

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,  
and

ELIZABETH A. CHAR, M.D., Director,  
Emergency Services, City and County of  
Honolulu; and MUFI HANNEMANN,  
Mayor, City and County of Honolulu,

Respondents.

CASE NO.: CE-10-744

ORDER NO. 2697

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

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

On December 30, 2009, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint (Complaint) against Respondents ELIZABETH A. CHAR, M.D. (Char), Director, Emergency Services, City and County of Honolulu; and MUFI HANNEMANN (Hannemann), Mayor, City and County of Honolulu (collectively, Respondents or City and County), alleging Respondents wilfully committed prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(1), (5), (7), and (8), when they failed to promptly select an arbitrator in several grievance proceedings as required by Section 15.17 of the Unit 10 collective bargaining agreement (Agreement).

On January 19, 2010, the UPW filed its Motion for Summary Judgment, asserting that Respondents committed multiple prohibited practices by breaching the duty to select arbitrators promptly, and that appropriate relief including attorneys fees and costs and civil penalties should be ordered by the Board.

On January 27, 2010, Respondents filed their Memorandum in Opposition to UPW's Motion for Summary Judgment Filed Herein on January 19, 2010, asserting that

Respondents' actions were not wilful; that the Board lacks jurisdiction to consider issues rendered moot; and that fees, costs, and civil penalties are not warranted.

On February 8, 2010, Respondents filed a Motion for Summary Judgment, asserting that Respondents' actions were not wilful, and that the Board lacks jurisdiction to consider issues rendered moot.

On February 16, 2010, the UPW filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, asserting that mere cessation of a violation does not render a prohibited practice claim moot; that wilfulness is presumed in this case; and that the mootness exception applies.

On February 17, 2010, the Board held oral argument on the parties' motions for summary judgment pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). At the hearing, Respondents orally moved to strike the UPW's Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, as untimely because the opposition was filed on February 16, 2010.

After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order granting in part and denying in part the UPW's Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment.

#### FINDINGS OF FACT

1. UPW was or is at all relevant times an employee organization within the meaning of HRS § 89-2<sup>1</sup> for employees belonging to Unit 10.<sup>2</sup>
2. At all relevant times, Respondent Hannemann was or is the Mayor of the City and County of Honolulu.

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<sup>1</sup>HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

<sup>2</sup>Pursuant to HRS § 89-6, Unit 10 consists of institutional, health, and correctional workers.

3. At all relevant time, Respondent Char was or is the Director of the Emergency Services Department, City and County of Honolulu.
4. Respondents were or are at all relevant times “public employers” within the meaning of HRS § 89-2 for purposes of this Complaint.<sup>3</sup>
5. The UPW and the City and County were parties to the Unit 10 Agreement with effective dates July 1, 2007, through June 30, 2009. This Agreement included a grievance procedure, culminating in a final step of arbitration, in Section 15.
6. Respondents do not dispute the applicability of Section 15 of the Agreement beyond the expiration of the contract. Further, the Board finds that a grievance procedure was made a mandatory subject of bargaining pursuant to HRS § 89-10.8, which provides in relevant part, “[a] public employer shall enter into a written agreement with the exclusive representative setting forth 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 a written agreement.” Accordingly, the grievance procedure in the Unit 10 Agreement may not be unilaterally changed without bargaining to impasse after the agreement has expired and negotiations on a new one have yet to be completed.<sup>4</sup> See, NLRB v. Katz, 369 U.S. 736 (1962); Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988).

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<sup>3</sup>HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

<sup>4</sup>In Litton Financial Printing Division v. NLRB, 501 U.S. 190 (1991), the Court held that an arbitration clause does not, by operation of the National Labor Relations Act as interpreted in Katz, continue in effect after expiration of a collective-bargaining agreement, as arbitration is a matter of consent and will not be imposed beyond the scope of the parties’ agreement. However, HRS § 89-10.8 makes the grievance procedure in the Unit 10 Agreement a mandatory subject of negotiation, and thus Litton is distinguishable in that respect.

7. Section 15.17 of the Unit 10 Agreement provides in relevant part:

SELECTION OF THE ARBITRATOR.

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

15.17 a. By mutual agreement from names suggested by the parties.

15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:

15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.

