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Case No. CE-10-753

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and DR. CHIYOME FUKINO, Director, Department of Health, State of Hawaii; and MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii, Respondents.	CASE NO. CE-10-753 ORDER NO. 3282 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF SUMMARY JUDGMENT IN FAVOR OF COMPLAINANT UNITED PUBLIC WORKERS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF SUMMARY JUDGMENT IN FAVOR OF UNITED PUBLIC WORKERS

For the reasons discussed below, the Hawaii Labor Relations Board (Board) hereby orders summary judgment in favor of Complainant UNITED PUBLIC WORKERS, LOCAL 646, AFL-CIO (Complainant or UPW). Any finding of fact or conclusion of law proposed by a party that is not adopted by the Board below is deemed denied; any finding of fact or conclusion of law proposed by a party that is inconsistent with any finding or conclusion of the Board below is deemed denied. Any finding of fact improperly designated a conclusion of law should be deemed a finding of fact; any conclusion of law improperly designated a finding of fact should be deemed a conclusion of law.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On March 8, 2010, the UPW filed with the Board a Prohibited Practice Complaint (Complaint) against Respondents DR. CHIYOME FUKINO[1] (Respondent Fukino), Director, Department of Health (DOH), State of Hawaii; and MARIE LADERTA (Respondent Laderta), Director, Department of Human Resources Development (DHRD), State of Hawaii, collectively "Respondents."

The Complaint alleged, *inter alia*, that on February 19, 2010, the UPW filed a class grievance in DMN-10-01 (Class Grievance) and requested information, and that Respondents declined to provide any information in response to the request. The Complaint alleged Respondents wilfully interfered, restrained, and coerced employees in the exercise of their statutory rights under Hawaii Revised Statutes (HRS) §§ 89-3 and 89-9(a); failed to bargain in good faith as required by HRS § 89-9(a); and violated the terms of the Unit 10 collective bargaining agreement (Agreement), thereby committing prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8).

On March 23, 2010, the UPW filed a Motion for Summary Judgment, asserting that the UPW is entitled to summary judgment on all claims as alleged in the Complaint; there are undisputed facts that the Respondents failed to provide information needed by the UPW in the grievances; that employers have an obligation to furnish information that is relevant and necessary to the union's role; and that prior decisions and orders of the Board have held the failure to provide information constitutes a breach of the duty to bargain in good faith, and violates HRS § 89-13(a)(5), (7), and (8), and that such violations result in derivative claims of violation of § 89-13(a)(1). The UPW further asserted that it is entitled to appropriate relief including reimbursement of costs and attorneys' fees and fines.

On March 31, 2010, Respondents filed Respondents' Memorandum in Opposition to UPW's Motion for Summary Judgment Filed on March 23, 2010, asserting that the duty to

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[1] Pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 25(d)(1), when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party; proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. Although the Board does not amend the caption in this matter, the Board, pursuant to HRCP Rule 25(d)(1), deems the successor Director of Health and the successor Director of DHRD to be parties in this matter.

supply information is dependent upon the existence of either a valid grievance or negotiable subject; that the furlough schedule is not a mandatory subject of bargaining, and the Class Grievance is a disguised attempt to seek an arbitral ruling that the Respondents violated an interest arbitration award, not the Unit 10 Agreement; that the Department of Health had no duty to provide information not in its possession; and that Respondents' good faith refusal to provide information in connection with an invalid demand for negotiations and invalid grievance cannot be construed as willful.

On April 7, 2010, the Respondents submitted Respondents' Supplemental Submission, consisting of exhibits of documents from circuit court proceeding S.P. No. 09-1-0305 (GWBC), concerning the UPW's motion to confirm and enforce an interest arbitration award.

