

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; COUNTY OF HAWAII; COUNTY OF MAUI; COUNTY OF KAUAI; HAWAII HEALTH SYSTEMS CORPORATION; AND THE JUDICIARY,

Complainants,

and

DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,

Respondents.

CASE NO. CU-10-278

ORDER NO. 2686

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT IN CU-10-278; GRANTING IN PART UPW'S MOTION FOR SUMMARY JUDGMENT IN CE-10-726; AND DENYING THE STATE'S MOTION TO SET THE INTEREST ARBITRATION DATES IN CU-10-278 AND CE-10-726

In the Matter of

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

Complainant,

and

MARIE LADERTA, Chief Negotiator, Office of Collective Bargaining, State of Hawaii,

Respondent.

CASE NO. CE-10-726

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT IN CU-10-278; GRANTING IN PART UPW'S MOTION FOR SUMMARY JUDGMENT IN CE-10-726; AND DENYING THE STATE'S MOTION TO SET THE INTEREST ARBITRATION DATES IN CU-10-278 AND CE-10-726

Case No. CU-10-278

On August 24, 2009, Complainants STATE OF HAWAII (State); CITY AND COUNTY OF HONOLULU; COUNTY OF HAWAII; COUNTY OF MAUI; COUNTY OF

KAUAI; HAWAII HEALTH SYSTEMS CORPORATION; and THE JUDICIARY (collectively Employer) filed a prohibited practice complaint against DAYTON NAKANELUA (Nakanelua), State Director, United Public Workers, AFSCME, Local 646, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (collectively UPW or Union) with the Hawaii Labor Relations Board (Board) in Case No. CU-10-278. Complainants alleged that, inter alia, the UPW refused to participate in the arbitrator selection in accordance with the alternate impasse procedure for the successor collective bargaining agreement for bargaining unit 10. Complainants contend that the Union wilfully violated Hawaii Revised Statutes (HRS) § 89-13(b)(4) by refusing to comply with any provision of this chapter.

On September 2, 2009, the State filed a Motion for Interlocutory Relief. The State moved the Board for a declaratory order that the UPW was in violation of the Memorandum of Agreement dated March 3, 2009, between the UPW and the State and other public employers, and had committed a prohibited practice and waived its right to participate in the selection of the neutral arbitrator. The State also moved the Board to dismiss Case No. CE-10-726.

On September 10, 2009, the UPW filed a Memorandum of Points and Authorities in Opposition to Motion for Interlocutory Relief. The UPW contended, inter alia, that the Circuit Court has subject matter over the enforcement of an agreement to arbitrate; that the State's counsel is responsible for the non-compliance with the procedure for selecting the neutral arbitrator; and that the UPW's conduct was not a waiver of either the right to participate in the selection process nor of participation in the proceeding itself.

On September 10, 2009, the UPW filed a Motion to Dismiss Complaint and in the Alternative for Summary Judgment.

On September 11, 2009, the UPW filed a Motion to Continue September 16, 2009 Hearing on Complainants' Motion for Interlocutory Relief.

On September 11, 2009, the State filed its Reply Memorandum to UPW's Memorandum of Points and Authorities in Opposition to Motion for Interlocutory Relief.

The Board previously scheduled the hearing on the Motion for Interlocutory Relief on September 16, 2009, at 1:30 p.m.

Case No. CE-10-726

On August 31, 2009, the UPW filed a prohibited practice complaint against MARIE LADERTA (Laderta), Chief Negotiator, Office of Collective Bargaining, State of Hawaii (OCB), in Case No. CE-10-726. The UPW alleged that, inter alia, on and after August 28, 2009, Laderta wilfully refused to proceed with the arbitrator selection process for

the Unit 10 interest arbitration. The UPW contended that Laderta committed a prohibited practice in violation of HRS § 89-13(a)(8).

On September 10, 2009, the UPW filed its Motion for Summary Judgment, asserting that Laderta, through her counsel, refused to exercise her second strike and requesting the Board compel Laderta to complete the striking process and proceed with the arbitral process under the arbitration agreement.

The Board scheduled the hearing on the merits of the complaint on September 21, 2009, at 9:30 a.m.

At the prehearing/settlement conference held on September 10, 2009, the Board inquired whether the parties objected to the consolidation of Case Nos.: CU-10-278 and CE-10-726. Laderta's counsel stated there was no objection to the consolidation. By letter dated September 11, 2009, UPW's counsel, stated that the Union continued to review the appropriateness of the consolidation and that the issue should be decided by motion of either party. The UPW indicated that the parties in the two cases were not the same and the claims arose from different agreements.

Consolidation

On September 16, 2009, the Board issued Order No. 2638, Order Consolidating Cases for Disposition; and Notice of Continued Hearing on Motions. The Board found that the complaints involved substantially the same parties, i.e., the UPW and the public employer, and the issues involved the selection of the neutral arbitrator for the Unit 10 interest arbitration for a successor collective bargaining agreement. The Board also found that consolidation of the proceedings would be efficient, conducive to the proper dispatch of business and the ends of justice and will not unduly delay the proceedings. Pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(13),¹ the Board, on its own initiative, consolidated the complaints and the proceedings thereon for disposition. The Board further scheduled a hearing on pending motions on September 21, 2009.

¹HAR § 12-42-9(g)(13) provides as follows:

The board, on its own initiative or upon motion, may consolidate for hearing or other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

On September 17, 2009, the State filed its Memorandum in Opposition to UPW's Motion to Dismiss Filed September 10, 2009, in Case No. CU-10-278.

Also on September 17, 2009, the State filed a Memorandum in Opposition to UPW's Motion for Summary Judgment Filed September 10, 2009, in Case No. CE-10-726.

On September 21, 2009, the Board heard argument on the pending motions in the consolidated cases.

