

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Complainant,

and

BENJAMIN J. CAYETANO, Governor,  
State of Hawaii and JAMES TAKUSHI,  
Director, Department of Human Resources  
Development, State of Hawaii,

Respondents.

CASE NO. CE-13-368

DECISION NO. 416A

FINDINGS OF FACT, CONCLU-  
SIONS OF LAW, AND ORDER  
AMENDING AND SUPPLEMENT-  
ING DECISION NO. 416

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER AMENDING AND SUPPLEMENTING DECISION NO. 416

On October 13, 1997, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against BENJAMIN J. CAYETANO, Governor, State of Hawaii and JAMES TAKUSHI (TAKUSHI), Director, Department of Human Resources Development (DHRD), State of Hawaii (collectively Employer). The HGEA alleges that on or about July 15, 1997, the Respondents implemented a retroactive reduction in shortage differentials of certain Unit 13 employees simultaneously with the implementation of a wage increase established through the decision and award of an Interest Arbitration Panel issued on January 31, 1997. The Union contends that the Employer violated Hawaii Revised Statutes (HRS) §§ 89-9(a) and 89-13(a)(1), (5), (7), and (8).

On January 29, 1999, the Employer filed a motion to dismiss and/or for summary judgment with the Board contending that the instant prohibited practice complaint should be dismissed for lack of jurisdiction and for failure to exhaust contractual remedies. Alternatively, the Employer contended that there are no genuine issues of material fact presented and the Employer is entitled to judgment as a matter of law.

On September 30, 1999, the Board conducted a hearing on Respondents' motion to dismiss the complaint. Thereafter, on December 2, 1999, the Board issued Order No. 1821, Order Denying Respondents' Motion to Dismiss and/or for Summary Judgment.

The Board found that the record reflected the existence of genuine issues of material fact presented in this case, and denied the Respondents' motion.

The Board conducted hearings on the instant complaint on February 28, March 10, and March 16, 2000. All parties were afforded full opportunity to present evidence and arguments before the Board. The parties filed post hearing briefs on May 5, 2000.

In Order No. 1869, dated May 22, 2000, the Board directed Complainant's counsel to submit a proposed order to the Board. Complainant's counsel was directed to secure the approval as to form of opposing counsel and if opposing counsel did not approve of the form of the proposed order, Respondents' counsel could submit objections and a proposed order to the Board.

Complainant filed its proposed order with the Board on June 14, 2000 without the approval as to form of opposing counsel. No objections were filed with the Board.

After thorough review of the record in the case, on June 29, 2000, the Board issued Decision No. 416, Findings of Fact, Conclusions of Law, and Order, wherein the Board concluded that Respondents committed a prohibited practice by failing to negotiate the retroactive application of the shortage differential and accordingly ordered the Employer to, inter alia, "make the affected employees whole."

On July 11, 2000, Respondents filed a motion for reconsideration of Decision No. 416. In support of its motion, Respondents argued that the Board's decision, 1) failed to address the issue of exhaustion of contractual remedies; 2) contained errors in nomenclature; 3) failed to address Complainant's alleged consent to the retroactive reduction of shortage differentials for newly hired employees; 4) failed to adequately address the disposition of employees hired before July 1, 1996 who also had shortage differentials retroactively reduced following reallocation or promotion; 5) failed to acknowledge or address the role of establishing the "hiring rate" in the establishment and implementation of the shortage differential; and 6) failed to acknowledge or address the contractual mechanism in place for the establishment and implementation of the shortage differential.

On July 28, 2000, Complainant filed a memorandum in opposition to Respondents' motion for reconsideration. In its memo, Complainant argued that each of the identified errors were either harmless and inconsequential, or adequately addressed by the decision and record.

On August 11, 2000, the Board conducted a hearing on the motion for reconsideration. Parties were afforded a full and fair opportunity to present arguments.



After a full review of the records and arguments in this case, the Board majority issued a Proposed Order Granting Respondents' Motion for Reconsideration and Amending and Supplementing Decision No. 416 on October 19, 2000. The Proposed Order provided that exceptions could be filed with the Board within ten days of service of a certified copy of the order. No exceptions have been filed by either party. Accordingly, the Board majority makes the following findings of fact, conclusions of law, and order.

### **RESPONDENTS' MOTION FOR RECONSIDERATION**

The administrative rules of the Board do not explicitly provide for motions for reconsideration. However, Complainant raises no objection to the Board's consideration of the motion for reconsideration on jurisdictional or procedural grounds. Instead, it has directed the Board's attention to Hawaii Rules of Civil Procedure (H.R.C.P) Rule 60(b), "Relief from judgment or order," which identifies six bases for the granting of such relief. In sum, these basis are 1) mistake or excusable neglect, 2) newly discovered evidence, 3) fraud, 4) the judgment is void, 5) the judgment has been satisfied, and 6) any other reason justifying relief from the operation of a judgment.

