

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

MARIE LADERTA, Director, Department of
Human Resources Development, State of
Hawaii,

Respondent.

CASE NOS.: CE-01-711a
CE-10-711b

ORDER NO. 2632

ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
RESPONDENT'S MOTION TO
DISMISS AND/OR FOR SUMMARY
JUDGMENT

ORDER GRANTING COMPLAINANT'S MOTION FOR
SUMMARY JUDGMENT AND DENYING RESPONDENT'S
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On June 29, 2009, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant, UPW or Union) filed a prohibited practice complaint against MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii (Respondent, Employer or Laderta) with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondent failed to provide information needed to investigate and process grievances in violation of Section 15.09 of the Unit 01 and Unit 10 collective bargaining agreements (CBAs), and breached the duty to bargain in good faith. Thus, Complainant contends that Respondent wilfully violated Hawaii Revised Statutes (HRS) § 89-9(a) and §§ 89-13(a)(5), (7) and (8).

On July 10, 2009, Complainant filed a motion for summary judgment with the Board. The UPW contends that there are no genuine issues of material fact in dispute and that Complainant is entitled to judgment as a matter of law since Respondent admits the requested information was not provided within seven (7) calendar days as required by Section 15.09 of the Units 01 and 10 CBAs.

On July 30, 2009, Respondent filed a motion to dismiss and/or for summary judgment. Employer contends the dispute is moot because of a circuit court order enjoining furloughs of State employees.

On August 5, 2009, the Board conducted a hearing on Complainant's motion for summary judgment, and Respondent's motion to dismiss and/or for summary judgment. After considering the evidence and arguments presented, the Board finds that there are no genuine issues of material fact in dispute and Complainant is entitled to judgment as a matter of law. In Order No. 2630 the Board on August 12, 2009, therefore, directed Complainant to submit a proposed order within ten (10) days. On August 17, 2009, Complainant filed its proposed order with the Board. On August 18, 2009, Respondent filed her Statement of Objections to UPW's Proposed Order No. 2630 with the Board.

The Board accepts and incorporates Complainant's proposed findings and conclusions which support the rationale of the instant order. The Board also rejects those findings and conclusions which do not support the Board's order. Accordingly, based upon a review of the record of proceedings herein the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW is the exclusive bargaining representative, as defined in HRS § 89-2, of employees of the State of Hawaii who are included in bargaining units 1 and 10.
2. Laderta is the director of the Department of Human Resources Development, State of Hawaii, and a representative of a public employer as defined in § 89-2, HRS.
3. The UPW and the State of Hawaii are parties to CBAs which cover blue collar non-supervisory employees in bargaining unit 01, and institutional, health, and correctional workers in bargaining unit 10.
4. On June 12, 2009 the UPW filed class action grievances with Respondent in case numbers DMN-09-01 and DMN-09-02, alleging violations of Sections 1, 14, 25, 26, 38, and 61 of the respective Units 01 and 10 CBAs arising from a June 1, 2009 announcement by Governor Linda Lingle of a statewide three-day per month furlough of employees for two years.
5. Prior to the filing of the complaint, by letter dated June 2, 2009, Laderta referred to Governor Linda Lingle's announcement of furloughs and solicited UPW's input on how to address the budget shortfall by June 10, 2009.
6. By letter dated June 8, 2009, the UPW, inter alia, requested bargaining over the changes in wages, hours, and conditions of work by the announcement on June 1, 2009.

7. By letter dated June 15, 2009, Laderta replied, inter alia, that furloughs are not negotiable.
8. On June 19, 2009, the Union submitted a request for information needed by the union to investigate and process the class grievances to be provided within 7 calendar days.
9. The request for information consisted of fourteen items relating to the furlough plans, the avoidance of possible layoffs, and the impact on wages, hours, and other terms and conditions of employment of bargaining unit employees and their positions.
10. The request for information was presented pursuant to Section 15.09 of the Units 01 and 10 CBAs.
11. On June 19, 2009 the Union amended the grievances by adding alleged violations of Sections 3, 12, and 66 of the CBA arising from the formulation of layoff plans by State officials on or about June 18, 2009.
12. On June 19, 2009 Respondent denied the initial grievances, and on June 24, 2009 responded to and denied the amended grievances of June 19, 2009.
13. On June 24, 2009, the UPW notified Respondent that the grievances would be submitted to arbitration.
14. On June 26, 2009, in separate letters, Respondent declined to provide the requested information to UPW on the same basis as she denied the respective grievances, i.e., that furloughs are not subject to negotiations; the grievances are premature; and because there will be no contract provision under which to grieve after June 30, 2009, and therefore, the grievances were non-arbitrable.
15. On July 2, 2009, Circuit Court Judge Karl K. Sakamoto (Sakamoto) granted an injunction to prevent the State of Hawaii from implementing the furlough plans for employees represented by the UPW, Hawaii State Teachers Association and Hawaii Government Employees Association.
16. By letter dated July 7, 2009, Laderta requested Randy Perreira, executive director, Hawaii Government Employees Association, and Dayton M. Nakanelua (Nakanelua), UPW state director, to begin collective bargaining on the subject of furloughs pursuant to Judge Sakamoto's decision and their prior requests to negotiate on the subject. The letter attached the Governor's executive order regarding furloughs and the State's proposed furlough plan.

