Dec. File

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
HAWAII NURSES ASSOCIATION,	)	Case No. CE-09-41
	)	
Complainant,	)	Decision No. 104
	)	
and	)	
	)	
GEORGE R. ARIYOSHI, Governor of the State of Hawaii, and GEORGE YUEN, Director of Health, State of Hawaii,	)	
	)	
Respondents.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

On April 28, 1978, the Hawaii Nurses Association (hereafter HNA) filed a prohibited practice charge with this Board against the above-named respondents (hereafter referred to as the Employer or the State).

The petition charged that the Employer violated Subsections 89-9(c), 89-13(a)(1), 89-13(a)(7) and 89-13(a)(8) of the Hawaii Revised Statutes (hereafter HRS) when it failed to consult with HNA prior to the implementation of a policy requiring the removal of three state vehicles from use by public health nurses stationed at the Kapahulu Nursing Office.

Hearings were held before this Board on June 6 and 22, 1978. All parties were represented by counsel and were afforded rights to call and cross examine witnesses, submit exhibits and present oral arguments and briefs. The State's brief was submitted to this Board on November 13, 1978. The oral arguments were made on November 28, 1978 and the transcript was received on December 29, 1978.

Upon a full review of the entire record in this case this Board makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

The HNA is, and was at all times relevant, the certified exclusive representative of the employees in bargaining unit 9 (registered professional nurses).

Governor George R. Ariyoshi and Mr. George Yuen, Director of Health, are public employers as defined in Section 89-2(9), HRS.

The State, through the Department of Accounting and General Services (hereafter DAGS) operates a Central Motor Pool (hereafter CMP) which regulates the use of state vehicles by state agencies. The CMP was established by Act 77, Session Laws of Hawaii (hereafter SLH) 1963, to regulate the utilization of, and reduce operating costs incurred in, the use of state vehicles. Prior to Act 77, SLH 1963, various departments operated their own motor pools (I Tr. 190-191).

The CMP is a self-supporting program which provides for the allocation, maintenance, repair and storage of state-owned vehicles (Resp. Ex. 13 at 2). CMP vehicles are rented to agencies on a trip, daily, weekly, monthly or semi-permanent basis.

There are no formal standards to determine agency priorities for state vehicles; however, because the CMP is self-supporting, the mileage factor is of primary concern (I Tr. 207; II Tr. 34). Studies conducted by DAGS have shown that the "break-even" point for the cost of operating a state vehicle is 750 miles per month (I Tr. 197).

When the Department of Health (hereafter DOH) had its own motor pool prior to the adoption of Act 77, SLH 1963, all public health nurses in the department had a state vehicle (II Tr. 90). Today, the DOH is allocated 39 vehicles, 22 of which are used by the six Public Health Nursing Branch Oahu offices.

The function of a public health nurse is to provide generalized comprehensive health services particularly in the areas of disease prevention and health promotion and maintenance (II Tr. 111). Eighty per cent of the work is conducted in the field, primarily in the form of home visits (II Tr. 123).

The DOH policy regarding the use of private vehicles for official business is to encourage such use when travel is less than 400 miles per month because at this rate of usage, mileage reimbursement is cheaper than renting a CMP car (Resp. Ex. 21 & 22; II Tr. 57-58).

Since 1972, the Kapahulu Nursing Office has been called about two to three times a year by the CMP dispatcher regarding the problem of underutilized vehicles (II Tr. 139).

On May 14, 1974, a memorandum from the State Comptroller was sent to state agencies which used CMP vehicles requesting a review of their transportation requirements, consideration of alternate ways to coordinate vehicular use for maximum utilization or ways to overcome low mileage transportation requirements by personal vehicle mileage reimbursement, mail service, messenger service, etc. The memorandum was necessitated because CMP records revealed a high percentage of underutilized vehicles. Due to the limited number of available vehicles and increasing demands and operating costs, underutilized vehicles would be

subject to withdrawal for reassignment (Resp. Ex. 14). A low mileage vehicle might not be removed if sufficient program justification could be provided in terms of safety and health. Vehicles assigned to department heads were not subject to recall because such cars are purchased specifically for use by the directors (I Tr. 209; 217).

In 1976, pursuant to the directive in the May 14, 1974 memorandum, Mr. Alexander Hirota, Chief of the Automotive Management Division of DAGS, discussed the continuing problem of underutilized vehicles with the supervisor of the Kapahulu Nursing Office, Mrs. Laura Armstrong. Mr. Hirota agreed to withhold action on the vehicles until Mrs. Armstrong could find alternate means of transportation for her nurses (II Tr. 18).