15.17 b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

8. This case involves the progression to the arbitration stage of five grievances:

LS-09-04:

September 29, 2009: The UPW notified the City and County that it was submitting the grievance to arbitration.

October 10, 2009: Counsel for the UPW sent a letter of representation to the City and County and suggested an arbitrator.

October 19, 2009: Counsel for the City and County sent a letter of representation to counsel for the UPW which declined the suggested arbitrator and recommended that the parties get a list of arbitrators from the Board.

October 20, 2009: The UPW requested a list of arbitrators from the Board.

- October 22, 2009: The Board provided the parties with a list of arbitrators (five names).
- October 23, 2009: The UPW sent a letter to the City and County inviting it to strike first.
- November 13, 2009: The City and County made its first strike.
- November 14, 2009: The UPW made its first strike.
- December 24, 2009: The UPW sent a letter to the City and County demanding a response by December 28, 2009, and threatened to file a complaint if no response was received by December 28, 2009.
- December 30, 2009: The City and County made its second strike.
- December 31, 2009: The UPW made its second strike.
- January 20, 2010: The parties held a pre-hearing conference.
- An arbitrator was selected, and the arbitration is scheduled for April 2010.

LS-09-04A

- September 29, 2009: The UPW notified the City and County that it was submitting the grievance to arbitration.
- October 10, 2009: Counsel for the UPW sent a letter of representation to the City and County and suggested an arbitrator.
- October 20, 2009: Counsel for the City and County sent a letter of representation to counsel for the UPW which declined the suggested arbitrator and recommended that the parties get a list of arbitrators from the Board.
- October 20, 2009: The UPW requested a list of arbitrators from the Board.
- October 22, 2009: The Board provided the parties with a list of arbitrators (five names).
- October 23, 2009: The UPW sent a letter to the City and County inviting it to strike first.

November 13, 2009: The City and County made its first strike.

November 14, 2009: The UPW made its first strike.

December 24, 2009: The UPW sent a letter to the City and County demanding a response by December 28, 2009, and threatened to file a complaint if no response was received by December 28, 2009.

December 30, 2009: The City and County made its second strike.

December 31, 2009: The UPW made its second strike.

An arbitrator was selected, and a prehearing conference was scheduled for February 12, 2010.

AM-09-11

October 22, 2009: The UPW notified the City and County that it was submitting the grievance to arbitration.

October 29, 2009: Counsel for the UPW sent a letter of representation to the City and County and suggested an arbitrator.

November 4, 2009: The UPW requested a list of arbitrators from the Board.

November 9, 2009: The Board provided the parties with a list of arbitrators (five names).

November 10, 2009: The UPW sent a letter to the City and County inviting it to strike first.

November 13, 2009: Counsel for the City and County sent a letter of representation to counsel for the UPW.

November 17, 2009: The UPW sent a letter inviting the City and County to make the first strike from the list of arbitrators.

December 24, 2009: The UPW sent a letter to the City and County requesting a response by December 28, 2009.

January 8, 2010: The City and County made its first strike.

January 9, 2010: The UPW made its first strike.

January 13, 2010: The City made its second strike.

January 15, 2010: The UPW made its second strike.

An arbitrator was selected, and the hearing commenced on February 3, 2010.

AM-09-14

November 9, 2009: The UPW sent a letter notifying the City and County that it was submitting the grievance to arbitration.

November 13, 2009: Counsel for the UPW sent a letter of representation to the City and County and suggested an arbitrator.

December 11, 2009: Counsel for the City and County sent a letter of representation to counsel for the UPW which declined the suggested arbitrator and recommended that the parties get a list of arbitrators from the Board.

December 15, 2009: The UPW requested a list of arbitrators from the Board.

December 17, 2009: The Board provided the parties with a list of arbitrators (five names).

December 19, 2009: The UPW sent a letter to the City and County inviting it to strike first.

December 24, 2009: The UPW sent a letter to the City and County demanding a response by December 28, 2009, and threatened to file a complaint if no response was received by December 28, 2009.

December 30, 2009: The City and County declined to strike first, and suggested that the UPW strike first or the parties follow the Agreement to determine who would strike first.

January 7, 2010: A coin toss was held to determine who would strike first.

January 8, 2010: The UPW made its first strike.

January 13, 2010: The City and County made its first strike.

January 15, 2010: The UPW made its second strike.

