

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

MUFI HANNEMANN, Mayor, City and
County of Honolulu; KENNETH
NAKAMATSU, Director, Department of
Human Resources, City and County of
Honolulu; and CLIFFORD LUM, Manager
and Chief Engineer, Board of Water Supply,
City and County of Honolulu,

Respondents.

CASE NO. CE-01-647

ORDER NO. 2483

ORDER DENYING UPW'S MOTION
FOR SUMMARY JUDGMENT; AND
ORDER DISMISSING PROHIBITED
PRACTICE COMPLAINT OR
ALTERNATIVELY, GRANTING
RESPONDENTS' CROSS-MOTION
FOR SUMMARY JUDGMENT

ORDER DENYING UPW'S MOTION FOR SUMMARY
JUDGMENT; AND ORDER DISMISSING PROHIBITED
PRACTICE COMPLAINT OR ALTERNATIVELY, GRANTING
RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT

On October 9, 2007, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint (Complaint) against Respondents MUFI HANNEMANN, Mayor, City and County of Honolulu (City), KENNETH NAKAMATSU, Director, Department of Human Resources (Director), and CLIFFORD LUM, Manager and Chief Engineer, Board of Water Supply, City and County of Honolulu (BWS), (collectively Respondents), alleging, inter alia, that the UPW submitted a request to Respondents for information needed to investigate and process a grievance, and that Respondents failed to fully comply with that request for information to the extent that it pertained to a listing of contractors relating to the BWS. The UPW alleged prohibited practices in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8).

On October 19, 2007, Respondents filed their Answer to Complaint, asserting that the Complaint fails to state a claim upon which relief can be granted; the Complaint fails to state a claim over which the Board retains subject matter jurisdiction; the subject matter

underlying the grievance is outside the scope of the collective bargaining agreement (CBA) and accordingly beyond the jurisdiction of the Board; that, assuming arguendo, the applicability of the CBA, Respondents committed no violation of said contract; and Respondents asserted the defense of accord and satisfaction.

On November 13, 2007, the UPW filed a Motion for Summary Judgment. On November 20, 2007, Respondents filed their Memorandum in Opposition to UPW's Motion for Summary Judgment Filed Herein on November 13, 2007, and Cross-Motion for Summary Judgment. On November 26, 2007, the UPW filed its Memorandum in Opposition to Respondents' Cross-Motion for Summary Judgment Filed on November 20, 2007.

On November 28, 2007, the Board held a hearing on UPW's Motion for Summary Judgment and Respondents' Cross-Motion for Summary Judgment. The hearing was attended by Herbert R. Takahashi, Esq., for UPW, and John S. Mukai, Deputy Corporation Counsel, for Respondents.

For the reasons discussed below, the Board denies the Union's Motion for Summary Judgment and grants Respondents' Cross-Motion for Summary Judgment. The Board dismisses the Complaint as moot.

FINDINGS OF FACT

1. Respondents were or are, at all times relevant to this proceeding, a public employer within the meaning of HRS § 89-2.¹
2. The UPW was or is, at all times relevant to this proceeding, an employee organization within the meaning of HRS § 89-2.
3. At all relevant times to this proceeding, Respondents and UPW were or are parties to the Unit 01 CBA that provides for a grievance procedure for grievances that arise out of alleged violation, misinterpretation, or misapplication of the CBA.

¹HRS § 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.

4. By letter dated July 18, 2007, the UPW sent to the City a Request For Information and For Bargaining Over Repeal of Act 90, 2001 Session Laws of Hawaii² (Request for Information). The UPW requested within 7 days from the date of the letter the following information:
 1. A true and accurate listing of all contracts with private entities and persons in effect on June 30, 2007 affecting or covering for services historically and customarily performed by bargaining unit 1 and 10 employees³ (per Act 90, 2001 Session Laws of Hawaii).
 2. For each of the contracts enumerated in response to item number 1 above please indicate the following:
 - a. The name and address of the private entity and person.
 - b. The nature of services provided to the City and the department and agency of the City who oversees the services rendered.
 - c. The dollar amount of value of the contract for the period from July 1, 2006 to June 30, 2007.
 - d. The dollar amount or value of the contract for the period from July 1, 2007 to June 30, 2008.