On September 25, 2009, the Board issued Order No. 2640 – Order Granting in Part Complainant State of Hawaii's Motion for Interlocutory Relief. The Board ordered that the American Arbitration Association (AAA) shall select the neutral arbitrator, and the parties shall take all actions necessary to expedite the scheduling of the interest arbitration proceeding. The Board further ordered that a copy of Order No. 2640 be posted by all parties on their respective websites and in conspicuous places where employees of Unit 10 assemble, and to keep the copies posted for a period of 60 days from the date of posting.

On October 22, 2009, the State filed its Motion to Set the Interest Arbitration Dates.

On October 26, 2009, the UPW filed its Opposition to Employer's Motion to Set Interest Arbitration Dates Filed October 22, 2009.

FINDINGS OF FACT

1. Bargaining Unit (Unit)10 is composed of institutional, health and correctional workers. HRS § 89-6(a). According to the Board's Informational Bulletin dated March 3, 2009, as of December 31, 2008, Unit 10 was composed of 1,627 employees of the State of Hawaii, 215 employees of the City and County of Honolulu, 26 employees of the Department of Education, 41 employees of the Judiciary, 2 employees of the University of Hawaii, and 1,050 employees of the Hawaii Health Systems Corporation.
2. The STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; COUNTY OF HAWAII; COUNTY OF MAUI; COUNTY OF KAUAI; HAWAII HEALTH SYSTEMS CORPORATION; and the JUDICIARY are

employers,² within the meaning of HRS § 89-2, of employees including those included in Unit 10.

3. MARIE LADERTA was for all relevant times, the Chief Negotiator, State of Hawaii, and assists the Governor, State of Hawaii, in collective bargaining negotiations.³ As such, Laderta acts in the Governor's interest in dealing with public employees and is an employer within the meaning of HRS § 89-2.

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.

³HRS §§ 89A-1 and -2, pertain to the Office of Collective Bargaining and Managed Competition, and provide as follows:

(a) There shall be established an office of collective bargaining and managed competition in the office of the governor to assist the governor in implementation and review of the managed process of public-private competition for particular government services through the managed competition process and negotiations between the State and the exclusive representatives on matters of wages, hours, and other negotiable terms and conditions of employment.

(b) The position of chief negotiator for the State is hereby established to head the office. The chief negotiator shall be experienced in labor relations. The governor shall appoint the chief negotiator and may also appoint deputy negotiators to assist the chief negotiator. The governor, at pleasure, may remove the chief negotiator and any deputy negotiator. All other employees shall be appointed by the chief negotiator. All employees in the office of collective bargaining and managed competition shall be included in any benefit programs generally applicable to employees of the State.

4. The UPW is an employee organization⁴ and the exclusive representative certified by the Board to represent the employees included in Unit 10. DAYTON NAKANELUA was for all relevant times, the State Director of the UPW.
5. The UPW and the employers are parties to the Unit 10 collective bargaining agreement (CBA) with effective dates July 1, 2007, through June 30, 2009.
6. On February 2, 2009, the Board issued Order No. 2576, Order Declaring an Impasse and Appointing a Mediator for employees included in Unit 10.
7. On March 3, 2009, the UPW and the State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, and the City and County of Honolulu, parties to the Unit 10 collective bargaining agreement, entered into a Memorandum of Agreement (MOA) setting forth an alternative impasse procedure for Unit 10 pursuant to HRS § 89-11(a).
8. The MOA provides, *inter alia*, for a three member arbitration panel, of which two panel members are to be selected by the parties (i.e., one panelist by the Employer and one panelist by the Union). The MOA provides in part as follows:
 3. **June 23, 2009** - HLRB notifies the parties that the impasse will be submitted to a 3-member arbitration panel. Two panel members are selected by the parties (i.e., one by the Employer and one by the Union). The neutral third member is the chair of the arbitration panel and is selected by mutual agreement of the parties.
 4. **July 6, 2009** - Deadline to select a neutral arbitrator. HLRB requests a list of arbitrators from AAA. In the event the parties fail to select the neutral third member of the panel by this date, HLRB will request a list of 5

⁴HRS § 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.

qualified arbitrators from AAA. The neutral is selected from such list.

Selection & Appointment of Neutral Arbitrator is made within 5 working days after receipt of AAA list. The parties alternately strike names from the list until a single name is left. HLRB immediately appoints such person as the neutral arbitrator and chairperson of the arbitration panel. (Additional time is provided to allow AAA to submit the list of arbitrators.)

5. **August 4, 2009** - Deadline for submission of written final positions by each party to the members of the arbitration panel and copy to the other party.
6. **September 11, 2009** - Commencement of arbitration hearing. (Panel members "are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.")

* * *

12. The authorized representatives for the parties regarding matters covered herein are:
 - a. Marie Laderta, Employer Representative, and
 - b. Dayton Nakanelua, Union Representative.
- 9 Cindy S. Inouye (Inouye) signed the MOA for Laderta, Employer Representative, State of Hawaii, Chief Negotiator, on behalf of the Employer; Nakanelua signed on behalf of the UPW.
- 10 By letter dated June 29, 2009, Herbert R. Takahashi, Esq. (Takahashi), advised the Board Chair that pursuant to the June 23, 2009, letter regarding "Submission of Impasse to Arbitration," Clifford Uwayne would serve as the Union's panel member. Takahashi also stated, "please note our appearance on this matter in behalf of the United Public Workers, AFSCME, Local 646, AFL-CIO." The letter indicated that a copy was sent to, inter alios, "Linda Lingle[.]"

