

APR 15 2008

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

MILTON ARAKAWA, Director, Department  
of Public Works and Environmental  
Management, County of Maui; and  
CHARMAINE TAVARES, Mayor, County  
of Maui,

Respondents.

CASE NO.: CE-01-655

ORDER NO. 2499

ORDER GRANTING IN PART AND  
DENYING IN PART UPW'S MOTION  
FOR SUMMARY JUDGMENT AND  
GRANTING IN PART AND DENYING  
IN PART COUNTY OF MAUI'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION  
FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING  
IN PART COUNTY OF MAUI'S CROSS-MOTION FOR SUMMARY JUDGMENT

On February 11, 2008, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint (Complaint) against Respondents MILTON ARAKAWA, Director, Department of Public Works and Environmental Management, County of Maui, and CHARMAINE TAVARES, Mayor, County of Maui (collectively, County of Maui), alleging the County of Maui wilfully refused to provide information relevant to the processing of a grievance and wilfully refused to follow the provisions in the Unit 01 collective bargaining agreement (CBA) regarding the selection of an arbitrator. UPW alleged violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), (7), and (8).

On February 28, 2008, UPW filed a Motion for Summary Judgment and on March 10, 2008, the County of Maui filed a Cross-Motion for Summary Judgment. The Board held a hearing on the parties' motions on March 19, 2008, 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 granting in part and denying in part UPW's Motion for Summary Judgment and granting in part and denying in part the County of Maui's Cross-Motion for Summary Judgment. The Board orders the parties to immediately commence selection of the arbitrator pursuant to Section 15.17 b. of the CBA, and defers the dispute over the January 24, 2008, information requests to the arbitrator.

I do hereby certify that this is a full, true and  
correct copy of the original on file in this office.

*Wali Iki Kueimoto*

Executive Officer  
Hawaii Labor Relations Board

## FINDINGS OF FACT

1. UPW was or is at all relevant times an employee organization within the meaning of HRS § 89-2<sup>1</sup> for employees belonging to Unit 01.
2. The County of Maui was or is at all relevant times a public employer within the meaning of HRS § 89-2 for purposes of this Complaint.<sup>2</sup>
3. The UPW and the County of Maui are parties to the Unit 01 CBA.
4. On or about August 30, 2006, UPW filed a grievance with the County of Maui, pursuant to the Unit 01 CBA, relating to denial of temporary assignments to an employee in Unit 01.
5. On or about August 30, 2006, UPW requested the County of Maui provide material related to the processing of the grievance, including material to identify the parties and persons involved in the decision making process and all persons affected by the grievance; copies of all applicable rules, regulations, policies, internal memoranda, and other statements of reasons for the action taken by the Employer; and materials relating to scheduling, overtime, or other disputes involving hours of work.

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<sup>1</sup>HRS § 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 employers 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.

<sup>2</sup>HRS § 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.

6. On or about September 13, 2006, UPW informed the County of Maui of its desire to proceed to Step 2 of the grievance procedure, as the County of Maui failed to respond at Step 1 of the procedure.
7. On or about September 20, 2006, the County of Maui requested from the UPW a three-month extension to respond to the grievance, to allow meetings with the department, gathering of relevant information, and response to the grievance. The UPW agreed to extend the deadline for the Employer's response from September 22, 2006, to October 23, 2006.
8. On or about December 11, 2007, the County of Maui notified the UPW that it was denying the grievance at Step 2.
9. On or about January 10, 2008, the UPW notified the County of Maui that it was submitting the grievance to arbitration.
10. On January 16, 2008, counsel for UPW proposed to the County of Maui that David Hagino (Hagino) serve as the arbitrator in the grievance.
11. On January 18, 2008, counsel for the County of Maui notified UPW that it would not accept Hagino as the arbitrator due to past arbitrations where he represented UPW. The County of Maui proposed Michael Nauyokas (Nauyokas) as the arbitrator.
12. On or about January 22, 2008, counsel for UPW requested information from counsel for the County of Maui regarding whether Nauyokas had any ties to the County of Maui's Corporation Counsel's office or its attorneys, and copies of awards he rendered in County of Maui cases.
13. On or about January 24, 2008, counsel for UPW notified the County of Maui that there has been no response to UPW's August 30, 2006, request for information. The UPW requested a response within seven days.
14. On or about January 24, 2008, counsel for UPW sent to the County of Maui a First Request for Answers to Interrogatories and Production of Documents in connection with the grievance.
15. On or about January 24, 2008, counsel for the County of Maui responded to UPW's request for more information regarding Nauyokas.
16. On or about January 28, 2008, based upon the County of Maui's response, UPW decided to select an arbitrator from a list of names provided by the Board, and requested such a list from the Board.

