

STATE OF HAWAII

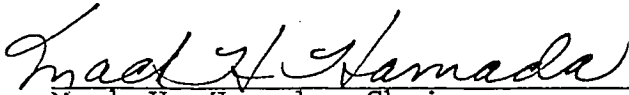
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
HAWAII GOVERNMENT EMPLOYEES')	Case No. <u>R-09-15</u>
ASSOCIATION, LOCAL 152,)	
AFSCME, AFL-CIO,)	
)	
Petitioner,)	Decision No. <u>109</u>
)	
and)	
HAWAII NURSES ASSOCIATION,)	
)	
Exclusive)	
Representative)	
and Intervenor,)	
)	
and)	
GEORGE R. ARIYOSHI, Governor)	
of the State of Hawaii;)	
FRANK F. FASI, Mayor of the)	
City and County of Honolulu;)	
HERBERT T. MATAYOSHI, Mayor)	
of the County of Hawaii;)	
ELMER F. CRAVALHO, Mayor of)	
the County of Maui; EDUARDO E.)	
MALAPIT, Mayor of the County.)	
of Kauai,)	
)	
Employers.)	

ERRATA AND NOTICE OF TIME OF TALLY

The attached pages contain corrections of an omission and an error in Decision No. 109 of the Hawaii Public Employment Relations Board in the above-entitled matter. The corrections do not alter the findings, conclusions, or orders of the Board in any respect. The corrections have been signified in the following manner: material to be deleted is bracketed; new material is underscored.

Also, please be advised that the tally of ballots scheduled for Friday, June 29, 1979, will commence at 9 a.m.


 Mack H. Hamada, Chairman
 Hawaii Public Employment Relations Board

Dated: May 29, 1979

Honolulu, Hawaii

Polling Place: LEAHI HOSPITAL

6:45a.m.-7:45a.m.
2:45p.m.-3:15p.m.

Leahi Hospital
Wilcox Building, Leahi Hospital
Hale Mohalu
Diamond Head Health Center
Kapahulu Health Center
Kaimuki High School
Kaiser High School
Kalani High School
McKinley High School
Hawaii School for Deaf and Blind
University of Hawaii
Jefferson School

Polling Place: HAWAII STATE HOSPITAL

6:30a.m.-7:30a.m.
3:00p.m.-3:30p.m.

Hawaii State Hospital
Windward Health Center
Windward Mental Health Center
Castle High School

Polling Place: MALUHIA HOSPITAL

6:30a.m.-7:30a.m.
3:00p.m.-3:30p.m.

Maluhia Hospital
Kalihi-Palama Mental Health Center
Lanakila Health Center
Kinau Hale
Liliuokalani Building
State Prison
Halawa Prison
Detention Home
Farrington High School
Roosevelt High School
C&C Health Dept.

Polling Place: WAIMANO TRAINING SCHOOL
AND HOSPITAL

6:30a.m.-7:00a.m.
3:00p.m.-3:30p.m.

Waimano Trng. Sch. and Hosp.
Leeward Health Center
Aiea High School
Pearl City High School
Radford High School

Polling Place: WAIPAHAU HEALTH CENTER

1:30p.m.-2:00p.m.

Waipahu Health Center
Waipahu Mental Health Center
Nanakuli Maternity and Infant Care Center
Ewa Mental Health Clinic
Wahiawa Mental Health Clinic
Haleiwa/Waiialua Mental Health Center
Waianae Mental Health Clinic
Campbell High School
Leilehua High School
Mililani High School
Waianae High School
Waipahu High School

Polling Place: KONA HOSPITAL

8:30a.m.-9:00a.m.

Kona Hospital
Kona Health Center
Konawaena High School

9. OBSERVERS. Each party hereto will be allowed to station an equal number of authorized observers, to be approved beforehand by the Board, at the polling places during the election to assist the Board in conducting the election and to challenge the eligibility of voters.

No observer or any other person while present in the polling place during the time of voting shall engage in any activity designed to influence the voters in their choices or wear or display any campaign material.

10. NO CAMPAIGNING. There shall be no campaigning within 100 feet of the entrance of the building in which the voting is being conducted.