11. By letter dated July 13, 2009, Laderta informed the Board Chair that the State had selected Georgina Kawamura (Kawamura) to serve as the employer panelist for the arbitration hearing for HGEA Units 02, 03, 04, 06, 08, 09, and 13 scheduled to commence on September 4, 2009. Laderta also informed that Kawamura would serve as the employer panelist for the UPW Unit 10 arbitration hearing scheduled to commence on September 4, 2009.
12. In proceeding I-10-122 (the Board's Order No. 2576 Declaring Impasse and Appointing a Mediator for Unit 10), the Board received a letter dated July 14, 2009, from Thomas M. Driskill, Jr., President and CEO of the Hawaii Health Systems Corporation (Driskill), Thomas R. Keller; Administrative Director of the Courts, Judiciary (Keller); Patricia Hamamoto, Superintendent, Department of Education (Hamamoto); and David McClain, President, University of Hawaii (McClain). The letter stated:

On behalf of our respective jurisdictions, we state our support of Chief Negotiator Marie Laderta's recommendation that Georgina Kawamura serve as the employer panelist for the HGEA and UPW arbitration hearings scheduled for September 2009.

“UPW Unit 10” is indicated beneath the signatures of Driskill and Keller. The letter indicated that a copy was provided to, inter alios, “Dayton Nakanelua, UPW[.]”

13. On July 15, 2009, the UPW filed with the Board a prohibited practice complaint in Case No. CE-10-718, alleging ultra vires action by Respondent Marie Laderta, Chief Negotiator, Office of Collective Bargaining, namely, selecting Georgina Kawamura as the employer representative for the Unit 10 interest arbitration proceeding, that constitutes a willful violation of HRS §§ 89-6(d) and 89-11(e), and thereby committing a prohibited practice contrary to HRS §§ 89-13(a)(7) and (8).⁵
14. By letter dated July 15, 2009, Chris Camardella (Camardella), Case Manager, AAA, transmitted a list of five arbitrators from which the parties could choose the chair of the panel. Camardella reminded the parties to alternately strike names and to notify the AAA of the sole remaining arbitrator within five days of the date of the letter.

⁵In Order No. 2644, dated October 1, 2009, the Board dismissed the complaint finding that the UPW lacked standing to file the complaint.

15. By letter dated July 24, 2009, Inouye (for Laderta) and Nakanelua submitted an amendment to the MOA to the Board Chair to extend the deadline to select the neutral arbitrator to Tuesday, July 28, 2009.
16. By letter dated July 28, 2009, Takahashi wrote to Attorney General Mark J. Bennett and Deputy Attorney General James E. Halvorson (Halvorson) stating that his office represented the UPW in connection with the interest arbitration case affecting Unit 10 and by copy of the letter to the attorneys representing public employers, he requested verification regarding who represented each employer jurisdiction. Takahashi advised that he would be selecting the arbitrator on behalf of UPW, all communications should be referred to him, and he wanted to find out who would be doing the selection for the employer jurisdictions.
17. By letter dated July 29, 2009, Laderta informed the Board Chair that the State had selected Stanley Shiraki to serve as the employer panelist for the UPW Unit 10 arbitration hearing. Regarding the status of efforts to select the neutral arbitration for Unit 10, Laderta indicated that she spoke to Valri Kunimoto, the Board's Executive Officer, by telephone to inform her that several attempts were made to contact Nakanelua but she did not hear back from Dayton or his representatives.
18. By letter dated July 31, 2009, Halvorson advised Takahashi that he had been assigned to represent the Employer, that he would be selecting the Arbitrator for the Unit 10 arbitration, and to please contact him to proceed with the Arbitrator selection.
19. By letter dated August 3, 2009, Takahashi responded to Halvorson that he appreciated his letter dated July 31, 2009, but wanted to know which "employer" Halvorson represented, and if Halvorson represented anyone other than Governor Lingle, then Takahashi wanted verification of that fact.
20. On August 4, 2009, the parties submitted their final position statements for the arbitration.
21. By letter dated August 6, 2009, Halvorson reiterated to Takahashi that he represented the employer in the upcoming interest arbitration and would be conducting the selection of the neutral arbitrator.
22. By letter dated August 7, 2009, Takahashi advised Halvorson that his August 6, 2009, letter was not responsive to Takahashi's request. Takahashi stated that pursuant to HRS § 89-6(d), any decision reached by applicable employer group shall be on the basis of simple majority for the purposes of

- bargaining, and that the selection of an arbitrator is part of the bargaining process. Takahashi reiterated his request to respond to the UPW's concerns.
23. By letter dated August 10, 2009, Halvorson requested the Board's assistance in selecting a neutral arbitrator.
 24. On August 10, 2009, the UPW filed a Motion to Amend Complaint in Case No. CE-10-718, seeking to include additional allegations, including, inter alia, Laderta's selection of Stanley Shiraki on July 29, 2009, to replace Georgina Kawamura as the Employer's representative.
 25. By letter dated August 11, 2009, the Board, by its Chair, notified the parties of a meeting on August 13, 2009, pursuant to Halvorson's August 10, 2009, letter.
 26. On August 12, 2009, the UPW filed in Case No. CE-10-718 its Objections to Hawaii Labor Relations Board Meeting Scheduled for August 13, 2009.
 27. Also on August 12, 2009, Laderta filed in Case No. CE-10-718 her Motion to Strike the UPW's Objections to Meeting.
 28. On August 13, 2009, the Board held a meeting where, inter alia, the State's counsel proposed to initiate the striking of names to select the neutral arbitrator from the list provided by the AAA.
 29. By letter dated August 14, 2009, Takahashi requested that Halvorson proceed with the first strike as he stated he was willing to do at the meeting with the Board on August 13, 2009. Takahashi indicated that he was not waiving the UPW's right to contest Halvorson's authority to represent the "employer," and his request was without prejudice to the UPW's contention in Case No. CE-10-718. Takahashi indicated that after receipt of Halvorson's strike, he would notify Halvorson of the UPW's first strike in writing. According to Halvorson, he received this letter on August 17, 2009.
 30. In an undated letter to Takahashi, Halvorson struck William Riker from the list. The Board received a copy of this letter on August 18, 2009.
 31. By letter dated August 20, 2009, Rebecca Covert struck Norman Brand, Esq., "based on the conditions set forth in [the] August 14, 2009, letter." According to Halvorson, he received this letter on August 24, 2009.
 32. In an email, dated August 21, 2009, Camardella advised the parties that the AAA had not received a response since the last request of August 7, 2009.