On January 6, 1978, the Medical Health Services Division received a call from the CMP dispatcher regarding underutilized vehicles assigned to the Public Health Nursing Branch (II Tr. 53). The Division then notified Mrs. Armstrong that at least two cars with low usage were likely to be removed from Kapahulu.

On January 9, 1978, Mrs. Armstrong met with the Kapahulu nurses to discuss the problem and to solicit suggestions for increasing mileage utilization and alternative transportation means. This was the first time the nurses were informed of the possibility that cars might be removed (I Tr. 30; Pet. Ex. H). The nurses did not want to give up any vehicle because they were verbally promised, when they were hired ten or more years ago, that they would have state cars (II Tr. 56, 88).

In a memorandum dated February 1, 1978, DAGS requested the return of three Kapahulu vehicles with low

mileage records to the CMP. Five of the six vehicles assigned to Kapahulu averaged a little over 100 miles per month during 1977. The average mileage reported for the three recalled vehicles during 1977 were 91.8, 114.0 and 115.5 miles per month (II Tr. 140-141). Said vehicles were among the ten most underutilized vehicles of the CMP fleet.

After the three cars were returned to the CMP, a car-sharing system was instituted at Kapahulu for the three remaining vehicles. According to the nurses, car-sharing has caused difficulty in the scheduling of appointments and has resulted in time wasting. Sometimes a nurse waits for as much as 40 minutes per day for a car or someone to pick her up (I Tr. 77). While service to the public has not been refused since the cars have been removed, services have been delayed and visits have been shortened (I Tr. 75-76). The Public Health Nursing Branch Chief, Mrs. Moorefield, however, believes that the quality of nursing care rendered by the Kapahulu nurses has not gone down and adequate care is being provided with the car-sharing system (II Tr. 110).

In late February, 1978, Mrs. Moorefield advised the nurses to file a grievance because it would give her some leverage in attempting to get the cars returned to Kapahulu (I Tr. 10). As a result, in March 1978, the nurses informed their grievance chairperson of the vehicle problem and were advised to continue the informal discussions with their supervisor (I Tr. 98). It was the nurses' understanding that as long as they continued informal discussions with their supervisor and Mrs. Moorefield, there was no need to file a grievance (I Tr. 32).

On April 12, 1978, a memorandum from the affected nurses was sent to Mrs. Moorefield, outlining the problem resulting from the loss of the three vehicles and requesting that additional cars be provided and assurance that the remaining three state cars would not be taken away (Pet. Ex. D).

On April 21, 1978, Mrs. Moorefield sent a memorandum to the nurses suggesting alternatives to resolve the transportation problem (Pet. Ex. J, I Tr. 129). The suggested alternatives were: (1) use their personal cars at 18 cents per mile reimbursement or (2) accept reassignment to a nursing district in which there is a state vehicle.

The nurses were requested to respond to the memorandum by May 1, 1978 but failed to do so. Informal discussions ceased with Mrs. Moorefield's memorandum and the nurses contacted the HNA to file a prohibited practice charge against the Employer.

At the time of the Unit 9 contract negotiations in 1972 with respect to transportation, the HNA's original position was that all nurses whose work requires a car be provided with state vehicles unless they choose to use their personal automobiles (Resp. Ex. 1). Since said proposal was economically unfeasible, the State's counterproposal provided that nurses would be provided state cars or other suitable transportation insofar as it is practicable unless by mutual agreement the employee was authorized to use her personal car (Resp. Ex. 2). The provision that was finally agreed upon and is still in Article X of the present contract reads as follows:

> The Employer shall insofar as it is practicable, provide an automobile or other suitable transportation to those Employees whose full-time work requires the use of an automobile, unless by mutual agreement the Employee is authorized to use the Employee's personal car.

CONCLUSIONS OF LAW

Section 89-13, HRS, provides, in relevant part:

> Sec. 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;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; or
>
> (8) Violate the terms of a collective bargaining agreement.

The HNA contends that the Employer committed a prohibited practice under Subsection 89-13(a)(1) and (7), by violating Subsection 89-9(c), and under Subsection 89-13(8) by violating Articles I and X of the Unit 9 collective bargaining agreement when it failed to consult the HNA prior to the removal of three state cars assigned to the Kapahulu Nursing Office.

The Employer, on the other hand, argues that it did not commit a prohibited practice because the subject of providing state vehicles is negotiable and a provision on the subject was negotiated into the Unit 9 agreement. Therefore, the Employer argues, there is no duty to consult under Subsection 89-9(c). The Employer further claims that it did not violate the collective bargaining agreement because the negotiated provision, Article X, gives the Employer the flexibility to make unilateral decisions on the allocation of cars.

