint against various City and County of Honolulu

[1]After considering Respondents' objections to the proposed order submitted by Complainant, the Board has adopted those proposed findings of fact and conclusions of law which support its decision in this case and rejected those which do not. The Board has modified the proposed order submitted by Complainant accordingly.

respondents (also referred to as "CITY")[2], in part, for violations of HRS §§ 89-13(a)(7) and (8). In its Decision, the Board made the following findings of fact:

> 8. Section 63 of the Unit 01 Contract provides for specific controlled substance tests, such as, testing within 32 hours following an accident (63.05a.); Random Test (63.06); Probationary Period Test (63.06 b); a 1998 Test (63.06c.); a Reasonable Suspicion Test (63.07); Return to Work Test Controlled Substance Test (63.08b); and Follow Up Test. Section 63 does not have a specific provision for testing a regular employee whose name is withdrawn from the random testing pool after a three- to four-month leave of absence due to an injury or disciplinary suspension for reasons unrelated to the drug testing provisions.
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> * * *
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> 12. On June 23, 2003, Lorrie Manassas-Liu (Manassas-Liu), the former divisional drug coordinator, who was involved in Ortiz's termination grievance, asked [CYNTHIA] JOHANSON, DFM Personnel Management Specialist V and departmental coordinator for the drug testing program since 1994, whether Ortiz should be subjected to a pre-duty/preemployment drug test when he reported to work. JOHANSON determined based on her understanding and interpretation of the DOT Rules and Section 63.04 of the Unit 01 Contract relating to preemployment testing, that Ortiz needed to be tested because she "knew that [Ortiz] had been removed from

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[2]In Case No. CE-01-538, the City Respondents were Larry J. Leopardi, Chief Engineer, Acting Director, Facility Maintenance, City and County of Honolulu; Cheryl Okuma-Sepe, Director, Department of Human Resources, City and County of Honolulu, Jeremy Harris, Former Mayor, City and County of Honolulu, 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. In the instant case, the Respondents are NAKAMATSU who succeeded Ms. Okuma-Sepe as Director of the Department of Human Resources and HANNEMANN who succeeded Mayor Harris. Since there is no material difference in the distinction between the Respondents in Case No. CE-01-538 and the Respondents in this case, the Board will also refer to the previous City Respondents as "CITY" throughout this order to avoid confusion. See also Hawaii Rules of Appellate Procedure Rule 43(c).

the drug testing pool when he was terminated." (footnote omitted.)

13. JOHANSON was aware that Section 63 did not expressly provide for preemployment testing of an employee being reinstated after a disciplinary discharge. (footnote omitted.)

14. As the departmental coordinator for drug testing, JOHANSON supervises the drug and alcohol testing program for the department. A staff person under her supervision maintains the database from which the random testing names are drawn. According to JOHANSON, the department conducts monthly drug tests of 10 to 12 employees selected randomly from a database of departmental employees that includes 50% of the workforce with CDLs or in safety sensitive positions every year.

15. An updated list of employees who are in the random drug testing pool is provided to the Union every calendar year. JOHANSON testified that: "Once they're in the pool, they're in there forever, unless they move out of a CDL or a safety sensitive position, or unless they're terminated or –". Since the beginning of the drug testing program in 1995, the random pool list is updated by removing employees who are no longer in a CDL or safety sensitive position, or off-the-job from an industrial injury for more than three or four months. However, JOHANSON admitted that the Union was never notified as to how and when an employee would be removed from the list or that the employees would be subject to a "pre-duty" drug test when they returned to the job. (footnote omitted.) According to JOHANSON, Ortiz was the first City employee who had been terminated to be subjected to preemployment testing prior to reinstatement.

16. On June 23, 2003, Manassas-Liu telephoned LENCHANKO at 7:35 a.m. and instructed him to have Ortiz drug-tested. LENCHANKO notified Ortiz of the drug test at 7:55 a.m. (footnote omitted.) when Ortiz

reported to work and thereafter LENCHANKO took Ortiz for the drug test.

17. On June 23, 2003, Ortiz tested positive for the first time. As a result, Ortiz received a 20-day suspension and was placed in the drug rehabilitation program. On January 28, 2004, Ortiz resigned from his job consistent with the First and Second Positive Controlled Substance Test provisions contained in Section 63.15c and 63.15d of the BU 01 Contract.

