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 SIDNEY QUINTAL, Director, Department of Enterprise Services, City and County of Honolulu, Respondents.	CASE NO. CE-01-685 ORDER NO. 2588 ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

For the reasons discussed below, the Board grants in part and denies in part the Motion for Summary Judgment brought by Complainant UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Union).

FINDINGS OF FACT

1. At all relevant times, the UPW was or is an employee organization[1] and the exclusive bargaining representative, within the meaning of Hawaii Revised Statutes (HRS) § 89-2, of employees included in bargaining unit (Unit or

[1]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.

BU) 01, composed of nonsupervisory employees in blue collar positions. See HRS § 89-6(1).

2. Respondent MUFI HANNEMANN, Mayor, City and County of Honolulu (Mayor) at all relevant times was or is a public employer within the meaning of HRS § 89-2. Respondent SIDNEY QUINTAL, Director, Department of Enterprise Services (DES) at all relevant times was or is the director of an agency of the City and County of Honolulu and represents the interests of the Mayor with respect to its employees, and is therefore an employer within the meaning of HRS § 89-2.[2] The Mayor and DES are hereinafter collectively referred to as "Employer" or "City and County."

3. The UPW and the Employer are parties to a Unit 01 collective bargaining agreement which for all relevant times includes 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 the collective bargaining agreement.

4. On August 14, 2008, the UPW filed a prohibited practice complaint (Complaint) against the Employer.

5. The Complaint alleges, inter alia, as follows:

> 7. On June 16, 2006, Union filed grievance case number SM-06-05 over the non-selection of BU 01 member Guy Kahale by the [DES] for the position of Tractor Mower Operator at Pali Golf Course pursuant to an inter-departmental competitive promotional process.
>
> 8. Grievant Kahale was the senior golf course groundskeeper at the Pali Golf Course, and since January 2004 had performed 1034 hours on Temporary Assignment in the Tractor Mower Operator position.

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[2]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.

9. Employer denied the grievance at Steps 1 and 2, and Union filed notice to arbitrate on January 12, 2007.

10. The parties selected Ted Sakai as arbitrator and the arbitration hearing was scheduled to take place on March 24 and 25, 2008.

11. While preparing to present the case at the scheduled arbitration hearing, on February 13, 2008, Employer submitted to UPW a draft settlement agreement.

12. The parties eventually negotiated a final agreement that Grievant and UPW State Director Dayton Nakanelua authorized by their signatures on March 20, 2008.

13. On or about April 10, 2008, UPW received an original copy of the settlement agreement purportedly including the authorizations of the Employer signatories, [DES] Director Sidney Quintal and Dept. of Human Resources Director Ken Nakamatsu.

14. Without attribution, the signature of Dana Manahara-Dias appears on the line reserved for DES Director Quintal's signature and is dated April 3, 2008.

15. The signature for DHR Director Ken Nakamatsu appears on the line reserved for his signature and is not dated.

16. The signed settlement agreement returned to the UPW on or about April 10, 2008 includes Employer's handwritten entry indicating that settlement agreement was made on April 7, 2008.

17. Prior to settling Grievant Kahale's case, UPW and Employer has [sic] settled another grievance, case #SM-06-06 (Grievance of Paul Nash) that had been scheduled for arbitration, had [sic] arisen under the same inter-departmental competitive exam promotional exam and process, and was based on the same contractual grounds as Kahale's grievance.

18. By email dated December 12, 2007 to DHR's Lau, UPW Staff Attorney Georgette Yaindl sought verification that the Nash settlement agreement would be effective upon Grievant Nash and UPW State Director Nakanelua's signature, "irrespective of when the named City signatories actually sign."

19. By email, Lau promptly responded, "that is correct."

20. Section 2.01 of the Kahale's [sic] settlement agreement provides, "The selection process for the Tractor Mower Operator, BC04 (Position #429) at Pali Golf Course shall be conducted and completed within three (3) months from the effective date of the Settlement Agreement (including notification to selectee)."

21. Section 2.04 of the Kahale's [sic] settlement agreement provides, "The appointing authority will consult with Human Resource Specialists in the Department of Human Resources, Examination Branch, for assistance in developing the interview and selection process for this case to include the interview questions. Prior to the selection being made, the Examination Branch shall review and audit the results of the selection."