Respondents in support of their motion for reconsideration argue, in effect, that Decision No. 416 could not be effectuated because it failed to adequately address the disposition of employees hired before July 1, 1996 who also had shortage differentials retroactively reduced following reallocation or promotion. Respondent also argues that the decision cannot serve as meaningful guidance to remedial and future conduct because the factual and legal analyses presented are incomplete or ambiguous.

Upon review of the decision, the Board majority agrees that the decision is at least ambiguous regarding the application of the order to employees hired prior to July 1, 1996 who had shortage differentials retroactively reduced following reallocation or promotion. The Board majority also agrees that the factual and legal analyses presented in the decision do not provide clear guidance regarding the application and interpretation of applicable law.

Accordingly, the Board majority hereby grants Respondents' motion for reconsideration. Although the Board majority is hesitant to disturb the finality of a decision in the absence of express procedural guidance or statutory direction, the Board majority concludes that the authority provided the Board by HRS § 89-5(b)(4) to "take such actions with respect [to prohibited practices complaints proceedings] as it deems necessary and proper" permits and requires the granting of the motion for reconsideration under the present unique circumstance.

## **RECONSIDERATION**

In proceeding to reconsider Decision No. 416, the Board majority notes that the parties do not suggest the necessity of the consideration of newly discovered evidence or evidence extrinsic to the existing record. Accordingly, the Board majority has reviewed the totality of the record in this case and determined that objections raised by the Respondent can be adequately addressed through the supplementing and amending of Decision No. 416.

Upon reconsideration of Decision No. 416, the Board majority hereby amends and supplements the relevant findings of fact, conclusions of law, and order contained in Decision No. 416 to read as follows:

## **FINDINGS OF FACT**

### **Parties**

1. The HGEA is the exclusive representative, as defined in HRS § 89-2 of employees of the State of Hawaii included within bargaining unit 13.
2. BENJAMIN J. CAYETANO, Governor, State of Hawaii, is a public employer, as defined in HRS § 89-2 of employees of the State of Hawaii.
3. JAMES TAKUSHI, Director, DHRD, State of Hawaii, was for all times relevant, a representative of the public employer as defined in HRS § 89-2.
4. The State of Hawaii and the HGEA are parties to a collective bargaining agreement covering the employees included in Unit 13.

### **Shortage Differentials**

5. HRS § 77-9 refers to initial appointments and shortage categories and provides in part:
  - (a) All initial appointments shall be made at the first step of the appropriate salary range.

\* \* \*

- (c) Whenever a labor shortage exists in a class or group of positions in a class, the director, with the prior approval of the chief executive, may declare the class or group of positions to be a shortage category. The director may review the impact of making such a declaration on other classes or groups of



positions in classes within the same series. If the director finds that it is necessary to preserve internal relationships within the series, the director may declare those other classes or groups of positions as related shortage categories. The director shall review each shortage category periodically, but at least once each year, to determine whether the shortage category should be continued. In making this determination, the following procedure shall be followed:

- (1) The director shall set the new entry salary of a shortage category at an amount that is fair and reasonable and at which employees can be recruited from the labor market;
- (2) The director shall set the new entry salary of a related shortage category in consideration of appropriate internal pay relationships;
- (3) Whenever a new entry salary is determined for a class or a group of positions in a class under paragraphs (1) and (2), incumbents thereof who are being paid less than the new entry salary shall have their pay adjusted to an amount that is not less than the new entry salary in a manner determined by the director;
- (4) In addition to establishing a new entry rate, the director, if necessary to promote retention of existing incumbents, may provide alternative adjustments to the salaries of incumbents in a shortage category and related shortage category. No adjustment under this paragraph shall result in a salary that exceeds the maximum step of the pay range;

\* \* \*

- (6) As a result of the periodic review of each shortage category, the director may adjust salaries established under this subsection. If the director determines that a shortage no longer exists, the director shall reestablish the first step of the

appropriate salary range as the entry salary rate for the class or group of positions;