²Part II of Act 90, which was repealed effective June 30, 2007, provided in part:

Notwithstanding any law to the contrary, including but not limited to chapters 46, 76, 77, 78, 89, and 89A, any other applicable civil service law, customary or historical past practices, or the fact that the services hereinafter described may have been performed by persons or positions in civil service, any state or county official in whom procurement authority is vested by law may enter into a contract financed by public funds, with a private entity to obtain services, including services provided in conjunction with the procurement of goods or construction, from a private entity, when there is reasonable basis to believe that the service of equivalent or better quality than that which could be provided by a government agency can be provided at lower cost.

³Pursuant to HRS § 6(a), Unit 1 consists of non-supervisory employees in blue collar positions, and unit 10 consists of institutional, health, and correctional workers.

- e. The department or agency for whom the service is provided.
 - f. The name of the contracting officer who is familiar with the contract for the City.
3. A true and accurate listing of all contracts which the County has entered or intends to enter with private entities or persons on and after July 1, 2007 and thereafter affecting or relating to services customarily and historically performed by bargaining unit 1 and 10 employees.
4. With respect to each of the contracts enumerated in response to number 3 above please indicate the following:
- a. The name and address of the private entity and person.
 - b. The nature of services provided to the City and the department and agency of the City who oversees the services rendered.
 - c. The dollar amount of value of the contract for the period from July 1, 2007 to June 30, 2008.
 - d. The department or agency for whom the service is provided.
 - e. The name of the contracting officer who is familiar with the contract for the City.
5. By letter dated August 1, 2007, the Director notified the Union that, among other things, the City required additional time to carefully consider and respond to the July 18, 2007, letter. The City expected to provide a response or status report by September 4, 2007.
6. By letter dated August 31, 2007, the City wrote to UPW and, with respect to the information request, stated in part:

The City intends to respond to your request in accordance with Hawaii Revised Statutes chapter 92F⁴. Although the specific lists requested do not exist, and the City is not required under Chapter 92F to compile such lists, we are working to compile the lists in the spirit of cooperation. We will, however, require additional time to complete this task due to the amount of information which must be analyzed.

7. On September 17, 2007, the UPW prepared a Step 1 Grievance Form for Unit 1 Employees in UPW case number DMN-07-05 (Grievance). The Grievance alleged, inter alia, that the City unlawfully continued to privatize services customarily and historically performed by unit 01 employees.
8. By letter dated September 21, 2007, the UPW requested from the Director that the information sought in its July 18, 2007, Request for Information be provided within 7 calendar days of the September 21, 2007 letter. The UPW stated that the information is necessary to investigate and process the grievance in DMN-07-05.
9. Section 15.09 of the Unit 01 CBA provides:

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:

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

⁴HRS Chapter 92F, entitled Uniform Information Practices Act (Modified), governs, inter alia, the freedom of information.

10. By letter dated September 27, 2007 (also sent via facsimile), the City's attorney notified the UPW that the request for information pursuant to Section 15.09 of the CBA, dated September 21, 2007, was received by the City on Monday, September 24, 2007, and accordingly, the City would be providing a response to the UPW's information request by October 1, 2007.
11. Also by letter dated September 27, 2007, the Director notified the UPW that, "in accordance with section 15.09.b. of the unit 1 contract, the requested materials are hereby being made available to the UPW for the purpose of review and/or photocopying."
12. By letter dated September 28, 2007, the UPW proposed that the parties mediate the dispute in the Grievance, and asked that the City please advise the UPW by October 2, 2007, whether the City would agree.
13. By letter dated October 2, 2007 (also sent via facsimile), the UPW requested to arrange for the review and photocopying of the information requested on September 21, 2007, which was received by the City on September 24, 2007.
14. By letter dated October 2, 2007 (also sent via facsimile), the City's attorney notified the UPW that unfortunately an internal meeting within the City to respond to the UPW's request for mediation dated September 28, 2007, could not occur until later in the week due to the unavailability of certain people. The City asked that it be allowed to respond to the UPW's proposal by Friday, October 5, 2007.
15. By letter dated October 2, 2007 (also sent via facsimile), the UPW notified the City's attorney that it had no objection to the request for extension of time to respond to the UPW's proposal to utilize mediation services. The UPW also sought clarification whether the City was requesting an extension regarding the production of documents under Section 15.09 of the CBA.
16. By letter dated October 2, 2007 (also sent via facsimile), the City's attorney notified the UPW that it may contact Lissa Lau of the City Department of Human Resources directly to make arrangements for access to the requested information. Additionally, the City stated that an "extension of time to respond will make for a more orderly production of documents, and may alleviate the need for the UPW contact person to conduct a manual search. Therefore, the City does hereby request an extension of time in which to respond to the 15.09 request."
17. By letter dated October 2, 2007, the UPW notified the City that it would agree to extend the deadline for production of documents and information under

