

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; and LESTER K.C.
CHANG, Director, Department of Parks and
Recreation, City and County of Honolulu,

Respondents.

CASE NO. CE-01-664

ORDER NO. 2527

ORDER GRANTING UPW'S MOTION
FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT

On April 29, 2008, 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, and LESTER K.C. CHANG, Director, Department of Parks and Recreation, City and County of Honolulu (collectively, City and County or Employer), alleging the City and County wilfully violated the terms of the Unit 01 Collective Bargaining Agreement (Agreement) when it failed to provide all information in its possession in response to UPW's request for information necessary to process a grievance. UPW alleged violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(8).

On May 28, 2008, UPW filed its Motion for Summary Judgment, and on June 3, 2008, the City and County filed its Memorandum in Opposition to UPW's Motion for Summary Judgment. The Board held a hearing on UPW's Motion for Summary Judgment on June 4, 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 UPW's Motion for Summary Judgment.

FINDINGS OF FACT

1. UPW was or is at all relevant times an employee organization within the meaning of HRS § 89-2¹ for employees belonging to Unit 01.
2. The City and County was or is at all relevant times a public employer within the meaning of HRS § 89-2 for purposes of this Complaint.²
3. The UPW and the City and County are parties to the Unit 01 Agreement.
4. Section 15.09 of the Unit 01 Agreement 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

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 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.

²HRS § 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.

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 or about September 29, 2006, UPW requested information relating to a pre-determination hearing for a Unit 01 employee. Specifically, UPW requested interviews of all the involved parties obtained during the investigations into each of the alleged incidents; identification of all persons acting in behalf of the Employer who were directly involved in the investigative process; copies of all written statements, notes, memos from any Employer or supervisor related to the grievance; and any notes, memos, and records of statements by the employee.
6. On or about October 12, 2006, the City and County responded to UPW's September 29, 2008, request for information.
7. On or about December 11, 2006, the grievant was terminated from employment with the City and County.
8. On or about December 21, 2006, UPW filed a Step 1 grievance relating to the termination of the Unit 01 employee; UPW also requested information related to the grievance, specifically: a true and accurate copy of all disciplinary rules, policies, and/or standards currently applicable to all bargaining unit employees; any and all documents, memoranda, letters, postings, notices and other records regarding the Employer's disciplinary rules, policies, and/or standards; the specific standard of conduct or rule which Employer believed the grievant violated, including the date the grievant was informed of the standard of conduct or rule and the reason for the Employer's standard of conduct or rule; a true and accurate copy of any and all documents which would indicate the nature and extent of the investigation conducted by the Employer to discover whether the grievant did in fact violate the rule or standard of conduct; identification of all persons acting in behalf of the Employer who were involved in the investigative process leading to the disciplinary action being challenged; identification of the person(s) acting in behalf of the Employer who made the final decision to impose the nature of the disciplinary action being challenged; identification of all employees of the Employer who had previously been investigated or disciplined for violations of the same or related standard of conduct or offense for which the grievant was disciplined; information relating to whether the Employer applies progressive discipline principles for the offense the grievant allegedly committed; and a copy of the grievant's personnel file and records.

