

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

LINDA LINGLE, Governor, State of Hawaii
and MARIE LADERTA, Director,
Department of Human Resources
Development, State of Hawaii,

Respondents.

CASE NOS.: CE-01-712a
CE-10-712b

ORDER NO.

ORDER GRANTING
COMPLAINANT'S MOTION FOR
SUMMARY JUDGMENT

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On June 29, 2009, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a Prohibited Practice Complaint (Complaint) against the above Respondents with the Hawaii Labor Relations Board (Board). Complainant UPW alleged, *inter alia*, that the UPW filed class action grievances in UPW Case Nos. DMN-07-11 and DMN-07-12 regarding unlawful privatization; on December 3, 2007 and June 8, 2009, the Union requested information needed to process the grievances; and Respondents failed to provide timely and/or full responses to the UPW's requests for information as required by Section 15.09 of the collective bargaining agreements and the duty to bargain in good faith under Hawaii Revised Statutes (HRS) § 89-9(a). The UPW contends that the Respondents wilfully violated the collective bargaining agreements and the statutory duty to bargain in good faith and committed prohibited practices in violation of HRS §§ 89-13(a)(5), (7) and (8).

On July 9, 2009, the UPW filed a Motion for Summary Judgment with the Board and on July 16, 2009, Respondents filed a Memorandum in Opposition to UPW's Motion for Summary Judgment Filed on July 9, 2009.

On August 5, 2009, the Board conducted a hearing on Complainant's Motion for Summary Judgment where the parties had full opportunity to present evidence and argument to the Board. After careful consideration of the record and the arguments presented in the parties' filings and at hearing, the Board, for the reasons

discussed below, makes the following findings of fact, conclusions of law and order granting Complainant's Motion for Judgment.

FINDINGS OF FACT

1. At all times relevant to the Complaint, the UPW was or is an employee organization¹ and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit or BU) 01, composed of nonsupervisory employees in blue collar positions, and BU 10, composed of institutional, health and correctional workers. See HRS §§ 89-6(a)(1) and 10.
2. At all times relevant to the Complaint, Respondent LINDA LINGLE, Governor, State of Hawaii (Governor) was a public employer within the meaning of HRS § 89-2.²
3. At all times relevant to the Complaint, Respondent MARIE LADERTA (Laderta) was the Director, Department of Human Resources Development, State of Hawaii, and was an individual who represented the Governor or acted in the Governor's interest in dealing with employees with respect to the grievances referred to in the Complaint, within the meaning of HRS § 89-2, supra.

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.

4. The UPW and the Governor are parties to a Unit 01 collective bargaining agreement (CBA) 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.
5. The UPW and the Governor are parties to a Unit 10 collective bargaining agreement (CBA) 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.
6. 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:

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

- 15.09 a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or
 - 15.09 b. Make the material requested available to the grieving party and/or the Union within seven (7) calendar days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that if the grieving party and/or the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.
7. By letter dated July 18, 2007, Complainant UPW, by its State Director, Dayton Nakanelua (Nakanelua), requested that the State of Hawaii (State) terminate all contracts with private entities and persons which were entered pursuant to Part II of Act 90, 2001 Session Laws of Hawaii and which was repealed effective June 30, 2007. The UPW requested the State to negotiate over the transition to restore public services and provide information regarding the private contracts, including a list of contracts relating to services customarily and historically performed by Units 01 and 10 employees.