On April 16, 2010, the UPW submitted its Supplemental Memorandum in Support of Motion for Summary Judgment Filed on March 23, 2010, asserting, *inter alia*, the interest arbitration award stated, in part, "Following issuance of this decision, the Union and Employer shall meet and confer, without undue delay, and draft such language for the 2009 – 2011 Agreement as is necessary and appropriate to give effect to the foregoing awards"; that on February 4, 2010, the employer unilaterally implemented a "furlough schedule" over which the UPW requested negotiations and submitted a request for information; that the UPW filed the Grievance and addressed a request for information to the Director of Health and the Director of DHRD; that the Department of Health provided some information after the filing of the Complaint; that the duty to provide information does not depend upon the merits of a grievance or the validity of a union's position; and that the failure to promptly respond to a request for information constitutes a breach of the duty imposed on the employer.

On April 19, 2010, the Board heard oral arguments on the UPW's Motion for Summary Judgment. At the oral arguments, the Respondents submitted a copy of the Board's Order No. 2541, and the UPW submitted its Exhibit 14, which is a copy of correspondence dated February 19, 2010, from the UPW to the Director of Health. Following the presentation of oral arguments, the Board took the matter under advisement.

On May 24, 2010, the Respondents submitted Respondents' Second Supplemental Submission; and on July 21, 2010, the Respondents submitted Respondents' Supplemental Submission.

On March 21, 2017, the Board issued Order No. 3239, Minute Order Directing Parties to Submit Proposed Findings of Fact, Conclusions of Law, and Order Granting or Denying Complainant's Motion for Summary Judgment. On May 15, 2017, Respondents submitted Respondents' Proposed Findings of Fact, Conclusions of Law, and Order Denying UPW's Motion for Summary Judgment, Filed on March 23, 2010. On May 22, 2017, the UPW filed Union's Proposed Findings of Fact, Conclusions of Law, and Order Granting Union's Motion for Summary Judgment.

The UPW was for all relevant times an employee organization and the exclusive representative, as defined in HRS § 89-2, of the employees in Bargaining Unit (BU) 10, composed of institutional, health, and correctional workers. Respondent Fukino was, for all relevant times, the Director of the DOH, and was a public employer within the meaning of HRS § 89-2. Respondent Laderta was, for all relevant times, the Director DHRD, was a public employer within the meaning of HRS § 89-2; Respondent Laderta was also, for all relevant times, the Chief Negotiator of the Office of Collective Bargaining and thus was a public employer within the meanings of HRS §§ 89-2 and 89-6.

At all times relevant to this matter the UPW and public employers were parties to a collective bargaining agreement covering the employees in BU 10 (Agreement).

The State of Hawaii (and other public employers) and the UPW have negotiated more than seventeen successive collective bargaining agreements setting the wages, hours, and other terms and conditions of employment for bargaining unit employees.

Since the initial agreement, the BU 10 agreements have required public employers to promptly provide information needed by the union to investigate and process grievances. At the time of the Complaint, Section 15.09 of the Agreement stated:

> 15.09 Information.
>
> The Employer shall provide information in the possession of the Employer which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:
>
> > 15.09a. Photocopy and give the material requested the grieving party and/or the union within seven calendar days of the request[.]

On or about January 14, 2010, an interest arbitration award (Award) set the final wages, hours, and other terms and conditions of employment of BU 10 employees for the period from July 1, 2009 to June 30, 2011.

The Award addressed the State deficit through either the State employers' authority to furlough BU 10 employees "zero to a maximum of fourteen days during the period commencing January 1, 2010 and ending 11:59 PM, June 30, 2010" or through temporary pay-rate reductions.

The DOH (other than the Hawaii State Hospital) was covered under "all other state agencies" and for those agencies including the DOH, the interest arbitration panel decided that:

> Any other Agency of the State of Hawaii. . . . shall have authority to furlough Unit 10 employees zero to a maximum of fourteen days during the period commencing January 1, 2010 and ending June 30, 2010 at 11:59 PM. Provided: furloughs shall be allotted as evenly as practicable and shall not be applied discriminatorily or punitively. If the Agency's plan is to distribute furlough days individually, reasonable consideration shall be given to seniority.

