

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

| | | |
|---|---|-------------------------------|
| In the Matter of |) | CASE NO. CE-01-465 |
| |) | |
| UNITED PUBLIC WORKERS, AFSCME, |) | DECISION NO. 433 |
| LOCAL 646, AFL-CIO, |) | |
| |) | FINDINGS OF FACT, CONCLUSIONS |
| Complainant, |) | OF LAW, AND ORDER |
| |) | |
| and |) | |
| |) | |
| JEREMY HARRIS, Mayor, City and County |) | |
| of Honolulu; CHERYL OKUMA-SEPE, |) | |
| Director, Department of Human Resources, |) | |
| City and County of Honolulu; and FRANK |) | |
| DOYLE, Refuse Collection and Disposal |) | |
| Division Chief, Department of Environmental |) | |
| Services, City and County of Honolulu, |) | |
| |) | |
| Respondents. |) | |
| <hr/> | | |

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On February 5, 2001 the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against JEREMY HARRIS (HARRIS), Mayor, City and County of Honolulu; CHERYL OKUMA-SEPE (OKUMA-SEPE), Director, Department of Human Resources, City and County of Honolulu; and FRANK DOYLE (DOYLE), Refuse Collection and Disposal Division Chief, Department of Environmental Services, City and County of Honolulu (collectively City, Respondents or Employer) for violations of Hawaii Revised Statutes (HRS) ' ' 89-13(a)(1), (5), (7), and (8), relating to route selection and transfers from a master pool in the refuse division on Oahu.

At a prehearing conference held on March 12, 2001, the parties agreed to resolve the dispute over route selection and address the master pool issue in mediation. The parties further agreed that if mediation did not resolve the master pool issue, cross-motions for summary judgment would be filed no later than April 19, 2001. The UPW filed its Cross-Motion for Summary Judgment on April 18, 2001. On April 18, 2001, Respondents filed a Motion for Extension of Deadline for Cross-Motions for Summary Judgment and a Memorandum in Opposition To Complainant=s Cross-Motion for Summary Judgment on April 30, 2001. The Board denied Respondents= motion for an extension of the deadline for filing Cross-Motions for Summary Judgment on May 2, 2001 and on July 19, 2001 the Board granted, in part (relating to route selection) and denied, in part (relating to transfers from a master pool) the UPW=s Cross-Motion for Summary Judgment in Order No. 2020.

Thereafter on September 10, 2001 the UPW filed a motion to amend the prohibited practice complaint to incorporate additional allegations of prohibited practices committed by Respondents, including an alleged failure to mediate a pending dispute over master pool and privatization, and the removal and placement of ten (10) employees from the Pearl City baseyard to the Honolulu baseyard. The motion was granted by the Board on September 26, 2001, and an amended prohibited practice complaint was filed by the UPW on the same day.

On October 3, 2001, the UPW filed motions for summary judgment and interlocutory relief with the Board. After hearing, the Board denied the UPW=s motion for summary judgment in Order No. 2045 issued on November 6, 2001.

The parties identified the issues in this case in prehearing statements filed on November 13, 2001 and November 21, 2001, respectively.

The Board conducted hearings on the merits of this complaint on November 28, 2001, November 29, 2001, December 3, 2001, December 4, 2001, December 10, 2001, and December 11, 2001. The parties were represented by counsel and afforded full opportunity to present evidence and argument to the Board. The parties thereafter filed post-hearing briefs with the Board on January 29, 2002.

Based on a thorough review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The UPW was at all relevant times an employee organization within the meaning of HRS ' 89-2 and the exclusive representative of employees included in Unit 01 (blue-collar nonsupervisory employees).
2. HARRIS is the Mayor of the City and County of Honolulu, and at all relevant times a public employer within the meaning of HRS ' 89-2.
3. OKUMA-SEPE is the Director of Human Resources of the City and County of Honolulu and is a representative of the Mayor and deemed to be a public employer within the meaning of HRS ' 89-2.
4. DOYLE is the Deputy Director of the Department of Environmental Services, City and County of Honolulu, and as a representative of the Mayor is deemed to be a public employer within the meaning of HRS ' 89-2.

5. The UPW was certified as the exclusive bargaining representative of blue collar non-supervisory employees in Unit 01 on October 20, 1971.
6. Since on or about July 1, 1972 the UPW and the City and County of Honolulu have been parties to 13 successive multi-employer collective bargaining agreements covering Unit 01 employees.
7. At all relevant times, the Unit 01 agreement has remained in full force and effect.
8. Historically, refuse collection on Oahu has been governed by the Unit 01 agreement and where applicable, the “Uku Pau Policies and Practices for Refuse Collection” dated December 13, 1973, specifically incorporated by reference into the Unit 01 agreements since 1989.
9. Refuse collection in the City and County of Honolulu is performed by equipment operators, refuse crew leaders, and refuse collectors assigned to the Honolulu, Kapaa, Pearl City, Wahiawa, Waialua, Laie, and Waianae baseyards under what is referred to as an “uku pau” system.
10. “Uku pau” pre-dates collective bargaining by at least several decades in Maui, Kauai, and Oahu. Its history and essential elements have been aptly described by Arbitrator Ted Tsukiyama in a 1986 arbitration decision and award in a dispute over changes to refuse collection routes on Maui.