18. By letter dated January 14, 2004, UPW State Director Dayton M. Nakanelua requested OKUMA-SEPE to negotiate modifications to the provisions of Section 63.04a. (Pre-employment Testing) of the collective bargaining agreements to conform to the DOT Rule 382.102 for CDL drivers. (footnote omitted.) OKUMA-SEPE failed to respond to the UPW's request for bargaining. Tr. Vol. II, p. 311.

5. In Decision No. 452, the Board concluded, in part:

8. The Respondents failed to notify the Union or consult over the drug testing of an employee being returned to work after being taken out of the random pool and wilfully ignored the Union's request to negotiate over the subject matter. Consultation and negotiation are provided for in HRS § 89-9 and Section 1.05 of the Unit 01 contract. The Board concludes that the City violated HRS § 89-9, thereby committing a prohibited practice in violation of HRS § 89-13(a)(7). The Board also concludes that the City violated Section 1.05, thereby committing a prohibited practice in violation of HRS § 89-13(a)(8).

6. The Board thereupon ordered the CITY to negotiate with the UPW, stating inter alia:

1. Respondents are ordered to cease and desist from taking unilateral actions on matters subject to the negotiations process and deal with the Union appropriately. On the matter of drug testing, the Respondents are ordered to

negotiate modifications to Section 63.04a to conform with the DOT Rules 382.102 for CDL drivers.

2. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of the affected bargaining unit assemble, and leave such copies posted for a period of 60 days from the initial date of posting.

3. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

7. The UPW and CITY appealed to the First Circuit Court in Civil Nos. 05-1-1388-08 and 05-1-1391-08, respectively. On October 24, 2005 , the Court issued a stay of the Board's orders pursuant to a motion filed by the CITY. The Court filed a written Order on June 1, 2006 stating in part:

> After reviewing the entire record and considering the written submissions of the parties and the oral arguments presented, the Court finds that the Board in Order No. 1 in Decision No. 452, requires Respondents to negotiate modifications to Section 63.04a to conform with the DOT Rules for CDL drivers and inadvertently and mistakenly refers to Rule 382.102. The Court therefore modifies the Board order to correctly refer to DOT Rules 382.301 for CDL drivers. The Court otherwise hereby affirms the Board's Findings of Fact, Conclusions of Law, and Order In Decision No. 452, dated June 30, 2005.
>
> Accordingly, IT IS HEREBY ORDERED that Board Decision No. 452 is affirmed, as modified and the instant appeals are denied. Moreover, the stay pending appeal issued on October 24, 2005 is hereby dissolved.

8. On June 5, 2006, the UPW filed a Notice of Appeal to the Supreme Court and the Intermediate Court of Appeals with the First Circuit Court.

9. By letter dated June 7, 2006, Dayton Nakanelua (Nakanelua), UPW State Director, submitted a written request to NAKAMATSU to negotiate in accordance with Decision No. 452, as modified by the Court. Nakanelua requested the initial bargaining to begin within 30 days. Nakanelua also requested the CITY to cease and desist from unilaterally implementing pre-

employment drug testing of regular employees (CDL employees). Nakanelua further requested information in connection with the bargaining request to be produced in 15 days.

10. On June 23, 2006 the CITY filed their Notice of Cross-Appeal to the Supreme Court and Intermediate Court of Appeals with the First Circuit Court.

11. The UPW filed the instant complaint with the Board on July 7, 2006.

12. Also, by letter dated July 7, 2006, NAKAMATSU wrote to Nakanelua responding to the June 7, 2006 letter acknowledging the appeals by the UPW and CITY. NAKAMATSU requested that discussions regarding the requested negotiations not take place until the parties are able to obtain a ruling upon the CITY's forthcoming request for stay. NAKAMATSU also requested the legal bases for the UPW's request for information.

13. There is no dispute that the CITY has refused to negotiate in compliance with Decision No. 452, as modified, and to provide information to the UPW pursuant to the Union's June 7, 2006 request.[3] Although the CITY responded to the UPW on July 7, 2006, the CITY only indicated that the matter was on appeal and that its counsel would be filing a motion for a stay of the bargaining order.

