Dec. File

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of FRANK F. FASI, Mayor of the City and County of Honolulu, Petitioner, and HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO; UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO; HAWAII STATE TEACHERS ASSOCIATION, NEA; and GEORGE R. ARIYOSHI, Governor of the State of Hawaii, Intervenors.	Case No. DR-02-30 Decision No. 107

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This case was commenced on November 18, 1977 by a petition filed with the Hawaii Public Employment Relations Board (hereafter HPERB or Board) by the Mayor of the City and County of Honolulu as public employer and party to the Unit 2 collective bargaining agreement. In the petition, the Mayor requested a declaratory ruling as to whether Article 12.B.5. of said agreement, as interpreted by Arbitrator Thomas L. Mui in the matter of the arbitration between Hawaii Government Employees' Association (hereafter HGEA), exclusive representative for Joseph W. Benson and the City and County of Honolulu (hereafter City), violated §89-1 and 89-9(d), Hawaii Revised Statutes (hereafter HRS).

Subsequently, the HGEA, the United Public Workers (hereafter UPW), and the Hawaii State Teachers Association

(hereafter HSTA) (collectively referred to herein as Union-Intervenors), along with the State of Hawaii (referred to herein as Employer-Intervenors) filed petitions to intervene. All of said petitions were granted.

On December 8, 1977, the HGEA filed a motion to dismiss the petition for a declaratory ruling based upon the grounds that the Board has no subject matter jurisdiction and that other good cause exists to dismiss the petition. The other Union-Intervenors joined in the HGEA's motion to dismiss.

On January 31, 1978, after due notice, the Board held a hearing on the motion to dismiss at which briefs and oral arguments were presented. Following the hearing, the Board in Order 172 determined that good cause existed for holding the declaratory ruling case in abeyance pending a decision in Supreme Court, Case No. 6119, in which the issue of the Board's jurisdiction to issue a declaratory ruling was on appeal to the Supreme Court.

On February 27, 1979, the Supreme Court filed an opinion in No. 6119 reversing and remanding the case to the Circuit Court. After due notice, the Board resumed the hearing on the motion to dismiss. After additional oral arguments were heard, the Board orally granted the Union-Intervenors' motion to dismiss.

The Board's decision was based upon full review of all exhibits, memoranda and arguments submitted and rendered. The following findings of fact, conclusions of law, and order are in support thereof.

FINDINGS OF FACT

1. The Petitioner Frank F. Fasi, Mayor of the City and County of Honolulu, is a public employer as defined by §89-2(d), HRS, and party to the Unit 2 collective bargaining agreement.

2. The HGEA is the exclusive bargaining representative for Units 2, 3, 4, 6, 8, and 13 and party to the Unit 2 collective bargaining agreement.

3. The UPW is the exclusive bargaining representative for Units 1 and 10.

4. The HSTA is the exclusive bargaining representative for Unit 5.

5. The State of Hawaii is a public employer as defined by §89-2(9), HRS, and party to the Unit 2 collective bargaining agreement.

6. On April 9, 1976, the Petitioner, the Employer-Intervenor, the Counties of Hawaii, Maui, and Kauai, and the three Union-Intervenors executed a collective bargaining agreement for Unit 2, effective July 1, 1976. Article 12.B.5. of that agreement relating to promotions provides:

> B. When making promotions, the civil service statutes, rules, regulations, and procedures governing promotions which exist on the effective date of this Agreement shall be applied, except as modified below.
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> . . .
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> 5. When making promotions, the Employer shall consider the following order of priority:
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> a. In the case of the respective County jurisdictions:
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> (1) Employees within the division where the vacancy occurs;
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> (2) Employees within the department where the vacancy occurs;

(3) Employees within the respective jurisdiction.

7. On August 19, 1976, the Petitioner posted a notice of vacancy for the position of Auditorium Trade Unit Supervisor, a Unit 2 position. Petitioner selected a Unit 1 employee over the grievant Joseph Benson, a Unit 2 employee. The HGEA filed a grievance on behalf of Benson alleging that the selection of the Unit 1 employee over Benson violated Article 12.B.5. of the collective bargaining contract. On August 15, 1977, Arbitrator Thomas L. Mui issued his decision (hereafter referred to as the Mui award). After ruling that the priorities established in Article 12.B.5. apply where applicants for a position are relatively equally qualified, the Mui award found for Benson stating in relevant part:

> The whole record and the weight of all substantial evidence discloses no material difference between the qualifications of Benson or the Selectee; therefore, the promotion of the Selectee was in violation of Sections 12.B.4. and 12.B.5. of the Unit 2 Collective Bargaining Agreement. Benson should be appointed as the Auditorium Trade Unit Supervisor, with back pay retroactive to the date the appointment was made.

8. On August 29, 1977, Petitioner moved the Circuit Court to vacate, modify, or correct the arbitration award pursuant to Hawaii Revised Statutes §658-9. After a hearing on the motions held October 6, 1977, the Circuit Court dismissed the motions. On November 17, 1977, Petitioner appealed to the Supreme Court from the order dismissing the motions. The appeal is currently pending in that Court.

9. On November 18, 1977, the Petitioner filed for the declaratory ruling which is the subject of this case.

CONCLUSIONS OF LAW

The relevant statutory authority under which the present petition is brought is HRS 91-8, which states:

> Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

The Petitioner and the Employer-Intervenor argued that the motion to dismiss should be denied because the Board has jurisdiction to entertain the request for a declaratory ruling as to whether the Mui award violates HRS 89-1 and 89-9(9) based upon its authority to interpret Chapter 89, HRS. The employers further contended that the fact that there is another case arising from this arbitration award does not preclude such jurisdiction.