Section 15.09 from October 1, 2007, to October 5, 2007, with the following understanding:

1. That the City will seriously consider mediation of the pending grievance and notify the UPW by 3:00 p.m. on Friday, October 5, 2007, regarding its decision.
2. The City will provide a listing of the contracts as illustrated by the County of Hawaii⁵ (referring to the UPW letter dated September 24, 2007, and its enclosure).

The UPW also stated, “[i]f the foregoing is acceptable, the extension you requested today is granted. If not, please advise immediately in writing.”

18. By letter dated October 3, 2007, addressed to Lissa Lau, the UPW confirmed that at 3:01 p.m. on Friday, October 5, 2007, it would be picking up the copies of all contracts in connection with the Grievance.
19. By letter dated October 3, 2007 (also sent via facsimile), the City notified the UPW that it would respond to the Union’s proposal to mediate the Grievance no later than 3:00 p.m. on Friday October 5, 2007. The City also stated:

In regard to the City’s request for an extension to respond to the Union’s request for information under Section 15.09, the City is unable to provide the information sought in the form you requested by October 5, 2007, and therefore requests additional time in which to respond.

As of this date, the City is able to provide a list of contracts which it has filtered from a general list of contracts under its docushare program. However, this would be an overinclusive list which contains contracts outside the scope of your request. The City anticipates that, after additional review and filtering, it would be able to provide a list of contracts responsive to the UPW’s request by October 15.

20. By letter dated October 4, 2007, the UPW stated that absent an agreement to mediate the pending grievance, it could not grant an extension any further.

⁵The information from the County of Hawaii was arranged into columns, providing for each contract the following information: Department, Contractor, Nature of Services, Contract period, and Contract Amount.

The UPW referred the City's attorney to the October 3, 2007, letter it send to Lissa Lau.

21. By letter dated October 5, 2007 (hand-delivered), the City sent to the UPW contract information, inclusive of contracts, purchase orders, delivery orders, and small purchases available and in the City's possession as of the date of the letter. The letter stated that the list may not include most of the contracts involving the BWS, which were contained in a separate database and would be subject to further search. The City notified the UPW that the listings may be overinclusive in that they may also include services and items involving other occupational areas above and beyond services that were customarily and historically performed by BU 01 and BU 10 employees. The letter further stated that the City assumed that the provision of the above-lists negates the UPW's need to photocopy the individual contract materials, and that the UPW should contact Lissa Lau if otherwise or if the UPW wished the City to further filter the listings to more closely reflect the information requested.
22. The listings provided by the City on October 5, 2007, contained the following information: for fiscal year 2007, vendor name, vendor address, total amount, department name; for fiscal year 2008, vendor name, vendor address, description, amount, department, and document creator.
23. By letter dated October 6, 2007, the UPW notified the City that if the BWS failed to provide information by 3:00 p.m. on Monday, October 8, 2007, the UPW would file a prohibited practice complaint against the BWS.
24. On October 9, 2007, UPW filed the present Complaint, alleging, inter alia, that the UPW submitted a request to Respondents for information needed to investigate and process a grievance, and that Respondents failed to fully comply with that request for information to the extent that it pertained to a listing of contractors relating to the BWS. UPW alleged prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8).
25. By letter dated October 9, 2007, the UPW provided the City with a prohibited practice complaint filed with the Board due to the failure of the BWS to provide the listing of contracts as requested by the UPW.
26. By letter dated October 12, 2007, the City's attorney notified the UPW that after a further search of BWS information, no additional information pertaining to the request was discovered, and thus all relevant information pertaining to BWS contracts was included in the City's October 5, 2007, transmittal letter.