The Award decided that the overtime language in the 2007-2009 Agreement would continue unchanged into the 2009-2011 Agreement. All other negotiated provision of the 2007-2009 agreement "except those modified herein or by mutual agreement of the Employer and Unit 10, will be carried forward into the next Agreement."

The "Effective Dates" section of the Award covered the dates July 1, 2009, through June 30, 2011. The second paragraph on "Effective Dates" stated: "Following issuance of this decision, the Union and Employer shall meet and confer, without undue delay, and draft such language for the 2009 – 2011 Agreement as is necessary and appropriate to give effect to the foregoing awards" (emphasis added). The union-appointed arbitrator concurred with this second paragraph; employer-appointed arbitrator did not concur with this second paragraph.

On January 22, 2010, the UPW sent to Respondent Laderta, Chief Negotiator of the Office of Collective Bargaining, a request that the State meet and confer to draft and finalize the terms of the BU 10 2009 –2011 Agreement. By letter dated January 25, 2010, Respondent Laderta replied in relevant part, "[r]egarding the 'meet and confer' language in the award, we are not aware of any provisions in the collective bargaining agreement that need to be revised in order to implement/give effect to the award." Respondent Laderta gave no indication of willingness to meet and confer.

On February 4, 2010, DHRD sent to the UPW a copy of the Furlough Plan and the furlough schedule for DOH BU 10 employees subject to furlough.

On February 10, 2010, the UPW sent to Respondent Laderta a request that the State negotiate the terms and conditions for furloughs proposed and transmitted on February 4, 2010, for employees of DOH. The request further asserted that, "while furloughs were addressed in the January 10, 2010 decision and award by arbitrator Dworkin, Uwaine, and Shiraki, it provides that 'furloughs shall be allotted evenly as practicable and shall not be applied discriminatorily or punitively.' The February 4, 2010 proposed plan is discriminatory, punitive, and uneven. The DOH plan which deviates from furlough days for HGEA is contrary to the award." The request also sought the following information:

1. Please identify the names of all bargaining 10 employees in the department of health effective January 10, 2010 and thereafter, and with respect to each and every employee provide the following:

    a. Name:
    b. Position:
    c. Date of Hire:
    d. Current hourly rate of pay:
    e. Current monthly rate of pay:
    f. Currently annual rate of pay:
    g. Date the employee is paid, i.e., the date checks are issued to the employee, from January 1, 2010 to June 30, 2010:
    h. Planned Furlough days from February 5, 2010 to June 30, 2010 for the employee and the total number of furlough days.
    i. Planned furlough days from February 5, 2010 to June 30, 2010 for HGEA represented employees and indicate the total number of furlough days.
    j. Please indicate the pay date for each employee from February 5, 2010 to June 30, 2010.
    k. Source of funding to pay employees and if special fund please indicate what type of special fund and the statutory basis.

2. Please provide a detailed account of how the State of Hawaii formulated and calculated the 14.36% adjustment for each pay period as referred to in the February 4, 2010 letter, and including the following:

    a. Total amount of anticipated pay from January 1, 2010 to June 30, 2010

b. From February 5, 2010 to June 30, 2010.

3. Please provide a detailed account of how the State of Hawaii formulated and calculated the 9.23% adjustment for each pay period as referred to in the February 4, 2010 letter.

4. Please indicate the amount of pay adjustment for HGEA represented employees on furlough for each pay period from January 1, 2010 to June 30, 2010 and from July 1, 2010 to June 30, 2011 in dollar and percentage terms:

a. For unit 2 employees
b. For unit 3 employees
c. For unit 4 employees
d. For unit 6 employees
e. For unit 8 employees
f. For unit 9 employees
g. For unit 13 employees.

