

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

v.

RICHARD BISSEN, Acting Director,
Department of Public Safety, State of Hawaii
and LINDA LINGLE, Governor, State of
Hawaii,

Respondents.

CASE NO. CE-10-595

ORDER NO. 2458

ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On March 30, 2005, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW" or "Union") filed the instant complaint against the above-named Respondents with the Hawaii Labor Relations Board ("Board"). Complainant alleges that on July 23, 2004 and continuously thereafter, Respondents wilfully failed to comply with the UPW's requests for information over certain pending grievances. Complainant contends that Respondents thereby interfered with the rights of employees under Chapter 89, breached their duty to negotiate in good faith by failing to provide information needed by the Union to investigate and process grievances, and failed to comply with the provisions of Chapter 89, including but not limited to Hawaii Revised Statutes ("HRS") §§ 89-10.8(a) and 89-9(a) thereby committing prohibited practices in violation of HRS §§ 89-13(a)(1), (5), and (7).

On April 20, 2005, the UPW filed a Motion for Partial Summary Judgment with the Board. The UPW contended that there were no genuine issues of material facts in dispute in connection with Respondents' failure to provide information as required by the UPW and that the Union was entitled to partial summary judgment as a matter of law. The UPW attached as exhibits 10 grievances with requests for information which the Respondents failed to provide information for within seven calendar days as required by the applicable Unit 10 collective bargaining agreement.

On April 25, 2005, Respondents filed a Memorandum in Opposition to Complainant UPW's Motion for Partial Summary Judgment with the Board. Respondents contend that the UPW failed to comply with the Hawaii Rules of Professional Conduct,

Rule 4.2, by directly contacting the Department of Public Safety after counsel had been appointed. In addition, Respondents contend that the UPW failed to permit the arbitrator to resolve any discovery disputes in compliance with the Unit 10 Agreement, Section 15A, Grievance Procedure and HRS § 658A-17 regarding subpoenas, depositions and discovery. Respondents also contend that the UPW has failed to establish that any noncompliance with the information requests was wilful.

The Board conducted a hearing on the UPW's motion on May 3, 2005. After considering the arguments of counsel and the evidence submitted, the Board indicated that it was inclined to grant UPW's motion for partial summary judgment finding that the contractual obligation to provide information within seven days was uniformly ignored. The Board further indicated that it was inclined to grant partial summary judgment on the basis of HRS § 89-13(a)(5).

Thereafter on May 9, 2005, the UPW filed a Notice of Withdrawal Without Prejudice of Claims Based on Section 89-13(a)(1) and (7), HRS.

Based on UPW's withdrawal of its HRS §§ 89-13(a)(1) and (7) claims and after a review of the record and the arguments submitted by counsel, the Board issued its proposed findings of fact, conclusions of law, and order granting summary judgment in UPW's favor pursuant to HRS § 91-11¹ on June 15, 2007. On June 21, 2007, Respondents, by and through their counsel, filed Respondents' Notice of Exceptions to Proposed Order Granting UPW's Motion for Summary Judgment with the Board. Respondents requested that the Board clarify its proposed order, i.e., proposed Finding of Fact No. 17 and proposed Conclusion of Law No. 6, to state whether the ruling applies only to the selection of an arbitrator as the Board previously ruled in Order No. 2372, dated April 19, 2006, Order

¹HRS § 91-11 provides as follows:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

While Board Members Springer and Hiramami did not participate in the hearings in this case, they have reviewed the entire record, including the pleadings, transcripts, and exhibits filed herein.

Granting Complainant's Motion to Schedule Hearing, and Notice of Prehearing Conference and Hearing on Prohibited Practice Complaint.

After consideration of Respondents' exceptions, the Board hereby issues the following findings of fact, conclusions of law, and order, as modified.

FINDINGS OF FACT

1. The UPW was, for all relevant times an employee organization and the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 10, composed of institutional, health, and correctional workers.
2. RICHARD BISSEN was, for all relevant times, the Acting Director of the Department of Public Safety ("PSD"), State of Hawaii, and an individual who represents the Governor of the State of Hawaii with respect to PSD employees. Accordingly, BISSEN is therefore a public employer within the meaning of HRS § 89-2.
3. LINDA LINGLE was, for all relevant times, the Governor of the State of Hawaii, and a public employer within the meaning of HRS § 89-2.
4. The UPW and public employers were parties to a collective bargaining agreement covering the employees in bargaining unit 10.
5. Section 15A.05 of the Unit 10 agreement provides:

15A.05 Information. The Employer shall provide information in the possession of the Employer that is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:

15A.05a. Copy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or

15A.05b. Make the material requested available to the grieving party and /or the Union within seven (7) calendar days of the request for the purpose of copying or review for five (5) calendar days on the condition that the grieving party and/or the Union agrees to sign Exhibit 15A.05 and be responsible for the material until it is returned.