22. Section 2.05 of the Kahale agreement provides, "The Grieving party and the Union shall withdraw all claims, grievances, or actions now pending on grievance Case No. SM-06-05."

23. By email dated May 19, 2008, UPW Oahu Division Director Laurie Santiago contacted Robin Chun-Carmichael, Chief, Employer and Personnel Services Decision [sic], DHR, and Lissa Lau, Branch Chief, Labor Relations, DHR to inquire about the status of the Employer's actions undertaken pursuant to the terms of the settlement agreement.

24. By email dated May 19, 2008, DHR's Lau responded, "they are working on the recruitment."

25. By email dated June 24, 2008, UPW's Santiago contacted DHR's Chun-Carmichael, Lau, and Labor Relations Specialist Andrew Yim making "note that

only a couple of weeks were left" during which time Employer must make the promotional selection, and to inquire about the status of Employer's actions.

26. On June 24, 2008, DHR's Yim responded to UPW's Santiago by email informing her he was looking into the matter and would contact her as soon as he had any information.

27. On July 3, 2008 Grievant Kahale telephoned UPW Staff Attorney Yaindl to report that he had earlier that day received a voice mail message on his cell phone from DES, Assistant Golf Course Administrator Leighton Wong informing him that interviews were scheduled for July 7, 2007 and he should call Golf Course Administrative Secretary Careen Kunihara if he had any questions.

28. Grievant Kahale reported that he contacted DES' Kunihara on July 3, 2008, and she informed him he should report to the interview at 9:30 a.m. on July 7, 2008. Kahale asked Kunihara how many candidates were being interviewed and the identity of the persons who would be conducting the interviews. Kunihara responded she did not know and asked, "didn't [Pali Golf Course Superintendent] Sean [DiMello] or [Pali Golf Course Maintenance Supervisor] Scott [Voller] talk to you?"

29. Grievant Kahale responded to DES' Kunihara and reported to UPW's Yaindl that the only notice or information provided to him prior to the July 7, 2008 interview was the voice message left on his cell phone on July 3, 2008. See Allegation #28, *supra*.

30. On July 7, 2008 at 5:03 p.m. UPW's Santiago received a phone message from DES Administrative officer Cathy Maki stating that the interviews had been conducted, the paperwork was forwarded to Director Quintal's office, and his signature was expected tomorrow [July 8, 2008].

31. Up to and including the time of the interview, Grievant Kahale continued to perform Temporary Assignment on the position of Tractor Mower Operator.

32. On July 16, 2008, Union received a letter dated July 15, 2008 from DES Director Sidney Quintal that the "selection process for Tractor Mower Operator position AD429 has been completed and Golf Course Groundskeeper Tom Napaepae has been selected."

33. On July 31, 2008, UPW filed a grievance (Case # EA-08-03) on behalf of Guy Kahale for his non-selection for the promotion Tractor Mower Operator pursuant to the July 7, 2008 interview process.

34. According to the terms of Section 2.01 of the Kahale settlement agreement and taking into consideration of [sic] the three different dates that appear as either authorizing or making the agreement, (see Allegations #12 and #16, *supra*,) the promotions process, including selectee notification should have been completed, arguably, by June 30, 2008, the date Grievant authorized the agreement by his signature (see Allegations ##12, 17, 18, and 19, *supra*) but in no event, at no time [sic] no later than April 7, 2008, the date Employer entered a written notation indicating the date agreement was "made" (see Allegation #16, *supra*).

6. The Complaint further alleges:

35. Employer committed a prohibited practice when it wilfully breached the Kahale settlement agreement by failing to conduct interviews, make a selection, perform a review and audit of the selection process, and notify the selectee arguably by June 20, 2008 and in no event no later than July 7, 2008, and instead merely conducted the interviews on July 7, 2008.

36. Employer's breach is wilful because it was done with "conscious, knowing, and deliberate intent." See In re UPW, HLRB Order No. 2527, Case No. CE-01-664 (July 25, 2008) ("[W]hen 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.").

37. Employer's breach was conscious, knowing and committed with deliberate intent because the terms of the settlement agreement are clear and unambiguous; and there exists no evidence of Employer's attempts at good faith compliance. See In re Aio, See 2 HPERB 458 (1980).