Camardella indicated that Takahashi had sent five copies of its First Request for Production of Documents to the AAA, and that none of the five arbitrators would likely be available to accommodate the September 11, 2009, commencement date and whichever candidate was chosen, new dates would have to be cleared with them at that time. Camardella set a deadline for the parties to select an Arbitrator by August 29, 2009, and stated that absent receipt of advice from the parties, the AAA would administratively appoint an arbitrator at that time.

33. By letter dated August 24, 2009, the UPW objected to the AAA's incorporation of its labor arbitration rules into the alternate impasse procedure. The UPW advised Camardella that there was currently a dispute as to who the "employer" is and whether the selection of arbitrators by the State under paragraphs 3 and 4 was improper.
34. On August 24, 2009, the Employers filed the Complaint in Case No. CU-10-276 with the Board, alleging the UPW refused to participate in the arbitrator selection in accordance with the alternate impasse procedure for the successor collective bargaining agreement for bargaining unit 10.
35. By letter dated August 26, 2009, Halvorson wrote to Takahashi as follows:

This responds to your most recent letter dated August 20, 2009, which I received on August 24, 2009 striking Norman Brand, Esq. as a potential arbitrator, and your request for production of documents and interrogatories from the public employers dated August 17, 2009.

As you know, the March 3, 2009 MOA concerning the alternate impasse procedure between the UPW and the Employer provides that the selection and appointment of neutral arbitrator shall be made within 5 working days after receipt of AAA list. Since July 15, 2009, the Chief Negotiator for the public employer made several attempts to contact the UPW State Director to no avail.

On July 28, 2009, you wrote a letter informing the employer that you would be making the selection of the neutral arbitrator. However, to date you have stonewalled any attempts to select an arbitrator. Despite my letter to you of July 31, 2009 requesting the selection of an arbitrator, and another letter dated August 6, 2009, as well as request for assistance made to the Board and a subsequent meeting at the Board on August 13,

2009, and me making the first strike on August 18, 2009, you have delayed the selection by taking one week to make your strike.

In addition, your August 24, 2009, letter to AAA shows you are not acting in good faith when you informed AAA about a dispute over who the "employer" is and whether my selection of the arbitrator is improper.

Your conduct throughout this process shows bad faith. Accordingly, we take the position that UPW waived its right to participate in the interest arbitration, or at a minimum UPW has waived its right to strike names from the list of arbitrators and the Employer is authorized to unilaterally select from the list of neutral arbitrator [sic]. We are seeking this relief through a prohibited practice complaint I filed on Monday, August 24, 2009.

As to your request for discovery, we do not believe that section 658A, HRS, governs the arbitration proceedings because chapter 89, HRS, is the applicable statute for interest arbitration proceedings. Even if section 658A, HRS, applies, discovery is within the discretion of the arbitrator. Because you have intentionally delayed the selection of a neutral arbitrator so that the parties do not yet have a neutral arbitrator, we will not respond to your request for discovery at this time.

36. By letter dated August 27, 2009, Takahashi responded, in part, as follows:

Please indicate your "second" strike from the list provided by the American Arbitration Association, under the "conditions" referred to in our August 14, 2009 letter.

Your "first" strike was William Riker, made on or about August 18, 2009. The UPW's "first" strike was Norman Brand made in a letter dated August 20, 2009. There has been no delay on our part.

If you refuse to exercise the "second" strike forthwith appropriate relief will be sought for willful violation of the memorandum of agreement.

You [sic] cooperation is requested.

37. On August 31, 2009, the UPW filed a Complaint against Laderta in Case No. CE-10-726. The UPW alleged that, inter alia, on and after August 28, 2009, Laderta wilfully refused to proceed with the arbitrator selection process for the Unit 10 interest arbitration.
38. On September 2, 2009, Complainant State filed a Motion for Interlocutory Relief, and moved the Board for a declaratory order that the UPW is in violation of the Memorandum of Agreement dated March 3, 2009, between the UPW and the State and other public employers, and had committed a prohibited practice and waived its right to participate in the selection of the neutral arbitrator. Complainant State also moved the Board to dismiss Case No. CE-10-726.
39. On September 9, 2009, the UPW filed a Motion to Compel Arbitration, Appointment of Arbitrators, and Other Appropriate Relief with the First Circuit Court in S.P. No. 09-1-0305 EEH. The UPW contended that the Circuit court has subject matter jurisdiction over this controversy pursuant to HRS § 658A-26(a), which provides:

A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

The UPW moved the Court for an order compelling arbitration pursuant to HRS § 658A-7, for an order appointing or determining the method of appointing the designated arbitrator of the employer group, and the neutral arbitrator pursuant to HRS § 658A-11, and for an order granting appropriate relief allowing for discovery and for rescheduling of arbitration hearings pursuant to HRS §§ 658A-5, 658A-15, and 658A

40. On September 10, 2009, the UPW filed a Memorandum of Points and Authorities in Opposition to Motion for Interlocutory Relief. The UPW contended, inter alia, that the Circuit Court has subject matter over the enforcement of an agreement to arbitrate; that the State's counsel is responsible for the non-compliance with the procedure for selecting the neutral arbitrator; and that the UPW's conduct was not a waiver of either the right to participate in the selection process nor of participation in the proceeding itself.
41. On September 10, 2009, the UPW filed a Motion to Dismiss Complaint and in the Alternative for Summary Judgment.
42. On September 11, 2009, the UPW filed a Motion to Continue the September 16, 2009, Hearing on Complainants' Motion for Interlocutory Relief.