January 22, 2010: The City and County made its second strike.

An arbitrator was selected.

AM-09-15

November 10, 2009: The UPW sent a letter notifying the City and County that it was submitting the grievance to arbitration.

November 16, 2009: The City and County received the letter from the UPW dated November 10, 2009.

November 17, 2009: Counsel for the UPW sent a letter of representation to the City and County and suggested an arbitrator.

December 11, 2009: Counsel for the City and County sent a letter of representation to counsel for the UPW which declined the suggested arbitrator and recommended that the parties get a list of arbitrators from the Board.

December 14, 2009: The UPW requested a list of arbitrators from the Board.

December 15, 2009: The Board provided the parties with a list of arbitrators (five names).

December 17, 2009: The UPW sent a letter to the City and County inviting it to strike first.

December 24, 2009: The UPW sent a letter to the City and County demanding a response by December 28, 2009, and threatened to file a complaint if no response was received by December 28, 2009.

December 30, 2009: The City and County declined to strike first, and suggested that the UPW strike first or the parties follow the Agreement to determine who would strike first.

January 7, 2010: A coin toss was held to determine who would strike first.



- January 8, 2010: The UPW made its first strike.
- January 13, 2010: The City and County made its first strike.
- January 15, 2010: The UPW made its second strike.
- January 22, 2010: The City and County made its second strike.

An arbitrator was selected, and the prehearing conference was scheduled for February 12, 2010.

9. On December 30, 2009, the UPW filed the instant Complaint, alleging Respondents wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8), when they failed to promptly select an arbitrator in several grievance proceedings as required by Section 15.17 of the Unit 10 Agreement.
10. On January 19, 2010, the UPW filed its Motion for Summary Judgment, asserting that Respondents committed multiple prohibited practices by breaching the duty to select arbitrators promptly, and that appropriate relief including attorneys fees and costs and civil penalties should be ordered by the Board.
11. On January 27, 2010, Respondents filed their Memorandum in Opposition to UPW's Motion for Summary Judgment Filed January 19, 2010, asserting that Respondents' actions were not wilful; that the Board lacks jurisdiction to consider issues rendered moot; and that fees, costs, and civil penalties are not warranted.
12. On February 8, 2010, Respondents filed a Motion for Summary Judgment, asserting that Respondents actions were not wilful, and that the Board lacks jurisdiction to consider issues rendered moot.
13. On February 16, 2010, the UPW filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, asserting that mere cessation of a violation does not render a prohibited practice claim moot; that wilfulness is presumed in this case; and that the mootness exception applies.
14. On February 17, 2010, the Board held oral argument on the parties' motions for summary judgment pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). At the hearing, Respondents orally moved to strike the UPW's Memorandum in Opposition to

Respondents' Motion for Summary Judgment Filed on February 8, 2010, as untimely because the opposition was filed on February 16, 2010.

15. As a preliminary matter, the Board finds that the UPW's Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, which was filed on February 16, 2010, was timely. Respondents' motion was filed on Monday, February 8, 2010. Because the intermediate Saturday, Sunday, and holiday (Presidents' Day) are not included in the computation, the deadline for the UPW to file its written response was February 16, 2010.
16. The Board finds that there has been undue delay in Respondents' participation in the selection of arbitrators. In LS-09-04 and LS-09-04A, there was a delay of 21 days from the UPW's invitation for Respondents to strike first and Respondents exercising their first strike; there was a delay of 47 days from the UPW exercising its first strike and Respondents exercising their second strike. In AM-09-11, there was a delay of 59 days from the UPW's invitation for Respondents to strike first and Respondents exercising their first strike. In AM-09-14, there was a delay of 28 days from the UPW's suggestion of an arbitrator and the date Respondents declined the suggested arbitrator and recommendation that the parties get a list of arbitrators from the Board; there was an 11-day delay from the UPW's invitation to Respondents to strike first and Respondents' declination of the UPW's offer. In AM-09-15, there was a delay of 24 days from the UPW's suggestion of an arbitrator and the date Respondents declined the suggested arbitrator and recommendation that the parties get a list of arbitrators from the Board; there was a 13-day delay from the UPW's invitation to Respondents to strike first and Respondents' declination of the UPW's offer.
17. Respondents did not provide any explanation for the delays in selecting the arbitrators other than the delay caused by the Christmas holiday period.<sup>5</sup> This explanation is not sufficient to explain all the delays noted above. The Board finds that Respondents' actions indicate a conscious indifference to their obligation under the Agreement regarding the timely selection of arbitrators.
18. Respondents argue that they did not refuse or fail to select the arbitrators in each grievance because the selection process was "moving along" even if it