9. On or about December 28, 2008, the City and County responded to UPW's December 21, 2008, request for information.
10. The grievance was denied at Steps 1 and 2 of the grievance procedure, and UPW requested arbitration on the matter. On or about October 30, 2007, the parties selected Louis L.C. Chang to serve as the grievance arbitrator.
11. Arbitration in the grievance was scheduled to commence on May 1, 2008.
12. On or about April 25, 2008, and as part of the grievance arbitration process, UPW received the City and County's Prehearing Statement and Exhibits List; Exhibits A through AAA; and Certificate of Service in grievance case no. DA-06-33. Among the City and County's exhibits were 27 documents that were not provided to UPW in response to either of the UPW's September 29, 2006, or December 21, 2006, requests; the documents included interviews of parties and alleged witnesses, investigative reports, supervisor's statements and memoranda, and letter of complaint from co-workers. Additionally, the City and County identified eight potential witnesses that had not been previously identified by the City and County.
13. On April 29, 2008, UPW filed the instant Complaint, alleging the City and County wilfully violated the terms of the Unit 01 Agreement when it failed to provide all information in its possession in response to UPW's September 29, 2006, and December 21, 2006, requests for information necessary to process a grievance. UPW alleged violation of HRS §§ 89-13(a)(8).
14. At the arbitration hearing on May 1, 2008, UPW filed two motions in limine pursuant to HRS § 658A-15(a) seeking an order from the arbitrator prohibiting the City and County from introducing into evidence the 27 documents and the testimony of the eight witnesses.
15. On May 2, 2008, the arbitrator held that "[t]he 27 exhibits that were not produced until a few days before the hearing has resulted in prejudice to the Grievant and the Union and will not be admitted into the record." Additionally, the arbitrator granted UPW's motion in limine in part to exclude the testimony of two witnesses.
16. On May 28, 2008, UPW filed its Motion for Summary Judgment in this prohibited practice case, and on June 3, 2008, the City and County filed its Memorandum in Opposition to UPW's Motion for Summary Judgment. The Board held a hearing on UPW's Motion for Summary Judgment on June 4, 2008, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).

17. The City and County admits that on October 12, 2006, it transmitted certain documents to the UPW that were not responsive to the incident at issue in the grievance; the transmittal incorrectly noted that certain witnesses were not interviewed and that the entire investigative reports and statements arising out of the incident were provided. In its December 28, 2006, response, the City and County assured UPW that all relevant information was provided.
18. It is the City and County's position that in its normal course of providing documents for the grievance procedure, it would turn over documents in issue. The Board accepts the City and County's position for the purposes of this Motion for Summary Judgment; however, what should "normally" occur did not happen in this case.
19. The City and County also asserts that it did not consciously, knowingly, or deliberately intend to wilfully withhold the documents at issue. The City and County, however, does not provide any explanation for the failure to provide all relevant information that was requested by UPW, despite the City and County being put on notice on or around April 29, 2008 (when the Complaint was filed), that its responses to the information requests were deficient. At the hearing on the Motion for Summary Judgment, the City and County asserted that at least some of the documents had actually been turned over to the UPW prior to the filing of the Complaint; however, there were no declarations or affidavits submitted to the Board to establish such argument as a fact. The Board has not been provided with a clear explanation of what caused the deficient responses to the information requests.
20. Accordingly, the City and County on two separate occasions failed to provide information responsive to UPW's requests, and affirmatively asserted to UPW that the appropriate documents were provided. When it became clear that a good number of documents and witness identities had not been provided, the City and County failed to provide an explanation for the discrepancies. Additionally, the information requests were made in September and December of 2006, and the existence of the additional documents and witness identities were not revealed by the City and County to UPW until on or about April 25, 2008.
21. Under the facts of this case, the Board finds that the City and County wilfully, i.e., with conscious, knowing, or deliberate intent, violated Section 15.09 of the Unit 01 Agreement, constituting a prohibited practice under HRS § 89-13(a)(8). The declaration attached to the City and County's Memorandum in Opposition to UPW's Motion for Summary Judgment, while establishing that it is the Department of Parks and Recreation's "normal"

procedure to turn over all documents in issue during the grievance process, do not, in the Board's view, create a genuine issue of disputed fact sufficient to survive summary judgment in this case.

22. Although the issue of the additional documents and identification of witnesses was raised before the arbitrator, the Board finds that UPW's information requests and the City and County's initial responses to those requests were made prior to the arbitration stage of the grievance; accordingly, the Board finds that it has jurisdiction over the Complaint with respect to the alleged violation of HRS § 89-13(a)(8).

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. "When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided [by Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Hawaii Rules of Civil Procedure (HRCPP) Rule 56. Thus, "[a] party opposing a motion for summary judgment

cannot discharge his or her burden by alleging conclusions, 'nor is [the party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time.'" Henderson v. Professional Coatings Corp., 72 Haw. 387, 501, 819 P.2d 84, 92 (1991).