11. MAIL BALLOTS. Eligible voters working at the following locations shall cast ballots by mail:

Kahuku High School (Oahu)
Hawaii Youth Correctional Facilities
Waimanalo Health Project
Kailua High School
Kalaheo High School
Hana Hospital (Maui)
Kaunakakai Public Health Nursing Office (Molokai)
Kalaupapa Settlement (Molokai)
Lanai Community Hospital (Lanai)
Kau Hospital (Hawaii)
[Kohala Public Health Nursing Office (Hawaii)]
Kau Public Health Nursing Office (Hawaii)
Kohala Hospital (Hawaii)
Kohala Public Health Nursing Office (Hawaii)
Honokaa Hospital (Hawaii)
Honokaa Public Health Nursing Office (Hawaii)
Honokaa High School (Hawaii)

The Board will mail ballots to such eligible voters. All mail ballots must be received by the Board no later than 4:30 p.m. on June 28, 1979.

12. ABSENTEE BALLOTS. Those eligible voters who will not be able to vote at their assigned polling places

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the County of Maui; EDUARDO E.)
MALAPIT, Mayor of the County)
of Kauai,)
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Employers.)

Case No. R-09-15

Decision No. 109

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION

Based upon the entire record in these proceedings, the Board makes the following findings of fact, conclusions of law and directs that a certification election shall be held pursuant to Section 89-7, Hawaii Revised Statutes (hereafter HRS), in optional appropriate bargaining unit 9 (registered professional nurses) upon the terms set forth herein.

FINDINGS OF FACT

Optional appropriate bargaining unit 9 consists of registered professional nurses who are employed by the State

of Hawaii and its four counties. The statutory employers are the Governor and the four mayors. However, no persons in Unit 9 are employed presently by the counties of Hawaii, Maui, and Kauai; one person is employed by the City and County of Honolulu, and the remainder of the persons in the unit are employed by the State.

The Hawaii Nurses Association (hereafter HNA) is the exclusive representative of employees in Unit 9.

A collective bargaining agreement between the public employers and the HNA for Unit 9 is in existence. It is for the period from July 1, 1976 through June 30, 1979.

The Hawaii Government Employees' Association (hereafter HGEA) is an "employee organization" as that term is defined in Subsection 89-2(8), HRS.

On April 2, 1979, the HGEA filed a petition requesting this Board to hold an election by which the employees in optional collective bargaining unit 9 (registered professional nurses) would have an opportunity to determine whether they wish to change their exclusive bargaining representative.

The HGEA's petition was supported by more than the 30 per cent showing of interest required by Section 89-7, HRS.

The petition was timely in that it was filed ninety days prior to June 30, 1979, which is the expiration date of the Unit 9 collective bargaining agreement between the HNA and the public employers.

Pursuant to its Rule No. 2.10, the Board, after due notice, on April 11, 1979, attempted to conduct the investigation called for by said rule.¹

¹Rule 2.10 provides:

2.10 Investigation.

(a) INITIATION. After the filing of a petition, the Board may direct an investigation.

The attorney for HNA attended said investigation but repeatedly refused to state whether he had any position to take on any of the issues which might arise during the course of the representation proceeding. He asserted as the reason for his inability to take positions that the 30-day open period provided for in Section 89-7, HRS, for the filing of representation petitions ("not more than ninety days, but not less than sixty days, prior to the expiration of the agreement") had not closed and that other parties unknown to him might intervene.

Unable to continue its investigation because of the unwillingness of counsel for the HNA to cooperate in any way with the proceedings, the Board determined at the April 11, 1979 investigation to go formally on the record with a court reporter present. The Board's chairman counted out ten working days from April 11, 1979, in order to be in compliance with Board Rule 1.08(c) and set April 26, 1979 as the hearing date. This counting and setting of the date was done in the presence

Footnote Continued

(b) CONDUCT OF INVESTIGATION. The Board, hearings officer or any staff member of the Board may conduct the investigation.