38. UPW's complaint in this matter is not mooted by the fact that Employer has made a promotional selection because "a tardy satisfaction of [an] obligation" is an issue "capable of repetition yet evading review." See In re UPW, 6 HLRB 215, 220 (2001).

39. By the aforementioned conduct and other deeds and acts to be established during proceedings in this case, Employer has committed prohibited practices as provided for by HRS §§ 89-13(a)(1), (5), and (8).

7. The Complaint requests that the Board adjudge Respondents in violation of HRS Chapter 89, and order appropriate relief including but not limited to:

a. declaratory ruling in favor of [the UPW] that [the Employer] committed a prohibited practice when it willfully breached the settlement agreement of grievance arbitration case # SM-06-05[;]

b. compensatory and other make whole relief to the adversely affected grievant, Guy Kahale, including but not limited to promotion to position of Tractor Mower Operator with back pay;

c. a cease and desist order prohibiting [the Employer] from engaging in prohibited practices and from failure to comply with the terms of settlement agreements reached pursuant to grievance arbitration process negotiated and provided for in the BU 01 collective bargaining agreement;

d. any other affirmative relief to ensure [the Employer's] full compliance with HRS Chapter 89; and

e. award of costs incurred by UPW in preparation for presentation of case #SM-06-05 to arbitration hearing on March 24, 2008, including and limited to: subpoena service fees; expert witness fees, and arbitrator fees.

8. On August 14, 2008, the Board mailed its Notice to Respondents of Prohibited Practice Complaint (Notice) along with a copy of the Complaint, via certified mail, return receipt requested, to the Mayor, DES, and the City and County's Corporation Counsel. The Notice stated in part:

> YOU ARE DIRECTED to file with this Board the original and five (5) copies of your answer, with proof of service upon Complainant, no later than 4:30 p.m. of the tenth day after service of the complaint. If you fail to timely file and serve an answer, such failure may constitute an admission of the material facts alleged in the complaint and a waiver of a hearing.

9. Corporation Counsel received the Board's Notice on August 18, 2008.

10. On August 28, 2008, the Employer filed its Answer to the Complaint, asserting, inter alia, that the Complaint failed to state a claim upon which relief can be granted; the Complaint fails to establish subject matter jurisdiction by the Board; the requested relief is barred by the equitable doctrines of waiver, estoppel, laches, unclean hands, acquiescence and election; the requested relief is barred by the UPW's failure to exhaust its contractual remedies; there is no case or controversy over which the Board retains jurisdiction; the Employer acted within management rights; the UPW is precluded from requested relief due to lack of consideration, voidable contract, no mutual assent, no meeting of the minds, conditional contract, failure of condition, statute of frauds, frustration of purpose and impossibility; the UPW is precluded from requested relief by the applicable statute of limitations; the UPW is barred from maintaining the action because the questions presented are moot; the claims are barred by the defense of accord and satisfaction; and the Complaint fails to state a claim in that it fails to allege the Employer materially breached the contract upon which the action is based.

11. In its Answer, the Employer denied various factual assertions of the Complaint, and denied "any and all legal conclusions" set forth in the Complaint as well as any allegations and any facts not specifically admitted.

12. On September 2, 2008, the UPW filed a Motion for Summary Judgment pursuant to HRS §§ 89-5(i)(4), (5), and (10); Hawaii Rules of Civil

Procedure (HRCP) §§ 81(b)(12) and 56(c) and (e); Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(c). The UPW requested the Board find that the Employer committed a prohibited practice under HRS §§ 89-13(a)(1), (5), and (8) when it "breached the settlement agreement in Case # SM-06-05 (Grievance of Guy Kahale)" and requested the Board by order grant in full the UPW's requests for relief as set forth in the Complaint. The UPW argued that the Employer failed to file an answer, constituting an admission of the material facts alleged in the Complaint and a waiver of hearing.

13. On September 8, 2008, the UPW filed a Motion for Leave to Amend Memorandum in Support of Union's Motion for Summary Judgment (Amended Memorandum). The Amended Memorandum adds a reference to HAR § 12-42-8(c) in its argument that the Employer failed to file an answer.

14. On September 9, 2008, the Employer filed its Memorandum in Opposition to Complainant's Motion for Summary Judgment Filed September 2, 2008. The Employer argues that it filed its Answer within ten days after its receipt of the Complaint, and that the UPW is not entitled to default judgment.