The issues in this case are: (1) whether there is a duty to consult under Subsection 89-9(c) on a matter which

has been negotiated; and (2) whether there has been a violation of the provisions in the collective bargaining agreement.

To determine the consultation issue, the Board must first ascertain whether the subject of providing government vehicles to public health nurses is negotiable. The Board is of the opinion that since 80 per cent of a nurse's work is conducted in the field, the furnishing of state-owned cars is a term and condition of employment and is, therefore, a negotiable subject matter.

A decision issued by the New York State Public Employment Relations Board supports the above conclusion. The New York Board held that the use of county-owned cars by public health nurses was a negotiable subject since it was a benefit which had "a significant and material relationship to conditions of employment." As such, the employer who was charged with unlawfully withdrawing county-owned cars from six public health nurses was directed to return the cars to the affected nurses and to negotiate in good faith with the union. County of Cattaraugus and Cattaraugus County Chapter, Civil Service Employees Association, Inc., 8 NYPERB 3111 (Sept. 26, 1975) and 8 NYPERB 4547 (May 8, 1975).

In the instant case, the subject of providing state cars to nurses was negotiated and a provision on the matter was included in the Unit 9 contract. The issue presented, as a matter of first impression, by this case is whether the duty to consult under Subsection 89-9(c) applies to matters which are negotiable under Subsection 89-9(a).

In a prior decision, this Board stated that, "Subsection 89-9(c) deals with the duty of the public employer to meet and confer with the union on matters other than those

related to negotiations" (Decision 37 at page 5). The Board did not elaborate on this matter since the focus in Decision 37 was on defining the scope of "matters affecting employee relations." The instant case requires further examination of the meaning and intent of Subsections 89-9(a) and 89-9(c), which are as follows:

> Sec. 89-9. Scope of negotiations. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under this Act 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.
>
> * * *
>
> (c) 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. (Emphasis added)

A review of the legislative history of Chapter 89 reveals that the bill, Senate Bill 1696-70, as originally introduced did not contain a consultation provision such as is now embodied in Subsection 89-9(c).

In the subsequent versions reported out of the Senate Committee on Public Employment (S.B. 1696-70, S.D. 1, p. 22) and the House Committee on Government Efficiency and Public Employment (S.B. 1696-70, S.D. 1, H.D. 1, p. 22), the

section dealing with the duty to negotiate was amended to include a consultation provision as follows:

> Sec. 10. Scope of negotiations. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment 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 making a concession.
>
> (b) 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. (Emphasis added)

The House Finance Committee further amended the consultation provision of the bill as follows:

> (c) 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. (S.B. 1696-70, S.D. 1, H.D. 2, p. 18; emphasis added)

It appears that the addition of the phrase "Except as otherwise provided herein. . ." to the consultation provision, was intended to restrict the scope of consultation to a narrower area than provided for in the previous broader draft of the bill which would have required consultation on all matters affecting employee relations.

Two relevant rules of statutory construction provide that:

> It is a cardinal rule of statutory construction that the courts are bound, if possible, to give effect to all parts of a statute, and no sentence, clause or word shall be construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute. In the Matter of the Tax Appeal of David P. Aiona, Taxpayer, Sup. Ct. No. 6462 (Hi. February 28, 1979). See also 2A, C. D. Sands, Sutherland Statutory Construction, §46.06 (4th ed., 1975).
>
> [A]ll sections of an act relating to the same subject matter should be considered together and not each by itself unless to do so would be plainly contrary to the legislative intent. Insofar as possible the separate effect or each individual part or section of an act is made consistent with the whole. 2A, C. D. Sands, Sutherland Statutory Construction, §47.06 (4th ed., 1975).

To determine the intent and scope of the consultation provision of Subsection 89-9(c), the words "Except as otherwise provided herein" must be given meaning within the context of the subsection's relationship to Subsection 89-9(a). Subsection 89-9(c) requires consultation on all matters affecting employee relations except for those that have been provided for otherwise. Those matters which have been provided for otherwise are wages, hours and other terms and conditions of employment which are subject to negotiations under Subsection 89-9(a).

The primary reason for a consultation provision is to facilitate employee participation in joint decision making on substantial and critical matters affecting employee relations which are normally determined by management alone. Matters of consultation do not require a resolution of differences. "All that is required is that the employer

inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or policy change take place" (Decision 54 Hearings Officer's Report at page 11).

