

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

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

Respondents.

CASE NO. CE-01-754

ORDER NO. 2758

ORDER DENYING COMPLAINANT'S
MOTION FOR INTERLOCUTORY
RELIEF; DENYING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT;
GRANTING COMPLAINANT'S
MOTION TO STRIKE; GRANTING
STATE RESPONDENTS' MOTION TO
CONSOLIDATE; GRANTING MOTIONS
TO REVOKE/ QUASH SUBPOENAS
DUCES TECUM; DENYING
COMPLAINANT'S MOTION TO
DISSOLVE STAY OF UNIT 01
ARBITRATION PROCEEDINGS AND
DEFERRING RULING ON UPW'S
MOTION TO DISMISS CASE NO. CU-
01-292; AND NOTICE OF HEARING

In the Matter of

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

Complainants,

and

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

Respondent.

CASE NO. CU-01-292

ORDER DENYING COMPLAINANT'S
MOTION FOR INTERLOCUTORY RELIEF; DENYING
COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT;
GRANTING COMPLAINANT'S MOTION TO STRIKE; GRANTING
RESPONDENT'S MOTION TO CONSOLIDATE; GRANTING
MOTIONS TO REVOKE/QUASH SUBPOENAS DUCES TECUM;
DENYING COMPLAINANT'S MOTION TO DISSOLVE STAY OF UNIT 01
ARBITRATION PROCEEDINGS AND DEFERRING RULING ON UPW'S
MOTION TO DISMISS CASE NO. CU-01-292; AND NOTICE OF HEARING

On March 22, 2010, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board) in Case No. CE-01-754. Complainant alleged, *inter alia*, that the parties were engaged in negotiations for the Unit 01 collective bargaining agreement (Agreement or CBA); the ground rules provide that all sections are tentatively agreed to pending completion of negotiations; on or about February 22, 2010, the parties entered into an agreement in principle for bargaining unit 01 employees by carrying forward the terms and provisions of the July 1, 2007 to June 30, 2009 agreement with certain modifications and understandings regarding wages (in section 23), other leaves of absences without pay (in section 38), and benefit plans (in section 62) for the period July 1, 2009 to June 2011; a memorandum regarding salary schedules and the amount of furlough days effective January 1, 2010 through June 30, 2010 and effective July 1, 2010 through June 30, 2011 was drafted, signed and executed on February 22, 2010 by the UPW and the mayors of all counties; on or about March 4, 2010, Respondent LINDA LINGLE (Lingle) and other employers signed and transmitted the memorandum on salary schedules and amount of furlough days; on March 5, 2010, the UPW reduced the terms and conditions of the Agreement from the period from July 1, 2009 to June 30, 2011 to writing and submitted it to all employers for review and signature; on March 6, 2010, the UPW initiated the ratification process and on or about March 18, 2010, the Unit 01 employees ratified the new Agreement; on or about March 19, 2010, the UPW notified the public employers of the ratification results and requested the employers to sign and execute the March 5, 2010 Agreement and submit the cost items to the legislative bodies for approval within 10 days and cease from prematurely implementing the agreement until approval of cost items; absent approval of cost items by all legislative bodies and completion of negotiations of all sections, no party is authorized to implement the agreement; and on and after March 11, 2010, Respondents unilaterally implemented State furlough plans for the executive branch employees without prior bargaining in good faith over mandatory subjects and refused to sign and execute the terms of the new Agreement. Complainant contends that Respondents violated terms of the Unit 01 Agreement, refused to comply with Hawaii Revised Statutes (HRS) §§ 89-10(a) and (b); interfered, restrained and coerced employees thereby committing prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8).

On March 25, 2010, Complainant filed a Motion for Interlocutory Relief with the Board. Complainant seeks to enjoin Respondents and all executive agencies and departments of the State of Hawaii (within their jurisdiction and authority) from implementing any furloughs of bargaining unit 01 employees until such time as all legislative bodies of the State of Hawaii, the County of Kauai, the County of Maui, the County of Hawaii, and the City and County of Honolulu have approved cost items as required by HRS §§ 89-10(a) and (b) for the Unit 01 CBA covering the period from July 1, 2009 to June 30, 2011.

On April 22, 2010, Respondents filed a Memorandum in Opposition to Motion for Interlocutory Relief and on May 13, 2010, filed Respondents' First Supplemental Memorandum in Opposition to Motion for Interlocutory Relief.

A Prehearing/Settlement conference was held on April 28, 2010. At the prehearing conference, the Board established the following deadlines and dates for hearings:

May 13, 2010 deadline to file motions;
May 21, 2010 deadline to file opposition to motions;
May 25, 2010 at 8:30 am as the date and time for hearing on the motions;
June 3, 2010 as deadline for exchange of Witness & Exhibit list;
and
June 10, 2010 at 8:30 am as the date and time for the hearing on the merits.

On May 13, 2010, Complainant filed a Motion for Summary Judgment. Complainant alleged that there are no disputes of material fact and that the UPW is entitled to judgment as a matter of law for (1) unlawful interference, restraint and coercion of rights guaranteed to public employees under § 89-3, HRS, by Respondents, (2) Breach of duty to bargain in good faith under § 89-9(a) HRS, by unilateral changes on mandatory subjects of bargaining, (3) violations of Sections 89-10(a) and (b), HRS by implementing cost items and non-cost items that are tied to or bargained against cost items without funding by legislative bodies, and (4) Violation of a collective bargaining agreement, i.e., to wit: ground rule #8 and other agreements entered by the parties.