8. By letter dated October 30, 2007, Respondent provided to UPW a listing of contracts in effect on June 30, 2007 and on and after July 1, 2007 which could involve work Units 01 and 10 employees may be asked to perform but did not concede that the work was customarily performed by civil servants or that the contracts were unlawful under Konno v. County of Hawaii, 85 Hawaii 61 (Konno).
9. On November 14, 2007, the UPW filed a grievance in DMN-07-11 on behalf of Unit 01 employees alleging, inter alia, violations of various provisions of the Unit 01 contract and requesting an order enjoining unlawful privatization and requiring the conversion to public operations. The UPW alleged that on and after July 18, 2007, the State unlawfully continued to privatize services customarily and historically performed by Unit 01 employees. Also on November 14, 2007, the UPW filed a similar grievance in DMN-07-12 on behalf of Unit 10 employees.
10. On November 27, 2007, Laderta denied the grievances.
11. By letter dated December 3, 2007, the UPW submitted its Step 2 appeal of the class grievances.
12. Also by letter dated December 3, 2007, Nakanelua requested Laderta to provide information within seven days regarding grievance nos. DMN-07-11 and DMN-08-12. The letter stated as follows:

In accordance with Section 15.09 of the Unit 1 and 10 Collective Bargaining Agreements, and the statutory duty to bargain in good faith, please provide the following information within seven (7) days from the date of this letter in connection with the above-entitled grievance:

1. Please indicate with respect to each and every contract you identified by letter dated October 30, 2007, whether the positions needed to perform the services in question are exempt under Section 76-16, Hawaii Revised Statutes.
2. Please identify all civil service positions in the State of Hawaii which perform similar services to those currently privatized through the contracts identified in the list provided on October 30, 2007. In connection (sic) each such position please indicate the following:
 - a. The position number(s).

- b. The class specification(s).
 - c. The departments or agencies where the position is assigned.
 - d. The prevailing and current hourly wages of the positions in question:
3. Please provide a copy of the position description and the class specification which are relevant to your answer to request #2 above.
4. Please identify the procurement officer or governmental contracting officer in the State of Hawaii who is responsible for ensuring compliance with Section 103-55, HRS, on prevailing wages and salaries, with respect to each of the contracts identified in the list provided in October 30, 2007, and indicate the following:
 - a. Name, position and address of the procurement officer.
 - b. The name, address and responsible person of the governmental contracting agency:
 - c. The name, position and address of the contractor who has certified that the services performed by the contractor are performing in accordance with the prevailing wages and standards.
5. Please obtain and submit to the union a copy of any and all certifications or other documents from the contractors listed on the list provided on October 30, 2007 regarding the actual amount of wages or salaries paid to employees of the contractor to be in compliance with Section 103-55, HRS.
6. Please verify whether the listing provided on October 30, 2007 constitutes a full and complete listing of private contracts previously exempt because of Act 90.

The foregoing requests should be updated and supplemented after you submit your initial response, and as additional information which is relevant becomes available.

13. By letter dated December 14, 2007, Laderta responded, inter alia, that additional time was necessary to review the contracts and the State would be substantially completed by March 1, 2008.
14. By letter dated December 18, 2007, Laderta indicated that both grievances should have been filed at Step 2 and thus the Step 2 appeal appeared unnecessary. Laderta indicated she was willing to discuss the UPW's concerns and requested tolling the applicable deadlines under the grievance and internal complaints procedures.
15. By separate letters dated December 26, 2007, the UPW submitted its intent to arbitrate the respective grievances.
16. By letter dated January 17, 2008, Laderta confirmed that Nakanelua verbally extended the date to respond to the request for additional information to March 1, 2008.
17. On or about February 29, 2008, Laderta met with UPW officials to discuss the grievances. By letter dated March 4, 2008, Laderta indicated that the State has been reviewing the 949 contracts identified and was undergoing a process of categorizing the contracts into more manageable categories for purposes of discussion and disposition. Laderta also stated her appreciation for the additional time permitted to continue discussions toward the goal of resolution and that she would provide Nakanelua with a progress report by the week of April 7, 2008.
18. On or about December 11, 2008, the State provided a list of DOT's Landscaping contracts and copies of a chart entitled Act 90 (DAGS Estimated Info - Summary) to Nakanelua.
19. By letter dated March 12, 2009, the UPW, by and through its counsel, requested counsel for the State to proceed with arbitration and asked that the employer provide responses to the December 3, 2007 requests for information.
20. By letter dated March 13, 2009, Laderta expressed her appreciation of Nakanelua's willingness to hold the matters in abeyance until after the legislative session has concluded. Laderta indicated that pursuant to their agreement, they would meet in June to continue discussions.
21. By letter dated June 8, 2009, Nakanelua wrote to Governor Linda Lingle regarding a Request for Compliance with Merit Principle. The letter states:

In behalf of all Bargaining Unit 1 and Unit 10 employees the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW) hereby requests the State of Hawaii to terminate all contracts for services which have historically and customarily been performed by civil servants no later than June 30, 2009 forthwith.