43. The Board had previously scheduled the hearing on the Motion for Interlocutory Relief on September 16, 2009, at 1:30 p.m.
44. On September 16, 2009, the Board issued Order No. 2638, Order Consolidating Cases for Disposition, and Notice of Continued Hearing on Motions.
45. On September 17, 2009, the State filed its Memorandum in Opposition to UPW's Motion to Dismiss Filed September 10, 2009, in Case No. CE-10-278, and also filed its Memorandum in Opposition to UPW's Motion for Summary Judgment Filed September 10, 2009, in Case No. CE-10-726.
46. On September 21, 2009, the Board heard oral argument on the pending motions.
47. On September 25, 2009, the Board issued Order No. 2640 – Order Granting in Part Complainant State of Hawaii's Motion for Interlocutory Relief. The Board ordered that the AAA shall select the neutral arbitrator, and the parties shall take all actions necessary to expedite the scheduling of the interest arbitration proceeding. The Board further ordered that a copy of Order No. 2640 be posted by all parties on their respective websites and in conspicuous places where employees of Unit 10 assemble, and to keep the copies posted for a period of 60 days from the date of posting.
48. On October 22, 2009, the State filed its Motion to Set the Interest Arbitration Dates.
49. On October 26, 2009, the UPW filed its Opposition to Employer's Motion to Set Interest Arbitration Dates Filed October 22, 2009, asserting, inter alia, the issue was moot because the neutral arbitrator selected by the AAA pursuant to Order No. 2640 already set the interest arbitration dates.
50. The Board finds that both the State and the UPW wilfully refused to complete the arbitrator selection process for the Unit 10 interest arbitration in a timely manner. Despite receiving the list of five arbitrators from the AAA, from which the parties could choose the chair of the panel, on July 15, 2009, the parties failed to select the neutral arbitrator by their own amended deadline of July 28, 2009. As a consequence, Camardella, in an email dated August 21, 2009, advised the parties that none of the five arbitrators would likely be available to accommodate the September 11, 2009, commencement date and whichever candidate was chosen, new dates would have to be cleared with them at that time. Accordingly, the failure of the parties to select the neutral

arbitrator in a timely manner resulted in a failure to commence the interest arbitration proceeding in a timely manner as well.

51. The Board finds that both the State and the UPW wilfully refused to complete the arbitrator selection process for the Unit 10 interest arbitration in a timely manner. Such refusal constitutes a violation of the provisions of HRS § 89-11 and violation of the parties' MOA. Accordingly, the Board finds that the employer committed a prohibited practice pursuant to HRS § 89-13(a)(8), by wilfully violating the terms of a collective bargaining agreement, and that the UPW committed a prohibited practice pursuant to HRS § 89-13(b)(4), by wilfully refusing or failing to comply with a provision of chapter 89.
52. The Board finds that, had the UPW's motions been decided prior to the issuance of Order No. 2640 granting interlocutory relief, the relief granted to the UPW would have been the same – i.e., that the AAA select the neutral arbitrator and that the parties post a copy of the Board's order on their respective websites and in conspicuous places where employees of Unit 10 assemble, and to keep the copies posted for a period of 60 days from the date of posting.
53. With respect to the selection of the neutral arbitrator, the Board finds that the issue is moot. With respect to the posting, the Board finds that Order No. 2640 did not address the issue of whether the employer committed a prohibited practice, only the UPW. Accordingly, the Board finds that the UPW is entitled to relief requiring the parties to post the Board's present order clarifying that the Board finds the employer also committed a prohibited practice.
54. The Board finds that the issue of the interest arbitration dates is moot.
55. The Board finds there are no material facts in dispute that would render summary judgment inappropriate.

CONCLUSIONS OF LAW AND DISCUSSION

1. HRS § 89-5 provides in relevant part:
 - (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

- (3) Resolve controversies under this chapter;
- (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper; [and]
- (5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions[.]

2. 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)⁶ or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91⁷. All references in section 377-9 to "labor organization" shall include employee organization.

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:

* * *

⁶HRS § 89-12 governs strikes, rights and prohibitions.

⁷HRS chapter 91 governs administrative procedure.

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

4. HRS § 89-13(b), governing prohibited practices by employee organizations, provides in relevant part:

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(4) Refuse or fail to comply with any provision of this chapter[.]

5. HRS § 89-6, governing appropriate bargaining units, provides in relevant part:

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

(1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit[.]

* * *

Any decision to be reached by the applicable employer group shall be on the basis of simple majority, except when a bargaining unit includes county employees from more than one county. In such case, the simple majority shall include at least one county.

6. HRS § 89-11, governing resolution of disputes; impasses, provides in relevant part:

(a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement.

The alternate impasse procedure shall specify whether the parties desire an arbitrator or arbitration panel, how the neutral arbitrator is to be selected or the name of the person whom the parties desire to be appointed as the neutral arbitrator, and other details regarding the issuance of an arbitration decision. When an impasse exists, the parties shall notify the board if they have agreed on an alternate impasse procedure. The board shall permit the parties to proceed with their procedure and assist at times and to the extent requested by the parties in their procedure. In the absence of an alternate impasse procedure, the board shall assist in the resolution of the impasse at times and in the manner prescribed in subsection (d) or (e), as the case may be. If the parties subsequently agree on an alternate impasse procedure, the parties shall notify the board. The board shall immediately discontinue the procedures initiated pursuant to subsection (d) or (e) and permit the parties to proceed with their procedure.

* * *

(c) An impasse over the terms of an initial or renewed agreement and the date of impasse shall be as follows:

- (1) More than ninety days after written notice by either party to initiate negotiations, either party may give written notice to the board that an impasse exists. The date on which the board receives notice shall be the date of impasse; and
- (2) If neither party gives written notice of an impasse and there are unresolved issues on January 31 of a year in which the agreement is due to expire, the board shall declare on January 31 that an impasse exists and February 1 shall be the date of impasse.