On May 13, 2010, Respondents filed a prohibited practice complaint against the UPW in Case No. CU-10-292 alleging, *inter alia*, that by filing the March 22, 2010 prohibited practice complaint, the UPW repudiated the Memorandum of Agreement (MOA) of February 2010 and committed a prohibited practices in violation of HRS §§ 89-13(b)(2), (4), and (5).

On May 13, 2010, Respondents filed a Motion to Consolidate Prohibited Practice Complaint Case No. CE-01-754 with Case No. CU-01-292.

On May 18, 2010, Complainant filed a Reply Brief in Support of Motion for Interlocutory relief.

On May 20, 2010, UPW filed a Motion to Dismiss the Complaint in Case No. CU-01-292. The UPW argued that the State of Hawaii lacked standing to file a prohibited practice complaint because it does not have the requisite majority to represent the interest of public employers.

On May 21, 2010, Respondents filed a Memorandum in Opposition to Motion for Summary Judgment and Cross Motion for Summary Judgment. Respondents argue that Complainant failed to exhaust its contractual remedies and that the UPW is in the process of utilizing the grievance procedure to address the same issues in the present case in UPW grievance Case Nos. DMN-10-02, DMN-10-03, DMN-10-04, DMN-10-05, & DMN-10-06 and seeks redress for alleged violations of the CBA committed by employer. Respondents argued that there were no violations of the ground rules; that at the time the February 23, 2010 agreement was reached the Governor was on the mainland but indicated she would sign; and on March 4, 2010, the Governor signed the MOA. Respondents argue that the MOA is final and not a tentative agreement and therefore enforceable and effective.

On May 21, 2010, Complainant filed a Memorandum in Opposition to Motion to Consolidate Case Nos. CE-01-754 and CU-01-292.

On May 24, 2010 Complainant filed a Motion to Strike Linda Lingle and Marie Laderta's Cross Motion for Summary Judgment.

On May 25, 2010, the Board held a hearing on the parties' motions pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). During the hearing Complainant argued that Respondents violated rule 8 of the ground rules for negotiations by prematurely and unilaterally implementing the February 22, 2010 tentative agreement on wages and furloughs without resolution of all issues relating to Unit 01 negotiations. The UPW contended that one of the key issues that remained unresolved was employer contributions for health benefits under Section 62 and Laderta confirmed this in her March 11, 2010 letter. As a result by letter dated March 17, 2010, the UPW requested that all employers not implement the terms of the tentative agreement pending completion of negotiations.

At the close of the hearing on the motions the Board issued the following oral order:

1. The Board reserved ruling on Complainant's Motion for Interlocutory Relief.
2. The Board Granted Complainant's Motion to Strike Respondent's Cross Motion for Summary Judgment.
3. The Board denied Complainant's Motion for Summary Judgment because the Board had concerns regarding:
 - a. the intent of the February 22, memorandum of agreement on wages and furloughs
 - b. whether furloughs were a cost item or tied to a cost item

- c. the Board did not know what was sent out to by the UPW to its members for ratification (no evidence presented)
4. The Board stayed the Grievance arbitration proceedings retaining jurisdiction over the grievances to resolve Chapter 89 issues.
5. The Board granted Respondent's Motion to Consolidate Case No. CU-01-292 with Case No. CE-01-754.

Hearings on the merits were scheduled to commence on June 10, 2010 at 8:30 a.m.

On May 28, 2010 Respondents filed an application for the issuance of a subpoena for Robin Chun-Carmichael, Deputy Director Department of Human Resources, City and County of Honolulu, to appear on June 10, 2010 at 1:30 p.m. to testify on behalf of Respondents.

On June 3, 2010, Complainant and Respondents filed their witness and exhibit lists.

On June 3, 2010 Complainant filed applications for the issuance of Subpoenas Duces Tecum for the following:

Rex Mauer III, Director of Budget and Fiscal Services, City and County of Honolulu to appear and produce documents at 9:00 a.m. on June 10, 2010

Fred Pablo, Budget Director County of Maui, to appear and produce documents at 10:00 a.m. on June 10, 2010

Gary Takamura, Budget Administrator, County of Hawaii, to appear and produce documents at 11:00 a.m. on June 10, 2010

Nancy Crawford, Director, Department of Finance, County of Hawaii, to appear and produce documents at 11:00 a.m. on June 10, 2010

Wallace Rezentes, Jr., Director of Finance, County of Kauai, to appear and produce documents at 1:00 p.m. on June 10, 2010

James E. Halvorson, Esq. (Halvorson), Deputy Attorney General, Employment Law Division to appear and produce documents at 1:30 p.m. on June 10, 2010

Keith Odachi (Odachi), Office of Collective Bargaining, State of Hawaii to appear and produce documents at 2:00 p.m. on June 10, 2010

Marie Laderta (Laderta), Department of Human Resources Development, State of Hawaii to appear and produce documents at 2:30 p.m. on June 10, 2010

Neal Miyahira, Budget Division Administrator, State of Hawaii to appear and produce documents at 3:00 p.m. on June 10, 2010

On June 8, 2010 Respondents filed a Motion to Quash Subpoena of Halvorson, Odachi, and Laderta. Respondents did not object to have the witness appear at the hearing to testify but their objection centered only on the portion regarding production of documents.