On the other hand, the Union-Intervenors have urged that in essence the Petitioner is requesting that the Board overturn the Mui award, an action not within Board authority. The Union-Intervenors argue in the alternative that even if the Board has the power to review arbitration awards, that the instant award is pending in the courts, precluding the Board's assertion of jurisdiction.

The Board has noted and weighed the contentions of all parties to this proceeding. The Board is of the opinion that it should decline jurisdiction over the instant declaratory ruling petition for good cause. In Petition for Declaratory Ruling by the Board of Education and Hawaii State Teachers Association, No. DR-05-11, Decision 56 at 4 (Nov. 26, 1974), this

Board ruled that according to Rule 1.09(f)(4), promulgated under HRS 91-8 and 89-5, the Board may decline issuance of a declaratory ruling for good cause. In that case, the Board considered a petition for a declaratory ruling that an arbitration decision, the Kagel award, violated HRS §89-11(b). The Board found that there was good cause to decline issuing an order, reasoning:

> Any way the BOE casts its prayer for relief, it is coming to this Board with a request that this Board overturn at least that part of the Kagel award. . . . If this Board were to overturn the Kagel award. . . it would be acting in a manner completely contrary to the spirit, intent and basic purpose of Chapter 89, HRS, and the mission of this Board which are to promote harmonious and cooperative relations between government and its employees, and encourage parties to any labor dispute to voluntarily settle their differences.

Based upon said decision, the Board is confined to the conclusion that it must refuse jurisdiction over the instant petition for declaratory ruling. As the Union-Intervenors have pointed out, the same ground for good cause exists in the present case. The instant petition is also essentially a request for this Board to overturn the Mui award.

Moreover, Petitioner is not precluded from relief from such award because a second case arising out of the Mui award is currently pending before the Supreme Court. As the Board stated in Decision 56:

> Although we rest our refusal to grant the requested declaratory order herein on the grounds stated above, we also take cognizance of the HSTA's argument that the proper forum to which the BOE should have taken its request for what is, in effect, a vacation or modification of the Kagel award is the Circuit Court under Chapter 658, HRS (Arbitration and Awards).

> . . .The BOE is aware that the Circuit Court has in the past taken jurisdiction over a case involving an arbitration award rendered under Chapter 89, HRS. HAWAII STATE TEACHERS ASSOCIATION vs. BOARD OF EDUCATION, S.P. 3505 (May 30, 1974). Certainly, if the BOE felt it had grounds for a modification or vacation of the Kagel award, it should have moved the Circuit Court under Section 658-11, HRS, for relief.

Although the Board, in the exercise of its discretion, bases its approval of the motion to dismiss upon good cause, it notes the lack of merit in the argument of the Petitioner and the Employer-Intervenor that the motion to dismiss should be denied because the Board has jurisdiction to entertain the Petitioner's request for a declaratory ruling pursuant to the Supreme Court's ruling in Frank Fasi vs. State of Hawaii Public Employment Relations Board, et als.; Hawaii State Teachers Association (HEA-NEA) vs. Hawaii Public Employment Relations Board, et als.; and HGEA, Local 152, AFSCME, AFL-CIO, vs. Hawaii Public Employment Relations Board, et als. (hereafter referred to herein as Aiu), Case No. 6114 (Haw. Feb. 27, 1979).

The Board has carefully read the Supreme Court's decision in the Aiu case. The Petitioner and Employer-Intervenor are correct in arguing that the Aiu ruling controls the Board's jurisdiction over the instant declaratory ruling petition. The City and State err, however, in their conclusion that such ruling supports the Board's approval of the Petitioner's request to deny the motion to dismiss. In reversing and remanding the case to the Circuit Court, the Supreme Court in Aiu did not confer open ended, concurrent declaratory ruling jurisdiction over arbitration cases to the Board. Rather, the Court expressly limited the Board's authority under HRS 91-8 stating:

> We think it is fairly implied, from the provision of §91-8 giving orders disposing of petitions for declaratory orders the same status as other orders of the Board, that the question presented by the petition had to be one which would be relevant to some action which the Board might take in the exercise of the powers granted by Chapter 89. The applicability of §89-9(d) to the collective bargaining agreement between C&C and UPW was thus before the Board in the context of the possible actions which the Board might take with reference to the disputed provision of the agreement.

The Court found such declaratory ruling jurisdiction upon the facts of the Aiu case stating:

> The wilful failure of an employer to observe the terms of a collective bargaining agreement is defined by §89-13(a)(8) as a prohibited practice, with respect to which §89-5(b)(4) empowers the Board, upon complaints by employers, employees and employee organizations, to "take such actions with respect thereto as it deems necessary and proper." Since the meaning and effect of a provision of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between C&C and UPW was a question which related to an action which the Board might take in the exercise of its powers. The applicability of §89-9(d) to the collective bargaining agreement is therefore a question which was properly placed before the Board by the petition pursuant to §91-8.
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> . . .If the Board has jurisdiction to take action with respect to a prohibited practice, it had jurisdiction to declare what would constitute a prohibited practice.

The petition in this case requests the Board to determine whether the contract provision relating to promotions, as interpreted by Arbitrator Mui, violates Chapter 89, HRS. The Petitioner has failed to demonstrate that any prohibited practice charge could arise out of the Mui award. Such a preliminary showing would be required for the Board to find that it has jurisdiction over the present petition under Aiu.

In view of the foregoing, this Board concludes that it has good cause to grant the Union-Intervenor's motion to dismiss the declaratory ruling petition.

ORDER

The motion to dismiss the declaratory ruling petition is granted.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: April 19, 1979

Honolulu, Hawaii