27. By letter dated October 13, 2007, the UPW requested a copy of the listing contained in the BWS database so the UPW could independently determine whether BWS has complied with the Union's request for information.
28. On October 19, 2007, Respondents filed their Answer to Complaint, asserting that the Complaint fails to state a claim upon which relief can be granted; the Complaint fails to state a claim over which the Board retains subject matter jurisdiction; the subject matter underlying the grievance is outside the scope of the CBA and according beyond the jurisdiction of the Board; that, assuming arguendo the applicability of the CBA, Respondents committed no violation of said contract; and Respondents asserted the defense of accord and satisfaction.
29. By letter dated October 22, 2007, the BWS provided the UPW with a copy of the listings contained in the database containing BWS contracts. The letter identified two shaded entries as the only contracts relating to Unit 1 services at the BWS. The entry relating to Order No. 400110, Glad's Landscaping & Tree Trimming, Inc., was included in the City's response to the UPW's request for information on October 5, 2007. The other entry, Order No. 400084, HTM Contractors, Inc., had a balance of zero and was concluded as of April 2007, and thus fell outside the scope of the UPW's Request for Information.
30. On November 13, 2007, the UPW filed a Motion for Summary Judgment. On November 20, 2007, Respondents filed their Memorandum in Opposition to UPW's Motion for Summary Judgment Filed Herein on November 13, 2007, and Cross-Motion for Summary Judgment. On November 26, 2007, the UPW filed its Memorandum in Opposition to Respondents' Cross-Motion for Summary Judgment Filed on November 20, 2007.
31. On November 28, 2007, the Board held a hearing on UPW's Motion for Summary Judgment and Respondents' Cross-Motion for Summary Judgment. Respondents argued that the subject matter of the underlying grievance concerned matters that were not arbitrable as they fall under HRS chapter 76 (governing civil service), and not HRS chapter 89 (governing collective bargaining); that all information was provided to the Union and thus the doctrine of accord and satisfaction should apply. The Union argued that the information is necessary to process the grievance; that it is for the arbitrator and not the Board to determine arbitrability; and that Respondents did not provide a description of the "nature of services" for the City's contracts.
32. Via letter dated October 22, 2007, Respondents provided the Union with a listing of BWS contracts, highlighting the two entries that pertain to contracts relating to Unit 01 services at the BWS. The letter explained that the entry

relating to Order No. 400110, Glad's Landscaping & Tree Trimming, Inc., was included in the City's response to the UPW's request for information on October 5, 2007. The other entry, Order No. 400084, HTM Contractors, Inc., had a balance of zero and was concluded as of April 2007, and thus fell outside the scope of the UPW's Request for Information. The attached listing provided a "description" of services for Order No. 400110, Glad's Landscaping & Tree Trimming, Inc., as "Tree trimming services." Accordingly, Respondents provided all information relating to the Union's request with respect to the BWS, including a description of the nature of services.

33. The Board finds that the case is moot. By letter dated September 27, 2007, the City timely notified the UPW that the requested materials were being made available to the UPW for review and photocopying. Thereafter, extensions were afforded to the City to consider mediation and complying with the format requested by the UPW. Although the Complaint was filed based upon the assertion by Respondents in their letter dated October 5, 2007, that the listing may not have included most of the contracts involving the BWS, which were contained in a separate database and would be subject to further search, Respondents subsequently notified the Union that no additional information pertaining to the request was discovered, and thus all relevant information pertaining to BWS contracts was included in the City's October 5, 2007, transmittal letter. By letter dated October 22, 2007, Respondents provided a "description" of services for Order No. 400110, Glad's Landscaping & Tree Trimming, Inc., as "Tree trimming services."

34. Section 15.19 b. of the CBA provides:

In the event the Employer disputes the arbitrability of a grievance the Arbitrator shall determine whether the grievance is arbitrable prior to or after hearing the merits of the grievance. If the Arbitrator decides the grievance is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

Given the provisions of Section 15.19 b. of the CBA, the Board declines to address Respondents' argument that the subject matter of the underlying Grievance is not arbitrable as that matter is within the Arbitrator's jurisdiction.

35. Additionally, assuming, arguendo, the case is not moot, the Board finds that there is no genuine dispute as to any material fact. Respondents provided the UPW with access to the contracts for review and copying within 7 days of its request. Further, the parties considered an extension to permit the City to consider mediation and to produce the information in a format requested by the UPW. Thereafter, the Respondents provided the relevant information regarding the BWS contracts requested by the UPW on October 5, 2007. Although Respondents were unsure whether the BWS information was provided, Respondents subsequently notified the Union that no additional information pertaining to the request was discovered, and thus all relevant information pertaining to BWS contracts was included in the City's October 5, 2007, transmittal letter. On or about October 22, 2007, the BWS provided the UPW with a copy of listings in the database containing BWS contracts, confirming the tree trimming contract with Glad's Landscaping & Tree Trimming, Inc. Accordingly, the Board finds that Respondents produced the information requested by the UPW in compliance with Section 15.09 of the Unit 01 CBA.