On June 8, 2010, the County of Hawaii filed a Motion to Revoke Quash or Protective Order of Subpoena Duces Tecum Served on Nancy Crawford.

On June 9, 2010, the City and County filed a Motion to Revoke Subpoena Duces Tecum of Rex Mauer III.

On June 9, 2010, Respondent filed a Motion to Quash Subpoena Duces Tecum of Neil Miyahira.

On June 10, 2010, Maui County filed a Motion to Revoke Subpoena of Fred Pablo.

On June 14, 2010, the County of Kauai filed a Motion to Revoke Subpoena of Wallace Rezentos.

On June 9, 2010 the Board issued a Notice of Hearing on Motions to Quash or Revoke Subpoenas and UPW's Motion to Dismiss Case No. CU-01-292 and set the hearing date for June 15, 2010 at 9:30 a.m.

The hearings on the merits previously scheduled to begin on June 10, 2010 at 8:30 a.m. were taken off of the calendar.

On June 15, 2010, the Board conducted a hearing on the motions to Quash/Revoke Subpoenas and UPW's Motion to Dismiss Case No. CU-01-292 pursuant to

HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3). At the conclusion of the hearing on the motions, the Board took the matters under advisement.

On November 3, 2010, Complainant UPW filed a Motion to Dissolve Stay of Arbitral Proceedings and for other Appropriate Relief Under HRS Sections 89-5(I)(10) and 377-9(B) (Motion to Dissolve Stay).

On November 29, 2010, the Board sent out a Notice of Hearing on UPW's Motion to Dissolve Stay and set the hearing for December 21, 2010 at 9:30 a.m.

On December 21, 2010, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3) the Board held a hearing on the UPW's Motion to Dissolve Stay. At the conclusion of the hearing the Board took the matter under advisement.

After careful consideration of the entire record and arguments presented, the Board makes the following findings of fact, conclusions of law, and order denying Complainant's Motion for Interlocutory Relief; Denying Complainant's Motion for Summary Judgment; Granting Complainant's Motion to Strike; Granting Respondent's Motion to Consolidate; Denying Complainant Motion to Dissolve Stay of Unit 01 Arbitration Proceedings; Granting the Motions to Quash/Revoke Subpoena Duces Tecum to the extent that the information requested is not relevant to the threshold issues in the complaint before the Board, which is, whether the parties entered into a binding Agreement to renew or modify the July 1, 2007 - June 30, 2009 Unit 01 Agreement, what the terms of that agreement are, and what was the intent of the parties in entering into the February 2010 MOA on Wages and Furloughs; and defers ruling on UPW's Motion to Dismiss in Case No. CU-01-292.

FINDINGS OF FACT

1. The UPW is an employee organization¹ within the meaning of HRS § 89-2.

¹HRS § 89-2 provides in relevant part:

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

2. At all times relevant to the complaint LINDA LINGLE was Governor of the State of Hawaii and a statutory employer within the meaning of HRS § 89-2.²
3. At all times relevant to the complaint, MARIE LADERTA (Laderta) was the director of the Department of Human Resources Development, State of Hawaii, the chief negotiator, and the designated representative of Governor Linda Lingle and as such is a public employer within the meaning of HRS § 89-2.
4. The UPW is duly certified as the exclusive bargaining representative of blue collar non-supervisory employees in bargaining unit 01 effective October 20, 1971.
5. The UPW and the State of Hawaii have negotiated more than fifteen successive collective bargaining agreements (CBA) setting forth the wages, hours, and other terms and conditions of employment of bargaining unit 01 employees on and after July 1, 1972.

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.

6. The UPW and public employers³ are parties to a CBA covering bargaining unit 01 employees for the period from July 1, 2007 to June 30, 2009.
7. On June 16, 2008, the UPW in accordance with Section 66, Duration, submitted a notice of intent to renew and modify the July 1, 2007 to June 30, 2009 CBA.
8. On June 30, 2008, the Employers submitted their notice of intent to renew or modify the July 1, 2007 to June 30, 2009 CBA.
9. On July 8, 2008, negotiations on a new CBA commenced.
10. On or about July 14, 2008, the parties entered into a Tentative Agreement on Unit 01 Negotiations Ground Rules for the 2009-____-Agreement that states in relevant part:

³HRS § 89-6 provides in part as follows:

(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 a 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.