5. Please indicate the actual dollar amount of loss time pay for each employee identified in response to item 1 above assuming they are furloughed on the following dates, and indicate the dates when the loss pay will be indicated in the pay checks issued after the date of each furlough:

a. February 5, 2010
b. February 12, 2010
c. March 5, 2010
d. March 12, 2010
e. March 19, 2010
f. April 9, 2010
g. April 23, 2010
h. April 30, 2010
i. May 7, 2010
j. May l4, 2010
k. May 2l, 2010
1. June 4, 2010
m. June 18, 2010
n. June 25, 2010

6. Please provide the total amount of loss time pay for each employee identified in response to items 1 for 14 days of furloughs for the dates indicated in item 4.

7. Please provide a true and accurate copy of the State of Hawaii furlough plan established or negotiated with HGEA for bargaining units 2, 3, 4, 6, 8, 9, and 13.

8. Please provide a true and accurate copy of any and all documents used, considered, or reviewed in formulating the following provisions of the State's furlough plan:

a. Paragraph 1 (implemented regardless of source of funding).
b. Paragraph 2a (14.3 6% and 9.23% adjustments)
c. Paragraph 2b (affected pay periods)
d. Paragraph 3 (Department head discretion to select furlough dates)
e. Paragraph 4 (pay reduction regardless if furlough taken in the pay period)
f. Paragraph 5a (makeup days at department discretion)
g. Paragraph 5b (make up days taken in same fiscal year)
h. Paragraph 6 (no credited back-pay for accrued furlough days not taken)
i. Paragraph 7 (employees working other than normal 8-hr workday may paid leave time to make up difference between 8-hr furlough day and actual hours employee scheduled to work or revert to normal 8-hr workday on weeks with furlough days)
j. Paragraph 7 (the example) (employee scheduled to work 10-hr on furlough Friday required to charge 2 hrs of vacation or compensatory time off or work 2 hrs more)
k. Paragraph 8 (no substitution for furlough day)
1. Paragraph 9 (any supplemental pay benefits (i.e., sick leave or vacation) adjusted for employees on workers' compensation)
m. Paragraph 10 (furlough hours not counted in calculating eligibility for overtime)
n. Paragraph 11a (no break in service from furloughs)
o. Paragraph 11b (no decrease in employer EUTF contribution from furlough)
p. Paragraph 11c (no change in amount of vacation and sick leave earned)
q. Paragraph 11d (no decrease in length of service for ERS and deferred plans)
r. Paragraph 11e (no change in classification of employee's position)
s. Paragraph 11f (no change in employee's salary range)
t. Paragraph 12 (salary scheduling effect on June 30, 2009 to remain in effect until June 30, 2011)
u. The February 2, 2010 memorandum from Rita Hoopii-Hall.
v. The calendar for February 10, 2010 through June 2010.

9. Please identify the names, positions, and roles of all individuals who drafted and prepared the State of Hawaii Furlough Plan (UPW Bargaining Unit 10) and any other furlough plan of the State of Hawaii.

10. Please indicate when the Department of Health received initial word of the unit 10 arbitration decision and award.

11. Please indicate when the Department to [sic] Health received the January 10, 2010 arbitration decision and award.

On February 11, 2010, the State indicated that it did "not agree to negotiate the terms and conditions of the plan" and did not agree to cease and desist from implementing the plan; the State further asserted that the furlough days were within the parameters set forth in the Award, and that there is nothing discriminatory or punitive about the furlough plan. The State's letter concluded with, "Based upon the fact that this matter is not subject to negotiation, we will not provide the information in your letter."