(c) PURPOSE OF INVESTIGATION. The purpose of the investigation is to resolve the following:

(1) Whether the showing of interest requirement of these rules has been satisfied.

(2) Whether more than one employee organization seeks to represent the employees in the appropriate bargaining or optional appropriate bargaining unit.

(3) Whether there is agreement among the parties to the composition of the appropriate bargaining or optional appropriate bargaining unit.

(4) Whether the parties desire to enter into a stipulation for a consent election.

of counsel for the HNA who appeared to acquiesce therein, subject to his position that any hearing during the 30-day open period was premature.

Thus, ten days of actual notice was given to all participants.

The Board on April 12, 1979 issued a written notice of the April 26 hearing, thus confirming the notice it had given to all the parties on April 11, 1979.

Thereafter, on April 20, 1979 counsel for the HNA, on behalf of his client, filed with the Board a petition to intervene in these proceedings. Said petition was granted by Order No. 245 of this Board on April 20, 1979.

On April 24, 1979, counsel for the HNA filed a Motion to Withdraw Notice of Hearing and/or to Amend a Notice of Hearing.

The Board, for the reasons set out hereinafter under its Conclusions of Law, orally denied said motion.

Counsel for the HNA asked for leave to appeal this interlocutory ruling but this was denied. He asked for written reasons for the denial of his motion and was told that he would be provided with a written order. However, when he subsequently asked leave to file proposed findings of facts and conclusions of law herein, the Board indicated that rather than giving him a series of written rulings, he would receive all of the written rulings in the form of the instant decision.

On April 24, 1979, the HNA filed a petition for a declaratory ruling. Case No. DR-09-35. By said petition, the HNA sought a ruling on the following questions:

- (1) Whether a majority of Unit 9 employees desire a separate, optional bargaining unit;

- (2) Whether a majority of both supervisory and nonsupervisory employees desire the inclusion of supervisory employees in such a bargaining unit;
- (3) What, if any, employee organization is to exclusively represent said bargaining unit.

In Order No. 246, issued on April 30, 1979, the Board dismissed Case No. DR-09-35 and said:

After hearing and considering arguments by counsel for both the HNA and the HGEA, the Board is of the opinion that pursuant to Rule 1.09(f), it must refuse to entertain the instant petition for good cause. The Board finds that such good cause exists because the declaratory ruling request presents only a legal question as to the proper statutory interpretation of HRS 89-6(a), which can be adequately and appropriately considered to the extent necessary in the pending case, R-09-15. There are no underlying factual issues presented by the instant petition which would merit the separate proceedings which the petitioner HNA requests.

In the instant case, the HGEA has petitioned for a certification election in the following unit:

Registered Professional Nurses, Unit 9, as described in Certification of Bargaining Representative in case No. R-09-07, Hawaii Public Employment Relations Board, February 17, 1972 (copy attached), and as subsequently amended to date. Our intention is to include all positions currently included in that unit. (Quoting from HGEA petition)

The positions presently included in bargaining unit 9 are Position HD215, employed by the City and County of Honolulu, and the following State Positions: 2121, 14320, 15997, 17578, 17579, 17580, 18541, 18542, 18543, 18544, 18545, 20160, 20207, 20489, 20515, 20750, 20754, 22066, 22985, 23627, 23628, 23630, 23632, 24485, 24839, 25177, 25332, 25861, 28497, 28735, 28974, 29021, 29177, 29178, 29179, 29180, 29181, 29200, 29201, 29553, 29610, 954, 956,