- (7) In the event that the new entry salary for a shortage category is subsequently lowered, incumbents shall not have their pay reduced so long as they remain in the shortage class or group of positions; and
  - (8) If employees move from their respective shortage or related shortage positions, the director shall adjust their pay appropriately.
- 6. On or about July 15, 1997, the Employer implemented retroactive wage and other increases ordered by an Interest Arbitration Panel. The Employer also removed shortage differentials for certain Unit 13 employees retroactive to July 1, 1996 in an amount equal to the amount of the arbitrated wage increase.
- 7. A shortage differential is a supplement to an established salary schedule rate provided to raise total compensation to a hiring rate established by DHRD. Shortage differentials are established pursuant to HRS § 77-9.
- 8. The shortage differentials are applied to shortage categories and positions identified by DHRD and approved by the governor. Shortage categories and positions are established pursuant to determinations that a labor shortage exists, that the applicable salary schedule rate is not comparable to private sector payment, and that resources are available to accommodate an increased total compensation.
- 9. When shortage categories and positions are established, DHRD also establishes a hiring rate. A hiring rate is the increased level of total compensation identified by DHRD as the entry level salary for particular shortage categories and positions. Shortage differentials are added to the entry level salary schedule rate so that total compensation equals the established hiring rate.
- 10. In order to promote retention and maintain proportional step increases, proportionally reduced shortage differentials are also provided incumbent employees in shortage categories except those receiving the maximum salary.
- 11. The purposes of shortage differentials are the recruitment and retention of employees in shortage categories. Satisfaction of these purposes can only be accomplished prospectively.



12. Shortage differentials are reflected in shortage differential tables prepared by DHRD. The tables reflect each affected position's negotiated salary rate, the hiring rate and adjusted step total compensation, and the shortage differential as the difference between the two figures.
13. Shortage differential tables are adjusted periodically to reflect changes in either negotiated salary levels or established hiring rates. Until the instant circumstance shortage differentials had always been adjusted prospectively.

#### Contract Provisions

14. Article 50, Salaries, in the applicable Unit 13 contract provides in part:

Employees who are receiving a shortage differential shall have their compensation adjusted by provisions contained in a separate memorandum of agreement.

15. On August 31, 1995, the HGEA and the public employers executed a Memorandum of Agreement (MOA) regarding shortage differentials. The MOA provides the method of computing compensation adjustments for individuals receiving a differential attributable to shortage for the period July 1, 1995 to and including June 30, 1997. The MOA provides, in part:

- (a) Employees receiving a differential attributable to shortage on the day prior to a negotiated step movement shall have their compensation adjusted as follows:
  - 1) Adjust basic rate of pay as provided for in the collective bargaining agreement.
  - 2) Adjustment, if any, to the employee's differentials related to shortage shall be provided in a management directive by the respective jurisdictions.
- (b) Employees in a shortage or related shortage position who are promoted, demoted, transferred, reallocated or whose class is repriced shall have their compensation adjusted as provided in a management directive by the respective jurisdiction.

16. The purpose of the contract provision and MOA was to ensure that employees receiving shortage differentials realize any negotiated salary increases as part of their total compensation. It had previously been the practice of the

employer to reduce shortage differentials by amounts equal to salary increases thereby leaving total compensation the same and effectively negating the salary increase.

17. On August 31, 1995, TAKUSHI issued a Departmental Circular No. 95-5, regarding compensation adjustments for individuals receiving a differential attributable to shortage for the period July 1, 1995 to and including June 30, 1997. The Circular as issued neither anticipated nor addressed retroactive adjustments of shortage differentials.
18. The Circular, was amended on May 13, 1997 to accommodate pay increases provided affected employees. The amendment provided in part:
  - B. Employees Hired On or After the Effective Date of the Across-the-Board Adjustment
    - 1) Adjust the employee's basic rate of pay, as provided in the contract.
    - 2) The employee's shortage differential (SD) shall equal the differential listed on the shortage table for the applicable step.

#### Application

19. Prior to January 31, 1997, the public employers and the HGEA were parties to an interest arbitration pursuant to HRS § 89-11 which resulted in an Arbitration Panel Decision and Award, dated January 31, 1997. The Panel awarded, inter alia, a 2.25% salary increase retroactive to July 1, 1996, to employees included in Unit 13.
20. Prior to the issuance of the Arbitration Panel Decision neither the HGEA nor DHRD anticipated or contemplated the retroactive reduction of shortage differentials.
21. Sometime between January and May of 1997, DHRD adjusted the shortage differential tables to reflect the Arbitration Panel Decision. Because the applicable hiring rates were unaffected, the salary increases were offset by commensurate reductions in shortage differentials. Total compensation was unaffected.
22. On or about May 5, 1997 representatives of the Employer and Union met to discuss implementation of the Arbitration Panel Decision. Employer alleges that at that meeting the Union was advised that, because of adjustments to shortage differentials, salary increases would not be reflected in total



compensation for employees hired after July 1, 1996. The Union asserts that they were not so advised.