15. On September 11, 2008, the Employer filed its Prehearing Conference Statement.

16. On September 12, 2008, the UPW filed its Prehearing Conference Statement.

17. On September 16, 2008, the UPW filed its Reply to Respondents' Memorandum in Opposition to Complainant's Motion for Summary Judgment. The UPW argued that HRCP Rule 4 is inapplicable to the Board's service of the Notice; that Rule 4 does not provide for a substitute for personal service by mail; that the UPW is entitled to judgment in its favor; and that UPW demurs to the Employer's claim that their failure to file an answer likely was a result of misinterpretation of a rule of law and not a willful act.

18. On September 25, 2008, the Board heard oral arguments on the UPW's Motion for Summary Judgment.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Board has jurisdiction over prohibited practice complaints 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 § 89-14, governing the prevention of prohibited practices, provides:

> 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 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. HRS § 377-9, governing the prevention of unfair labor practices, provides in relevant part:

> (b) Any party in interest may file with the board a written complaint, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice. The board shall serve a copy of the complaint upon the person charged, hereinafter referred to as the respondent. If the board has reasonable cause to believe that the respondent is a member of or represented by a labor union, then service upon an officer of the union shall be deemed to

be service upon the respondent. Service may be by delivery to the person, or by mail or by telegram. Any other person claiming interest in the dispute or controversy, as an employer, an employee or their representative, shall be made a party upon proof of the interest. The board may bring in additional parties by service of a copy of the complaint. Only one complaint shall issue against a person with respect to a single controversy, but any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon. The respondent may file an answer to the original or amended complaint but the board may find to be true any allegation in the complaint in the event either no answer is filed or the answer neither specifically denies nor explains the allegation nor states that the respondent is without knowledge concerning the allegation. The respondent shall have the right to appear in person or otherwise give testimony at the place and time fixed in the notice of hearing. The hearing on the complaint shall be before either the board or a hearings officer of the board, as the board may determine.

7. HAR § 12-42-42(b) provides:

> A prohibited practice complaint shall be prepared on a form furnished by the board. The original and five copies shall be filed with the board, and the board shall serve a copy of the complaint upon the person charged.

8. HAR § 12-42-45 provides in relevant part:

> (a) A respondent shall file a written answer to the complaint within ten days after service of the complaint. One copy of the answer shall be served on each party, and the original and five copies, with certificate of service on all parties, shall be filed with the board.

* * *

(g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

9. Historically, the Board has relied upon the Hawaii Rules of Civil Procedure (HRCP) in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000). For example, the issue of a party filing a motion to dismiss in lieu of an answer – a matter upon which the Board's rules are silent – arose in UPW/HGEA and Cayetano, Case Nos. CE-01-378a, CE-03-378b, CE-10-378c, and CE-13-378d, Order No. 2014 (June 6, 2001). In that case, the Board found that its rules are not inconsistent with the HRCP, and relied upon the provisions of HRCP Rule 12(b) to conclude that a respondent's motion to dismiss the complaint filed in lieu of its answer "extends the time for filing of the answer until such time after the Board rules on the motion." (Order No. 2014 at 7).

10. HRCP Rule 4, governing process, provides in relevant part:

> (a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons. Plaintiff shall deliver the complaint and summons for service to a person authorized to serve process. Upon request of the plaintiff separate or additional summons shall issue against any defendants.
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> * * *
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> (d) Same: Personal service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
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> * *
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> (6) Upon a county, as provided by statute or the county charter, or by delivering a copy of the summons and of the complaint to the corporation counsel or county attorney or any of his or her deputies.

11. HRCP Rule 5, governing service and filing of pleadings and other papers, provides in relevant part:

(b) Same: How made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court.

(1) Service upon the attorney or upon a party shall be made (a) by delivering a copy to the attorney or party; or (b) by mailing it to the attorney or party at the attorney's or party's last known address; or (c) if no address is known, by leaving it with the clerk of the court; or (d) if service is to be upon the attorney, by facsimile transmission to the attorney's business facsimile receiver.

(2) Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Facsimile transmission means transmission and receipt of the entire document without error with a cover sheet which states the attorney(s) to whom it is directed, the case name and court case number, and the title and number of pages of the document.