17. By letter dated July 20, 2009 Respondent informed Nakanelua of an impending layoff with a list of permanent civil service positions in Units 01 and 10 in the State Executive Branch that are part of the proposed impending layoff, which included one hundred twenty three (123) unit 01 and nine-three (93) unit 10 employees.
18. By letter dated July 22, 2009, Clifford Uwaine, for Nakanelua requested negotiations over the criteria and procedure for the impending layoffs announced.
19. On July 29, 2009, Judge Sakamoto entered his findings of fact and conclusions of law, and order granting a permanent injunction against the State's June 1, 2009 furlough plan.
20. By letter dated July 30, 2009, Respondent, inter alia, refused UPW's request to negotiate over the impending layoffs.
21. To date, Respondent has not provided any information to the UPW in response to the Union's June 19, 2009 request in accordance with Section 15.09 of the respective CBA.

DISCUSSION

Section 15.09 of the 2007-2009 Unit 01 CBA and Section 15.09 of the 2007-2009 Unit 10 CBA have identical provisions regarding the provision of information in the grievance procedure which provide as follows:

15.09. Information.

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

- 15.09a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or
- 15.09b. Make the material requested available to the grieving party and/or the Union within seven (7) calendar days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that the grieving party and/or

Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

Initially, Respondent denied the instant grievances on the basis that (a) furloughs were not subject to negotiations, (b) the grievances were premature because the furlough would not be effectuated until July 1, 2009, and (c) if there were no new contracts negotiated after June 20, 2009, there would be no provision in the contract which to grieve. Respondent denied the amended grievances challenging the layoffs on the basis that the grievances were premature because no layoffs had been implemented. By letter dated June 26, 2009, Respondent "declined" to provide the requested information on the same basis that the grievances were denied. Respondent contends here that the Circuit Court's ruling granting UPW's preliminary injunction which stopped the implementation of the Furlough Plan renders the information requested moot. Respondent also contends that the UPW failed to prove wilful conduct.

Based upon a review of the record, the Board finds and concludes that Respondent violated Section 15.09 of the Units 01 and 10 CBAs by refusing to provide the information needed by the UPW to investigate and process its class grievances.

The determination of the arbitrability of the grievances is reserved for the arbitrator under Section 15.19b¹¹ of the Units 01 and 10 CBAs, and the Board refrains from addressing the arbitrability of the grievances. Because there has been no determination yet by an arbitrator declining the arbitrability of the grievances, the Board finds the information request is not moot.

The Circuit Court concluded that the subject of furloughs was a mandatory subject to collective bargaining, which negates Respondent's reasoning for not providing the requested information. On July 20, 2009 Respondent informed UPW of impending layoffs of 123 Unit 01 and 93 Unit 10 employees. Moreover, even after the Circuit Court's ruling, Respondent refused to provide the information requested. Accordingly, the Board finds that the refusal arose to the level of wilful conduct, i.e., with conscious, knowing, or deliberate intent, and therefore violated Section 15.09 of the applicable Units 01 and 10 CBAs constituting a prohibited practice under HRS § 89-13(a)(8).

¹Section 15.19, Arbitrability, provides as follows:

* * *

- 15.19 b. 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.

Having found the foregoing prohibited practice, the Board need not address whether Respondent's conduct violated HRS §§ 89-13 (a)(5) and (7). The Board grants summary judgment in favor of Complainant, and denies Respondent's motion to dismiss and/or for summary judgment.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to §§ 89-5 and 89-14, HRS.
2. Respondent committed a prohibited practice in violation of HRS § 89-13(a)(8) when Employer wilfully violated Section 15.09 of the Units 01 and 10 CBAs by failing to provide information to the UPW as requested on June 19, 2009 within seven (7) days.
3. Based upon a review of the evidence in the record, the Board determines there is no material issue of fact in dispute. It is undisputed that Respondent refused and failed to provide the information requested by the UPW within seven calendar days as provided by the collective bargaining agreements.
4. The Board concludes there is substantial evidence in the record that Respondent's refusal to provide the information was conscious, knowing, and deliberate. Accordingly, the Board grants summary judgment in favor of Complainant.
5. The Board denies Respondent's motion to dismiss and/or for summary judgment. The complaint by UPW does state a claim for relief, and Respondent is not entitled to judgment as a matter of law.
6. Neither the dispute nor the controversy in this case has been rendered moot. The question of arbitrability of the underlying grievances is reserved for an arbitrator, not the Board.

ORDER

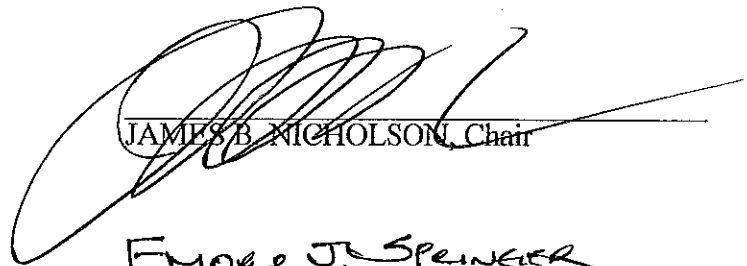
Based on the foregoing findings of fact, and conclusions of law, the Board issues the following order.

1. Respondent is ordered to provide the information in the possession of the employer pursuant to section 15.09 of the applicable Units 01 and 10 CBAs (and as requested by the UPW on June 19, 2009).

2. Respondent shall immediately post copies of this decision and order on its websites, and in conspicuous places at the worksites where employees of Units 01 and 10 employees assemble, and keep such copies posted for a period of 60 days from the initial date of posting.
3. Respondent shall notify the Board in writing of the steps taken to comply herewith in 10 days of receipt of this order with a certificate of service of the notice to the Complainant.

Dated: Honolulu, Hawaii, August 26, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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