

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Complainant,

and

HARRY KIM, Mayor, County of Hawaii;
PATRICIA G. ENGLEHARD, Director,
Department of Parks and Recreation, County
of Hawaii; and LARRY DAVIS,
Administrator, Aquatic Division, County of
Hawaii,

Respondents.

CASE NO. CE-03-586

ORDER NO. 2434

FINAL ORDER ADOPTING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING
COMPLAINANT'S MOTION FOR
SUMMARY JUDGMENT

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CONCLUSIONS OF LAW, AND ORDER GRANTING
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

On February 26, 2007, the Hawaii Labor Relations Board ("Board") filed its Proposed Findings of Fact, Conclusions of Law and Order Granting Complainant's Motion for Summary Judgment ("Proposed Order"). As the time limit for the filing of exceptions to the proposed order has passed without exceptions being filed by any party, the Board hereby adopts the Proposed Order.

DATED: Honolulu, Hawaii, March 19, 2007

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO v.
HARRY KIM, et al.
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Joyce Najita, IRC

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On December 9, 2004, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO ("HGEA" or "Complainant") filed a prohibited practice complaint ("Complaint") against Respondents, alleging Respondents refused and/or failed to negotiate and bargain over a "sick leave abuse" policy or a "pattern of sick leave abuse" policy upon which they have disciplined employees. Complainant alleged a violation of the duty to bargain pursuant to Hawaii Revised Statutes ("HRS") § 89-9(a)(5); breach of statutory duty to comply with all provisions of Chapter 89, HRS, in violation of HRS § 89-13(a)(7); and breach of statutory duty not to violate the terms of collective bargaining agreement in violation of HRS § 89-13(a)(8).

On April 28, 2005, the Board was informed that the parties had agreed to proceed on the record of this matter by motion for summary judgment to be filed by Complainant. On May 11, 2005, Complainant filed its Motion for Summary Judgment. On May 20, 2005, Respondents filed their Memorandum in Opposition to Complainant's Motion for Summary Judgment, asserting that the fact that the Employer made an effort to negotiate the policy referred to in these proceedings does not preclude the Employer from exercising action which are consistent with its management rights, including items referred to in HRS § 89-9.

The Board held hearings on Complainant's Motion for Summary Judgment on May 31, 2005, and February 9, 2006, pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules ("HAR") § 12-42-8(g)(3).

After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order.

PROPOSED FINDINGS OF FACT

1. Complainant HGEA is an employee organization, as defined in HRS § 89-2, which represents all white-collar non-supervisory County of Hawaii employees in bargaining unit (BU) 03. Complainant was certified by the Board's predecessor, the Hawaii Public Employment Relations Board, as the exclusive representative of BU 03 on April 3, 1972.
2. Respondent HARRY KIM is the Mayor of the County of Hawaii, and the public employer, as defined in HRS § 89-2, of County of Hawaii employees in BU 03.
3. Respondent PATRICIA ENGLEHARD, in her capacity as Director, Department of Parks and Recreation, County of Hawaii, and Respondent LARRY DAVIS, in his capacity as Administrator, Aquatics Division, County of Hawaii, are designated representatives of the Mayor, and are deemed to be public employers within the meaning of HRS § 89-2.
4. On August 28, 2002, Complainant filed a Unit 03 grievance on behalf of an employee in the Department of Parks and Recreation, Aquatics Division, County of Hawaii, alleging that the County of Hawaii had violated the Unit 03 collective bargaining agreement ("Agreement" or "CBA") by requiring the employee to provide a doctor's excuse each time sick leave was taken. The County had initiated this requirement due to an alleged "sick leave abuse pattern." This grievance was resolved through a Settlement and Release agreement.
5. On October 25, 2004, Complainant filed a Unit 03 Class grievance on behalf of all employees within the Aquatics Division of the County of Hawaii, Department of Parks and Recreation based on the Employer's requirement that employees alleged to have a pattern of illness submit a doctor's excuse for all sick leave taken. This grievance is still pending.
6. On December 1, 2004, the public employer made a proposal regarding sick leave usage to Complainant during the negotiations for the Unit 03

Agreement. The proposal included language addressing patterns of sick leave usage. This proposal was later withdrawn and the parties did not reach an agreement on patterns of sick leave usage.

7. On December 6, 2004, Complainant filed a Unit 03 grievance on behalf of another employee in the Aquatics Division, challenging a one-day suspension and being charged 8 hours of unauthorized leave for failing to produce a doctor's note for absence due to sickness relating to sick leave abuse patterns.
8. The Complaint was filed on December 9, 2004 alleging that Respondents refused and/or failed to negotiate and bargain over a "sick leave abuse" policy or a "pattern of sick leave abuse" policy upon which they have disciplined employees, in violation of the duty to bargain pursuant to HRS § 89-9(a)(5); breach of statutory duty to comply with all provisions of Chapter 89, HRS, in violation of § 89-13(a)(7); and breach of statutory duty not to violate the terms of collective bargaining agreement in violation of § 89-13(a)(8).
9. By Respondents' admission, the Department of Parks and Recreation (Department), County of Hawaii has conducted investigations of sick leave abuse where patterns of sick leave became apparent to the Employer and implemented a policy of requiring examination by the County Physician at no cost to the employee. The Department further requires the employees suspected of sick leave abuse to supply a doctor's excuse each time sick leave is taken.
10. The Unit 01 Agreement between the public employers and the United Public Workers, AFSCME, Local 646, AFL-CIO ("UPW"), contains provisions governing investigation of sick leave that were negotiated and entered into by the UPW and the public employers, including the County of Hawaii.
11. Article 4 of the Unit 03 Agreement, Personnel Policy Changes, provided at all relevant times:
 - A. All matters affecting Employee relations, including those that are, or may be, the subject of a regulation promulgated by the Employer or any Personnel Director, are subject to consultation with the Union. The Employer shall consult with the Union prior to effecting changes in any major policy affecting Employee relations.

B. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

12. Article 36 of the Unit 03 Agreement, Sick Leave, provided at all relevant times, in part:

D. Application for Sick Leave.

1. Application for sick leave shall be filed on a form prescribed by the Employer or designee, within five (5) working days after return to duty; provided, that in the event such Employee dies before that time or before returning to duty, the Employee's executor or administrator or department head if deemed proper may file such application within six (6) months after the Employee's death. Sick leave shall not be granted unless it is provided to the satisfaction of the department head that the Employee's absence from work was necessary because of sickness.

2. The department head shall require the Employee to submit a licensed physician's certificate for absences of five (5) or more consecutive working days to substantiate the fact that the period of absence was due entirely to sickness and that the Employee to be examined by a physician of said department head's choice provided the department assumes the cost of the physician's services.

13. There is no evidence other than the December 1, 2004, proposal mentioned above that the Respondents attempted to negotiate over the issue of patterns of sick leave usage with the HGEA.
14. As evidenced by the Unit 01 Agreement and the provisions for sick leave in the Unit 03 Agreement, patterns of sick leave usage is a mandatory subject of negotiations because it affects working conditions. The Department's requirement to submit a physician's excuse for each sick leave occurrence is a change from Unit 03, Article 36's requirement for a excuse slip after five or more consecutive working days of absence.
15. Accordingly, the Board finds that Respondents wilfully failed to negotiate over the issue of patterns of sick leave usage prior to implementing a requirement that employees suspected of patterns of sick leave usage obtain

medical certification for each occurrence of illness, to the detriment of employees.

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled 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.
3. The burden is on the party moving for summary judgment 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. Id.
4. 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.
5. 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.
6. 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.
7. HRS § 89-13(a)(8) provides that it shall be a prohibited practice for a public employer or its designated representative wilfully to violate the terms of a collective bargaining agreement.
8. Pursuant to HRS § 89-9(a), the employer 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[.]"

9. In the present case, there are no material facts in dispute.
10. As evidenced by the Unit 01 Agreement, patterns of sick leave usage is a mandatory subject of negotiations. There is no evidence other than the December 1, 2004 proposal by the Employer that Respondents attempted to negotiate over the issue of patterns of sick leave usage.
11. The language of Section 36.D.1. of the Unit 03 CBA, "Sick leave shall not be granted unless it is provided to the satisfaction of the department head that the Employee's absence from work was necessary because of sickness," does not authorize the actions taken by Respondents as alleged in the present Complaint. While the Board recognizes that the Employer may properly investigate an employee's suspected abuse of sick leave under the foregoing provision, the unilateral implementation of a requirement to submit a doctor's excuse for each absence modifies the existing contractual provisions without the HGEA's mutual consent and violates the duty to bargain in good faith.
12. Accordingly, the Board finds that Respondents wilfully failed to negotiate over the issue of patterns of sick leave usage prior to implementing a requirement that employees suspected of patterns of sick leave usage obtain medical certification for illness, to the detriment of employees.
13. Respondents' wilful failure to negotiate over the issue of patterns of sick leave usage prior to implementing a requirement that employees suspected of patterns of sick leave usage obtain medical certification for illness, in violation of Articles 4 and 36.D.1 of the Unit 03 CBA, constitutes a violation of HRS §§ 89-13(a)(5), (7), and (8).

PROPOSED ORDER

The Board hereby grants Complainant's Motion for Summary Judgment and orders the following:

1. Respondents are ordered to cease and desist from further violations of HRS Chapter 89 and the Unit 03 collective bargaining agreement.
2. Respondents are ordered to rescind its Sick Leave Abuse Policy and/or its Patterns of Sick Leave Abuse Policy, and all discipline

imposed on Unit 03 employees by such policies from and since 90 days prior to the filing of the instant complaint.¹

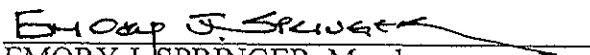
3. Respondents are ordered to comply with their statutory duty to bargain over its Sick Leave Abuse Policy and/or its Patterns of Sick Leave Abuse policy and its duty to comply with the provisions of the Unit 03 CBA.
4. Respondents shall immediately post copies of this decision on their respective websites 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.
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, February 26, 2007.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with Board, pursuant to HRS § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal

¹Although the HGEA requested that all disciplinary actions based upon Respondents' patterns of sick leave abuse policy be rescinded to 2001, HRS § 377-9(l) made applicable to the Board by HRS § 89-14, provides the Board with a 90-day statute of limitations. Accordingly, the Board concludes that only disciplinary actions taken within 90 days of the filing of the complaint should properly be rescinded.

authorities therefore. A hearing for the presentation of oral arguments may be scheduled by the Board in its discretion. In such event, the parties will be so notified.

Copies sent to:

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