(3) Service by mail is complete upon mailing. Service by facsimile transmission is complete upon receipt of the entire document by the intended recipient and between the hours of 8:00 a.m. and 5:00 p.m. on a court day. Service by facsimile transmission that occurs after 5:00 p.m. shall be deemed to have occurred on the next court day.

12. HRCP Rule 6, governing times, provides in relevant part:

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some

proceedings within a prescribed period after the service of a notice or other paper upon [the party] and the notice or paper is served upon [the party] by mail, 2 days shall be added to the prescribed period.

13. HRCP Rule 1, governing the scope of rules, provides:

> These rules govern the procedure in the circuit courts of the State in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.[3] They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

14. HRCP Rule 81, governing applicability, provides in relevant part (emphasis added):

> (b) Other proceedings. These rules shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:
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> * * *
>
> (12) Proceedings under: section 92-6, relating to public records; chapter 172, relating to foreclosure of liens for commutation and for expenses of determination of boundaries; chapters 89 and 380, relating to collective bargaining and labor disputes; sections 383-34(d), 383-35, 392-79(d), and 392-80, with respect to reconsideration of a determination upon a claim for unemployment benefits or temporary disability benefits; sections 403-192 and 406-51 to 52, relating to banks and trust companies; sections 467-16 to 467-25, relating to collection of a judgment from the real estate recovery fund; section 480-22(a), relating to consent judgments under chapter 480; sections 515-10(e) and 515-14(c), relating to discriminatory practices; part II of chapter 664, relating to fences; and part III of

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[3]HRCP Rule 81(a) excludes certain proceedings from the scope of the HRCP – for example, probate proceedings under HRS chapter 560; guardianship proceedings under chapter 551; and proceedings in the family court.

chapter 664, relating to rights of private way and water rights.

15. The Board's service of the Complaint upon the Employer was complete upon mailing on August 14, 2008, even though Corporation Counsel did not receive the Complaint until August 18, 2008. Although the Board's rules do not specifically state, as does HRCP Rule 5(b)(3), that "[s]ervice is complete upon mailing[,]" review of the HRCP for guidance reveals that "service by mail" is not the same as "delivery" (see HRCP Rule 5(b)(2) for description of delivery). Moreover, pursuant to HRS § 377-9(b), the Board may effectuate service "by delivery to the person, or by mail or by telegram." (Emphases added). Accordingly, the Board does not require actual delivery of a complaint before service may be deemed complete.

16. HRCP Rule 4(d)(6) requires that service of a civil complaint upon a county be performed "as provided by statute or the county charter, or by delivering a copy of the summons and of the complaint to the corporation counsel or county attorney or any of his or her deputies." However, the Board concludes that HRCP Rule 4(d)(6) is not applicable to proceedings before the Board, except to any extent the Board may rely upon that rule in resolving ambiguities in the Board's own rules. HRCP Rule 1 provides that the HRCP "govern the procedure in the circuit courts of the State in all suits of a civil nature" (emphasis added), and thus are not applicable to proceedings before the Board. Although HRCP Rule 81(b)(12) provides that the HRCP are also applicable to proceedings under "chapters 89 and 380, relating to collective bargaining and labor disputes[,]" that rule appears to refer to collective bargaining and labor disputes *brought before the circuit courts*, and not the Board; otherwise, Rule 81(b)(12) would conflict with the provisions of Rule 1. By way of example, HRS § 89-14, governing the prevention of prohibited practices, provides in relevant part that, "[a]ny 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 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. (Emphasis added); the Board presumes that the HRCP would apply to such proceedings.

17. Here, the Board's rules were enacted pursuant to HRS § 377-9, which clearly provides that the Board "shall serve a copy of the complaint upon the person charged" and that "[s]ervice may be by delivery to the person, or

by mail or by telegram." (Emphases added). Thus, the Board concludes that HRS § 377-9 is clear that service to a party, including a county, may be "by mail" and "upon the person charged." The Board is not convinced that there is ambiguity in its rule, nor that adoption of the provisions of HRCP Rule 4(d)(6) is necessary to resolve any ambiguity, and thus declines to do so.