23. On or about May 13, 1997, the Departmental Circular was amended as per Finding of Fact No. 18, supra.
24. On or about July 15, 1997, the Employer implemented the wage and other increases ordered by the Arbitration Panel. The Employer also reduced shortage differentials for certain Unit 13 employees retroactive to July 1, 1996 in an amount equal to the amount of the arbitrated wage increase.
25. Affected employees included those hired, promoted or reallocated after July 1, 1996 to positions entitled to shortage differentials. The shortage differential tables and DHRD circulars amended in 1997 were applied to these positions as though they were in effect at the time of the hiring, promotion or reallocation.
26. Employees in place in positions receiving shortage differentials prior to July 1, 1996 continued to receive the differential in effect prior to the 1997 amendment of the shortage tables. The salary increases were thus reflected in their total compensation.
27. On or about July 15, 1997, certain affected Unit 13 members complained to the HGEA about the retroactive adjustment to their shortage differentials, which in effect eliminated any arbitrated wage increase.
28. On or about August 6, 1997, the Union wrote a letter to DHRD requesting the factual, legal and/or contractual basis for retroactive decreases in the shortage differential. The Union considered the letter an informal step grievance.
29. On or about August 14, 1997, DHRD replied that the retroactive decreases were implemented pursuant to the applicable MOA and Departmental Circular.

### DISCUSSION

The Union alleges that by its unilateral retroactive reduction of shortage differentials, the Employer violated its duty under HRS § 89-9(a) to “meet at reasonable times, ... and... negotiate in good faith with respect to wages ....”<sup>1</sup> The Union further alleges

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<sup>1</sup>HRS § 89-9(a) refers to the scope of negotiations and provides as follows:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer’s

that this failure to negotiate in good faith over a mandatory subject of negotiations constitute a prohibited practice in violation of HRS §§ 89-13(a)(5), (7), and (8).<sup>2</sup>

The Employer contends that the establishment and implementation of shortage differentials are management rights and, as such, are excluded from subjects of negotiations by HRS § 89-9(d).<sup>3</sup> Employer further contends that any duty to negotiate was satisfied because its conduct comported with the provisions of the collective bargaining agreement regarding shortage differentials. Finally, Employer contends that the Union consented to its retroactive reduction of shortage differentials.

The Employer's retroactive reduction of shortage differentials clearly affected wages, a traditional subject of negotiations. Thus, absent satisfaction or a reason for exclusion, the Employer was under a duty to negotiate its implementation and its failure to do so would constitute violations of HRS §§ 89-9 and 89-13.

### **Management Rights**

Employer's principal argument is that the establishment and implementation of shortage differentials are management rights and accordingly excluded as a subject of negotiations.

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budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental and longevity steps and movements between steps within the salary range, the amounts of contributions by the State and respective counties to the Hawaii public employees health fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

<sup>2</sup>HRS § 89-13 provides in relevant part:

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

\* \* \*

(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; . . .

<sup>3</sup>It was also asserted that the Union failed to exhaust its contractual remedies. This argument was addressed and rejected in Board Order No. 1821, denying Respondents' motion to dismiss and/or summary judgment.



In Decision No. 389, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 719 (1997) (UPW), the Board recognized that pursuant to HRS § 77-9, the DHRD director may declare a class of positions or group of positions in a class to be a shortage category when there is a labor shortage and may set the new entry salary at which the employees can be recruited from the labor market. The Board there found that the implementation of such shortage differentials pursuant to the federal court order were not subject to negotiations.

In so finding, the Board in UPW applied a balancing test to determine whether the establishment and application of shortage differentials when required to do so prospectively by a federal court order were a subject of mandatory bargaining. The Board concluded that the balance weighed in favor of management because it could find “no evidence of any adverse effect to the applicants or incumbents in the shortage class,” Id. at 727, and found that negotiations would cause “significant interference” with the “Employer’s right to fill critical vacancies during labor shortage by offering recruitment incentives.” Id.

The Board majority continues to believe that UPW was properly analyzed and concluded. As a general rule, the prospective establishment and application of shortage categories and differentials are not mandatory subjects for negotiation.

However, in the instant circumstance, application of the UPW analysis yields a contrary result. In UPW, the Board found no evidence of adverse effect upon employees. Here, the retroactive application of the adjusted differential tables resulted in the taking back of wages already paid affected employees for work performed. Further, the prospective application of the adjusted tables are likely to result in these bargaining unit members being deprived of the actual receipt of bargained for salary increases. The Board majority finds these to be significant adverse effects on affected employees.

The Board majority can identify no such adverse impact on the Employer’s rights. The purpose of the shortage differential process is the recruitment and retention of employees in shortage categories. These purposes can only be satisfied prospectively. Employers have not identified any nexus between the recruitment and retention of employees in shortage categories and the retroactive reduction of shortage differentials. Nor has any evidence been presented that bargaining over retroactive application of changes in shortage tables would interfere with or impede “Employer’s right to fill critical vacancies during labor shortage by offering recruitment incentives.” Id. The Board majority therefore finds that bargaining over the retroactive application of shortage differential adjustments would not impose any burden upon the satisfaction of the purposes for which the shortage differential process was established.