(e) In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

8. Sections are tentatively agreed to pending completion of negotiations. Except for cost items, sections agreed to as provided in HRS Section 89-6 (d) shall be valid and enforceable and shall be effective as agreed to during negotiations, regardless of the requirement to submit cost items as provided in HRS Section 89-10.
11. On February 22, 2010, the UPW and the Mayors for each County executed an MOA for BU 01, effective July 1, 2009 through June 30, 2011.
12. Lingle and Laderta were not present when UPW and the county Mayors entered into the agreement.
13. By letter dated February 22, 2010, Mayor Hannemann, City and County of Honolulu, transmitted a copy of the MOA that was executed by the UPW and county Mayors to Governor Lingle.
14. On or about March 4, 2010 the Governor, the Hawaii Health Systems Corporation and the Judiciary signed the MOA and submitted it to the UPW.
15. The February 2010 MOA executed by all parties states:

MEMORANDUM OF AGREEMENT

FOR BU 1

EFFECTIVE JULY 1, 2009 THROUGH JUNE 30, 2011

This MEMORANDUM OF AGREEMENT is made and entered into on this _____ day of _____, 2010 by and between the United Public Workers, AFSCME Local 646, AFL-CIO, hereinafter referred to as the "UNION" and State of Hawaii, the Hawaii Health Systems Corporation, the Judiciary, the City and County of Honolulu, the County of Hawaii, the County of Maui, the County of Kauai, hereinafter referred to as the "EMPLOYER", as defined in the HRS §89-6.

The salary scheduled in effect on June 30, 2009 shall remain in effect until June 30, 2011.

Effective January 2, 2010 through June 30, 2010, Employees shall be furloughed from zero (0) up to thirteen (13) days, with a corresponding pay adjustment for each furlough day, as determined by the following:

- the governor in the case of all UPW State of Hawaii executive branch employees, except employees of the department of education, the University of Hawaii, the Hawaii Health Systems Corporation, and Hawaii State Public Library System,
- the respective mayors in the case of the counties,
- the chief justice of the supreme court in the case of UPW employees of the judiciary,
- the board of education in the case of UPW employees of the department of education and the Hawaii State Public Library System,
- the board of regents in the case of UPW employees of the University of Hawaii, and
- the Hawaii health systems corporation board in the case of UPW employees of the Hawaii health systems corporation.

Effective July 1, 2010 through June 30, 2011, Employees shall be furloughed from zero (0) up to twenty-four (24) days, with a corresponding pay adjustment for each furlough day, as determined by the following:

- the governor in the case of all UPW State of Hawaii executive branch employees, except employees of the department of education, the University of Hawaii, the Hawaii Health Systems Corporation, and Hawaii State Public Library System,
- the respective mayors in the case of the counties,
- the chief justice of the supreme court in the case of UPW employees of the judiciary,
- the board of education in the case of UPW employees of the department of education and the Hawaii State Public Library System,
- the board of regents in the case of UPW employees of the University of Hawaii, and
- the Hawaii health systems corporation board in the case of UPW employees of the Hawaii Health Systems Corporation.

The above-listed individuals or entities will develop their respective furlough schedules and the method and means for implementing furloughs.

Other issues pertaining to implementing the furloughs shall be at the discretion of the above-listed individuals or entities, with the understanding that the Employer shall notify the Union of any changes to the departments' furlough schedules and provide an opportunity for comment from the Union.

This Agreement may be signed in separate counterparts, and/or via facsimile, each of which shall be deemed to be an original, and all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Employer and the Union by their authorized representatives have executed this MEMORANDUM OF AGREEMENT.

16. By letter date March 5, 2010 the UPW informed Laderta, Chief Negotiator, Office of Collective Bargaining, and all employers of the following:

We are transmitting at this time a memorandum of agreement to implement the bargaining unit 1 agreement negotiated on or about February 22, 2010, which is being presented to bargaining unit employees for ratification.

A copy is being sent to all public employers. This MOA incorporates all terms and conditions as agreed to by the parties.

We request all parties to indicate their consent by their signatures in the space provided no later than seven (7) days from the date of this letter.

17. The MOA transmitted to the employers by the UPW on March 5, 2010 states:

MEMORANDUM OF AGREEMENT
FOR BU 1
EFFECTIVE JULY 1, 2009 THROUGH JUNE 30, 2011

This MEMORANDUM OF AGREEMENT is made and entered this ____ day of _____, 2010 by and between the United Public Workers, AFSCME, Local 646, AFL-CIO, hereinafter referred to as the "Union," and State of Hawaii, the Hawaii Health Systems Corporation, the Judiciary, the City and County of Honolulu, the County of Hawaii, the County of Maui,

and the County of Kauai, hereafter referred to as the "Employer," as defined in HRS §89-6.

Whereas, a tentative agreement was reached during negotiations of the collective bargaining agreement covering employees in Bargaining Unit 1 effective July 1, 2009 through June 30, 2011.

NOW THEREFORE, the Employer and the Union mutually agree that this Memorandum of Agreement shall be used to implement the tentative agreement reached and the collective bargaining agreement referenced herein effective July 1, 2009 through June 30, 2011.

1. The terms and conditions of the collective bargaining agreement between the Employer and Union effective July 1, 2007 to and including June 30, 2009 for Bargaining Unit 1 shall be carried forward and are incorporated without change for the period July 1, 2009 to and including June 30, 2011, except for the changes set forth below and to the sections listed or referred to below as described.

2. Section 23. Wages

The wages and salary scheduled in effect on June 30, 2009 shall remain in effect until June 30, 2011.

3. Section 38. Other Leaves of Absence Without Pay

Effective January 1, 2010 through June 30, 2010 employees shall be furloughed from zero (0) up to thirteen (13) days. Effective July 1, 2010 to June 30, 2011, employees shall be furloughed from zero (0) up to twenty-four (24) days.