The “taskwork” (uku pau) system has been in existence prior to the first collective bargaining agreement between the parties. “Uku pau” is a colloquialism for the piece work contract work system under the refuse collection operations where a certain quantum of work is determined and designated as the equivalent of an 8-hour day’s work, which can be completed at the will and pace of each work crew. We are indeed indebted to the Union’s Post-Hearing Brief (p. 2) for its interpretation of the word and meaning of “uku pau”, that is, in the Hawaiian language the word “uku” means “flea” and “pau” means “finish or complete”, thus to “uku pau” means “to jump around like a flea to quickly finish the work.” The “uku pau” systems differ in each county in which the applicable work unit may be measured by poundage as in Honolulu, by housing units as in Kauai, or by route as is the case in the County of Maui. Each county (except County of Hawaii) has formulated and adopted an “uku pau” agreement in writing with the Union.

Union Exhibit (Ex.) 29-4.

11. The basic work unit of the “uku pau” system is a refuse crew which is assigned to a specific route with a designated number and pre-determined “task.” At one time the refuse crews consisted of five members including a crew leader (driver) and collectors who worked on an open “fence truck.” In the 1960=s, with the advent of the rear end loader and compactor, these manual crews were reduced in size to three members consisting of one crew leader (driver) and two collectors. It is estimated that there were more than 85 basic “manual” crews on Oahu engaged in refuse collection operations. All refuse crews worked at their own pace, were free to leave upon the completion of their work task, and were not subject to the eight-hour work day which applied to other civil servants.
12. When the initial Unit 01 agreement was negotiated in 1972 the multi-employer group and UPW recognized the pre-existing task work (“uku pau”) system in Section 51.02, and its essential principle of “uku pau” pay and compensation in Section 51.03. In Sections 51.01 and 51.04 they further agreed that the Unit 01 agreement would not “abolish” or “modify” existing task work policies in the various counties, and that any changes to those policies would be left to negotiations by the Union with the individual counties. In Section 51.05, violations of the task work policies were made grievable.
13. In 1973 the policies and procedures applicable to “uku pau” on Oahu were consolidated into a single document entitled “Policies and Procedures on Task Work for Refuse Collection” and agreed to by representatives of the City and the UPW. There have been no changes to these task work policies and procedures for the City and County of Honolulu since 1973. The task work policies and procedures provide for a 24,000 pound work standard for the establishment and annual adjustment of all refuse routes under Sections 11a and b; the annual selection of all routes and assignments in order of “seniority” under Section 7; the assignment of overtime work in Section 5 with first preference afforded current route team members with subsequent assignment by seniority; temporary assignments in Section 12 by seniority; and “uku pau” pay and other compensation in Section 10.
14. Section 11 of the Policy establishes the 24,000 pound work standard for manual route collection. Subsection 11-H provides:

There will be no layoffs, transfers out of yards or Division, or change in pay status as a result of initiating this route policy; however, subsequent change may be made pursuant to applicable rules and policies.

Union Ex. 28-15.

15. For manual refuse crews, routes are established which approximate the 24,000 pound standard established in the “uku pau” agreement. At an annual route selection, crew chiefs select their preferred routes. Selection is made in order of refuse division seniority. Crew members similarly select their routes in order of division seniority. Collectors and Crew chiefs who are not able to select routes are assigned to a baseyard master pool or foreman=s pool from which they are assigned, again by order of seniority, to substitute duty or other baseyard tasks. Crews having been established, are free to work at their own pace to complete their self-assigned routes. The conclusion of the route equals conclusion of the equivalent of an eight-hour workday. This usually requires less than eight hours. Seniority-based route selection thus determines effective hourly wages, work assignments and crews.
16. Overtime and temporary assignments are similarly seniority-based. Opportunities are first provided to the senior crew chief or members on a route. They are subsequently made available, in order of division seniority, to other members of the baseyard.
17. Soon after Policy 11-H was adopted in 1973 refuse managers attempted to involuntarily transfer two employees (James Soloman and Melvin Kato) from the Honolulu baseyard to Pearl City or Nanakuli. The employees were threatened with disciplinary actions and a work stoppage ensued. The job action prompted meetings with “management” to resolve the dispute, and there have been no involuntary transfers between baseyards ever since. All City officials who have been called to testify during these proceedings have confirmed the absence of any involuntary transfers between refuse baseyards since the 1973 attempt.
18. On or about July 1, 1991 the parties to the “Uku Pau Policies and Practices for Refuse Collection” agreed to a demonstration project for the implementation of the automated refuse collection operation on Oahu. The demonstration project was extended by agreement on May 19, 1993.
19. On or about June 1, 1994 the UPW and the City and County of Honolulu implemented phase 1 of the automated refuse collection operation on Oahu by entering into a Memorandum of Agreement pursuant to Section 1.05 of the Unit 01 agreement.
20. Automated refuse collection was fully implemented on Oahu in seven phases pursuant to memoranda of agreement entered on August 12, 1995, March 14, 1996, September 26, 1997, March 2, 1998, and May 5, 1999.

21. Section 1.05 of the initial Unit 01 agreement in 1972 provides in relevant portions:

No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent. (Emphasis added).

Union Ex. 6-2. The foregoing language has remained unchanged over 13 successive terms of the Unit 01 agreement. Union Exs. 7-2, 8-2, 9-2, 10-2, 11-2, 12-2, 13-3, 14-3, 15-3, 16-3, 17-2, and 18-1.

22. Each and every stage of the automated refuse collection operation and the wages, hours, and other terms and conditions of employment of Unit 01 employees involved in the said operation have been negotiated and resolved by mutual consent under Section 1.05 of the Unit 01 agreement.
23. No change in wages, hours, and other terms and conditions of employment of those engaged in the manual and automated refuse collection operation is permissible without “mutual consent” under Section 1.05 of the Unit 01 agreement.
24. Section “u” of the March 2, 1998 Memorandum of Agreement on Automated Refuse Collection Operation (ARCO MOA) states:

Modification to this Memorandum of Agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 1 Agreement.