The balance here clearly tips in favor of the affected employees and the negotiability of the subject matter. The Board majority therefore concludes that the

retroactive application of adjustments to shortage differential tables was a mandatory subject of negotiations.

### Contract Provisions

Employer argues that any duty to negotiate was satisfied by the inclusion and subsequent satisfaction of the provision regarding shortage differentials in the applicable bargaining agreement. Essentially, the provision, Article 50, provides that shortage differentials were to be adjusted pursuant to provisions contained in a MOA. The consequent MOA provides for adjustment as per management directive. Departmental Circular 95-5 was issued by DHRD on August 31, 1995 as this management directive. It was amended on May 13, 1997 and the Employer contends that the amended terms dictated the retroactive application of the adjusted differential tables. Accordingly, it concludes, wages were only impacted as per the collective bargaining agreement.

An exceedingly literal reading of the terms of the amended Departmental Circular arguably supports the Employer's contention.<sup>4</sup> However, the Board majority need not engage in the language parsing exercise necessary to unravel the meaning of the Circular because we conclude that the Circular, as applied, contravened, rather than implemented, the terms of the collective bargaining agreement.

It is axiomatic that "the interpretation of the terms of a collective bargaining agreement, like other forms of contract, depends on the intent of the parties." Decision No. 260, William Blanchard, 4 HLRB 350, 377 (1988) (citation omitted). The uncontroverted testimony of the Union regarding the intent of the relevant language of Article 50 is as follows:

For years our organization had raised upset with the state particularly over the manner in which adjustments were made to employees who received shortage. For years every time the union negotiated a pay increase, the employer, upon doing

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<sup>4</sup>At issue is the following added provision:

- B. Employees Hired On or After the Effective Date of the Across-the-Board Adjustment
  - 1) Adjust the employee's basic rate of pay, as provided in the contract.
  - 2) The employee's shortage differential (SD) shall equal the differential listed on the shortage table for the applicable step.

Arguably, this provision anticipates the application of the adjusted shortage table for employees hired on or after July 31, 1996, the effective date of the retroactive pay increases. However, the language is by no means unambiguous as to which shortage table is to be applied or what, if any, retroactive impact would follow from the amended provision.



whatever analysis it did relative to the market, would make adjustments to the differential that they provide employees and in effect negate the pay increase...

\* \* \*

The intent and purpose for the union was to in effect eliminate that practice and provide that when an employee was to receive a negotiated wage increase that he or she would actually see some increase in their compensation. That was the whole point.

Testimony of Randy Perreira, TR19-21 (2/28/2000).

Testimony of the Employer's witness regarding the intent of the MOA executed pursuant to Article 50 appears to confirm the Union's intent and suggests Employer's concurrence and another tangential objective that does not appear relevant to this proceeding:

And in discussions with the union, it seemed to make sense that we would have an MOA that would assure employees that they got their full negotiated increase, because this was the number one priority for the union, and that also we had well detailed procedures as to how to handle the other kinds of situations that might occur.

From the employer's perspective one of the major concerns is to be sure that when an employee is granted a shortage differential for filling a hard-to-fill job and he subsequently moves to a different job that perhaps we might not have had to establish a shortage for and are not required to pay as much for, he can't take the money and run.

Testimony of Diana Kaapu, TR 43 (3/10/00).

The Board majority therefore concludes that the intent of the provision was to avoid precisely the outcome that the Employer now claims is a result of its application. The retroactive application of the adjusted shortage differential tables was thus outside of the scope of the collective bargaining agreement. Implementation, whether or not pursuant to the revised management directive, did not take place within the context of the bargaining agreement. Instead, it, in fact violated the terms of the contract.

### Consent

Employer's witness testified that on or about May 5, 1997, representatives of the Employer and Union met to discuss implementation of the Arbitration Panel Decision and that at that meeting the Union was advised that, because of adjustments to shortage differentials, salary increases would not be reflected in total compensation for employees hired after July 1, 1996. The witness further testified that "they [the union] were...comfortable with us on that provision." Testimony of Joy Inouye, TR 66 (3/10/00). Accordingly, Employer argues that the Union was advised of, and consented to, the retroactive application of the adjusted shortage differential tables.

The Union contests being advised of, or consenting to, the retroactive reduction of shortage differentials for employees hired after July 1, 1996. It further claims that it had no knowledge of Employer's intent to retroactively reduce shortage differentials or the affecting of such reductions until it was completed after July 15, 1997. See, Union Exhibit 5 (informal step grievance regarding retroactive reductions of shortage differentials).