957, 1004, 1006, 1008, 1009, 1011, 1015, 1935, 2119, 2120,
2124, 2126, 3011, 3044, 4406, 6907, 6908, 6909, 7106, 8128,
8130, 8133, 8314, 10316, 10997, 10999, 11000, 11001, 11003,
11005, 11048, 11673, 11677, 11678, 11679, 12920, 12922, 12924,
12925, 12926, 13614, 13615, 13616, 13730, 14177, 14319, 14321,
14322, 14323, 14324, 14325, 14326, 14327, 14328, 14329, 14330,
14331, 15240, 15993, 15998, 17319, 17401, 17581, 17582, 17583,
18091, 18152, 18153, 18154, 18155, 18158, 18160, 18168, 18173,
18181, 18183, 18185, 18188, 18189, 18190, 18191, 18192, 18196,
18197, 18198, 18199, 18200, 18201, 18247, 18248, 18275, 18280,
18281, 18282, 18283, 18285, 18286, 18289, 18290, 18291, 18292,
18355, 18589, 19671, 19672, 19673, 19674, 19675, 19676, 19677,
19678, 19679, 19680, 19681, 19682, 19683, 19684, 19685, 19686,
19687, 19688, 19689, 19690, 19691, 19692, 19693, 19694, 19695,
19696, 19697, 19698, 19699, 19700, 19701, 19702, 19703, 19704,
19705, 19706, 19762, 19763, 19764, 19765, 19766, 19772, 19864,
19879, 19880, 19882, 19883, 19884, 19985, 20036, 20103, 20104,
20105, 20106, 20113, 20156, 20157, 20165, 20166, 20167, 20168,
20205, 20206, 20207, 20208, 20209, 20210, 20211, 20251, 20252,
20253, 20254, 20255, 20257, 20258, 20471, 20481, 20482, 20483,
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20503, 20504, 20505, 20506, 20507, 20508, 20509, 20510, 20511,
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26193, 26274, 27783, 28315, 28316, 28430, 28578, 28586, 28672,
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25285, 25643, 26078, 26200, 26330, 27812, 6090, 20461, 22691,
25804, E19890, 923, 1010, 2382, 3867, 3868, 4445, 4470, 6087,
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26146, 27457, 953, 977, 3008, 3010, 3033, 3048, 3056, 3802, 3805, 6086, 7190, 7192, 7193, 7197, 7397, 12114, 18170, 19256, 19661, 20459, 20858, 20935, 23091, 25602, 19787, 20203, 20320, 20321, 20322, 20323, 21489, 21859, 22654, 23575, 26169, 19788, 20319, 11674, 2128. (HGEA Exhibit 1)

The positions presently excluded from Unit 9 are as follows: 20162, 20250, 20739, 20858, 28364, 2218, 3007, 7395, 9884, 21847, 19660, 20030, 20458, 20934, 23413, 3006. (HGEA Exhibit 2)

HPERB Rule 2.06(b)(1), (2), and (3) states:

(b) VALID DETERMINATION; VALID ELECTION; COLLECTIVE BARGAINING AGREEMENT.

(1) VALID DETERMINATION; VALID ELECTION. Where there has been a valid determination of an optional appropriate bargaining unit or election to determine the exclusive bargaining representative in an appropriate bargaining or optional appropriate bargaining unit, the Board shall not entertain a petition for determination, election or decertification until the expiration of twelve months of such determination or election.

(2) COLLECTIVE BARGAINING AGREEMENT. Where there is a collective bargaining agreement, a petition for determination, election or decertification shall be filed not more than ninety days and not less than sixty days prior to the expiration of the agreement.

(3) SHOWING OF INTEREST.

a. PETITIONS FOR DETERMINATION; ELECTION; DECERTIFICATION. The petition for determination, certification or decertification shall be supported by a showing of interest of at least thirty per cent of the employees in the appropriate bargaining or optional appropriate bargaining unit.

b. EXCLUSIVE BARGAINING REPRESENTATIVE; PARTY TO COLLECTIVE BARGAINING AGREEMENT. An employee organization shall be regarded as satisfying the showing of interest requirement as an intervenor if it is the exclusive bargaining representative or if it is the party to a currently effective or recently expired collective bargaining agreement covering the employees in such petitioned bargaining unit.

c. . . FILING OF SHOWING OF INTEREST.

The proof of showing of interest may be filed simultaneously with such petition or filed within forty-eight hours of such petition. (Emphasis added)

The HGEA did not submit a petition for determination of an optional appropriate bargaining unit to determine if the nurses wish to continue to have a separate Unit 9 for registered professional nurses (referred to hereafter as determination election).

The HGEA did not file a showing of interest to support a determination election; support for a determination election cannot be inferred from the showing of interest cards filed by the HGEA in support of its petition for representation election.