14. On August 4, 2006, the UPW filed a motion for summary judgment with the Board in the instant case. On August 16, 2006, the Board conducted a hearing on the motion and the CITY indicated it had filed a motion for stay with the appellate court. After considering the arguments made, the Board indicated it would grant the UPW's motion for summary judgment.

15. The appeal was docketed as No. 27962 in the Hawaii Appellate Courts on August 4, 2006 and on September 27, 2006, the Intermediate Court of Appeals denied the CITY's Motion for Stay, without prejudice.

16. On October 20, 2006, the UPW filed a Motion to Reopen the Record of Proceedings and Timely and Appropriate Relief by the Board. The UPW requested the Board to reopen the record to accept the September 27, 2006 order entered by the Intermediate Court of Appeals as Exhibit 6.

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[3]Nakanelua states in an affidavit, dated August 3, 2006, in support of the UPW's Motion for Summary Judgment filed on August 4, 2006 that the Union received no information as requested on June 6, 2006 and no indication of a willingness to negotiate at this time.

There is no dispute that to this date the CITY has not provided information to the UPW and has refused to negotiate in compliance with Decision No. 452, as modified.

17. In its Memorandum in Opposition to the Motion for Stay, filed on October 27, 2006, the CITY indicated that it had filed a Motion for Stay with the Circuit Court.

18. The Board conducted a hearing on the UPW's Motion to Reopen the Record on November 3, 2006, and the Board granted the UPW's motion to permit the supplementation of the record with the Intermediate Court of Appeals' denial of the CITY's Motion for Stay and the CITY's subsequent motion for stay filed with the First Circuit Court. On November 26, 2006, the First Circuit Court orally denied the CITY's motion for stay and on December 26, 2006, the First Circuit Court issued its Order Denying Respondents-Appellees/Respondents-Appellants' Motion for Stay of Enforcement Pending Appeal Filed on 10/27/06.

19. On January 4, 2007, the CITY filed a Motion for Stay Pending Appeal in Case No. 27962 with the Intermediate Court of Appeals. As of this date, no stay has been granted.

20. Since August 4, 2006, Respondents have continued to refuse to negotiate with the UPW and failed or refused to provide the information requested by the Union. The CITY has not provided any persuasive reason for its continued refusal to negotiate and provide information requested by the Union.

21. There is no probative evidence in the record that Respondents did not comply with Order Nos. 2 and 3 in Decision No. 452, as modified and corrected by the Circuit Court on June 1, 2006.

CONCLUSIONS OF LAW

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

2. Summary judgment is appropriate if the pleadings, depositions, interrogatories, admissions on file, together with affidavits, if any show there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. Thompson v. AIG Hawai`i Ins. Co., Inc., 111 Hawai`i 413, 422-23, 142 P.3d 277, 286 (2006). A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Stanford Carr Development Corp. v. Unity House, Inc., 111 Hawai`i 286, 141 P.3d 459, 468 (2006).

3. HRS § 89-13(a)(5) provides that it shall be a prohibited practice for a public employer or its designated representative wilfully to refuse to bargain collectively in good faith with the exclusive representative as required in HRS § 89-9.

4. HRS § 89-13(a)(7) provides that it shall be a prohibited practice for a public employer or its designated representative wilfully to refuse or fail to comply with any provision of this chapter.

5. In previous cases, the Board has held that the employer's failure or refusal to provide information requested by the Union relevant to its role as bargaining agent constitutes a refusal to bargain in good faith in violation of HRS § 89-13(a)(5). State of Hawaii Organization of Police Officers, 3 HPERB 25 (1982); Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 6 HLRB1 (1998).

6. Based on the entire record, and viewing the facts in the light most favorable to Respondents, the Board majority concludes there are no genuine issues of material fact in dispute in the present case. The Board majority further concludes Respondents have wilfully breached their duty to bargain in good faith on and after June 1, 2006 by (a) refusing to meet, confer, and negotiate with the Union over modifications to Section 63.04a of the Unit 01 collective bargaining agreement to conform with DOT Rule 382.301, and (b) failing to provide information needed by the exclusive bargaining representative for the purposes of negotiations as requested on June 7, 2006, in violation of HRS § 89-13(a)(5).

