

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

CLIFFORD LUM, Manager and Chief
Engineer, Board of Water Supply, City and
County of Honolulu,

Respondent.

CASE NO. CE-01-643

ORDER NO. 2474

ORDER DENYING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT,
FILED ON SEPTEMBER 10, 2007

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On August 6, 2007, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union), by and through its counsel, filed a prohibited practice complaint against Respondent CLIFFORD LUM (LUM) with the Hawaii Labor Relations Board (Board). The UPW alleged that on July 23, 2007, it filed a grievance regarding the multi-skilled worker program and on July 24, 2007, the UPW submitted a request for information needed to investigate and process the grievance which was to be provided within 7 days in accordance with Section 15.09 of the Unit 01 collective bargaining agreement (Agreement). The UPW further alleged that LUM failed to comply with its request for information the UPW therefore contends that by these actions LUM wilfully violated Section 15.09 of the Unit 01 Agreement; breached the duty to bargain in good faith and unlawfully interfered with the rights of employees provided in Hawaii Revised Statutes (HRS) § 89-3. Thus the UPW contends LUM committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8).

The Board conducted a prehearing conference on September 4, 2007 where Respondent's counsel stated, inter alia, that he would be filing a dispositive motion in this matter. Thereafter, on September 10, 2007, Respondent LUM, by and through his counsel, filed a Motion for Summary Judgment with the Board contending that there are no genuine issues of material fact in dispute and he is entitled to judgment as a matter of law. Respondent contends that under the undisputed facts in this case, Complainant failed to establish that Respondent acted in a wilful manner and thus, Respondent is entitled to judgment as a matter of law and dismissal of this complaint.

On September 17, 2007, the UPW, by and through its counsel, filed a memorandum in opposition to Respondent's motion for summary judgment. The UPW contends that LUM failed to establish he is entitled to summary judgment and if, summary judgment were to be granted in this case, judgment should be granted in favor of the UPW.

On September 19, 2007, the Board conducted a hearing on Respondent's Motion to Dismiss pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g) and HRS §§ 89-14 and 89-5(i)(4) and (5). Herbert R. Takahashi, Esq., appeared on behalf of Complainant and Deputy Corporation Counsel Paul T. Tsukiyama appeared on behalf of Respondent.

For the following reasons, the Board denies Respondent's motion for summary judgment.

FINDINGS OF FACT

1. Complainant was, at all times relevant to this proceeding, an employee organization and exclusive representative, as defined in HRS § 89-2,¹ respectively, representing the interests of employees in Bargaining Unit 01.²

¹HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employees concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

* * *

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

²HRS § 89-6 provides that [a]ll employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

- (1) Nonsupervisory employees in blue collar positions;

2. Respondent LUM was, at all times relevant to this proceeding, the Manager and Chief Engineer of the Board of Water Supply (BWS), City and County of Honolulu, and a public employer within the meaning of HRS § 89-2.³
3. Article 15 of the Unit 01 Agreement⁴ provides for a grievance procedure and

³HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

⁴The Board takes notice that Article 15 of the Unit 01 Agreement, effective July 1, 2007 to June 30, 2009, provides in relevant part as follows:

SECTION 15.GRIEVANCE PROCEDURE.

* * *

15.11 STEP 1 GRIEVANCE.

The grievance shall be filed with the department head or the department head’s designee in writing as follows:

15.11 a. Within eighteen (18) calendar days after the occurrence of the alleged violation. The term “after the occurrence of the alleged violation” as provided in Section 15.11 a. shall mean:

15.11 a.1. Discharge: Eighteen (18) calendar days after the effective date of the discharge.

15.11 a.2. Suspension: Eighteen (18) calendar days after the last day of the suspension.

15.11 a.3. Other Disciplinary Actions: Eighteen (18) calendar days after the effective date of the discipline.

15.11 a.4. Other Alleged Violation(s): Eighteen (18) calendar days after the alleged violation(s) occurred unless the violation(s) are continuing as provided in Section

15.11 b.

15.11 b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.

15.11 c. Within eighteen (18) calendar days after the alleged violation is discovered by the grieving party and/or the Union if it is a payroll computational error.