17. On or about January 29, 2008, the Board sent to UPW's counsel with a copy to the County of Maui's counsel, a list of five potential arbitrators, which consisted of Randall Y.C. Ching (Ching); Ronald T. Fujiwara (Fujiwara); Kerry M. Komatsubara (Komatsubara); Boyd P. Mossman (Mossman); and T. David Woo (Woo).
18. On or about January 30, 2008, counsel for the County of Maui notified UPW that she received the request for information relating to the grievance, received the assignment to handle the arbitration, requested that the information be provided to her, and that she should be able to forward the information to UPW the following week. Also on or about January 30, 2008, counsel for the County of Maui notified UPW's counsel that she received the transmittal of the Request for Answers to Interrogatories and Production of Documents and as discovery is controlled by the arbitrator, and that because the parties were still in the process of selecting an arbitrator, the request was premature. Also on or about January 30, 2008, counsel for the County of Maui acknowledged UPW's rejection of Nauyokas as the arbitrator, and notified UPW that it awaited a copy of the list of possible arbitrators from the Board.
19. On or about January 31, 2008, counsel for UPW requested that counsel for the County of Maui call him as soon as possible so they could select an arbitrator from the list provided by the Board.
20. On or about January 31, 2008, counsel for the County of Maui notified UPW that Ching had close associations with the UPW and its counsel in the past, and that she believed Ching would have to disqualify himself from serving as the arbitrator; further, that the County of Maui would agree to select either Mossman or Woo as arbitrator, and would not agree to select either Fujiwara or Komatsubara.
21. On or about February 1, 2008, counsel for UPW notified counsel for the County of Maui of his concerns regarding the suitability of Mossman and Woo, and requested counsel for the County of Maui call him so they could select from the list provided by the Board, or as may be mutually changed on the phone, just before the striking process begins. He also stated that if counsel for the County of Maui wanted to get three additional names from the Board to replace Mossman, Woo, and Ching, he could recommend that to his client.
22. On or about February 1, 2008, counsel for the County of Maui notified counsel for UPW that she received his letter questioning the suitability of Mossman and Woo to serve as arbitrator. She suggested James Hoenig (Hoenig) serve as arbitrator, or asking for a new list from the Board.

23. On or about February 2, 2008, counsel for UPW declined the County of Maui's suggestion to use Hoenig as the arbitrator, and requested counsel for the County of Maui call him so they could do the selection pursuant to Section 15.17 b. of the CBA, and offered to let the County of Maui exercise the first strike.
24. On or about February 6, 2008, counsel for the County of Maui acknowledged UPW's rejection of Hoenig, and argued that UPW objected to two names on the original list and the County of Maui objected to the other three, so that a new list should be obtained from the Board. Also on or about February 6, 2008, the County of Maui requested a new list from the Board.
25. On or about February 6, 2008, UPW objected to the County of Maui's request for a new list.
26. On or about February 6, 2008, counsel for the County of Maui responded to the February 6, 2008, letter, asserting that the parties were entitled to neutral arbitrators and that the list from the Board was not binding on the parties. Counsel for the County of Maui stated that the parties could agree to whatever they wish and that she has never had a problem with other unions in agreeing to someone off the list, even when a list had been requested.
27. On or about February 7, 2008, counsel for UPW again requested that counsel for the County of Maui call him to select from the original list.
28. On February 11, 2008, UPW filed the instant Complaint alleging Maui County wilfully refused to provide information relevant to the processing of a grievance and wilfully refused to follow the provisions in the Unit 01 CBA regarding selection of an arbitrator. UPW alleged violation of HRS §§ 89-13(a)(5), (7), and (8).
29. On February 28, 2008, UPW filed a Motion for Summary Judgment and on March 10, 2008, the County of Maui filed a Cross-Motion for Summary Judgment. The Board held a hearing on the parties' motions on March 19, 2008, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).
30. Section 15.09 of the Unit 01 CBA provides in relevant part:

## 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 part 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.

31. Section 15.17 of the Unit 01 CBA provides in relevant part:

## SELECTION OF THE ARBITRATOR

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

- 15.17 a. By mutual agreement from names suggested by the parties.
- 15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:
  - 15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.
  - 15.17. b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

DISCUSSION AND 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) provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

\* \* \*

- (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[.]

6. The CBA requires the parties to select an arbitrator within fourteen days after the notice of arbitration. Here, the notice of arbitration was made on or about January 10, 2008. Although the parties were attempting to reach mutual agreement on the selection of an arbitrator, no agreement had been

reached as of January 24, 2008 (the fourteenth day following the notice of arbitration), when UPW requested a list of potential arbitrators from the Board. UPW's action in requesting the list is consistent with the provisions of Section 15.17 b. of the CBA.

7. The parties continued to correspond after January 24, 2008, regarding the selection of an arbitrator. Section 15.05b. of the CBA provides that "[b]y mutual agreement between the Union and the Employer any requirement of Section 15. may be waived." However, on or about February 2, 2008, UPW declined the County of Maui's suggestion to use Hoenig as the arbitrator and requested that the parties do the selection pursuant to Section 15.17 b of the CBA. Rather than follow the "striking" procedure set forth in the CBA, the County of Maui, on or about February 6, 2008, argued that UPW objected to two names on the original list and the County of Maui objected to the other three, so that a new list should be obtained from the Board. Also on or about February 6, 2008, the County of Maui requested a new list from the Board. On or about February 7, 2008, UPW again requested that the County of Maui select from the original list. To date, the parties have not selected an arbitrator pursuant to the "striking" process in the CBA.
8. The "striking" process provided for in the CBA is clear, and must be followed absent mutual agreement from names selected by the parties, or mutual agreement between the union and employer to waive the provisions governing selection of the arbitrator, neither of which is present here. The County of Maui argues that the "striking" process will result in an arbitrator who is disqualified or will recuse himself, and thus a new list is necessary. However, the Board cannot find as a "fact" which of the names on the list would be the final name, as the process has not been followed. For example, the selection of the arbitrator may depend on which party is chosen to exercise the first strike, and the results of the subsequent alternating strikes. Further, the Board hesitates to presume which potential arbitrator any particular party will find objectionable, which potential arbitrators have actual conflicts, or which potential arbitrators will recuse themselves if asked.
9. Accordingly, the Board finds that the County of Maui wilfully refused to follow the "striking" provisions in the CBA regarding selection of the arbitrator, despite being twice requested to do so. The Board orders that the parties immediately commence selection of the arbitrator in accordance with Section 15.17 b of the CBA.



10. The Board acknowledges that the “striking” provisions in the CBA may result in an arbitrator with an actual conflict, or one who chooses recusal, thus leaving the parties without an arbitrator. Should that occur, upon request, the Board will issue a new list of potential arbitrators.<sup>3</sup>
11. 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). Relevant information includes information requested for the purpose of processing a grievance. NLRB v. Realty Maintenance, Inc., 723 F.2d 746, 747 (1984).
12. The County of Maui failed to fully respond to UPW’s August 30, 2006, request for material related to the processing of the grievance, as governed by Section 15.09 of the Unit 01 CBA. However, pursuant to HRS § 377-9(1), “[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.” Accordingly, although the County of Maui failed to provide the requested documents within seven days as required by the CBA, the UPW did not file the present Complaint until February 11, 2008, rendering this portion of the claim untimely.
13. On January 24, 2008, UPW again requested the documents previously asked for in the August 30, 2006, request and also submitted to the County of Maui its First Request for Answers to Interrogatories<sup>4</sup> and Production of Documents in connection with the grievance. The Complaint is timely with respect to the January 24, 2008, requests. However, UPW had notified the

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<sup>3</sup>The Board also acknowledges that HRS § 658A-11 provides in relevant part:

If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.