7. With respect to the HRS § 89-13(a)(7) violation, the UPW alleged in its complaint, inter alia, that Respondents breached their duty to bargain in good faith and refused to comply with the remedial order obtained by the Board from the Circuit Court thereby violating HRS §§ 89-13(a)(5) and (7). The UPW contended that Respondents wilfully refused and failed to comply with the provisions of Chapter 89 on and after June 1, 2006 by declining to comply with the Board Orders 1 through 3 in Decision No. 452 as modified and corrected by the Circuit Court on June 1, 2006 in violation of HRS § 89-13(a)(7). The UPW further argued that the CITY's failure to comply with the Board's order contravenes HRS §§ 89-1(b)(3) and 89-5(i)(4), (9), and (10).[4]

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[4]HRS §§ 89-1(b)(3) and 89-5(i)(4), (9), and (10), provide as follows:

§89-1 Statement of findings and policy.

* * *

Based upon a review of the record, there is insufficient evidence to prove that Respondents failed to comply with Order Nos. 2 and 3 of Decision No. 452.

In addition, the Board notes that in Decision No. 54, Anne B. Sage, 1 HPERB 498 (1974), the Board held that the Board of Regents violated its duty to meet and confer imposed by HRS § 89-9(c) and thereby failing to comply with a provision of HRS Chapter 89 and committing a violation of HRS § 89-13(a)(7). See also Hawaii Firefighters Association, Local 1463, IAFF, AFL-CIO, 1 HPERB 650 (1977), failure to consult about Fire Fighter Trainee class violated HRS § 89-9(c) and HRS § 89-13(a)(7). However, in Robert Burns, 3 HPERB 114 (1982), the Board dismissed allegations of HRS § 89-13(a)(7) violations where no independent specific violations of Chapter 89 were alleged other than allegations of HRS §§ 89-13(a)(5) and (8). The Board stated at 169:

> Complainants further allege that violations of Subsections 89-13(a)(5) and (8), H.R.S., warrant a finding of a Subsection 89-13(a)(7), H.R.S., violation. The Board disagrees.

(b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:

* * *

(3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

§89-5. Hawaii labor relations board.

* * *

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

(4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

* * *

(9) Adopt rules relative to the exercise of its powers and authority and to govern the proceedings before it accordance with chapter 91; and

(10) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

> Subsection 89-13(a)(7), H.R.S., provides that violations of Chapter 89 constitute prohibited practices. These statutory violations must occur independently of Section 89-13, H.R.S. Any other interpretation would render Subsection 89-13(a)(7), H.R.S., meaningless and redundant. Hence the Board concludes that Complainants have failed to prove a Subsection 89-13(a)(7), H.R.S., violation. Accordingly, that charge is dismissed.

Similarly in this case, the Board concludes that the UPW must prove violations of statutory provisions other than HRS § 89-13(a)(5) to establish a violation of HRS § 89-13(a)(7). In reviewing the statutory provisions which the UPW contends the Respondents violated, i.e., HRS §§ 89-1(b)(3) and 89-5(i)(4), (9), and (10), the Board finds that these provisions relate to the creation, powers and functions of the Board and concludes that the UPW failed to establish that Respondents violated these provisions. Accordingly, the Board hereby dismisses the UPW's prohibited practice claims based upon a violation of HRS § 89-13(a)(7).

8. Pursuant to HRS § 89-14, the Board is mandated to prevent prohibited practices "in the same manner and with the same effect" as provided in HRS § 377-9. HRS § 377-9(d) states in relevant portions as follows:

> §377-9 Prevention of unfair labor practices.
>
> (d) After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all issues involved in the controversy and the determination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as the final orders. <u>Final orders may</u> dismiss the complaint or <u>require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take such affirmative action, including reinstatement or employees with or without pay, as the board may deem proper.</u> Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order. [Emphasis added.]

9. The board's order in a case of this nature is calculated to remedy the nature of the prohibited practices which has been found to be committed. Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawai`i 489, 509, 146 P.3d 1066, 1086 (2006).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Board issues the following order:

1. Respondents NAKAMATSU and MUFI HANNEMANN shall cease and desist from continuing to engage in the foregoing prohibited practices.