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<sup>5</sup>The Board recognizes that in each of the grievances, the UPW sent correspondence to Respondents on December 24, 2009, which was a Thursday and also Christmas Eve. In each case, the UPW sought a response by December 28, 2009, a Monday and the very next working day, as Friday, December 25, 2009, was a state holiday designated as Christmas Day (see HRS § 8-1). Accordingly, some delay attributable to the Christmas holiday is reasonable; however, this does not explain or account for the rest of the delays in selecting the arbitrators.

was delayed. However, Respondents have not provided any reasons for the delays (other than those attributable to the holiday period) and accordingly the Board cannot find the delays to be reasonable when no reasons are presented.

19. The Board finds that Respondents' actions constitute wilful breaches of the Unit 10 Agreement and wilful interference with the UPW's representation of its members in the arbitration stage of the grievance process.<sup>6</sup>
20. The Board finds that Respondents' actions do not constitute wilful refusal to bargain collectively in good faith with the UPW, nor wilful refusal or failure to comply with the provisions of chapter 89.

### DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
3. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.
4. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
5. "When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided [by Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Hawaii Rules of Civil Procedure (HRCP) Rule 56. Thus, "[a] party opposing a motion for summary judgment

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<sup>6</sup>The Board recognizes that it is not always possible for parties to select an arbitrator within fourteen days as required by Section 15.17 of the Agreement; however, parties should at least make good faith efforts to attempt to select an arbitrator within a reasonable time period.

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

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

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

\* \* \*

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

\* \* \*

- (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;

7. The Board looks to the Hawaii Supreme Court’s evolving guidance in interpreting provisions of HRS Chapter 89. In 2007, the Hawaii Supreme Court reiterated that in assessing a violation of HRS § 89-13, the Board is required to determine whether the respondent acted with “conscious, knowing, and deliberate intent to violate the provisions” of HRS Chapter 89. In re Hawaii Government Employees Ass’n., AFSCME, Local 152, AFL-CIO, 116 Hawai`i 73, 99, 170 P.3d 324, 350 (2007) (“With respect to HRS chapter 89, this court has said that ‘wilfully’ means ‘conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89’ . . . Thus, in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the ‘conscious, knowing, and deliberate intent to violate the provisions’ of HRS chapter 89 when it removed the campaign

materials”). Accordingly, when assessing an alleged prohibited practice under HRS § 89-13, the Board will determine whether the respondent acted with “conscious, knowing, and deliberate intent” to violate the provisions of HRS chapter 89.

8. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. See Doe v. Doe, 116 Hawai`i 323, 326, 172 P.3d 1067, 1070 (2007).
9. However, there are exceptions to the mootness doctrine. One exception is an action that is capable of repetition, yet evading review. The phrase, “capable of repetition, yet evading review” means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because of the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit. Clark v. Arakaki, 118 Hawai`i, 355, 360, 191 P.3d 176, 181 (2008).
10. When analyzing the public interest exception to the mootness doctrine, the courts look to (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination for future guidance of public officers; and (3) the likelihood of future recurrence of the question. Doe v. Doe, 116 Hawai`i 323m 327m 172 P.3d 1067, 1071 (2007).
11. Respondents contend that the instant controversy is moot because the arbitrators have been selected. The Board finds that the instant case falls within an exception to the mootness doctrine because the matter involves questions that affect public interest and are capable of repetition yet may evade review because of the short time frame provided in the Agreement for the selection of an arbitrator. Linda Lingle v. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 107 Hawai`i 178, 111 P.3d. 587 (2005).
12. HAR § 12-42-8(g), which governs hearings before the Board, provides in relevant part that all motions other than those made during a hearing shall be subject to the following:
  - (iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of

service on all parties, shall be filed with the [B]oard within five days after service of the motion papers, unless the [B]oard directs otherwise.