6. HRS § 89-13(a) provides in relevant part:

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

* * *

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

7. The Board looks to the Hawaii Supreme Court's evolving guidance in interpreting provisions of HRS Chapter 89. Recently, the Hawaii Supreme Court reiterated that in assessing a violation of HRS § 89-13, the Board is required to determine whether the respondent acted with "conscious, knowing, and deliberate intent to violate the provisions" of HRS Chapter 89. In re Hawaii Government Employees Ass'n., AFSCME, Local 152, AFL-CIO, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007) ("With respect to HRS chapter 89, this court has said that 'wilfully' means 'conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89' . . . Thus, in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89 when it removed the campaign materials"). Accordingly, when assessing an alleged prohibited practice under HRS § 89-13, the Board will determine whether the respondent acted with "conscious, knowing, and deliberate intent" to violate the provisions of HRS chapter 89.
8. In the present case, the City and County asserts that it did not consciously, knowingly, or deliberately intend to wilfully withhold the documents at issue. The City and County, however, does not provide any explanation for the failure to provide all relevant information that was requested by UPW, despite the City and County being put on notice on or around April 29, 2008 (when the Complaint was filed), that its responses to the information requests were deficient. At the hearing on the Motion for Summary Judgment, the City and County asserted that at least some of the documents had actually been turned over to the UPW prior to the filing of the Complaint; however, there were no declarations or affidavits submitted to the Board to establish such argument as a fact. The Board has not been provided with a clear explanation of what

caused the deficient responses to the information requests. Thus, the City and County on two separate occasions failed to provide information responsive to UPW's requests, and affirmatively asserted to UPW that the appropriate documents were provided. When it became clear that a good number of documents and witness identities had not been provided, the City and County failed to provide an explanation for the discrepancies. Additionally, the information requests were made in September and December of 2006, and the existence of the additional documents and witness identities were not revealed by the City and County to UPW until on or about April 25, 2008. Under the facts of this case, the Board finds that the City and County wilfully, i.e., with conscious, knowing, or deliberate intent, violated Section 15.09 of the Unit 01 Agreement, constituting a prohibited practice under HRS § 89-13(a)(8).

9. The declaration attached to the City and County's Memorandum in Opposition to UPW's Motion for Summary Judgment, while establishing that it is the Department of Parks and Recreation's "normal" procedure to turn over all documents in issue during the grievance process, do not, in the Board's view, create a genuine issue of disputed fact sufficient to survive summary judgment in this case.

10. Although the issue of the additional documents and identification of witnesses was raised before the arbitrator, the Board finds that UPW's information requests and the City and County's initial responses to those requests were made prior to the arbitration stage of the grievance. The requests were made on or about September 26, 2006, and at Step 1 of the Grievance process on December 21, 2006. However, the UPW did not know that there was information missing from the City and County's responses to those requests until on or about April 25, 2008, and thus the Complaint was timely. The Board finds that it has jurisdiction over the Complaint with respect to the alleged violation of HRS § 89-13(a)(8). The Board has deferred information disputes to the arbitrator where the information request arose after the arbitration stage of the grievance has been invoked. See HRS § 658A-9, which defines the initiation of arbitration ("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"). However, in this case, the information requests and responses at issue occurred prior to the arbitration stage of the grievance.

ORDER

For the reasons discussed above, the Board grants UPW's Motion for Summary Judgment and finds that the City and County committed a prohibited practice pursuant to HRS § 89-13(a)(8) by wilfully violating Section 15.09 of the Unit 01 Agreement governing requests for information necessary for the processing of a grievance by failing to provide documents and other information within its possession in a timely manner. The City and County is ordered to cease and desist from such action, and is ordered to conduct further investigation as to why so many documents and witness identification were not disclosed to UPW, in order to minimize such occurrence from happening in the future. The City and County is ordered to report to the Board, with service on UPW, the results of its investigation within 30 days of this order.

DATED: Honolulu, Hawaii, July 25, 2008

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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