15.12 **STEP 1 DECISION.**
The decision of the department head or the department head's designee shall be in writing and shall be transmitted to the grieving party and/or the Union within thirteen (13) calendar days after receipt of the grievance.

15.13 **STEP 2 APPEAL OR GRIEVANCE.**

15.13 a. In the event the grievance is not resolved in Step 1, the grieving party and/or the Union may file a letter of appeal with the Employer or the Employer's designee specifying the reasons for the appeal together with a copy of the grievance and a copy of the Step 1 decision within nine (9) calendar days after receipt of the Step 1 decision.

15.13 b. In the event a grievance is filed at Step 2 as provided in Section 15.04, the grievance shall be filed as provided in Section 15.11 except that the grievance shall be filed with the Employer or the Employer's designee instead of the department head or the department head's designee.

* * *

15.15 **STEP 2 DECISION.**
The decision of the Employer or the Employer's designee shall be in writing and transmitted to the grieving party and/or the Union within nine (9) calendar days after receipt of the appeal.

15.16 **STEP 3 ARBITRATION.**
In the event the grievance is not resolved in Step 2,

sets forth stringent timelines for the filing and processing of a grievance. If the grievance is not resolved at Step 1, the grieving party and/or the Union may file a letter of appeal with the Employer within nine (9) calendar days after receipt of the Step 1 decision. See Article 15.13 a. The Step 2 decision shall be transmitted to the grieving party and/or the Union within nine (9) days after receipt of the appeal. Step 3 provides for arbitration to be requested within thirty (30) days of the receipt of the Step 2 decision. Id.

4. Section 15.09 of the Unit 01 Agreement provides part as follows:

15.09 INFORMATION.

The Employer shall provide all information in the possession of the Employer which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:

15.09a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or

15.09b. 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 photocopying or review for five (5) calendar days on the condition that the grieving party and/or the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

5. On July 23, 2007, the UPW filed a class grievance No. DMN-07-01 at Step 1 by fax with the BWS. (Respondent's Exhibit [R's Ex.] A.) The UPW alleged that the BWS violated various provisions of the Unit 01 Agreement and all memoranda of agreement and understanding regarding Multi-Skilled Workers (MSW), including supplemental agreements dated 12/9/03, 6/27/05, 9/30/05, and 1/25/07, by, inter alia, failing to properly compensate BWS employees. Id.

6. By letter dated July 24, 2007, UPW State Director Nakanelua requested information (information request) from LUM to determine how and in what

and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

matter BWS formulated its payroll for July 15, 2007 for various categories of employees. R's Ex. B. The 12-page information request was not mailed until July 27, 2007 (Id.) and was received by BWS on July 30, 2007 at 12:42 p.m. (Declaration [Decl.] of Karen Oshiro [Oshiro]).

7. John J. Witeck (Witeck) was assigned to respond to the information request on July 30, 2007. Witeck Decl. According to Witeck, due to the volume and nature of the information request, Witeck called the UPW State Director's Office on July 30, 2007 to request an extension of time to respond to the request and left a voicemail message with the State Director's secretary Martti Fernandez requesting an extension of time to respond and offering to meet to discuss the grievance. Id.
8. By letter dated August 1, 2007, LUM requested an extension of time to August 31, 2007 within which to provide the information. R's Ex. C.
9. Counsel for Complainant Herbert R. Takahashi prepared and faxed a letter dated Saturday August 4, 2007 to Respondent's counsel, Deputy Corporation Counsel Paul T. Tsukiyama. Complainant's counsel requested Respondent's counsel to advise LUM that the UPW would not extend the date to respond to the request under Section 15.09 (R's Ex. D), because the UPW believed that seven (7) calendar days was adequate to obtain and provide the information to the Union. Nakanelua Decl. Complainant's counsel advised that if the request was not complied with by 12:00 noon on Monday August 6, 2007, the UPW would seek appropriate relief under Chapter 89. Id.
10. Respondent's counsel did not receive Complainant's counsel's Saturday, August 4, 2007 fax until Monday, August 6, 2007. Paul T. Tsukiyama's Decl.
11. On August 6, 2007, the BWS rendered its Step 1 decision on the grievance denying the grievance. R's Ex. 10.
12. On August 6, 2007, the BWS faxed a cover letter to the UPW at approximately 4:20 p.m. with a partial response to the UPW's request for information. Witeck Decl.; R's Ex. E. Witeck attempted to hand-deliver the response and information to UPW at approximately 4:40 p.m on August 6, 2007 but the office was closed for the day. Witeck Decl. Witeck hand-delivered the documents on the following morning, August 7, 2007. Id.
13. On August 16, 2007, the BWS transmitted additional documents to the UPW. Witeck Decl.; R's Ex. I. The information was compiled by BWS Field Operations Division staff which were not available on August 6, 2007. Witeck Decl.