On February 19, 2010, the UPW filed with Respondent Fukino a class action grievance in UPW case number DMN-10-0l. The grievance alleged, in relevant part, that:

* * *

f. The January 14, 2010 award requires the State of Hawaii (and other employers) to meet and confer without undue delay, and draft such language for the 2009-2011 agreement as is necessary and appropriate to give effect to the terms of the award.

g. On January 22, 2010, the UPW requested the State of Hawaii to meet and confer, draft and finalize the July 1, 2009 to June 30, 2019 unit 10 collective bargaining agreement.

h. On January 25, 2010 the State of Hawaii declined to meet and confer as requested by the UPW, and instead on February 4, 2010 unilateral [sic] announced a furlough plan applicable to unit 10 employees in the Department of Health.

i. The furlough plan announced on February 4, 2010 unilaterally changes existing wages, hours, and other terms and conditions of employment as set forth in the January 14, 2010 arbitration award and the renewed terms of the unit 10 collective bargaining agreement for the period from July 1, 2009 to June 30, 2011.

The grievance alleged that the employer violated the following sections of the BU 10 Agreement:

> Section 1 – By failing and refusing to meet and confer as ordered by the arbitrators, negotiate, and/or obtain mutual consent over changes to existing terms of the unit 10 agreement . . . [.]
>
> Section 3 – By discriminating against employees because of lawful union activity including filing suit on the furlough action and grievances contesting the employer's layoffs and other adverse actions.
>
> Section 14 – By abridging, amending and waiving rights and benefits covered by constitutions and statutes which are prior rights enjoyed by bargaining unit 10 employees.

By letter dated February 19, 2010, the UPW submitted a request for information to Respondent Fukino, the Director of DOH. The letter stated the UPW "requests the following information needed by the union to investigate and process the grievance in UPW Case No DMN-10-01, and consisted of 12 items. Items 1-10 were identical to the information request of February 10, 2010, sent to Respondent Laderta. The new items 11 and 12 that were requested from the DOH were:

> 11. Please indicate when the Department to Health received the preliminary draft decision and award of Jonathan Dworkin.
>
> 12. A true and accurate copy of the posted work schedules for bargaining unit 10 employees of the Department of Health in effect for the period from January 1, 2010 and thereafter.

The request also stated, "Please transmit full and complete responses within 7 calendar days of the date of this request as required by Section 15.09 of the unit 10 collective bargaining agreement"; and further stated, "To the extent the requested information is more readily available to Marie Laderta of the Department of Human Resources Development (DHRD), we are sending her a copy of this letter. Please confer with DHRD to obtain the necessary information so timely responses are made." The letter indicates that Respondent Laderta was copied.

By letter dated March 4, 2010, the UPW informed Respondent Laderta of its desire to proceed to Step 2 of the grievance procedure, as the "employer failed to respond at Step-1 of the grievance procedure." The BU 10 Agreement provides in section 15.06 that "[i]n the event the

Employer fails to respond within the time limits of any step of section 15, the grievance may be appealed to the next step." Section 15.12 further provides that the decision of the department head or designee "shall be in writing and shall be transmitted to the grieving party and/or the Union within thirteen (13) calendar days after receipt of the grievance.

By letter dated March 11, 2010, DOH responded to the grievance DMN-10-01 and the February 19, 2010 request for information as follows, in relevant part:

> The matter that has been brought forth in this grievance has already been arbitrated and implantation of an arbitration decision does not require consultation.
>
> The furlough plan is consistent with the interest arbitration decision that was issued on January 14, 2010 by Arbitrator Dworkin and is within the parameters set forth in that decision.
>
> Additionally, based on the fact that this matter is not subject to negotiations, we will not be providing the information requested in your February 19, 2010 letter.

Also by letter dated March 11, 2010, the UPW notified Respondent Laderta of DHRD that the UPW was submitting the grievance to arbitration. By letter dated March 15, 2010, DHRD acknowledged receipt of the notice to arbitrate.

No response to the UPW's information request was provided by Respondents until March 18, 2010. By letter dated March 18, 2010, the DOH provided partial responses to the UPW's February 19, 2010 request for information, and responded to the remaining requests with "Documents to be provided by the DHRD/Labor Relations."

The Board held a prehearing conference on April 9, 2010, during which the UPW indicated it may have received all of the documents responsive to its request at that time, but that UPW's representative had not had a chance to look at them yet. Subsequently, the UPW noted that the April 6, 2010 response from DHRD did not specifically respond to portions of items 5 and 6; 8a to 8t; and 9.