Having determined that the Employer was under a duty to bargain, the Union's alleged consent must either satisfy this duty or constitute a waiver of bargaining rights. Any consent clearly did not occur within the context or for the purposes of bargaining. Satisfaction cannot therefore be found to have occurred.

With respect to any waiver, in Board Decision No. 242, Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO, 4 HLRB 164 (1987), the Board discussed the law applicable to the waiver of bargaining rights:

Case law indicates that waivers must be strictly construed; to find a waiver, a union must clearly and unmistakably waive rights to bargain. Before a waiver can be found, the union must be offered a meaningful opportunity to bargain. Thus the union must be given a sufficient opportunity to bargain. The union must be put on notice of employer's plans before a waiver can be found. Id., at 203, citations omitted.

The Board can find no waiver to have occurred. There was no "clear and unmistakable waiver." There was no offer of a meaningful opportunity to bargain. And although the Employer asserts that notice was provided, the Union, and its conduct contests this assertion.



### Conclusion

In United Public Workers, AFSCME Local 646, AFL-CIO, 3 HPERB 507 (1984), the Board held that wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's actions. Based upon the evidence in the record, the Board majority finds that the natural consequence of retroactively removing shortage differentials from affected Unit 13 employees which effectively eliminated any arbitrated wage increase violated their rights. Thus, the Board majority concludes that the Employer's actions were wilful.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject complaint pursuant to HRS §§89-5 and 89-14.
2. An Employer commits a prohibited practice in violation of HRS §§ 89-13(a)(5) and (7), when it fails to bargain collectively in good faith with the exclusive representative as required in HRS § 89-9.
3. An Employer commits a prohibited practice in violation of HRS § 89-13(a)(8) when it failed to adhere to Article 50 of the Unit 13 collective bargaining agreement.
4. The Employer's retroactive reduction of shortage differentials clearly affected wages, a traditional subject of negotiations. Thus, absent satisfaction or a reason for exclusion, the Employer was under a duty to negotiate its implementation and its failure to do so would constitute a violation of HRS §§ 89-9 and 89-13.
5. The purpose of the shortage differential process is the recruitment and retention of employees in shortage categories. These purposes can only be satisfied prospectively. The Employer has not identified any nexus between the recruitment and retention of employees in shortage categories and the retroactive reduction of shortage differentials. Nor has any evidence been presented that bargaining over retroactive application of changes in shortage tables would interfere with or impede "Employer's right to fill critical vacancies during labor shortage by offering recruitment incentives." Id. The Board majority therefore finds that bargaining over the retroactive application of shortage differential adjustments would not impose any burden upon the satisfaction of the purposes for which the shortage differential process was established.

6. It is axiomatic that “the interpretation of the terms of a collective bargaining agreement, like other forms of contract, depends on the intent of the parties.”
7. The retroactive application of the adjusted shortage differential tables was thus outside of the scope of the collective bargaining agreement. Implementation, whether or not pursuant to the revised management directive, did not take place within the context of the bargaining agreement. Instead, it in fact, violated the terms of the contract.
8. Waivers must be strictly construed; to find a waiver, a Union must clearly and unmistakably waive rights to bargain. Before a waiver can be found, the Union must be offered a meaningful opportunity to bargain. Thus, the Union must be given a sufficient opportunity to bargain. The Union must be put on notice of Employer’s plans before a waiver can be found. The Union did not waive its rights to bargain in this case.
9. Wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party’s actions. Based upon the evidence in the record, the Board majority finds that the natural consequence of retroactively removing shortage differentials from affected Unit 13 employees which effectively eliminated any arbitrated wage increase violated their rights. Thus, the Board majority concludes that the Employer’s actions were wilful.

### **ORDER**

The Employer is ordered to cease and desist from committing the instant prohibited practices and is ordered to comply with the requirements of HRS Chapter 89.

The Employer shall make the affected employees whole.

The Employer shall immediately post copies of this decision in conspicuous places at its work sites where employees of bargaining Unit 13 assemble and congregate, and leave such copies posted for a period of 60 days from the initial date of posting.

The Employer shall notify the Board of the steps taken by the Employer to comply herewith within 30 days of receipt of this order.



DATED: Honolulu, Hawaii, November 16, 2000

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
CHESTER C. KUNITAKE, Board Member

**DISSENTING OPINION**

I respectfully dissent from the Board majority's disposition of this case. The Unit 13 employees whose shortage differentials were recalculated by the Director of DHRD pursuant to HRS Chapter 77 trigger by retroactive pay increases should have appealed to the Civil Service Commission. Moreover, the HGEA failed to exhaust the contractual remedies bargained for by filing a prohibited practice complaint with the Board alleging a violation of Article 50 of the Unit 13 Contract and the August 31, 1995 MOA.