* * *

(e) If an impasse exists between a public employer and the exclusive representative of . . . bargaining unit (10), institutional, health, and correctional workers . . ., the board shall assist in the resolution of the impasse as follows:

- (1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.
- (2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.
 - (A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of such list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.
 - (B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions

in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.

* * *

(h) Any time frame provided in an impasse procedure, whether an alternate procedure or the procedures in this section, may be modified by mutual agreement of the parties. In the absence of a mutual agreement to modify time frames, any delay, failure, or refusal by either party to participate in the impasse procedure shall not be permitted to halt or otherwise delay the process, unless the board so orders due to an unforeseeable emergency. The process shall commence or continue as though all parties were participating.

7. HAR §§ 12-42-70 and 12-42-71 of Subchapter 4 of the Board's rules, governing Resolution of Disputes, Grievances, and Impasses Pursuant to Section 89-11, HRS, provide in relevant part:

§12-42-70 Notification of arbitration.

If the dispute continues thirty days after the date of the impasse, the parties may mutually agree to submit the remaining differences to arbitration which shall result in a final and binding decision. Upon such mutual agreement, the parties shall forthwith file with the board the original and five copies of a written arbitration notification signed by both parties.

§ 12-42-71 Selection and certification of arbitration panel.

(a) The public employer and exclusive bargaining representative shall each select one arbitrator, and the interest arbitrators shall select an impartial arbitrator.

(b) The board shall select arbitrators in the following situations:

- (1) If the interest arbitrators do not select the impartial arbitrator within three days after filing of the arbitrator notification, the board shall select the impartial arbitrator from the register of arbitrators.
- (2) If either the public employer or exclusive bargaining representative fails to select an arbitrator within three days after the filing of the arbitration notification, the board shall select an arbitrator from the register of arbitrators.

(3) If the public employer and the exclusive bargaining representative fail to select arbitrators within three days after filing the notification of arbitration, the board shall select three arbitrators from the register of arbitrators.

(c) Upon the appointment of an arbitration panel, the board shall serve a copy of its certification of appointment of such panel upon all parties.

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

(d) After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the determination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order.

9. In Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawai'i 489, 507, 146 P.3d 1066, 1083 (2006), the Hawaii Supreme Court concluded, "the clear text [of HRS § 377-9] shows that the Hawai'i legislature empowered the HLRB with discretion to determine appropriate remedies for the commission of unfair labor practices."

10. Pursuant to HRS § 89-14, the Board has jurisdiction over the consolidated cases. The Board has exclusive original jurisdiction over any controversy concerning prohibited practices, with the exception of appropriate proceedings in circuit court pursuant to section 89-12(e) (involving "strikes, rights, or prohibitions"), or judicial review of decisions or orders of the board pursuant to HRS chapter 91.

11. The Board's exclusive jurisdiction over all controversies involving prohibited practices includes the refusal or failure to comply with any provision of Chapter 89 (HRS § 89-14(b)(4)), and the violation of the terms of a collective bargaining agreement (HRS § 89-13(a)(8)).

12. Although HRS § 89-13(a)(8), read together with § 89-14, refers to jurisdiction over "collective bargaining agreements" as opposed to "interest arbitration," it should be noted that for the purposes of Chapter 89, interest arbitration awards are treated as collective bargaining agreements. For example, HRS § 89-11(g), governing interest arbitration, provides that "[a]greements reached pursuant to the decision of an arbitration panel and the amounts of contributions by the State and counties to the Hawai'i public employees health fund, as provided herein, shall not be subject to ratification"; and "[a]ll items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies." (Emphases added). Additionally, the Legislature itself referred to interest arbitration decision as collective bargaining agreements. When the Legislature amended HRS § 89-11 by adding a section dealing with mandatory arbitration, the Standing Committee Reports for both the Senate and the House on House Bill 1815-78 (which became Act 108) included the following language: "As with all other collective bargaining agreements, the bill provides for final approval of any cost items by the appropriate legislative bodies." (Emphasis added). S. Stand. Comm. Rep. No. 632-778, Haw. S.J. 1032 (1978); H. Stand. Comm. Rep. No. 480-78, Haw. H.J. 1608 (1978). Accordingly, under Chapter 89 the Board has exclusive jurisdiction over disputes involving interest arbitration as it does over disputes involving collective bargaining.

13. "Interest arbitration" in labor matters involves the submission of disputes over the terms for a new collective bargaining agreement to an independent third party who determines what the new terms of the contract will be. International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. M & B Railroad, L.L.C., 65 F. Supp.2d 1234, 1238 (M.D. Ala. 1999). Interest arbitration should be distinguished from grievance arbitration, which involves the submission of disputed interpretations of an existing collective bargaining agreement to an independent third party who determines what construction the existing term should be given. Id. In interest arbitrations, the power to set the terms and conditions of public employment is broader and more intrusive upon the functions of government than the arbitrator's authority in a case to resolve an individual grievance. Cape Elizabeth School Bd. v. Cape Elizabeth Teachers Ass'n, 459 A.2d 166, 172 (Me. 1983). In contrast, in grievance

arbitrations, the arbitrator's role is confined to interpreting and applying terms which the parties have created or agreed to and which it is capable of making more or less precise. Id.

The Board concludes that disputes concerning interest arbitrations, which involve the creation of a new or renewed collective bargaining agreement, governed by HRS § 89-11(e), is subject to the exclusive original jurisdiction of the Board.