The Board finds that the information requested as part of DMN-10-01 was reasonable and necessary to assist the UPW in determining the merits of DMN-10-01, and to assess if the DOH's furloughs were either discriminatory or punitive such that furloughs would violate the interest arbitration award.

With respect to prohibited practices, in order to establish that a prohibited practice was committed, a "conscious, knowing, and deliberate intent to violate the provisions of HRS

Chapter 89 must be proven." HGEA v. Casupang, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (*citing* Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983).

The Board finds that Respondents failed to provide a timely response in full to the UPW's request for information in connection with the processing of a grievance, and Respondents did provide extenuating circumstances for their failure to so respond. Although the DOH provided the explanation, "based on the fact that this matter is not subject to negotiations, we will not be providing the information requested in your February 19, 2010 letter[,]" the Board does not find such explanation sufficient in this particular case to excuse compliance with the obligation to provide information necessary for the processing of a grievance; moreover, such explanation was not provided until the seven calendar day period to respond to an information request had passed, and after the grievance had been processed by the UPW to step 2 of the grievance procedure. Furthermore, when responses were provided by Respondents, the responses were untimely and incomplete, without sufficient justification provided for the untimeliness and incompleteness. Therefore, the Board finds in this matter that Respondents' conduct in providing untimely and incomplete responses to the UPW's information request to be with conscious, knowing, or deliberate intent or disregard of their obligation under the CBA and HRS chapter 89, and thus wilfull.

Accordingly, the Board finds Respondents committed prohibited practices under HRS § 89-13(a)(1), (5), (7), and (8).

DISCUSSION AND CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaint pursuant to HRS §§ 89-5 and 89-14. The Board finds and concludes that this matter is not moot, or, that an exception to mootness applies. 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). However, the Hawaii Supreme Court has recognized an exception to the mootness doctrine in cases involving questions that affect public interest and are capable of repetition yet evading review. Diamond v. State of Hawaii, BLNR, 112 Hawai'i 161, 145 P.3d 704 (2006). This Board has previously held that an information request from an exclusive

representative related to a dispute involving public employees and collective bargaining work was a matter affecting public interest, and that the refusal to provide information was capable of repetition yet would evade review if the information was subsequently provided before the Board could rule. See Board Order No. 2825, in Board Case No. CE-05-783, HSTA and Halau Lokahi Charter School, et al..

The Board's administrative rules, contained in Hawaii Administrative Rules (HAR) Title 12, chapter 42, permit parties to file motions during hearing or otherwise, and including dispositive motions such as motions to dismiss a case (see HAR § 12-42-8(g)(3)). Any motion made other than during a hearing shall be accompanied by affidavits or memoranda setting forth the grounds upon which they are based. HAR § 12-42-8(g)(3)(C)(i). Here, Complainant filed a motion for summary judgment, and set forth the summary judgment standards used by the Hawaii courts.[2] Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Gonsalves v. Nisssan Motor Corp. in Hawaii, Ltd., 100 Hawaii 149, 166, 58 P.3d 1196, 1213 (2002); State of Hawaii Organization of Police Officers (SHOPO) v. Society of Prof'l Journalists – Univ. of Hawaii Chapter, 83 Hawaii 378, 927 P.2d 386 (1996). Judgment may be granted where the facts are undisputed or are susceptible of only one reasonable interpretation. De Los Santos v. State, 65 Haw. 608, 610, 655 P.2d 869, 871 (1982). The Board has also previously articulated the standard that 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. 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. A non-movant . . . must produce evidence which would be

[2] The Board's own rules do not provide a specific standard for motions for summary judgment. However, historically, the Board has relied upon the Hawaii Rules of Civil Procedure (HRRP) to assist in resolving ambiguities in the Board's rules (see, e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association and Benjamin Cayetano, et al., Order No. 1903, Case No. CE-13-368.

admissible at trial to make out the requisite issue of material fact. Tri-S Corp. v. Western World Ins. Co., 110 Hawaii 473, 494, 135 P.3d 82, 103 (2006).