Assuming arguendo, the Board's jurisdiction was proper the record does not support the conclusion of law that the Employer's actions were wilful. Based on a review of the record in its entirety, there is no basis to presume nor infer that the Employer's failure to bargain before recalculating the shortage differential for certain Unit 13 employees applied retroactive to July 1, 1996 was "wilful."

For these reasons, Respondents' motion for reconsideration should be granted and the case dismissed for lack of jurisdiction and failure to exhaust contractual remedies.

**Civil Service Commission**

The Hawaii Labor Relations Board established under HRS § 26-20 is mandated to "exercise its powers and duties in accordance with chapters 89 and 377." As such the Board derives its adjudicatory authority from the Hawaii statutes.

Shortage differential is not found in HRS Chapters 89 or 377, but rather in HRS Chapter 77. HRS § 77-9, entitled "Initial appointments and shortage categories," authorizes personnel directors of the State and counties to set new entry level salaries for shortage categories and adjust the salary if the shortage continues. Respondent TAKUSHI as the State's Director of Human Resources Development is authorized to determine when the shortage ends.

Moreover, HRS § 77-8, mandates that the Civil Service Commission “shall hear and decide appeals by employees and department heads from action taken by the director under this part....” (Emphasis added.)

In my view the issue at the heart of HGEA’s complaint is whether the Director’s reduction of shortage differentials applied retroactive to July 1, 1996 to cover the cost of arbitrated salary increases was just and proper. This is a question for the Civil Service Commission.

By taking jurisdiction the Board majority could not consider, nor could the parties dispute, that the Director’s action was anything but proper. Nevertheless, the distinction between applying shortage differential in a prospective versus retroactive manner was the determining factor for the Board majority to conclude that the Employer committed a prohibited practice by not bargaining first.

The Board majority finds that satisfaction of the purposes of shortage differentials, i.e., recruitment and retention, “can only be accomplished prospectively.” Finding of Fact No. 11. While I may disagree, I believe the Civil Service Commission is the appropriate forum to make such a finding and determination.

It is the retroactive reduction or recalculation of shortage differential used to cover the cost of arbitrated pay increases that distinguishes this case from Decision No. 389, the UPW case cited by the Board majority.<sup>5</sup>

The Board majority had no statutory authority to question whether the Director’s action was a proper exercise of management’s rights over shortage differential. But the record shows the Board majority did just that by focusing on whether the Director could apply shortage differential in a retroactive manner versus prospectively. As a result, the Board majority concluded that Respondents could not reduce shortage differentials already given to employees to pay for arbitrated salary increases unless the impact on the employees’ wages was first negotiated.

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<sup>5</sup>In my opinion, it’s a distinction without a difference for purposes of deciding whether the impact should be negotiated. This is where I part company with the Board majority. I cannot agree that the balance tips for the affected employees. In applying the balancing test in Decision No. 389, UPW, supra, the Board majority tipped the balance in favor of the affected employees whose total compensation did not change or remained unaffected by the reduction of the shortage differential. Simply because Respondents reduced shortage differential retroactive to July 1, 1996 by an amount equal to the arbitrated pay increase, the Board majority found Respondents “took back wages already paid.” I disagree because the wages were not taken back. The wages weren’t paid a second time. To add a pay increase to the total compensation, rather than the base pay, the public employer would essentially be paying the salary increase twice -- first, using the shortage differential and second, by adding new money to the total compensation. Therefore, in my view, the balance should tip in favor of the Employer given the adverse economic impact compared to employees who initially received a higher pay rate via the shortage differential and therefore saw no change in their total compensation. Thus, relying on Decision No. 389, I would find that shortage differential is not a proper subject of mandatory bargaining.



In denying Respondents' motion to dismiss, the Board stated that it was "unable to determine on this record which provision of the [Departmental Circular issued by the personnel director] the State applied to retroactively reduce the shortage differentials and whether the State violated Chapter 89, HRS, as alleged by the HGEA." The only legal basis articulated in denying Respondents' motion and accepting jurisdiction went to the merits of the case in finding that there was "a genuine issue as to material facts presented in this case." In my opinion, the Board erred by failing to address why the controversy was properly before it and not the Civil Service Commission. Had they done so, the Board in Order No. 1821 should have dismissed the complaint for lack of jurisdiction.