CONCLUSIONS OF LAW AND DISCUSSION

1. Assuming, arguendo, this case is not moot, the Board has jurisdiction over the instant prohibited practice complaint pursuant to HRS §§ 89-5⁶ and 89-14⁷.

⁶HRS § 89-5(i) provides in relevant part:

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[.]

⁷HRS § 89-14 provides:

Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to

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. The Complaint alleges violation of HRS §§ 89-13(a)(1), (5), (7), and (8), which provides in relevant part:

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; or

- (8) Violate the terms of a collective bargaining agreement[.]

section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

6. A case that previously had been suitable for determination may be rendered non-justiciable by mootness. In re App'n. of J.T. Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254-55 (1990). The mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal - adverse interest and effective remedy - have been compromised." Id., at 226, 832 P.2d at 254-55 (quoting Wong v. Board of Regents, University of Hawai'i, 62 Haw. 391, 394, 616 P.2d 201, 203-204 (1980)).
7. The Board finds that the case is moot, and accordingly dismisses the complaint for lack of jurisdiction due to mootness. By letter dated September 27, 2007, the City timely notified the UPW that the requested materials were being made available to the UPW for review and photocopying. Although the Complaint was filed based upon assertion by Respondents in their letter dated October 5, 2007, that the listing may not include most of the BWS contracts which were contained in a separate database and would be subject to further search, Respondents subsequently notified the Union that no additional information pertaining to the request was discovered, and thus all relevant information pertaining to BWS contracts was included in the City's October 5, 2007, transmittal letter. By letter dated October 22, 2007, Respondents also provided a "description" of services for Order No. 400110, Glad's Landscaping & Tree Trimming, Inc., as "Tree trimming services."
8. Assuming, arguendo, the Board has jurisdiction over this complaint, the Board concludes that Respondents did not wilfully violate HRS §§ 89-13(a)(1), (5), (7), or (8). Based upon the facts in the record, the Board finds there is no genuine issue as to any material fact and Respondents are entitled to judgment as a matter of law. Respondents provided the UPW with access to the contracts for review and copying within 7 days of its request. Further, the parties considered an extension to permit the City to consider mediation and to produce the information in a format requested by the UPW. Thereafter, the Respondents provided the relevant information regarding the BWS contracts requested by the UPW on October 5, 2007. Although Respondents were unsure whether the BWS information was provided, Respondents subsequently notified the Union that no additional information pertaining to the request was discovered, and thus all relevant information pertaining to BWS contracts was included in the City's October 5, 2007, transmittal letter. Accordingly, the Board concludes that Respondents are entitled to judgment as a matter of law.
9. Given the provisions of Section 15.19 b. of the CBA, the Board declines to address Respondents' argument that the subject matter of the underlying

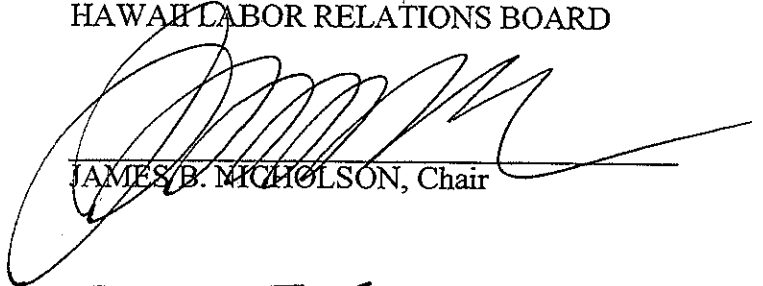
9. Given the provisions of Section 15.19 b. of the CBA, the Board declines to address Respondents' argument that the subject matter of the underlying Grievance is not arbitrable as the CBA provides that the issue of arbitrability is reserved for the Arbitrator.

ORDER

For the above-discussed reasons, the Board hereby denies the Union's Motion for Summary Judgment and dismisses the complaint as moot, or alternatively, grants Respondents' Cross-Motion for Summary Judgment.

DATED: Honolulu, Hawaii, December 27, 2007.

HAWAII LABOR RELATIONS BOARD



JAMES B. MICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:

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John S. Mukai, Deputy Corporation Counsel