Union Ex. 45-10.

25. Section “k” of the March 2, 1998 ARCO MOA provides for the selection of Refuse Collection Equipment Operators (automated refuse collection drivers) on the basis of route assignment and baseyard seniority. Union Ex. 45-5.
26. Section “b” of the March 2, 1998 ARCO MOA provides as follows:

The implementation of the fifth, sixth, and seventh phases shall not cause any employee to be placed or removed from the Refuse Division.

Union Ex. 45-1.

27. On or about November 13, 1999 representatives of the UPW and the City and County of Honolulu met to negotiate over various changes to the March 2, 1998 ARCO MOA.
28. City officials in said meeting proposed that the March 2, 1998 ARCO MOA be amended to establish a refuse division master pool to resolve the problem of excess staffing in the Pearl City baseyard that resulted from the implementation of automated refuse collection and the reduction of manual routes on Oahu from 85 to 15.
29. On or about January 21, 2000, the City transmitted a written Master Pool proposal to the UPW.
30. On or about February 24, 2000, the UPW expressed its objection to a provision in the City=s master pool proposal which would have required employees not assigned to the master pool to work an eight-hour day.
31. On or about June 19, 2000, the City informed the Union that excess employees in manual crews would be involuntarily transferred from Pearl City to the Honolulu baseyard. The Union objected to the plan and threatened legal action. The City resorted to hiring temporary workers to remedy the shortage of staff for manual routes and reduce overtime costs at the Honolulu baseyard.
32. On or around November 13, 2000, the City received a Master Pool agreement counterproposal from the UPW. Revised counterproposals were subsequently transmitted to the City on November 30 and December 1, 2000.
33. On December 5, 2000, the City faxed a copy of UPW=s last counterproposal with handwritten notations to the UPW. The fax cover sheet contained the following:

...these are minor changes as we have reached agreement on the major issues. If okay, please send final document for signature.

Employer Ex. H.

34. On or around December 13, 2000, the UPW suspended negotiations on the master pool issue because of the City=s alleged failure to resolve pending lawsuits regarding the privatization of refuse collection and because of the City=s alleged attempts to undermine then occurring Unit 01 negotiations by seeking to have refuse workers declared essential employees in the event of a Unit 01 strike. The UPW alleged that these actions were a clear indication of bad faith.

35. On December 14, 2000 the UPW advised City officials that it expected full compliance with the March 2, 1998 ARCO MOA, which required route selection to be completed by no later than February 1, 2001.
36. On January 29, 2001 Respondents announced their intent to unilaterally implement changes to the March 2, 1998 ARCO MOA in connection with the “the Refuse Division Master Pool,” without the mutual consent of UPW.
37. On February 1, 2001 the UPW requested that Respondents cease and desist from their unilateral course of conduct and to proceed with route selection as required by the March 2, 1998 ARCO MOA. In that same communication the UPW indicated that it “remains willing and able to negotiate in good faith” regarding the proposed master pool agreement.
38. On and after February 1, 2001 the City declined to implement route selection.
39. On February 5, 2001, the UPW filed the instant complaint.
40. On or about February 13, 2001, the City advised the UPW that the 2001 route selections could not be completed until the master pool issue is resolved. It further advised that, “[I]f we don=t hear from you by February 23, 2001, we will ask that an impasse be declared and proceed with implementation.”
41. On March 13, 2001, the Board conducted a prehearing conference on the instant complaint. At the conference, the parties agreed to defer a scheduled hearing on the merits because of agreements that had been reached. As memorialized by UPW=s counsel (to which exception has not been taken by the City) the agreements were in relevant part as follows:
 1. Respondents will provide the UPW by the end of this week (March 18, 2000) a response to the information request dated December 14, 2000 needed in connection with route selection.
 2. Respondents will commence route selection by no later than the end of this week. The process will take approximately 30 days to complete.
 3. The UPW and Respondents agree to refer the master pool issue to mediators Peter Char and Ted Tsukiyama.
 4. If the parties are unable to resolve the master pool issue in mediation, cross motions for summary judgment will be filed by no later than April 19, 2001. Pending the ruling

on said motions status quo shall be maintained by the parties.

42. Between February 15, 2001 and March 20, 2001, tonnage and route map information was transmitted by the City to UPW. Requested information regarding seniority is not represented by the City as having been transmitted.
43. On March 20, 2001, Refuse Collection Administrator David Shiraishi (Shiraishi) met UPW=s Executive Assistant to the State Director Dayton Nakanelua (Nakanelua) to discuss route selection. At that meeting Shiraishi inquired as to whether route selection could proceed with employees being apprised that master pool proposals might be subsequently implemented. Nakanelua responded that he doubted that UPW State Director Gary Rodrigues would agree to such a procedure.
44. On March 28 and 30, 2001, Shiraishi met with shop stewards, UPW staff and other personnel to discuss route selection. No further meetings have been held.
45. Mediation meetings were held April 10 and 17, 2001. Further meetings were scheduled.
46. On July 19, 2001 the Board granted, in part, UPW=s cross-motion for summary judgment in Order No. 2020 leaving the master pool issue to be determined. On July 24, 2001 counsel for UPW and the City (a document which was signed by Deputy Corporation Counsel Paul Tsukiyama in behalf of Respondents) notified the Board of a stipulation as follows:

In light of Order No. 2020 the parties have stipulated to a stay of proceedings in the above referenced case for a period of 40 days. During this 40-day period the parties are making another effort at mediating the underlying dispute involving master pool and privatization.