4. Section 62. Benefit Plans

The terms and provisions of Section 62 of the July 1, 2007 to June 30, 2009 Unit 1 agreement shall be carried over and incorporated for the period covering July 1, 2009 to June 30, 2011, without prejudice to the position of Employer or Union in the proceedings now pending

before the Hawaii Labor Relations Board (Board) in case numbers CE-01-717a and CE-10-717b or any other proceeding which may arise over this subject matter. Moreover, in the event the Employer and the Union are unable to resolve their dispute over this subject matter through the process of further negotiations, the no-strike or lock out provision in Section 10 shall be inapplicable upon impasse following good faith bargaining.

5. Section 66. Duration

66.01 Effective Dates.

The Unit 1 agreement shall be effective July 1, 2009 and shall remain in full force and effect to and including June 30, 2011. It shall be renewed thereafter in accordance with statutes unless either party hereto gives written notice to the other party of its desire to modify, amend, or terminate the unit 1 agreement.

66.02 Notices and Proposals

Notices and proposals shall be in writing and shall be presented to the other party between June 15 and June 30, 2010. When the notice is given, negotiations to a new Unit 1 agreement shall commence on a mutually agreeable date following the exchange of written proposals.

6. This agreement may be signed in separate counterparts, and/or via facsimile, each of which shall be deemed to be an original, and all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Employer and the Union by their authorized representatives have executed this MEMORANDUM OF AGREEMENT.

18. On March 6, 2010, the UPW initiated the process of employee ratification.⁴

⁴The Board notes that there is no evidence in the record to indicate what was sent by UPW to its members for ratification.

19. By letter dated March 11, 2010, Laderta informed the UPW, with a copy sent to all employers, of the following:

Re: Transmittal of Memorandum of Agreement for BU 1

On March 8, 2010, we received your correspondence dated March 6, 2010 regarding the above referenced subject.

We are not in agreement that the MOA transmitted on March 5, 2010 incorporates all terms and conditions as agreed to by the State and the Union. The items identified below were not part of our discussions:⁵ (emphasis added)

1. Section 38 Other leaves of Absence Without Pay

There was no discussions specific to provisions in this Section of the BU 1 Collective bargaining agreement. (CBA)

2. Section 62, Benefit Plans

There was no agreement between the State and UPW to carry over and incorporate the terms and provisions of Section 62 for the period covering July 1, 2009 to June 30, 2011. A Letter of Understanding was provided to the Union that outlined the State's position on the benefit plan issue.

Additionally, there was no agreement that Section 10, No Strike or Lockout, of the BU 1 CBA would be inapplicable upon impasse following good faith bargaining on the benefits plan issues.

The Memorandum of Agreement, that was signed by the parties on or about February 22, 2010, enables the Governor to develop the furlough schedules and the methods/means for implementing furloughs for all BU1 State of Hawaii executive branch employees, except for employees of the Department of Education, the University of Hawaii, the Hawaii Health Systems Corporation and the Hawaii State Public Library System. The MOA also provides an opportunity for the Union to comment.

⁵The Board notes that there is no evidence in the record to indicate any meetings or discussions between Respondents and the UPW were held during the period in question.

Based on the provisions in the documents that have been signed by the parties the State will implement the furlough of its BUI employees.

20. By letter to Laderta with a copy to all employers dated March 17, 2010 the UPW wrote in part;

I am disappointed with your March 11, 2010 refusal to agree and to execute the Memorandum of Agreement (MOA) transmitted to all public employers on March 5, 2010 by UPW.

Absent an agreement on paragraphs 1 through 6 of the March, 2010 MOA, the tentative agreement on "furloughs" negotiated with the Council and the Mayors (sic) and signed by the Governor (thereafter) cannot be implemented.

I refer you to ground rule 8 which states that all sections are "tentatively agreed to pending completion of negotiations." See enclosed unit 1 ground rules. In addition, throughout negotiations employer took the position that a supplemental agreement without a master agreement is ineffective, and could not be implemented.

Accordingly, all employers are requested to cease and desist from implementing furloughs until completion of negotiations on all items. Please be advised that absent a final resolution of all issues the unilateral implementation of furloughs constitutes a prohibited practice. (Emphasis added).

21. By memorandum dated March 19, 2010, the UPW informed all employers:

In accordance with Section 89-10(a) Hawaii Revised Statutes, this is to notify all employers that blue collar non-supervisory employees in Bargaining Unit 1 ratified the collective bargaining agreement, July 1, 2009 to June 30, 2011, between the United Public Workers. AFSCME, 646, AFL-CIO and the State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, the county of Kauai, the county of Maui, the County of Hawaii, and the City and County of Honolulu.

Please have all employers to sign the Memorandum of Agreement transmitted by the UPW March 5, 2010,⁶ as required under by Section 89-10(a)⁷ HRS, and within 10 days of this letter submit cost items to appropriate legislative bodies for their approval (or rejection) as provided in Section 89-10(b) HRS. As you know, wages, furloughs, and employer contributions for

⁶The Board notes that there is no evidence in the record to indicate that any employers signed the March 5, 2010 MOA.

⁷HRS § 89-10 Written agreements; enforceability; cost items, provides in part:

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

health benefits are "cost items" and require approval by all legislative bodies under 89-10(b) before implementation.

We understand there are currently pending before the state legislature and the county councils various measures for approval (or rejection) of Unit 1 cost items. If not please notify legislative leaders of supplemental measures needed to comply with Section 89-10 (b), HRS. We request copies of appropriate measures with in 10 days.