14. On August 27, 2007, the BWS completed its response to the information request by transmitting documents largely relating to payroll and finance information that had been requested. R's Ex. J.
15. According to Witeck, the BWS did not completely respond to the UPW's information within seven days of receipt due to a number of reasons, including but not limited to the nature and volume of the request, the inability of BWS to immediately access and gather the information requested, the inability to comprehend some of the UPW's items of information requested, the need to update, gather, and compile data in order to respond to some of the requests relating to employees' hours and payroll information, and the fact that those assigned to gather the information were also required to attend to other assigned duties and meetings and could not devote their full time or attention to gathering the requested information. Witeck Decl.
16. According to Witeck, the usual practice with the UPW and BWS is to routinely grant requests for extensions of time to respond to information requests. Witeck Decl.
17. Nakanelua disputes Witeck's characterization of the "routine" granting of extensions for information citing the Union's previously filed grievance with the BWS because of the failure to provide information within seven calendar days. Nakanelua Decl. In addition, Nakanelua believed the information requested was available given BWS' assurances that the necessary information to accurately compensate each MSW employee in accordance with prior training and experience was during the pilot, roll out or training and other periods would be considered and the first payroll was made on or before July 15, 2007. Id. In addition, Nakanelua states the information requested by the Union was available to LUM who formulated a response to the July 23, 2007 grievance on August 6, 2007. Id.; Complainant's (C) Ex. 10. Nakanelua denied the request for extension dated August 1, 2007 because the data being requested was available and needed to prepare the first payroll prior to July 15, 2007. Id.
18. Based on the record, the Board finds that LUM failed to provide the information requested by the UPW within the seven-day timeline set forth in Article 15.09 of the Unit 01 Agreement. The BWS, by Witeck, attempted to provide a partial response to the UPW on August 6, 2007 after hours but was unable to deliver the materials to the UPW office because it was closed. Witeck provided partial responses to the Union on August 7 and August 16, and completed the UPW's information request on August 27, 2007. However, as the UPW did not agree to any extension of the seven-day contractual

deadline to provide the information, the Board finds that LUM failed to provide the information UPW requested after the contractual deadline passed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this case 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. Pursuant to HRS §§ 89-13(a)(1), (5), (7), and (8), it shall be a prohibited practice for a public employer or its designated representative wilfully to:
 - (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
 - (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
* * *
 - (7) Refuse or fail to comply with any provision of this chapter;
 - (8) Violate the terms of a collective bargaining agreement;
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 and concludes that the LUM violated Article 15.09 of the Unit 01 collective bargaining agreement by failing to provide the information requested to the Union within seven (7) calendar days of the request or by making the materials available to the Union to photocopy or review. However, as HRS § 89-13(a) requires that a prohibited practice - interference with an employee's Chapter 89 rights, a breach of the duty to bargain in good faith, a violation of Chapter 89, or a violation of the collective bargaining agreement - be wilful, the Board finds there is a genuine issue of material fact as to whether the Respondent's actions in the instant case were wilful. Accordingly, the Board concludes there are genuine issues of material fact in dispute which prevent it from issuing judgment as a matter of law at this time. Accordingly, this cause shall be set for further hearing.

ORDER

Based on the foregoing, the Board hereby denies Respondent's Motion for Summary Judgment, filed on September 10, 2007.

DATED: Honolulu, Hawaii, October 15, 2007.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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