On the other hand, a matter that is negotiable should be settled through the bargaining process.

> Collective bargaining is not limited to negotiation of an agreement under which the parties will operate. In some instances bargaining can and must be carried on during the term of an existing agreement. In the words of the Supreme Court, "Collective bargaining is a continuing process" involving among other things day-to-day adjustments in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract. C. J. Morris, The Developing Labor Law, p. 340 (1971). (Footnotes omitted; emphasis added)

If a change in the negotiated contract provision is desired, the matter should be renegotiated.

The concepts of negotiation and consultation are distinctly different. It is unlikely that the Legislature intended to overlap these concepts and require that negotiable matters be also subject to consultation.

The Board, therefore, concludes that, in light of the foregoing, the Employer was not required to consult, pursuant to Subsection 89-9(c), with the HNA regarding the negotiable subject of State vehicles from the Kapahulu Nursing Office. Hence, there was no violation of Subsection 89-9(c), 89-13(a)(1) and 89-13(7).

We now turn to the second issue of this case which is whether the Employer wilfully violated the provisions of the Unit 9 collective bargaining agreement, and thus committed a prohibited practice under Subsection 89-13(8).

The pertinent parts of the contractual provisions in question are:

ARTICLE I - RECOGNITION AND COVERAGE

* * *

> The Employer agrees that it shall consult the Association when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours, or other conditions of work contained herein may be made except by mutual consent.

ARTICLE X - TRANSPORTATION

Section 1. Use of Government Automobile:

> A. The Employer shall insofar as it is practicable, provide an automobile or other suitable transportation to those Employees whose full-time work requires the use of an automobile, unless by mutual agreement the Employee is authorized to use the Employee's personal car.

* * *

The HNA charges that the Employer wilfully violated Article I when it: (1) formulated and implemented the 1974 DAGS policy on low mileage vehicles without consulting the union; and (2) made a change in working conditions by withdrawing the cars without mutual consent.

The Employer contends that the union was aware during negotiations that the State could not feasibly provide cars for all the nurses due to economic reasons. The history of negotiations reported in the Findings of Fact above supports this contention. The Employer further argues that despite the consultation requirements in Article I, the mutually agreed upon language of "insofar as it is practicable" in Article X gives the Employer discretionary authority to allocate state cars.

The Employer's unilateral action was based on a claim of contractual authority in one contract clause

(Article X) while the union's prohibited practice charge was based on another contract clause (Article I). Resolution of this dispute requires clarification of the ambiguous language of "insofar as it is practicable" in Article X and the interrelationship of Articles I and X. The dispute clearly involves contractual interpretation. As such, it should be resolved through the grievance arbitration procedure agreed to by the parties. Decision 22.

In the case of Department of Transportation, State of Hawaii vs. Hawaii Public Employment Relations Board and David Santos, Civil No. 51437 (Judgment entered March 23, 1979), the Circuit Court for the First Circuit reversed Decision 76 of this Board and ruled as follows:

> HPERB, before acting on the pending violation of contract charge against the Employer should have deferred to the grievance procedure set forth in the Unit 1 contract.

Based on said ruling, the Board is constrained to agree with the Employer that the issue of whether it violated the Unit 9 agreement should be deferred to the arbitration process provided for in said agreement.

The Unit 9 contract provides for a grievance procedure in Article XXI which reads in part:

> It shall be the intention of the parties that an Employee grievance which arises out of alleged violation, misinterpretation or misapplication of this Agreement shall be resolved in accordance with provisions set forth herein.

ORDERS

In view of the foregoing, the Board hereby orders and directs that:

(1) The prohibited practice charge alleging violation of Subsections 89-9(c), 89-13(a)(1), and 89-13(a)(7) HRS, be dismissed;

(2) The questions regarding interpretation of the Unit 9 contract be resolved by the parties through the grievance arbitration procedure provided in the Unit 9 contract. The Board shall retain limited jurisdiction for the purpose of determining whether the arbitrator's award is within the scope of his powers, the proceedings were expeditious, lawful and fair, and the award is consistent with Chapter 89; and

(3) The prohibited practice charge alleging violation of Subsection 89-13(8), HRS, be conditionally dismissed, subject to a motion to reopen if the Employer is unwilling to settle this dispute through the grievance arbitration procedure in the Unit 9 contract based on the ground that the time limit for filing a grievance has expired. The Board notes that while there is a time limit for filing a grievance in the Unit 9 contract, it can be waived by the Employer.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: April 4, 1979

Honolulu, Hawaii