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[.]

In interpreting HRS chapter 89, the Board has historically looked toward analogous federal law as "instructive." Hawaii State Teachers Ass'n. v. Hawaii Public Employees Relations Bd., 60 Haw. 361, 365, 590 P.2d 993, 996 (1979); Univ. of Hawaii Professional Assembly v. Tomasu, 79 Hawai'i 154, 159, 160-61, 900 P.2d. 161, 166, 167-68 (1995); Aio v. Hamada, 66 Haw. 401, 408, 664 P.2d 727, 732 (1983); Poe v. Hawaii Labor Relations Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004).

With respect to HRS § 89-13(a)(1) and (5), as a general rule, an employer must provide a union with relevant information necessary for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 567-68 (1967). The failure to provide relevant information may support a finding of a failure to bargain in good faith. In Acme Industrial Co., the United States Supreme Court enforced a decision of the National Labor Relations Board that an employer violated the duty to bargain by refusing to furnish requested information that would allow a union to decide whether or not to process a grievance to arbitration. (See also, Timken Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963); Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712 (D.C. Cir., 1981)). Furthermore, the Board has previously

held, such as in Order No. 2699, Board Case No. CE-10-746, UPW and Elizabeth Char, et al., that a respondent's wilfull failure to provide information during a grievance constituted a prohibited practice pursuant to HRS § 89-13(a)(1) ("As a result of the lack of response to the UPW's request for information, Respondents' actions also unduly delayed, and thus interfered with, the UPW's representation of its members in the arbitration stage of the grievance process"). Here, the Board concludes that the failure to respond to the UPW's information requests interfered with the UPW's representation of its members in processing the grievance. In Acme Industrial Co., the Court noted that "Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. . . . respondent's restrictive view would . . . force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim." 385 U.S. at 438, 87 S. Ct. at 569.

Accordingly, the Board concludes that Respondents committed a prohibited practice pursuant to HRS § 89-13(a)(1) and (5).

HRS § 89-11(g) governs decisions of an interest arbitration panel, and provides in part that "[t]he parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement." Here, the arbitration award required the parties to meet and confer following its issuance, without undue delay, to draft such language for the 2009 – 2011 Agreement as is necessary and appropriate to give effect to the awards. By refusing to meet and confer, and refusing to provide requested information to the UPW that is related thereto, Respondents have wilfully violated § 89-11(g), and thus committed a prohibited practice pursuant to § 89-13(a)(7). The Board notes that, alternatively, a violation of § 89-11 may more appropriately be deemed a prohibited practice pursuant to § 89-13(a)(6)(refusal to participate in good faith in the mediation and arbitration procedures set forth in § 89-11); however, as the Board's ultimate holding in this matter and the remedies ordered below would not change whether the Board finds a prohibited practice pursuant to § 89-13(a)(6) rather than 89-13(a)(7), the Board merely notes this in dicta.

Since the initial agreement, the BU 10 agreements have required public employers to promptly provide information needed by the union to investigate and process grievances. At the time of the Complaint, Section 15.09 of the Agreement stated:

15.09 Information.

> The Employer shall provide information in the possession of the Employer which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:
>
> > 15.09a. Photocopy and give the material requested the grieving party and/or the union within seven calendar days of the request[.]