2. All departments and agencies of the City and County of Honolulu employing bargaining unit 01 employees who are subject to Section 63 of the Unit 01 collective bargaining agreement shall forthwith provide the UPW with full and complete responses to the request for information submitted to Respondent NAKAMATSU on June 7, 2006.

3. Within 30 days of the date of this decision and order, Respondent NAKAMATSU and/or his duly authorized agents shall meet and confer with UPW representatives to negotiate over modifications to Section 63.04a to conform with DOT Rule 382.301 in accordance with Decision 452, as modified and corrected by the First Circuit Court.

4. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of Unit 01 assemble, and leave such copies posted for a period of 60 days from the initial date of posting.

5. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, March 6, 2007.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

CONCURRING OPINION

For the reasons discussed supra, I concur with the Board Majority's conclusion that the UPW's HRS § 89-13(a)(7) claim should be dismissed. I also concur with the Board Majority's conclusion that the CITY committed a prohibited practice pursuant to HRS § 89-13(a)(5) for the reasons discussed below.

Prohibited Practice Pursuant to HRS § 89-13(a)(5)

Pursuant to HRS § 89-13(a)(5), it shall be a prohibited practice for a public employer or its designated representative wilfully to "[r]efuse to bargain collectively in good faith with the exclusive representative as required in section 89-9[.]"

In turn, HRS § 89-9 provides that the employer and the exclusive representative shall meet at reasonable times . . . and shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement[.]" HRS § 89-9(a). The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting. HRS § 89-9(b).

Here, by letter dated June 7, 2006, the Union submitted a written request to the CITY to negotiate in accordance with the Board's decision No. 452 and requested the initial bargaining to begin within 30 days. The Union also requested information in connection with the bargaining request, to be produced within 15 days.

By letter dated July 7, 2006, the CITY responded to the Union's June 7, 2006, request by acknowledging the pending appeals of Decision No. 452 by both the CITY and the Union, and requested that negotiations not take place until the parties are able to obtain a ruling upon the CITY's forthcoming request for stay. The CITY also requested the legal bases for the Union's request for information. As a general rule, an employer must provide a union with relevant information necessary for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 567-68 (1967). The failure to provide relevant information may support a finding of a failure to bargain in good faith. See, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753 (1956).

In a proceeding on a motion for summary judgment, the burden is on the moving party to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw.App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

The facts alleged in the Complaint and in the Union's Motion for Summary Judgment indicate that the Union requested bargaining within 30 days and information within 15 days. The CITY responded by reminding the Union of the appeals filed by both parties, requesting that negotiations not take place until the parties are able to obtain a ruling upon the CITY's forthcoming request for stay, and requesting the legal bases for the Union's information request. There is no evidence in the record indicating that the Union responded to the CITY's request to hold off on negotiations until the request for stay was ruled upon by the court, at least up until the time the Union's Motion for Summary Judgment was filed and initially heard by this Board. Viewed in the light most favorable to the CITY, the limited facts alleged in the Complaint and Motion for Summary Judgment would not, standing alone, establish that the CITY wilfully refused to bargain such that the Union is entitled to judgment as a matter of law and without a full hearing on the merits.

However, during the pendency of this proceeding, the record has been supplemented with the results of the CITY's requests for stay, which so far have been denied by the courts.[5] Additionally, the CITY was put on notice by the Complaint, the Union's Motion for Summary Judgment, and the arguments present by Union's counsel throughout the proceedings that the Union was not acceding to the CITY's request to hold off on negotiations pending the court's ruling on the stay. Regardless of this additional notice to the CITY, the CITY has continued to fail to bargain with the Union and provide the Union with the requested information.

Accordingly, based upon the record as a whole, including supplements to the record following hearing on the Union's Motion for Summary Judgment, I concur with the Board Majority's conclusion that the CITY committed a prohibited practice pursuant to HRS § 89-13(a)(5).

SARAH R. HIRAKAMI, Member

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[5]Pursuant to HRS § 91-14(c), an appeal to the courts from an administrative decision shall not stay enforcement of the agency decisions, although the reviewing court may order a stay if certain criteria are met.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. KENNETH NAKAMATSU, et al.
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ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT, FILED ON AUGUST 4, 2006

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