6. On July 23, 2004, the UPW Business Agent Alton Nosaka (“Nosaka”) filed a grievance in Case No. AN-04-14. UPW’s Exhibit (“Ex.”) 1. Also on that date Nosaka submitted a request for information to John Peyton, Jr., then Director of PSD. Id. PSD provided the information requested on April 22, 2005. Declaration (“Decl.”) of Roy Yamamoto (“Yamamoto”) ¶ 2.
7. Also on July 23, 2004, Nosaka filed a grievance in Case No. AN-04-15 and submitted a request for information to John Peyton, Jr., then Director of PSD. UPW’s Ex. 2. PSD provided the information requested on April 22, 2005. Yamamoto Decl. ¶ 2.
8. On July 23, 2004, Nosaka filed a grievance in Case No. AN-04-16 and a corresponding information request. UPW’s Ex. 3. PSD provided the information requested on April 22, 2005. PSD provided the information requested on April 22, 2005. Yamamoto Decl. ¶ 2.
9. On September 28, 2004, Nosaka filed a grievance in Case No. AN-04-21 and a corresponding information request.² UPW’s Ex. 4.
10. On October 1, 2004, Nosaka filed a grievance in Case No. AN-04-22 and a corresponding information request.³ UPW’s Ex. 5.
11. On October 26, 2004, Nosaka filed a grievance in Case No. AN-04-25 and a corresponding information request. UPW’s Ex. 6. PSD provided the information requested on April 22, 2005. Yamamoto Decl. ¶ 2.
12. Also on October 26, 2004, Nosaka filed a grievance in Case No. AN-04-26 and a corresponding information request. UPW’s Ex. 7. PSD responded on April 7, 2005. Yamamoto Decl. ¶ 2.
13. On February 2, 2005, UPW Executive Assistant Clifford T. Uwaine (“Uwaine”) filed grievances in Case Nos. CU-05-01 and CU-05-02 with corresponding information requests. UPW’s Exs. 8 and 9. PSD responded to

²PSD did not respond to information request for Case No. AN-04-21 because the remedy for the grievance was granted on February 18, 2005 and the case was closed. Yamamoto Decl. ¶ 3a. Thus, the UPW did not ask for summary judgment with respect to Case No. AN-04-21. Transcript of hearing on May 3, 2005 (“Tr.”) p. 8.

³PSD did not respond to information requests for Case No. AN-04-22 because the remedy for the grievance was granted on and January 28, 2005 and the case was closed. Yamamoto Decl. ¶ 3b. Thus, the UPW did not ask for summary judgment with respect to Case No. AN-04-22. Tr. p. 9.

Case Nos. CU-05-01 and CU-05-02 on February 18, 2005. Yamamoto Decl. ¶ 2.

14. Also on February 2, 2005, Uwaine filed a grievance in Case No. CU-05-03 and a corresponding information request. UPW's Ex. 10. Thereafter, on April 7, 2005, Assistant Departmental Personnel Officer Walter Harrington responded to the request. *Id.*, Yamamoto Decl. ¶ 2.
15. For Case Nos. AN-04-14 and AN-04-15, PSD informed the Union on April 9, 2005 that it was working on the information requests. For Case No. AN-04-25, PSD represented that it provided the information requested on February 14, 2005 in its response to Case No. AN-05-02.
16. PSD was inundated with requests for information upon the reassignment of approximately 50 arbitration cases to UPW's counsel. Yamamoto Decl. ¶ 4.
17. The Board finds that there is no material issue of fact presented and viewing the facts in the light most favorable to PSD, the Board finds that PSD uniformly ignored the seven-day contractual requirement to respond to the UPW's information requests.⁴ The evidence in the record establishes clearly that the Union made a request for information, there is no dispute that the information was relevant and necessary to the Union's role, and Respondents failed to provide the information within the time provided by the collective bargaining agreement. The Board presumes wilfulness as a consequence of Respondents' actions.

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*

⁴This finding is applicable where the information was requested by the UPW prior to the appointment of the arbitrator.

Development Corp. v. Unity House, Inc., 111 Hawai`i 286, 141 P.3d 459, 468 (2006).

3. Pursuant to HRS § 89-13(a)(5), it is 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. This Board may use parallel federal case law as guidance when interpreting Hawaii labor laws. See, Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999) (although federal law did not govern the case, the Hawaii Supreme Court consulted federal precedent to guide its interpretation of Hawaii's public employment laws).
5. 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). See also Decision No. 130, Manuel Veincent, 2 HPERB 494 (1980).
6. Based upon a review of the evidence in the record, the Board finds there is no material issues of fact presented. The Board finds that the PSD failed to provide the information requested or respond to the UPW's requests for information within seven days as provided by the collective bargaining agreement. The Board concludes that there is substantial evidence in the record (i.e., the multiple instances of missed deadlines without any response to the UPW and the length of time for response), that Respondents' failure to respond to the Union occurred with indifference to its contractual obligations and therefore wilful. The Board therefore concludes that Respondents thereby breached its duty to bargain in good faith and committed a prohibited practice in violation of HRS § 89-13(a)(5).⁵

ORDER

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

1. Respondents shall cease and desist from ignoring the contractual time limits in responding to the UPW's requests for information during the grievance process.

⁵This conclusion is applicable where the information was requested by the UPW prior to the appointment of an arbitrator.

2. 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.
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.

DATED: Honolulu, Hawaii, June 29, 2007.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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