Union Ex. 50-1.

47. Before mediation could be scheduled, DOYLE on September 26, 2001 informed the UPW of a change in the City=s position. The letter stated in relevant portions:

Since the City will be proceeding with the permanent transfer, the proposal to create an island-wide master pool for refuse employees is hereby withdrawn. It is therefore unnecessary

to further discuss, mediate, or negotiate the master pool issue. It is the City's position that the withdrawal of the master pool proposal renders moot all matters pending before the Hawaii Labor Relations Board in Case No. CE-01-465.

Union Ex. 63-2.

48. By letter dated August 16, 2001 Timothy E. Steinberger, Acting Director of the Department of Environmental Services, informed Gary Rodrigues that the City intended to remove 13 refuse collectors working in manual crews from Pearl City and place them in vacant positions in the Honolulu baseyard. The letter states in relevant part:

This is to inform you that due to excess staffing at the Pearl baseyard, we have tentatively identified thirteen refuse collectors who will be transferred from Pearl City to the Honolulu baseyard. We currently have a need for collectors at the Honolulu baseyard and thirteen collectors will be transferred to Honolulu. We are targeting November 1, 2001 for the transfer. The thirteen collectors have the least baseyard seniority and are identified on the Attachment A. Attachment B shows the seniority listing for the Honolulu baseyard and where the thirteen collectors will fall in the seniority list. The thirteen collectors will have their seniority transferred with them pursuant to 16.01a of the agreement.

Union Ex. 56-1.

49. On September 13, 2001 the Employer refused to negotiate the announced changes as requested by UPW, and on October 29, 2001 modified the number of employees being removed and placed from 13 to ten (10). On November 21, 2001 the ten (10) employees being removed from Pearl City were informed that the changes would become effective on December 10, 2001.

Union Exs. 70-1 -70-10.

50. The involuntary transfer of ten manual refuse collection employees would result in 44 Honolulu baseyard refuse collectors having seniority higher than any of the ten Pearl City baseyard employees transferred. Eleven Honolulu baseyard refuse collectors would have seniority less than one or more of the Pearl City baseyard employees transferred.

51. At the Pearl City baseyard alone automated refuse collection would entail reduction of regular manual routes from 18 to one. With a reduction in crew size from three (in manual) to one (in automated), the proposed changes would mean that 140 positions in refuse collection would be eliminated.
52. Unrebutted testimony was received from Union witnesses that City management personnel, including DOYLE and HARRIS, promised that transfers would not occur in the course of implementing automated refuse collection.
53. Gary Rodrigues testified that unless he was certain of a commitment barring transfers the Union would never have agreed to any automated route selection memoranda of agreement. City witnesses testified that without the cooperation of the Union, automated route selection would never have proceeded. Except for the current instance, the City never advised the Union that it retained any right to transfer manual refuse workers between baseyards.

DISCUSSION

The UPW alleges that the City has violated HRS ' ' 89-13(a)(1), (5), (7), and (8)¹ by its commitment to permanently and unilaterally transfer ten manual refuse collectors from the Pearl City baseyard to the Honolulu baseyard, and by its failure to negotiate or participate in mediation regarding the transfers.

¹HRS ' 89-13(a) provides:

' 89-13 Prohibited practices; evidence of bad faith. (a) 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;

(8) Violate the terms of a collective bargaining agreement;Y.

It argues that the permanent unilateral transfers are contractually forbidden by 1) the “mutual consent” requirement of section 1.05 of the Unit 01 agreement; 2) the “noYtransfers” language of subsection 11-H of the “uku pau” agreement; and 3) the “notYplaced or removed” language of section b of the March 2, 1998 ARCO MOA. The UPW further argues that the City failed to act in good faith throughout the bargaining and mediation process as evidenced by their failure to participate in mediation on master pool notwithstanding a stipulated agreement to do so.

The City argues that none of the referenced contractual provisions forbid the permanent involuntary transfer of manual refuse collection employees, and that in any event that the making of permanent transfers are statutorily protected management rights.

“Uku Pau”

Refuse collection baseyards appear to be a wholly unique subset within government employment. By virtue of “uku pau” practices in place for between 40 and 50 years, and memorialized in collective bargaining agreements since 1973, hours, assignments, effective rates of pay, overtime opportunities and temporary assignment opportunities are driven by seniority-based employee selection rather than management prerogative.

For manual refuse crews, routes are established which approximate the 24,000 pound standard established in the “uku pau” agreement. At an annual route selection, crew chiefs select their preferred routes. Selection is made in order of refuse division seniority. Crew members similarly select their routes in order of division seniority. Collectors and Crew chiefs who are not able to select routes are assigned to a baseyard master pool or foreman=s pool from which they are assigned, again by order of seniority, to substitute duty or other baseyard tasks. Crews having been established, are free to work at their own pace to complete their self-assigned routes. The conclusion of the route equals conclusion of the equivalent of an eight-hour workday. This usually requires less than eight hours. Seniority-based route selection thus determines effective hourly wages, work assignments and crews.

Overtime and temporary assignments are similarly seniority-based. Opportunities are first provided to the senior crew chief or members on a route. They are subsequently made available, in order of division seniority, to other members of the baseyard.

This system was contractually memorialized in the “uku pau” agreement in 1973 and has since been incorporated by reference in all Unit 01 agreements.