### **Exhaustion of Remedies**

The Board majority finds that on August 6, 1997, the HGEA filed an informal step grievance by questioning the Director's factual, legal and/or contractual basis for applying retroactive decreases in shortage differential for certain employees. Finding of Fact No. 28. On August 14, 1997, the Director replied that his actions were pursuant to the MOA referenced in Article 50 of the Unit 13 contract and the Departmental Circular. Instead of pursuing the grievance procedure bargained for in the Unit 13 contract, HGEA filed this prohibited practice complaint on October 13, 1997. HGEA, on behalf of the class of employees whose shortage differential was used to pay for the arbitrated salary increases, thus failed to exhaust the grievance procedure to arbitration.

Before bringing a prohibited practice complaint that asserts a violation of the collective bargaining agreement under HRS § 89-13(a)(8), this Board has consistently applied the general rule articulated by the Hawaii Supreme Court in Santos v. State, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982). "Where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement." Santos, supra, 64 Haw. at 653, 646 P.2d at 966. See also, Winslow v. State, 2 Haw.App. 50, 55, 625 P.2d 1046, 1050 (1981).

This Board has continued to follow the policy articulated in Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253 (1972), "to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Id., at 261. See also, Ronald Caldeira, 3 HPERB 523, 547 (1984) and Lewis W. Poe, Case No. CE-03-423, Order No. 1732, June 15, 1999.

In this case, the Board majority, without explanation, chose to ignore its own policy and the prevailing National Labor Relations Board policy favoring arbitration as a dispute settlement mechanism. Under the procedural circumstances of this case, when the



Board majority decided to retain jurisdiction, it would have been an appropriate exercise of its discretion to require the parties to use the grievance/arbitration procedure bargained for. The fact that the Board majority ignored HGEA's failure to exhaust the contractual remedies coupled with its failure to question its statutory authority over the actions of the Director regarding shortage differential, calls into question the validity of its final decision and order.

### Wilful Conduct

Finally, I disagree that the record supports any inference or presumption of wilfulness based on the natural consequence of the Director's action in recalculating shortage differentials to pay for the arbitrated pay increases retroactive to July 1, 1996.

HRS § 89-13(a), HRS, requires that violations must be wilfully committed to constitute a prohibited practice. In the past the Board has interpreted "wilful" to mean conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS." Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983).

In Decision No. 194, United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984), relied upon by the Board Majority, the Board stretched the literal interpretation set forth in Aio, when it ruled that "wilfulness could be inferred from circumstances depending on whether obligations under the law which are allegedly broken are clearly delineated in settled doctrines." 2 HPERB at 481. The Board has also ruled that wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions." 3 HPERB at 514.

To presume wilfulness in finding a violation essentially eliminates the need to separately prove a "wilful" act or omission. That's neither right, nor fair. If the Board does apply this standard, then it needs to find the wilful conduct within the violation itself. In the instant case, this means showing Respondents' failure to negotiate before acting on the shortage differential was "willfully" done.<sup>6</sup> After reviewing the transcripts of the hearing, in particular the testimony of Respondents' witnesses, Diana Kaapu and Joy Inouye, I am not convinced Respondents' failure to negotiate the recalculation of shortage differential applied retroactive to July 1, 1996, was indeed wilful.

First, under the circumstances of the instant case, there is no basis in fact on which an inference or presumption of wilfulness can be made that the Director's action over

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<sup>6</sup>"An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law." Aio v. Hamada, 66 Haw. at 409, n.8. "A wilful act may be described as one done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtless, heedlessly, or inadvertently. A wilful act differs essentially from a negligent act. The one is positive and the other negative." Id. at 410.



the recalculation of shortage differentials retroactive to July 1, 1996 was an improper exercise of management's rights. Absent any finding by the Civil Service Commission to the contrary, the Board majority would have to assume the Director, in accordance with HRS § 77-9, properly recalculated the shortage differential tables and made reductions retroactive to July 1, 1996 to coincide with the retroactive pay increases.

Second, the record fails to show that in recalculating the shortage differential retroactive to July 1, 1996, Respondents knew they were obligated to first negotiate the impact on wages to affected employees. On the contrary, given the Board's Decision No. 389,<sup>7</sup> there was no reason for Respondents to think they had to negotiate first before recalculating the shortage differentials retroactive to July 1, 1996.

Just two months prior to the filing of the instant complaint, on August 25, 1997, this Board issued Decision 389. The Board found that the shortage differential is a matter which falls within the area of management rights under HRS § 89-9(d) and, therefore, is not a mandatory subject of negotiations. Id.

For the above stated reasons, I respectfully dissent from the Board majority's decision.

  
KATHLEEN RACUYA-MARKRICH, Board Member

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<sup>7</sup>In Decision No. 389, UPW, the Board examined the Respondents' implementation and use of shortage pay differentials authorized under HRS § 77-9, as opposed to a permanent salary increase as a way to fill vacancies required by a federal court order. The union sought bargaining over the implementation of shortage declarations including who, how much and when the shortage differentials are applied.