Here, the Board concludes that Respondents' actions constituted a wilfull breach of the CBA, and thus a prohibited practice pursuant to HRS § 89-13(a)(8). The Board does not require deferral to the arbitration process where, as here, the employer has interfered with the union's ability to fairly process the grievance. See Order No. 2699, *supra.*

Previously, in Board Order No. 2632 (dated August 26, 2009), in Board Case Nos. CE-01-711a and CE-10-711b, UPW and Marie Laderta, the Board held that the Director of DHRD committed a prohibited practice pursuant to HRS § 89-13(a)(8) by wilfully failing to provide information requested by the UPW in connection with class grievances, based upon the same reasons the employer provided for denying the grievances themselves in that matter (the furlough were not subject to negotiations, the grievances were premature, and if there were no new contracts negotiated after June 20, 2009, there would be no provision in the contract which to grieve). However, the Board in that case noted that the determination of arbitrability of the grievances was reserved for the arbitrator. The Board finds and concludes that the violation found in Order No. 2632 is similar enough to the present case that the Board finds a repeat prohibited practice here.

HRS § 377-9(d)[3] provides in relevant part (emphases added):

> 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 affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay with interest, **costs, and attorneys' fees**. 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. Furthermore, an employer or employee who wilfully or repeatedly commits unfair or prohibited practices

[3] HRS § 399-7 is made applicable to prohibited practice proceedings by HRS § 89-14, "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[.]"

> that interfere with the statutory rights of an employer or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a **civil penalty** not to exceed $10,000 for each violation. **In determining the amount of any penalty, under this section, the board shall consider the gravity of the unfair or prohibited practice and the impact of the practice on the charging party, on other persons seeking to exercise rights guaranteed by this section or on public interest.**

In the present case, the Board finds and concludes that the remedies award should include costs and attorney's fees for the UPW, and a civil penalty. As noted above, this is not the first time that DHRD has been found to have committed a prohibited practice for refusing to provide information requested in connection with a class grievance in a timely manner. Board Order No. 2632 was issued more than seven months prior to the prohibited practices in the present case, and thus the employer should have been "on notice." Furthermore, interest arbitration awards are in the public interest, as they are used to resolve collective bargaining impasses by determining the actual contract terms that will bind the parties during the life of the new collective bargaining agreement (State v. Nakanelua, 132 Hawai'i 492, 497, 323 P.3d 136, 141 (App. 2014), *affirmed and clarified by 134 Hawai'i 489, 345 P.3d 155 (2015)* (citing Charles B. Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C.L. Rev. 557, 558 n.8 (1980))). The amount of penalty is based upon the repeat prohibited practice pursuant to HRS § 89-13(a)(8), and Respondents' refusal to meet and confer as required by the interest arbitration award, which is a matter within the public's interest.

Accordingly, and for the reasons discussed above, the Board hereby orders summary judgment in favor of the UPW, and further orders the following as a remedy:

1. Respondents shall cease and desist from failing or refusing to provide information requested by the Union necessary for the processing of grievances within the time limits provided under relevant contract provisions even where the grievance arises related to the enforcement of the terms of that award, and absent extenuating circumstances.

2. Respondents shall collectively pay a penalty in the amount of **$10,000**, payable to the Director of Finance.

3. Respondents shall pay the UPW's reasonable attorneys' fees and costs incurred in CE-10-753. The UPW shall submit a request for payment to the Board, with service upon all parties that includes sufficient detail of the

amount and reason for fees and costs incurred, for a determination by the Board of "reasonableness." The UPW's request shall be submitted to the Board no later than **ten days** following issuance of this Order. If Respondents dispute any requested fee or cost, Respondents shall submit their objection to the Board, with service on all parties, no later than **five days** after the filing of the UPW's request. Thereafter, the Board will issue an order in this matter solely regarding fees and costs; however, hereafter, this case shall be deemed "closed" for all other purposes, with the exception of a determination of reasonable fees and costs.

4. Respondents shall immediately post copies of this Decision on their respective websites and in conspicuous places at the work sites where employees of Unit 10 assemble, and leave such copies posted for a period of **60 days** form the initial date of posting.

5. Respondents shall notify the Board, with service on all parties, of steps taken to comply with the Board's order no later than **30 days** from date of this order.

DATED: Honolulu, Hawaii, August 8, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copy:

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