14. Even assuming, arguendo, that disputes arising out of interest arbitration procedures, or agreements to govern interest arbitration procedures, may be subject to HRS chapter 658A, there would then be a conflict between chapter 658A and chapter 89 for disputes that also constitute prohibited practices. The Board would have jurisdiction pursuant to HRS § 89-19, which provides:

This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, or rules adopted by the State, a county, or any department or agency thereof, including the departments of human resources development or of personnel services or the civil service commission.

15. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
16. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
17. 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.

18. 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. 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.
19. A case is moot when events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. See Okada Trucking Co. v. Board of Water Supply, 99 Hawai`i 191, 195-96, 53 P.3d 799, 803-04 (2002).
20. The MOA required the parties to select the neutral arbitrator within five days of receiving the list of names from AAA. The AAA provided the parties with a list of five qualified potential arbitrators on July 15, 2009. However, the employer did not exercise its strike until sometime on or around August 18, 2009, and the UPW did not exercise its first strike until sometime on or around August 20, 2009, which was received by the employer on August 24, 2009.
21. As a result, the parties missed the initial deadline for selection of the neutral arbitrator of five working days from receipt of the list from AAA. The parties agreed to extend the deadline to select the neutral arbitrator to July 28, 2009, yet failed to meet that deadline as well. In an email dated August 21, 2009, Camardella advised the parties that the AAA had not received a response since the last request of August 7, 2009. Camardella indicated that none of the five arbitrators would likely be available to accommodate the September 11, 2009, commencement date and whichever candidate was chosen, new dates would have to be cleared with them at that time. Camardella set a deadline for the parties to select an Arbitrator by August 29, 2009, and stated that absent receipt of advice from the parties, the AAA would administratively appoint an arbitrator at that time.
22. Although the parties did not select the neutral arbitrator, since July 15, 2009, the date of the list from AAA, the parties managed to find the time to do the following:

- a. On July 15, 2009, the UPW filed with the Board prohibited practice complaint in Case No. CE-10-718, alleging ultra vires action by Respondent Marie Laderta, Chief Negotiator, Office of Collective Bargaining, namely, selecting Georgina Kawamura as the employer representative for the Unit 10 interest arbitration proceeding, that constitutes a willful violation of HRS §§ 89-6(d) and 89-11(e), and thereby committing a prohibited practice contrary to HRS §§ 89-13(a)(7) and (8).
- b. By letter dated July 28, 2009, Takahashi wrote to Attorney General Mark J. Bennett and Deputy Attorney General James E. Halvorson stating that his office represented the UPW in connection with the interest arbitration case affecting Unit 10 and by copy of the letter to the attorneys representing public employers, he requested verification regarding who represented each employer jurisdiction. Takahashi advised that he would be selecting the arbitrator on behalf of UPW, all communications should be referred to him, and he wanted to find out who would be doing the selection for the employer jurisdictions.
- c. By letter dated July 29, 2009, Laderta informed the Board Chair that the State had selected Stanley Shiraki to serve as the employer panelist for the UPW Unit 10 arbitration hearing. Regarding the status of efforts to select the neutral arbitration for Unit 10, Laderta indicated that she spoke to Valri Kunimoto, Executive Officer, by telephone to inform her that several attempts were made to contact Nakanelua but she did not hear back from Dayton or his representatives.
- d. By letter dated July 31, 2009, Halvorson advised Takahashi that he had been assigned to represent the Employer, that he would be selecting the Arbitrator for the Unit 10 arbitration, and to please contact him to proceed with the Arbitrator selection.
- e. By letter dated August 3, 2009, Takahashi responded to Halvorson that he appreciated his letter dated July 31, 2009, but wanted to know which "employer" Halvorson represented, and if Halvorson represented anyone other than Governor Lingle, Takahashi wanted verification of that fact.
- f. On August 4, 2009, the parties submitted their final position statements for the arbitration.

- g. By letter dated August 6, 2009, Halvorson reiterated to Takahashi that he represented the employer in the upcoming interest arbitration and would be conducting the selection of the neutral arbitrator.
- h. By letter dated August 7, 2009, Takahashi advised Halvorson that his August 6, 2009, letter was not responsive to Takahashi's request. Takahashi stated that pursuant to HRS § 89-6(d), any decision reached by applicable employer group shall be on the basis of simple majority for the purposes of bargaining, and that the selection of an arbitrator is part of the bargaining process. Takahashi reiterated his request to respond to the UPW's concerns.
- i. By letter dated August 10, 2009, Halvorson requested the Board's assistance in selecting a neutral arbitrator.
- j. On August 10, 2009, the UPW filed a Motion to Amend Complaint in Case No. CE-10-718, seeking to include additional allegations, including, inter alia, Laderta's selection of Stanley Shiraki on July 29, 2009, to replace Georgina Kawamura as the Employer's representative.
- k. By letter dated August 11, 2009, the Board, by its Chair, notified the parties of a meeting on August 13, 2009, pursuant to Halvorson's August 10, 2009, letter.
- l. On August 12, 2009, the UPW filed in Case No. CE-10-718 its Objections to Hawaii Labor Relations Board Meeting Scheduled for August 13, 2009.
- m. Also on August 12, 2009, Laderta filed in Case No. CE-10-718 her Motion to Strike the UPW's Objections to Meeting.
- n. By letter dated August 14, 2009, Takahashi requested that Halvorson proceed with the first strike as he stated he was willing to do at the meeting with the Board on August 13, 2009. Takahashi indicated that he was not waiving the UPW's right to contest his authority to represent the "employer," and his request was without prejudice to the UPW's contention in Case No. CE-10-718. Takahashi indicated that after receipt of Halvorson's strike, he would notify Halvorson of the UPW's first strike in

writing. According to Halvorson, he received this letter on August 17, 2009.