For purposes of this Complaint, the Board does not find that Section 15.17 of the CBA has failed, only that the County of Maui has refused to comply with the provisions.

<sup>4</sup>The Unit 01 CBA does not expressly provide a right to requests for answers to interrogatories.

County of Maui on or about January 10, 2008, that it was submitting the grievance to arbitration. Pursuant to HRS § 658A-9, a “person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties . . . The notice shall describe the nature of the controversy and the remedy sought.” Thus, when the January 24, 2008, requests for information were made, the grievance was already at the arbitration stage. Pursuant to HRS § 658A-17, the arbitrator controls witnesses, subpoenas, depositions, and discovery. An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective (HRS § 658A-17(c)). Accordingly, the issue of information requests, including UPW’s requests of January 24, 2008, during the arbitration stage of a grievance is properly within the jurisdiction of the arbitrator.

14. The failure of the employer to provide documents during the arbitration stage of a grievance may be a violation of Section 15.09 of the CBA, governing “Information.” The CBA, however, does not dictate whether such information dispute will be resolved by the arbitrator or the Board. Pursuant to HRS § 89-5, the Board resolves controversies under chapter 89, and conducts proceedings on prohibited practice complaints. Additionally, pursuant to HRS § 89-19, “[chapter 89] shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, or rules adopted by the State, a county, or any department or agency thereof, including the departments of human resources development or of personnel services or the civil service commission.” Chapter 658A, however, is not a “conflicting statute,” for HRS § 89-10.8(a)<sup>5</sup> specifically allows the parties to enter into an agreement setting forth a grievance procedure culminating in arbitration. In turn, the circuit courts have consistently applied chapter 658A to such arbitration proceedings. Accordingly, the Board concludes that the arbitrator has jurisdiction over the present January 24, 2008, information dispute. To the extent the Board may have concurrent jurisdiction, the Board defers to the arbitrator.

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<sup>5</sup>HRS § 89-10.8(a) provides in relevant part:

A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.

15. In the present case, the Board orders the parties to immediately select an arbitrator using the "striking" process provided for in the CBA. The selected arbitrator may then resolve the dispute over the information requests. In the event the process results in an arbitrator who is precluded from serving by conflict, or who chooses recusal, the parties shall immediately notify the Board for a new list.
16. The Board acknowledges UPW's argument that the County of Maui's failure to utilize the "striking" process in the CBA may delay obtaining relief on the discovery issues because no arbitrator has been selected. The Board, however, has ordered the County of Maui to immediately commence selection of an arbitrator in accordance with Section 15.17 b of the CBA. Additionally, HRS § 658A-8(a) provides provisional remedies to parties during the period before an arbitrator is selected, to protect the effectiveness of the arbitration proceeding.

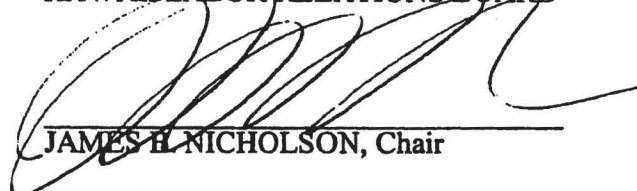
ORDER

For the reasons discussed above, the Board finds that the County of Maui committed a prohibited practice pursuant to HRS § 89-13(a)(8) by wilfully refusing to utilize the provisions of Section 15.17 b. in the CBA despite having been requested to do so by the UPW. The parties are ordered to immediately commence selection of the arbitrator pursuant to Section 15.17 b. of the CBA. The Board further finds that the dispute over the January 24, 2008, information requests are properly under the jurisdiction of the arbitrator, and to the extent the Board may have concurrent jurisdiction, the Board defers to the arbitrator.

The Board therefore grants in part and denies in part UPW's Motion for Summary Judgment, and grants in part and denies in part the County of Maui's Cross-Motion for Summary Judgment.

DATED: Honolulu, Hawaii, April 14, 2008.

HAWAII LABOR RELATIONS BOARD

  
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JAMES H. NICHOLSON, Chair

  
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EMORY J. SPRINGER, Member

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. MILTON ARAKAWA,  
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SARAH R. HIRAKAMI, Member

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