This virtually self-contained system of route and task selection appears to have worked well enough until 1991 when the City began transitioning from manual refuse collection to automated refuse collection. The initiative was prompted by City refuse officials to achieve major cost savings projected to be in the millions of dollars per year. At an operational level the changes would involve the elimination of as many as 70 manual

routes and the reduction in the number of manual crews from 85 to 15 on Oahu. At the Pearl City baseyard alone automated refuse collection would entail reduction of regular manual routes from 18 to one. With a reduction in crew size from three (in manual) to one (in automated), the proposed changes would mean that 140 positions in refuse collection would be eliminated.

The transition from manual to automated collection was negotiated between the Union and City in the form of memoranda of agreement identifying the terms and conditions of transition. In the course of this transition no manual collectors were involuntarily terminated or transferred. But because of resultant imbalances in required workforces, a surplus of manual collectors developed in the Pearl City baseyard and alleged shortages in the Honolulu baseyard. The City has sought to address this imbalance by involuntarily transferring ten manual collectors from Pearl City to Honolulu. The dispositive issue in this case is whether any such attempt is prohibited by statute or collective bargaining agreement.

Mutual Consent

Section 1.05 of the Unit 01 agreement provides, and has provided since the incorporation of the “uku pau” agreement into the bargaining agreement, in relevant part that “[N]o changes in wages, hours or other conditions of work contained herein be made except by mutual consent.” It prohibits mid-term unilateral changes to existing terms and conditions and is founded on the statutory duty to bargain. University of Hawai`i Professional Assembly v. Tomasu, 79 Hawai`i 154, 159, 900 P.2d 161 (1995) (“...[T]he obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith.”). The UPW contends that the proposed unilateral involuntary transfer of the manual refuse workers from the Pearl City to Honolulu baseyards constitute such a change so that the City’s refusal to negotiate the matter constitutes a prohibited practice.

The City, citing the Board’s decision in Hawaii Government Employees Association, 6 HLRB 1 (1998) (Kapolei), argues that the transfers do not rise to the level of a change in conditions of work requiring negotiations, and instead constitutes only “matters affecting employee relations” requiring consultation pursuant to HRS § 89-9(c).²

²HRS § 89-9(c) provides:

Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

Kapolei involved the relocation of several State offices from Honolulu to Kapolei, some seventeen miles distant. The Board concluded that, “while it is clear that the relocation of government offices to Kapolei will create hardships and pose a substantial inconvenience to certain employees in terms of commuting to and from work, there is no evidence that the move will have a significant and substantial impact on their terms and conditions of employment. No one will be displaced and the duties and responsibilities of those individuals designated to relocate will remain the same.”³ Id. at 9. Accordingly, the

³The claimed burdens experienced by employees are catalogued by the Board as follows:

The HGEA contends that the relocation of programs to Kapolei will have a substantial and significant impact on the ability of employees to perform their current duties, and include the following:

- . Loss of actual work time due to extended travel time between downtown and Kapolei during work hours.
- . Loss of downtown parking privileges and a concomitant increase in mileage and parking cost reimbursements provided under contract and personnel rules.
- . Difficulty in completing work duties and responsibilities assigned and contained in position descriptions.
- . Decrease to public access to certain agencies.
- . Inability to respond quickly to working situations that require coordinated responses from more than one agency.
- . Inability to respond to court presence immediately.
- . Inability to be present at hearings with file records.
- . Mileage reimbursements are capped at \$100 per month. No indication from employer if that amount will be increased because of relocation.
- . Starting times may impact the ability of certain employees to attend hearings in the morning.
- . Change in location of position for which employee was initially hired.

The HGEA also argues that the relocation will have a substantial and significant personal impact on employees, which include the following:

- . Additional personal expenses, like purchases of vehicles, gas, mileage, wear and tear on these vehicles, auto insurance, etc.
- . Unreimbursed business related expenses like parking downtown, Kapolei.

Board held that the relocation created only a duty to consult rather than a duty to negotiate. Id.

The City contends that the burden imposed upon employees by the involuntary transfers are similarly collateral or personal in nature. The UPW conversely argues that conditions of employment are directly affected. Both sides rely upon the testimony of UPW State Director Gary Rodrigues to support their argument:

- Q. [by Member Kunitake]. And with regard to this thinking, I keep hearing that it=s highly objectionable to force a Refuse employee from one baseyard to another baseyard.
- A. [by Gary Rodrigues]. Yes.

-
- . Lack of early bus service for those who require or need the bus system.
 - . Inability to timely respond to personal emergencies.
 - . Hardship and difficulty in getting to and from Kapolei.
 - . Lack of flex time as an alternative to these employees.
 - . Lack of early and late building security.
 - . Inconvenience of travel to and from home to Kapolei. (Increase in travel time in excess of hours).
 - . Lack of concomitant increase in wages to offset additional personal expense incurred to now perform their employment duties.
 - . Lack of employer alternatives to accommodate relocation.
 - . Inability and difficulty in child and adult care. May include increased child/adult care costs.
 - . Loss of second jobs.
 - . Elimination of opportunity for further education.
 - . General changes to decisions in personal life based on location of present employment, i.e., children=s schools, day-care, adult-care, spouses= employment opportunities, etc.

Complainant also contends that in a limited effort to respond to employee concerns, the employer has condoned activities, i.e., job swapping, which impacts on the collective bargaining agreements. The HGEA contends that mileage reimbursement, car allowances, parking, hours of work, changes in job location, impacts on collective bargaining agreements. The HGEA contends that the additional expenses reduces the employees= net income and affects wages.

Id., at 8-9.