As you know, privatization violates the merit principle and contravenes Article XVI, Section 1 of the State Constitution. See Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997).

The continuing violation of the merit principle undermines the job security of all civil servants, particularly in a period of possible layoffs and wage and hour cuts which you publicly and unilaterally announced on June 1, 2009.

Accordingly, we request that you provide a list of all private contracts which contravene the ruling in Konno, the name of contractor, the duration of the contract, and a brief description of the nature of services rendered, and the cost savings to the State (if the contracts were terminated as requested). In addition, we request that you cease and desist from renewing said agreements on and after June 30, 2009.

Please provide a written response to this request by June 15, 2009.

22. By letter dated June 15, 2009, Laderta responded to Nakanelua's June 8, 2009 letter addressed to Governor Lingle and requested a meeting "sometime in June" with the UPW State Director to address the matter.
23. By letter dated June 22, 2009, Nakanelua responded to Laderta that a meeting was unlikely in June because of their respective busy schedules and that there was no resolution in sight. Nakanelua again requested Laderta provide full and complete responses to the information request of December 3, 2007 within seven days and if no information was received, the UPW would have no choice but to file a prohibited practice complaint. Nakanelua also indicated that his letter to the Governor was a separate matter because continued contracting out and privatization gave rise to a separate civil action particularly in the wake of threatened layoffs on June 11 and June 17, 2009.

24. There is no evidence of a further response from Laderta to Nakanelua's December 3, 2007 request within seven days.
25. On June 29, 2009, the UPW filed the instant Complaint with the Board.
26. In her Declaration, dated July 16, 2009, Laderta states as follows:

DHRD is attempting to comply with the renewed request for the information demanded in Dayton Nakanelua's June 22, 2009 letter. Two years have passed since that request was received. The information requested is quite broad in scope and DHRD does not know whether its previous responses as to certain requests meet with the union's expectations. As well, the various Departments need to update their information to reflect current circumstances. Accordingly, it will take additional time to fulfill the request and it would greatly assist us if the union could identify what information it believes remain unfulfilled. UPW has elected not to assist us in that regard.

27. The Board finds that despite numerous continuances granted by the UPW, Laderta has failed to provide responses to the UPW's requests for information submitted on December 3, 2007 as required by Sections 15.09 of the Units 01 and 10 CBAs. The Board notes that the State initially provided some information to the UPW on or about October 30, 2007. The UPW requested additional information on December 3, 2007 and by March 2008, the State had identified 949 contracts which it was in the process of reviewing. On or about December 11, 2008, the State provided information regarding landscaping contracts and DAGS Estimated Information. The UPW again requested the information in March 2009 and Laderta again requested a continuance until June 2009. When Nakanelua renewed the request for information in June, Laderta did not provide any further information but requested another meeting with Nakanelua. Nakanelua responded that the parties would be too busy to meet in June, and again requested the information within seven days. Seven days later, no information was provided and the UPW filed the instant Complaint. Based upon a review of the record, the Board concludes that Respondent violated Section 15.09 of the Units 01 and 10 CBAs by failing to provide information needed by the UPW to investigate and process its class grievances.
28. By letter dated June 8, 2009 to the Governor, Nakanelua requested "a list of all private contracts which contravene the ruling in Konno, the name of contractor, the duration of the contract, and a brief description of the nature

of services rendered, and the cost savings to the State (if the contracts were terminated as requested) in conjunction with a request to terminate private contracts where work was customarily work performed by Units 01 and 10 civil servants. By letter dated June 22, 2009 letter, the UPW clarified that the request was not part of the grievance processing but a separate request relating to a civil action. Viewing the June 8, 2009, in the light most favorable to Respondent, that information request did not pertain to the grievances at issue. However, in Nakanelua's June 22, 2009 letter, he clearly requested the information be provided within seven days. Thus, notwithstanding the June 8, 2009 request for information regarding a possible civil action, Nakanelua clearly requested the information by letter dated June 22, 2009. There is no dispute that no further information was provided to the UPW.