- o. In an undated letter to Takahashi, Halvorson struck William Riker from the list. The Board received a copy of this letter on August 18, 2009.
- p. By letter dated August 20, 2009, Rebecca Covert struck Norman Brand, Esq., "based on the conditions set forth in [the] August 14, 2009, letter." According to Halvorson, he received this letter on August 24, 2009.
- q. By letter dated August 24, 2009, the UPW objected to the AAA's incorporation of its labor arbitration rules into the alternate impasse procedure. The UPW advised Camardella that there was currently a dispute as to who the "employer" is and whether the selection of arbitrators by the State under paragraphs 3 and 4 was improper.
- r. On August 24, 2009, the Employers filed the Complaint in Case No. CU-10-278 with the Board, alleging the UPW refused to participate in the arbitrator selection in accordance with the alternate impasse procedure for the successor collective bargaining agreement for bargaining unit 10.
- s. On August 31, 2009, the UPW filed the Complaint in Case No. CE-10-726, alleging, inter alia, that on and after August 28, 2009, Laderta wilfully refused to proceed with the arbitrator selection process for the Unit 10 interest arbitration.
- t. On September 2, 2009, Complainant State filed a Motion for Interlocutory Relief, and moved the Board for a declaratory order that the UPW is in violation of the Memorandum of Agreement dated March 3, 2009, between the UPW and the State and other public employers, and had committed a prohibited practice and waived its right to participate in the selection of the neutral arbitrator. Complainant State also moved the Board to dismiss Case No. CE-10-726.
- u. On September 9, 2009, the UPW filed a Motion to Compel Arbitration, Appointment of Arbitrators, and Other Appropriate Relief with the First Circuit Court in S.P. No. 09-1-0305 EEH.

- v. On September 10, 2009, the UPW filed a Memorandum of Points and Authorities in Opposition to Motion for Interlocutory Relief. The UPW contends, inter alia, that the Circuit Court has subject matter over the enforcement of an agreement to arbitrate; that the State's counsel is responsible for the non-compliance with the procedure for selecting the neutral arbitrator; and that the UPW's conduct was not a waiver of either the right to participate in the selection process nor of participation in the proceeding itself.
 - w. On September 10, 2009, the UPW filed a Motion to Dismiss Complaint and in the Alternative for Summary Judgment.
 - x. On September 11, 2009, the UPW filed a Motion to Continue the September 16, 2009, Hearing on Complainants' Motion for Interlocutory Relief.
 - y. On September 17, 2009, Complainant State filed its Memorandum in Opposition to UPW's Motion to Dismiss Filed September 10, 2009, and Memorandum in Opposition to UPW's Motion for Summary Judgment Filed September 10, 2009.
23. It is clear to the Board that there has been undue delay in the selection of the neutral arbitrator. The Board concludes that both the State and the UPW wilfully failed to complete the arbitrator selection process for the Unit 10 interest arbitration. Such refusal constitutes a violation of the provisions of HRS § 89-11 and violation of the parties' MOA. Accordingly, the Board concludes that the employer committed a prohibited practice pursuant to HRS § 89-13(a)(8), by wilfully violating the terms of a collective bargaining agreement, and that the UPW committed a prohibited practice pursuant to HRS § 89-13(b)(4), by wilfully refusing or failing to comply with a provision of chapter 89.
24. The Board found that, had the UPW's motions been decided prior to the issuance of Order No. 2640 granting interlocutory relief, the relief granted to the UPW would have been the same – i.e., that the AAA select the neutral arbitrator and that the parties post a copy of the Board's order on their respective websites and in conspicuous places where employees of Unit 10 assemble, and to keep the copies posted for a period of 60 days from the date of posting.
25. With respect to the selection of the neutral arbitrator, the Board concludes that the issue is moot. With respect to the posting, the Board found that Order No.

2640 did not address the issue of whether the employer committed a prohibited practice, only the UPW. Accordingly, the Board concludes that the UPW is entitled to relief requiring the parties to post the Board's present order clarifying that the Board finds the employer also committed a prohibited practice.

26. The Board concludes that the issue of the interest arbitration dates is moot.

ORDER

The Board hereby grants in part and denies in part the UPW's Motion to Dismiss or in the Alternative for Summary Judgment in CU-10-278; grants in part the UPW's Motion for Summary Judgment in CE-10-726; and denies the State's Motion to Set the Interest Arbitration Dates in CU-10-278 and CE-10-726, consistent with the Board's findings of fact and conclusions of law above.

The Board holds that the State and the UPW wilfully refused to complete the arbitrator selection process for the Unit 10 interest arbitration. Such refusal constitutes a violation of the provisions of HRS § 89-11 and violation of the parties' MOA. Accordingly, the Board holds that the employer committed a prohibited practice pursuant to HRS § 89-13(a)(8), by wilfully violating the terms of a collective bargaining agreement, and that the UPW committed a prohibited practice pursuant to HRS § 89-13(b)(4), by wilfully refusing or failing to comply with a provision of chapter 89.

The Board orders that a copy of this Order be posted by all parties on their website and in conspicuous places where employees of Unit 10 assemble, and to keep the copies posted for a period of 60 days from the date of posting. The parties 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 on the other parties.

DATED: Honolulu, Hawaii, February 9, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

STATE OF HAWAII v. DAYTON NAKANELUA, et al.

CASE NO CU-10-278

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. MARIE LADERTA

CASE NO. CE-10-726

ORDER NO. 2686

ORDER GRANTING IN PART AND DENYING IN PART UPW'S MOTION TO DISMISS OR
IN THE ALTERNATIVE FOR SUMMARY JUDGMENT IN CU-10-278; GRANTING IN PART
UPW'S MOTION FOR SUMMARY JUDGMENT IN CE-10-726; AND DENYING THE
STATE'S MOTION TO SET THE INTEREST ARBITRATION DATES IN CU-10-278 AND
CE-10-726

Copies sent to:

James E. Halvorson, Deputy Attorney General

Nelson N. Nabeta, Deputy Attorney General

Herbert R. Takahashi, Esq.