22. On May 19, 2010, the UPW filed a grievance in Case Nos. DMN-10-02, DMN-10-03, DMN-10-04, DMN-10-05, & DMN-10-06 on behalf of Unit 01 employees against the State of Hawaii contending, *inter alia*, that the terms of the unit 01 agreement are multi-employer in nature, have been negotiated pursuant to Section 89-6 (d) HRS, are governed by the provisions of Chapter 89, and are uniformly applicable to all employers requiring compliance with HRS 89-10.

In each of the grievances the UPW asserts that on or about February 22, 2010 Public employers and the UPW who is the authorized representative of unit 01 employees entered into a new agreement covering the period from July 1, 2009 to June 30, 2011; and that the agreement authorized the State of Hawaii to furlough employees from 0 up to 13 days effective January 1, 2010 to June 30, 2010 and 0 up to 24 days effective July 1, 2010 to June 30, 2011 subject to approval of cost items by legislative bodies.

That the agreement was ratified by employees during the week of March 8, 2010 and that the implementation of furloughs is subject to approval of cost items and non-cost items pursuant to HRS Chapter 89-10.

That the State violated the terms of the Unit 1 agreement and Chapter 89 by unilaterally implementing cost items and related non-cost items of the new agreement without prior approval by legislative bodies pursuant to HRS section 89-10.

CONCLUSIONS OF LAW

1. Pursuant to HRS §§ 89-5(i)(4) and 89-14, the Board has exclusive original jurisdiction over any controversy concerning a prohibited practice complaint.

2. The UPW and public employers⁸ are parties to a collective bargaining agreement covering bargaining unit 01 employees covering the period from July 1, 2007 to June 30, 2009.
3. For purposes of negotiating the Unit 01 agreement the public employers are the Governor, the Mayors of each county, the Judiciary and the Hawaii Health systems.
4. The Board finds that the threshold issue in this complaint is whether the parties entered into a binding Agreement to renew or modify the July 1, 2007 - June 30, 2009 Unit 1 CBA and if so what are the terms of that Agreement.
5. The UPW sent letters to all employers on March 17 and March 19, 2010. The letter, dated March 17, 2010, that was generated due to the refusal of the State to sign the March 5, 2010 MOA,⁹ informed all employers absent an agreement on items 1-6 that all employers are requested to cease and desist from implementing furloughs until completion of negotiations on all items. (Emphasis added)
6. The March 17, 2010 letter is followed by a letter dated March 19, 2010 from the UPW informing all employers that blue collar non-supervisory employees in Bargaining Unit 1 ratified the collective bargaining agreement for the period covering July 1, 2009 to June 30, 2011 and instructed all employers to sign the Memorandum of Agreement transmitted by the UPW on March 5, 2010, as required by Section 89-10(a) HRS, and within 10 days of this letter submit cost items to appropriate legislative bodies for their approval (or rejection) as provided in Section 89-10(b) HRS. The UPW reminded employers that in their opinion wages, furloughs, and employer contributions for health benefits are “cost items” and require approval by all legislative bodies under HRS § 89-10(b) before implementation.
7. The Board finds that in order to have a binding CBA, the parties must first arrive at an agreement to renew the existing terms and conditions of a current or expired agreement, agree on any changes or modifications to the agreement, or enter into new agreement.

⁸See footnote 3, *supra*.

⁹By letter dated March 11, 2010, Ladertá informed the UPW that the State was, “not in agreement that the MOA transmitted on March 5, 2010 incorporates all terms and conditions as agreed to by the State and the Union.”

8. Pursuant to HRS § 89-10 the terms and conditions agreed upon by the parties must then be ratified by the membership.
9. The Board finds based on the records, pleadings and arguments made during hearing that there is a question of fact regarding whether negotiations were completed, and if so, what the parties agreed upon and whether what was agreed upon was submitted to the membership for ratification.¹⁰
10. The Board is unable to determine from the record of these proceedings if the parties entered into a valid binding CBA covering the period effective July 1, 2009 to and including June 30, 2011.¹¹
11. The Board finds that there is dispute of facts regarding the parties' intent in entering into the February 22, 2010 MOA. The Board is unable to determine from the record whether the parties intended the MOA to be implemented immediately, was subject to ratification, whether it was part of the ratification process or whether the parties intended to have the MOA made part of a new agreement covering the period of July 1, 2009 to June 30, 2011.
12. 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.
13. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential

¹⁰The Board notes that there is no evidence in the record to indicate that any employers signed the March 5, 2010 MOA; there is no evidence of what was submitted to Unit 01 members for ratification; and other than the February 22, 2010 memorandum on wages and furloughs signed by all parties and the MOA on rules of Negotiations, there is no evidence of a written agreement on other items agreed upon by the parties during negotiations.

¹¹An agreement could be for longer than two year period but must have expiration date of June 30 of an odd-numbered year pursuant to HRS § 89-10(c).

elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997).

14. 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.
15. 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.
16. The Board finds as discussed above that material allegations of fact remain in dispute in this case such that granting Complainant's Motion for Summary Judgment is not proper.