29. The Board finds that Laderta's refusal to provide the information rose to a level of wilful conduct, i.e., with conscious, knowing, or deliberate intent, given the fact that contracts at issue were available in March 2008 and yet only partial information regarding landscaping contracts was provided to the UPW in December 2008. As no further information was provided to the UPW, the Board concludes there is substantial evidence in the record to find and conclude that Laderta wilfully violated § 15.09 of the applicable Units 01 and 10 CBAs which constitutes a prohibited practice under HRS § 89-13(a)(8).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this Complaint pursuant to HRS §§ 89-5 and 89-14.
2. The Board finds based on the record that there are no genuine issues of material fact presented and Complainant is entitled to judgment as a matter of law.
3. HRS § 89-13(a), governing prohibited practices by public employers, 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[.]
4. 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.
 5. 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.
 6. 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.
 7. Based upon a review of the evidence in the record, the Board determines that there is no material issue of fact in dispute. It is undisputed and the Board finds that despite numerous continuances granted by the UPW, Laderta has failed to provide responses to the UPW's requests for information submitted on December 3, 2007 as required by Sections 15.09 of the Units 01 and 10 CBAs. The Board notes that the State initially provided some information to the UPW on or about October 30, 2007. The UPW requested additional information on December 3, 2007 and by March 2008, the State had identified 949 contracts which it was in the process of reviewing. On or about December 11, 2008, the State provided information regarding landscaping contracts and DAGS Estimated Information. The UPW again requested the information in March 2009 and Laderta again requested a continuance until June 2009. When Nakanelua renewed the request for information in June, Laderta did not provide any further information but requested another meeting with Nakanelua. Nakanelua responded that the parties would be too busy to meet in June, and again requested the information within seven days. Seven days later, no further information was provided and the UPW filed the instant Complaint. Based upon a review of the record, the Board concludes that Respondent wilfully

violated Section 15.09 of the Units 01 and 10 CBAs by failing to provide information needed by the UPW to investigate and process its class grievances.

7. In view of the foregoing decision and order, the Board need not address whether Respondent's conduct violated HRS §§ 89-13(a)(5) and (7).

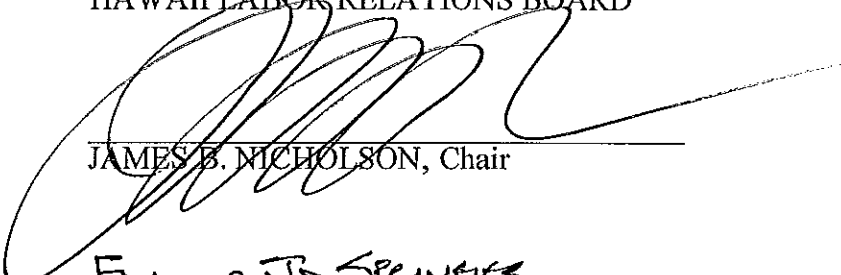
ORDER

Based upon the foregoing findings of fact and conclusions of law, the Board issues the following order:

1. Respondent is ordered to provide the information in possession of the employer pursuant to Section 15.09 of the applicable Units 01 and 10 CBAs requested by the UPW on December 3, 2007.
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 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 the receipt of this order with a certificate of service of the notice on Complainant.

DATED: Honolulu, Hawaii, August 26, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. LINDA LINGLE, et al.
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SARAH R. HIRAKAMI, Member

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