Q. Why?

A. Because, first of all, we have that agreement that says you cannot do it. And, second, because the ten people that they want to move, you can tell the City knows nothing about their workers. They don=t know that people catch busses [sic] to work. They start early in the morning. They have different financial arrangements that they do because they pau work. They may have a second job or they have arrangements for their children.

And if they work at a different yard, that causes to extend the time by which they get home, they could end up losing their second job or have an effect on caring for children. There is a whole list of negative impacts upon these workers.

And the last thing that they are concerned about is if you=re not from a baseyard and you voluntarily or are forced to go into another baseyard, especially -- if you=re forced to, you take your seniority with you. You go into that baseyard. You now rank on the seniority list higher than other people there. Then you have route selection.

Now, the person may have been working there for 10 years in the Honolulu yard. But I have 11 years in Refuse from Pearl City yard. I get to the Honolulu yard. I select the route before that person who was 10 years in Honolulu yard. And I just showed up in Honolulu yard to work.

Guess what? There is tension in the air. Because -- and people don=t want to do that. They don=t want to cause grief to the people who are working there to select routes. And route selection is choice. I mean, that=s the bottom line.

It=s the biggest thing for the refuse guys. That=s why we have routes that start at 4:00 in the morning that is the top choice for selection.

So that=s some of the impact that occurs that would be negative to the Refuse guys. Besides violation

of the contract. But the human side of it is what I am explaining.

Transcript, Volume II (hearing held on November 29, 2001) at 370-72.

The City argues that Rodrigues= identification of items such as commuting, child care, and second job opportunities are personal and collateral to conditions of employment, and thus, pursuant to Kapolei, not mandatory subjects of negotiations. The City further argues that the issues resulting from transfer of seniority from one baseyard to another has already been negotiated since the Unit 01 agreement contains a negotiated term regarding the portability of seniority.⁴

The Board agrees with the UPW that Kapolei is clearly distinguishable from the instant circumstance so that the proposed involuntary transfers are a mandatory subject of negotiations. Foremost, in Kapolei the Board found “no evidence that the move will have a significant and substantial impact on their terms and conditions of employment. No one will be displaced and the duties and responsibilities of those individuals designated to relocate will remain the same.” Here, there is ample evidence that the involuntary transfer of manual collection workers from the Pearl City to Honolulu baseyards and the correlating withdrawal and interposition of seniority based rights, is likely to have a substantial and material impact on the employees= terms and conditions of employment. Inasmuch as route selection, team selection, overtime opportunities, hours of actual work, and temporary assignments are affected or determined by seniority among baseyard members, the duties, responsibilities and effective pay of both the transferred workers and those with less seniority are likely to be impacted.

The Board cannot agree that the Union has, in effect, already negotiated the involuntary transfer issue with respect to those subject to the “uku pau” agreement. Section 16.01a of the Unit 01 agreement addresses the portability of seniority “whenever” an “employee is involuntarily transferred from one position to another.” First it is unclear from the record whether the proposed transfers are “from one position to another.” And second, at

⁴Section 16.01a of the Unit 01 agreement provides:

16.01a. An employee shall have seniority transferred with the Employee whenever:

* * *

4. The Employee is involuntarily transferred from one position to another within an employer or an agency by action of the Employer due to lack of work, funds or other legitimate reasons.

issue is not the movement of seniority, but rather the contractual right of the employer to make the transfer itself.

Subsection 11-H

The UPW further argues that the proposed transfers would violate Subsection 11-H of the “uku pau” agreement. Section 11 of the Policy establishes the 24,000 pound work standard. Subsection 11-H provides:

There will be no layoffs, transfers out of yards or Division, or change in pay status as a result of initiating this route policy; however, subsequent change may be made pursuant to applicable rules and policies.

The UPW asserts that the prohibition against “transfers out of yards” expressly prohibits the proposed transfers at issue. The City argues that the conditioning language, “as a result of initiating this route policy” limits applicability to the initiation and implementation of the 24,000 pound manual collection work standard. It reasons that since the proposed transfers are a result of automated refuse collection, rather than the initiation or implementation of the 24,000 pound standard, the prohibition is inapplicable.

The UPW further argues that an interpretation prohibiting transfers between yards is supported by past practice. The City claims that resort to the past practice doctrine is inappropriate because the language is unambiguous and practice not established.

The past practice doctrine is limited to “ascertain the intent of the parties >which would otherwise remain unascertainable.=” State of Hawaii Organization of Police Officers, 3 HPERB 47, 67 (1982) (citations omitted). Thus, if the language of a contract or agreement is clear and unambiguous, the doctrine is inapplicable.

The City argues that the language of the provision is clear and unambiguous in that it limits application to layoffs, transfers or changes in pay resulting from “initiating this (24,000 pound) route policy.” “Initiating” understood literally would require that the limitations attached only at the time the policy was first implemented, in 1973. Inclusion of reference to “this route policy” is argued to limit applicability to the 24,000 pound manual collection policy. The City concludes that since the proposed involuntary transfers would occur 23 years after initiation of the policy, and since they are a result from the introduction of automated refuse collection rather than a change in manual policy, the restrictions of Subsection 11-H cannot be applied.

The Board cannot agree that the language of Subsection 11-H is clear and unambiguous. “Initiating@ cannot be unambiguously understood to limit application to initial implementation. The subsection specifically refers to “subsequent change” that can be made.

This at least suggests some form of continuing application. Similarly, “this route policy” cannot unambiguously be limited to changes in the initial 24,000 pound manual route policy. Again, the reference to “subsequent change” appears to reflect an anticipated evolution in the scope and nature of the subsection. Accordingly, we find the language of the subsection to be ambiguous and turn to past practice to assist in interpretation.