There are questions fact regarding:

- A. Whether there is a collective bargaining agreement between the parties covering the period of July 1, 2009 to June 30, 2011.
 - B. What was agreed upon between the multi employer group and the UPW.
 - C. Whether the March 5, 2010 MOA presented by the UPW to employers for signature was signed by any of the employers.¹²
 - D. Whether the March 5, 2010 MOA presented by the UPW for employers signature contained the same information presented to the union membership for ratification.
 - E. What the parties' intentions were in entering into the February 2010 MOA on Wages and Furloughs.
17. The Board finds that threshold issues that must be resolved are whether the parties have arrived at an agreement over the terms and conditions of a CBA

¹²No evidence was introduced to show that any employer signed the MOA sent by the UPW to all Employers for signature on March 5, 2010 and again on March 19, 2010 when UPW informed all Employers that blue collar non-supervisory employees in Bargaining Unit 01 ratified the collective bargaining agreement covering the period of July 1, 2009 to June 30, 2011.

covering the period from July 1, 2009- June 30, 2011, what are the terms of the agreement, and what was the intent of the parties in entering into the February 2010 MOA on Wages and Furloughs.

18. Accordingly, for these reasons and for the reasons discussed above, the Board denies the UPW's Motion for Summary Judgment.
19. The Board finds that the issue of whether furloughs are a cost item or tied to a cost item which requires submission to the appropriate legislative branch for approval does not arise unless the parties have reached agreement on the terms and conditions of a CBA covering the period from July 1, 2009 to June 30, 2011.
20. The Board finds based on the record, that the issue of whether rule 8 of the rules of negotiations was violated does not arise unless the parties have agreed upon the terms and conditions of an agreement covering the period from July 1, 2009 to June 30, 2011 that was ratified by Unit 1 members.
21. The Board grants the motions to quash or revoke the issuance of the subpoena duces tecum to the extent that the information requested is not relevant to what the Board has determined to be the threshold issues in the complaint, i.e., whether the parties entered into a binding Agreement to renew or modify the July 1, 2007 - June 30, 2009 Unit 1 Agreement, what the terms of the Agreement are, and what was the intent of the parties in agreeing to the February 2010 MOA on Wages and Furloughs.
22. The Board grants Complainant's Motion to consolidate Case Nos. CE-01-754 and CU-01-292 for disposition pursuant to Hawaii Administrative Rules §12-42-8(g)(13). After reviewing these complaints, the Board finds that the complaints involve substantially the same parties, and issues, regarding the Agreement and MOA. The Board also finds 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.
23. The Board defers ruling on UPW's Motion to Dismiss Case No. CU-01-292 until it resolves the issue of whether there is an agreement covering the period of July 1, 2009 to June 30, 2011, what the terms of the agreement are, and what the parties intended when they entered into the February 2010 MOA on Wages and Furloughs.

24. The Board denies Complainant's Motion to dissolve the Board's May 25, 2010 oral order staying proceedings in UPW Unit 01 grievance Case Nos. DMN-10-02, DMN-10-03, DMN-10-04, DMN-10-05, & DMN-10-06.¹³
- A. The Board has exclusive original jurisdiction over any controversy concerning prohibited practice complaints Pursuant to HRS §§ 89-5(i)(4) and 89-14.
 - B. As discussed above, the Board finds that the threshold issues raised in the prohibited practice complaint are:
 - 1. Whether the parties have a CBA covering the period from July 1, 2009 to June 30, 2011 and if so, what are the terms of that agreement.
 - 2. What the parties intended when they entered into the February 2010 MOA on wages on furloughs.
 - C. That the Board and not the arbitrator has exclusive original jurisdiction to decide these threshold issues.¹⁴
 - D. The Board has reviewed the grievances attached to Respondents' motion in opposition to Complainant's motion for summary judgment and finds that the grievances filed seek to redress substantially the same alleged statutory violations as alleged in this prohibited practice complaint and therefore stays those proceeding until an order is issued on the statutory claims in this matter.¹⁵

¹³The Board's ruling does not apply to the Unit 10 grievance proceedings.

¹⁴HRS §§ 89-11(d) and 89-14.

¹⁵The Hawaii Supreme Court has held that "a court which has acquired jurisdiction over a cause retains its power over the same to the exclusion of any court of coordinate jurisdiction until the court renders a final judgment in the case or until the action is terminated by the parties." Jordan v. Hamada, 64 Haw. 446, 448, 643 P.2d 70, 72 (1982). Concurrent disposition of the same issue is disfavored because it "would be wasteful of court time and energy. It would involve the hazard of confusing or unseemly discord between two courts . . . concerning essentially the same controversy. It would encourage the practice of 'forum shopping,' which is inimical to sound judicial administration." Id. (quoting Pacific Gas & Electric Co. v. Federal Power Commission, 253 F.2d 536, 541 (9th Cir. 1958)).

- E. In each of the grievances the UPW asserts that on or about February 22, 2010, Public employers and the UPW who is the authorized representative of Unit 01 employees entered into a new agreement for the period covering the period from July 1, 2009 to June 30, 2011 and that the agreement authorized the State of Hawaii to furlough employees from 0 up to 13 days effective January 1, 2010 to June 30, 2010 and 0 up to 24 days effective July 1, 2010 to June 30, 2011 subject to approval of cost items by legislative bodies .