13. HAR § 12-42-8(c) provides in relevant part:

In computing any period of time prescribed or allowed by these rules or by order of the [B]oard, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. As used in this section, "holiday" shall mean any day designated as such pursuant to section 8-1, HRS.

14. Pursuant to HRS § 8-1, the third Monday in February is a state holiday designated as "Presidents' Day."
15. As a preliminary matter, the Board concludes that the UPW's Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, which was filed on February 16, 2010, was timely. Respondents' motion was filed on Monday, February 8, 2010. Because the intermediate Saturday, Sunday, and holiday (Presidents' Day) are not included in the computation, the deadline for the UPW to file its written response was February 16, 2010. Accordingly, Respondents' oral motion to strike the UPW's Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed on February 8, 2010, is denied.
16. Respondents did not provide any explanation for the delays in selecting the arbitrators other than the delay caused by the Christmas holiday period. This explanation is not sufficient to explain all the delays noted above, and Respondents do not provide any other explanation. The Board finds that Respondents' actions indicate a conscious indifference to their obligation under the Agreement regarding the timely selection of arbitrators and concludes that Respondents' actions were wilful.
17. The Board finds that Respondents wilfully delayed the selection of the arbitrators in the above grievances, constituting a wilful violation of

Section 15.17 of the Agreement. The Board concludes that Respondents' actions constitute a prohibited practice pursuant to HRS § 89-13(a)(8).

18. The Board further concludes that Respondents' actions constitute a prohibited practice pursuant to HRS § 89-13(a)(1). As a result of the undue delay in selecting an arbitrator, Respondents' actions also unduly delayed, and thus interfered with, the UPW's representation of its members in the arbitration stage of the grievance process.
19. The Board concludes that Respondents' actions do not constitute a prohibited practice pursuant to HRS § 89-13(a)(7). In the Complaint, the UPW alleges that Respondents wilfully interfered, restrained, and coerced employees in the exercise of their statutory rights under HRS § 89-3. However, HRS § 89-3 provides (emphasis added):

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to **engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion**. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

The UPW has not alleged facts to support a claim that Respondents violated the provisions of HRS § 89-3 except for an allegation that Respondents interfered, restrained, and coerced employees. Such allegation (interference, restraint, or coercion) is specifically governed by HRS § 89-13(a)(1). Respondents have not alleged any other violation of chapter 89 that is not already governed by HRS § 89-13(a)(1). Accordingly, the Board concludes that HRS § 89-13(a)(7) is not applicable to an allegation of violation of § 89-3 to the extent such allegation is specifically governed by § 89-13(a)(1). Otherwise, there would be redundancy between §§ 89-13(a)(1) and (7) with respect to alleged violation of HRS § 89-3.

20. The Board concludes that Respondents' actions do not constitute a prohibited practice pursuant to HRS § 89-13(a)(5). The UPW has not alleged facts to support a claim that Respondents refused to bargain collectively in good faith

except for the fact that Respondents violated the Unit 10 Agreement in not selecting the arbitrators in a timely manner; violations of the collective bargaining agreement are specifically governed by § 89-13(a)(8). There are no other allegations of refusal to bargain collectively in good faith. If a violation of a collective bargaining agreement automatically constitutes a prohibited practice pursuant to HRS § 89-13(a)(5), then HRS § 89-13(a)(8) would merely be redundant.

21. With respect to the question of appropriate remedy,<sup>7</sup> the Board reserves its ruling on remedies and requests that the parties further brief this specific matter prior to the Board ruling in this issue.

### ORDER

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

### NOTICE OF HEARING

The Board sets April 28, 2010 as the deadline for filing memoranda specifically addressing the issue of appropriate remedies, and will conduct a hearing on the issue on May 4, 2010 at 9:00 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii \_\_\_\_\_ April 12, 2010 \_\_\_\_\_.

HAWAII LABOR RELATIONS BOARD

  
\_\_\_\_\_  
JAMES B. NICHOLSON, Chair

  
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SARAH R. HIRAKAMI, Member

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<sup>7</sup>The UPW in its Motion for Summary Judgment, filed on January 19, 2010, requested make whole remedies to the Union, including attorney's fees and costs incurred and also, fines under HRS § 377-9(d).



UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and ELIZABETH A. CHAR,  
M.D., et al.

CASE NO. CE-10-744

ORDER NO. 2697

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Copies sent to:

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