In State of Hawaii Organization of Police Officers, supra, at 67, the Board concluded that:

[P]ast practice, to be binding on parties must be:
(1) unequivocal; (2) clearly enunciated and acted upon; and
(3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

The record reflects that with the exception of a single aborted attempt in 1973, there has never been an attempt by management to involuntarily transfer manual refuse collection workers between baseyards. It is also undisputed that the “uku pau” agreement has been in effect since 1973. The UPW=s witnesses (Joseph Rodrigues, Gary Rodrigues, and Nakanelua) testified that it was the Union=s understanding and expectation that the “no transfer” provision of Subsection 11-H applied to all manual collection workers. Unrebutted testimony was received from Union witnesses that City management personnel, including DOYLE and HARRIS, promised that transfers would not occur in the course of implementing automated refuse collection. Gary Rodrigues testified that unless he was certain of a commitment barring transfers the Union would never have agreed to any automated route selection memoranda of agreement. City witnesses testified that without the cooperation of the Union, automated route selection would never have proceeded. Except for the current instance, the City never advised the Union that it retained any right to transfer manual refuse workers between baseyards.

The City asserts that the past practice doctrine is inapplicable because its failure to transfer any manual collection workers between baseyards was not a result of any interpretation of Subsection 11-H but rather simply because there had never arisen any need for such transfers.

The Board finds that the City=s actions speak much louder than its newfound words and accordingly concludes that as a result of past practices Subsection 11-H forbids the transfer of manual refuse collection workers between baseyards. The Subsection bound the parties for approximately 29 years. For 27 of those years, the Union has relied upon its uncontroverted understanding of the provision as barring transfers. This understanding undoubtedly contributed to the negotiating of at least eight collective bargaining agreements and all automated route selection memoranda of agreement. Throughout this time the City sat silent and inactive regarding the subsection. Twenty seven years of practice is “unequivocal.” Confirmation by City officials satisfy the requirement of enunciation and

their quarter century of acquiescence to the Union=s position until the current instance satisfies the requirement that the practice be “acted upon.” And much more than a “reasonable period of time@ has passed to establish the practice as established by both parties.

Accordingly, Subsection 11-H precludes the permanent, unilateral, and involuntary transfers proposed by the City.

Management Rights

The City argues that notwithstanding any argued contractual prohibitions, the proposed transfer constitutes an exercise of its statutorily protected management rights. The management rights upon which the City relies are identified in HRS ' 89-9(d).

The UPW in its Memorandum of Fact and Law aptly summarizes the Board=s assessment of apparent conflicts between the obligation to bargain under HRS ' 89-9(a) and management rights under HRS ' 89-9(d):

The notion that “management rights” grants to employers certain absolute or exclusive authority has long been rejected in labor management relations. University of Hawaii Professional Assembly v. University of Hawaii, 66 Haw. 207, 211-12, 659 P.2d 717 (1983); Department of Education, 1 HPERB 311 (1973); Hawaii Firefighters Association, 2 HPERB 207 (1979); Elkouri & Elkouri, How Arbitration Works (5th Ed. 1997), pp. 661-79. Since its earliest decision the labor board has applied a “balancing test” to determine whether interference with “management rights” precludes negotiations on matters affecting “working conditions” under chapter 89, HRS. HSTA v. Department of Education, Decision No. 22, 1 HPERB 251, 266 (1972); See also, Linda Lingle v. UPW, 5 HLRB 650, 677 (1996). The board measures the impact on “employee rights” under ' 89-9(a), HRS, and the impact on “management rights” under ' 89-9(d), HRS, to determine whether bargaining on the subject matter is appropriate.

Section 89-9(a), (c) and (d) must be considered in relationship to each other in determining the scope of bargaining. For if Section 89-9(a) were considered disjunctively, on the one hand, all matters affecting the terms and conditions of employment would be referred to the bargaining table, regardless of employer rights. On the other

hand, Section 89-9(d), viewed in isolation, would preclude nearly every matter affecting terms and conditions of employment from the scope of bargaining. Surely neither interpretation was intended by the Legislature.

Bearing in mind that the Legislature intended Chapter 89 to be a positive piece of legislation establishing guidelines for joint-decision making over matters of wages, hours and working conditions, we are of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Section 89-9(d).

As joint-decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours and conditions of employment, even those which may overlap with employer rights as enumerated in Section 89-9(d), are now shared rights up to the point where mutual determinations respecting such matters interfere with employer rights which, of necessity, cannot be relinquished because they are matters of policy “which are fundamental to the existence, direction and operation of the enterprise”. West Hartford Educ. Assn. v. DeCourcy, 80 LRRM 2422-2429 (Conn. Sup. Ct. 1972). (Emphasis added).

1 HPERB 251 at 266. In University of Hawaii Professional Assembly v. Tomasu, 79 Hawai'i 154, 161, 900 P.2d 161 (1995), this [sic] [the Supreme] Court gave its seal of approval to the balancing test as applied by the labor board.

Complainant UPW=s Memorandum of Fact and Law at 59-60.

In applying this balancing test, the Board has concluded above that the exercise of the purported management right to transfer as applied to the instant case is likely to have a substantial impact on the terms and conditions of employment of employees subject to the “uku pau” agreement. Conversely, the City has not demonstrated that the exercise of the right is “fundamental to the existence, direction and operation of the enterprise.” The fact that the right was not exercised for more than 25 years and assurances were received by City management that the status quo would not be disturbed by the transition to automated refuse belies any claim of the fundamentality of the right. Moreover, the City has not demonstrated that the proposed transfers are either necessary or sufficient to address any workload imbalance between the baseyards. Consequently even arguments regarding efficiency of operations have little bearing in the balance.