That the agreement was ratified by employees during the week of March 8, 2010 and the implementation of furloughs is subject to approval of cost items and non cost items pursuant to HRS § 89-10.

That the State violated the terms of the Unit 01 agreement and Chapter 89 by unilaterally implementing cost items and related non-cost items of the new agreement without prior approval by legislative bodies pursuant to HRS § 89-10.

25. The record reflects that Complainant made the same arguments in its motion for interlocutory relief before this Board. Complainant sought to enjoin Respondents and all executive agencies and departments of the State of Hawaii (within their jurisdiction and authority) from implementing any furloughs of bargaining unit 01 employees until such time as all legislative bodies of the State of Hawaii, the County of Kauai, the County of Maui, the County of Hawaii, and the City and County of Honolulu have approved cost items as required by HRS §§ 89-10(a) and (b) for the Unit 01 collective bargaining agreement covering the period from July 1, 2009 to June 30, 2011.
26. The interpretation and application of HRS § 89-10(a) and (b) are clearly within the Board's exclusive jurisdiction and as stated above is not applicable until it can be established that there was an agreement between the parties regarding the terms and conditions of a CBA covering the period from July 1, 2009 to June 30, 2011, that was ratified by the Union membership.
27. In Office of Hawaiian Affairs, et al. v. Housing and Community Development Corp., et al., 117 Hawai'i 174, 211, 177 P.3d 884, 921 (2008), the Hawaii Supreme Court discussed the standards for injunctive relief, and stated:

The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the

issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction.

The Court cited to Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978), and other cases.

A. Likely to Prevail on the Merits

After reviewing the record and the arguments presented, the Board finds that the UPW is not entitled to interlocutory relief at this juncture. For example, the Board is concerned with issues involving whether there is a CBA covering the period from July 1, 2008 to June 30, 2011, what are the terms of that agreement, and what the intentions of the parties were in entering into the February Memorandum of Agreement on wages and furloughs; whether furloughs were tied to cost items, what was ratified by the membership, etc.

Accordingly, the Board concludes that the UPW has not sufficiently demonstrated the likelihood of success on the merits.

B. Balance of Irreparable Damage

With respect to the balance of irreparable harm, should the UPW prevail on the merits against the State, the harm likely to be suffered by the employees is financial and not of such a character that a fair and reasonable redress may not be had following further proceedings, such that to refuse the interlocutory relief would be a denial of justice; such injury can be readily, adequately, and completely compensated for with money. Klausmeyer v. Makaha Valley Farms, Ltd., 41 Haw. 287, 339-40 (1956).

The Board finds that the type of harm that may occur from the furloughs is primarily financial in nature and not irreparable. Monetary injury is not normally considered irreparable. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). Although the reduction in pay may entail more than monetary damages, including emotional distress, the Board finds that the risk of harm involves primarily financial matters for purposes of weighing hardships.

C. Public Interest

With respect to public interest, the Board is mindful of the policies underlying Chapter 89 support joint-decision making over wages and working conditions. At this juncture, because of the unresolved factual questions presented in this case, the Board is unable to conclude that the public interest supports the granting of interlocutory relief at this time against the State.

28. Accordingly, for these reasons and for the reasons discussed above, the Board hereby denies the UPW's Motion for Interlocutory Relief.

ORDER

For the reasons discussed above, the Board denies Complainant's Motion for Interlocutory Relief; Denies Complainant's Motion for Summary Judgment; Grants Complainant's Motion to Strike; Grants Respondent's Motion to Consolidate; Denies Complainant's Motion to Dissolve the Stay of Unit 01 Arbitration Proceedings; Grants the motions to Quash/Revoke Subpoena Duces Tecum to the extent that the information requested is not relevant to the threshold issues in the Complaint before the Board, i.e., whether the parties entered into a binding Agreement to renew or modify the July 1, 2007 - June 30, 2009 Unit 01 Agreement, what the terms of that agreement are, and what the intent of the parties was in entering into the February 2010 MOA on Wages and Furloughs, and defers ruling on UPW's Motion to Dismiss Case No. CU-01-292.

NOTICE OF HEARING

The Board will conduct a hearing on **February 16, 2011 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii to hear testimony and receive evidence on the threshold issues in the prohibited practice complaint, i.e., whether the parties entered into a binding Agreement to renew or modify the July 1, 2007 - June 30, 2009 Unit 01 Agreement, what the terms of that agreement are, and what was the intent of the parties in entering into the February 2010 MOA on Wages and Furloughs.

DATED: Honolulu, Hawaii, _____ January 5, 2011 _____.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. LINDA LINGLE, et al.
CASE NO. CE-01-754
LINDA LINGLE, et al. v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO
CASE NO. CU-01-292
ORDER NO. 2758

ORDER DENYING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF;
DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; GRANTING
COMPLAINANT'S MOTION TO STRIKE; GRANTING STATE RESPONDENTS' MOTION
TO CONSOLIDATE; GRANTING MOTIONS TO REVOKE/QUASH SUBPOENAS DUCES
TECUM; DENYING COMPLAINANT'S MOTION TO DISSOLVE STAY OF UNIT 01
ARBITRATION PROCEEDINGS AND DEFERRING RULING ON UPW'S MOTION TO
DISMISS CASE NO. CU-01-292; AND NOTICE OF HEARING



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

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