18. Because service of the Complaint was complete upon mailing on August 14, 2008, the Employer's Answer was due by August 25, 2008, Monday. See HAR § 12-42-8(c) ("The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday"). The Board's rules do not expressly provide for additional time after service by mail. However, assuming the Board were to review HRCP Rule 6(e) for guidance to resolve an ambiguity and add two days to the prescribed period, the Employer's Answer is still untimely. Adding two days would result in a due date of Tuesday, August 26, 2008, for the Answer[4]; however, the Employer's Answer was not filed until August 28, 2008. Accordingly, the Board concludes that the Answer was untimely.

19. Pursuant to HAR § 12-42-45(g), if the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing. Although, here, the Employer did file its Answer, the Answer was untimely and failed to comply with the provisions of HAR § 12-42-45(a) that an answer be filed within ten days after service of a complaint; accordingly, the Board may conclude that such failure constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing.

20. The Employer argues that deeming the material allegations in the Complaint as true would be akin to a default judgment, and such default judgment is not appropriate here. Generally, default judgments are not favored because they do not afford parties an opportunity to litigate claims or defenses on the merits. See In re Genesys Data Technologies, Inc. v. Genesys Pacific Technologies, Inc., 95 Hawai`i 33, 40, 18 P.3d 895, 902 (2001). ("Generally,") the Ninth Circuit has considered the following factors when exercising discretion as to the entry of a default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's

[4]See Rivera v. Department of Labor and Industrial Relations, 100 Hawai`i 348, 352, 60 P.3d 298, 302 (2002).

substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (1986).

21. Here, there does not appear to be much prejudice to the UPW due to the Answer being filed two days late; however, non-compliance with the Board's deadlines prejudices the Board's prevention of unfair labor practices in that the Board has a statutorily-imposed time frame in which to fix a time for hearing of a prohibited practice complaint (see HRS § 377-9(b) (the Board "shall fix a time for the hearing on the complaint, which shall be not less than ten nor more than forty days after the filing of the complaint or amendment thereof"). For the reasons discussed above, the Board concludes that the default was not due to excusable neglect. The Board further concludes that the sum of money at stake in the action is likely to be small. With respect to the remaining factors articulated by the Court in Eitel v. McCool, the Board concludes that there may not be much dispute over basic facts such as the dates of significant occurrence during the grievance process, or over the content of correspondence between the parties. There may be dispute as to whether the timeline in the settlement agreement was mandatory or directory; whether there was a material breach of the settlement agreement; whether any such breach was wilful or whether the Employer was excused from performance by other circumstances; whether the UPW is entitled to any relief or as to what relief is appropriate; and, significantly, whether the Board has jurisdiction over the dispute.

22. The Board therefore concludes that the appropriate ruling is to deem certain factual allegations in the Complaint as true, and allow the parties to present evidence as to the remaining allegations and legal conclusions contained in the Complaint.

The factual assertions set forth in Finding of Fact #5, supra, in the Complaint are deemed as true.

At hearing, the parties may present evidence and argument on the remaining factual assertions and legal conclusions contained in the Complaint, including the following issues: whether the timeline in the settlement agreement was mandatory or directory; whether there was a material breach of the settlement agreement; whether any such breach was wilful or whether the Employer was excused from performance by other circumstances;

whether the UPW is entitled to any relief and, if so, what relief is appropriate; and, whether the Board has jurisdiction over the dispute.

23. Accordingly, the Board grants in part and denies in part the UPW's Motion for Summary Judgment, as discussed above.

ORDER

For the reasons discussed above, the Board grants in part and denies in part the UPW's Motion for Summary Judgment.

NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4) and (i)(5) and HAR § 12-42-47, will conduct a second prehearing/settlement conference on the Complaint on **February 23, 2009 at 9:30 a.m.**, in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The Board encourages the parties to have a representative with settlement authority and/or is familiar with the dispute appear at the prehearing settlement conference.

NOTICE IS ALSO GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4), 89-5(i)(5), and 89-14, and HAR § 12-42-8(g), will conduct a hearing on the merits of the instant complaint on **March 10, 2009 at 9:00 a.m.** in the above-referenced hearing room. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

DATED: Honolulu, Hawaii, February 12, 2009.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. MUFI HANNEMANN,

et al.

CASE NO. CE-01-685

ORDER NO. 2588

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF HEARING

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

Copies sent to:

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