The City cites the Board=s language in Hawaii State Teachers Association, 1 HPERB 251 (1972) to the effect “that the employer does have the ultimate right to transfer its employees.” 1 HPERB at 271. In the cited decision, the Board of Education asserted that its management right to transfer employees superceded any obligation to negotiate the transfer of 169.5 teachers from support positions back into the classroom. The Board in that decision, while recognizing the right to transfer, concluded that, because the transfers resulted in the loss of bargained for support services to classroom teachers, the transfers had to be reconverted to avoid the deleterious impact on the bargained-for rights of the teachers.

Similarly, in the instant case the proposed transfers, and consequent disruption of seniority at both baseyards are likely to have a deleterious effect upon the exercise of bargained-for rights. Accordingly, any management right to transfer must be limited to preserve those rights.

Finally, the precedential and probable impact of the literal application of the management rights identified in HRS ' 89-9(d) would be disastrous to bargained for rights and relationships under the “uku pau” agreement. Management rights specifically delineated by the statute include: “to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer=s operations are to be conductedY.” If each, or any, of these enumerated rights are given literal application, as is urged by the City for the right to transfer, the unique seniority-based self selection of many conditions of employment that lay at the heart of the agreement could simply be superceded by alleged management rights. In Ariyoshi v. Hawaii Public Employee Relations Board, 5 Haw.App. 533, 704 P.2d 917 (1985), the Hawaii Intermediate Court of Appeals reversed an order of the Board=s predecessor because the order was “in fact disruptive of public employer-employee relations under the contract and not in concert with the policy and goals of collective bargaining in public employment as proclaimed in H.R.S. ' 89-1” (footnote omitted), 5 Haw.App. at 543. Here, the Board similarly concludes that planting the seeds for the destruction of bargained-for rights that have existed without amendment for more than a quarter of a century would be similarly “in fact disruptive of public employer-employee relations under the contract and not in concert with the policy and goals of collective bargaining in public employment as proclaimed in H.R.S. ' 89-1.” Accordingly, the Board cannot find that the management right to transfer supercedes the rights contained in the bargaining agreement.

WILFULNESS

In order to find a prohibited practice, the Board must conclude that these statutory violations were wilful. In United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583-84 (1996) the Board discussed the element of “wilfulness”:

[T]he Board, while acknowledging its previous interpretation of “wilful” as meaning “conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS” nevertheless stated that “wilfulness can be presumed where a violation occurs as a natural consequence of a party’s actions.” (citations omitted.)

Here, the violation of HRS ' 89-13(a)(8) occurred as a natural consequence of the City’s actions. The City was fully aware of its contractual obligations and embarked on a course to unilaterally transfer the employees in spite of its contractual responsibilities. Wilfulness will therefore be presumed and the Board concludes that the City committed a prohibited practice by its failure to abide by the terms of the Unit 01 and “uku pau” agreements.

The ARCO MOA

The UPW also asserts that section “b” of the March 2, 1998 ARCO MOA bars the proposed transfers. Having determined that the transfers are barred by both the Unit 01 agreement and “uku pau” agreement, the Board need not address this issue at this time.

Failure to Participate in Mediation

The UPW also asserts that the City’s failure to participate in mediation on the Statewide master pool proposal constituted a prohibited practice since the City had stipulated to mediation. The Board is in agreement with the City that its withdrawal of the master pool proposal on September 26, 2001 moots any obligation to mediate or negotiate the matter.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this complaint under HRS ' ' 89-5(b) and 89-4.
2. HRS ' 89-13(a)(8) provides that it is a prohibited practice for an employer to violate the terms of the collective bargaining agreement.

3. Based on the record, the Board concludes that the Employer violated Section 1.05 of the Unit 01 agreement and Subsection 11-H of the “uku pau” agreement by its unilateral decision to transfer ten manual refuse collection workers from the Pearl City baseyard to the Honolulu baseyard. The Employer thereby violated HRS ' 89-13(a)(8).
4. In determining whether the proposed transfer of the employees at issue is an exercise of management rights, the Board applied a balancing test to determine whether interference with management rights precludes negotiations on matters affecting working conditions. The Board concludes that the Employer=s transfer of refuse workers is likely to have a substantial impact on the terms and conditions of employment for employees subject to the “uku pau” agreement and the consequent disruption of seniority at both baseyards is likely to have a deleterious effect upon the exercise of bargained-for rights which are seniority-based. The Board cannot find that the management right to transfer supercedes the rights contained in the bargaining agreement.
5. The issue of whether the City=s failure to participate in mediation on the master pool proposal constitutes a prohibited practice is moot since the City has withdrawn the master pool proposal.

ORDER

1. The Employer is ordered to cease and desist from committing the instant prohibited practices by rescinding its proposed involuntary transfer of ten manual collection refuse workers from the Pearl City baseyard to the Honolulu baseyard.
2. The Employer and the Union shall immediately post copies of this decision in conspicuous places at its work sites where employees of Unit 01 assemble and congregate, and on the Employer=s website for a period of 60 days from the initial date of posting.
3. The Employer shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, March 15, 2002.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA

BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Paul T. Tsukiyama, Deputy Corporation Counsel
Joyce Najita, IRC
William Puette, CLEAR
Richardson School of Law Library
Publications Distribution Center
University of Hawaii Library
State Archives
Library of Congress