The HGEA did, however, file a petition and a showing of interest sufficient to call for a representation election in the existing optional unit.

The HNA proposed that four presently excluded positions, 3007, 7395, 9884, and 21847, be included in the unit. The HNA, however, failed to provide evidence that would justify such an inclusion. The evidence which was submitted concerning the positions supports their continued exclusion.

There was no disagreement among the parties as to any other inclusions or exclusions of positions. Although the HNA from time to time suggested that it had reservations about some inclusions and exclusions, it failed to produce evidence on these matters.

No employee organization other than the HNA petitioned to intervene in this case.

Both parties in this case filed proposed findings of fact. The HGEA also filed proposed conclusions of law.

RESPONSES TO THE HNA'S PROPOSED
FINDINGS OF FACT

The first three findings of fact proposed by the HNA are the following:

1. The State of Hawaii and the City and County of Honolulu are public employers employing registered professional nurses in bargaining unit 9.

2. The Hawaii Government Employees' Association, hereafter "HGEA", is an employee organization and the Petitioner for an optional appropriate bargaining unit in this case.

3. The Hawaii Nurses Association, hereafter "HNA", is the current exclusive representative of collective bargaining unit 9 (registered professional nurses).

The Board has made substantially similar findings of fact herein.

The fourth proposed HNA finding of fact is:

4. On or about April 2, 1979, HGEA filed a petition for representation for an optional appropriate bargaining unit composed of registered professional nurses currently included in unit 9 as defined in the certification of bargaining representative in Case No. R-09-07. At the time of the filing of said petition by HGEA, a collective bargaining agreement between the State of Hawaii and the City and County of Honolulu and HNA was in existence covering the period July 1, 1976 to June 30, 1977.

The Board is in substantial agreement with the above proposal and has so found. However, the Board disagrees with the HNA's assertion that the current collective bargaining agreement between the public employers and the HNA covers the period from July 1, 1976 to June 30, 1977. It covers the period from July 1, 1977 to June 30, 1979.

The fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, fifteenth and sixteenth HNA proposed findings of fact are:

5. HGEA did not request in its petition for representation a bargaining unit other than for unit 9 as it existed by virtue of Decision No. 10 in Case No. R-09-07. Said decision provided in relevant portions as follows:

...pursuant to the authority vested in the Board by the Hawaii Public Employment Relations Act, IT IS HEREBY CERTIFIED that the HAWAII NURSES ASSOCIATION, INC. has been designated and selected by a majority of the Registered Professional Nurses, supervisory and non-supervisory, of the above-named public employers, in the optional appropriate bargaining unit described herein, as their exclusive bargaining representative for the purpose of bargaining collectively on questions of wages, hours, and other terms and conditions of employment.

UNIT:

Included: All SUPERVISORY and NON-SUPERVISORY Registered Professional Nurses as listed on the official voting lists at the polling places.

Excluded: All Registered Professional Nurses assigned to the following position numbers: 20162, 20250, 23030, 3033, 2218, 19660, 20030, 20458, 20737, 20934, 23413, 7395, 9884, 3007, 3006. (Emphasis added)

6. HGEA's petition was supported by a showing of at least 30 per cent of the employees in the optional appropriate bargaining unit 9 in accordance with Rule 2.06(b)(3)a.

8. On April 20, 1979 the Board granted HNA intervenor status pursuant to Rule 2.06(b)(3)b.

9. An investigative conference was scheduled and held by the Board on April 11, 1979.

10. On April 24, 1979 HNA filed a motion to withdraw notice of hearing and/or to amend a notice of hearing. Said motion was denied by the Board orally on April 26, 1979. While a commitment to prepare a written order on the motion was given by the Chairman, no written order has been prepared or entered.

11. Following the denial of HNA's motion to reschedule the hearing on April 26, 1979, HNA requested leave of the Board to appeal on

said order for judicial review under HRS §91-14. The request for leave was denied by the Board.

12. On April 20, 1979, in Order No. 246, Case No. DR-09-35, a petition for declaratory ruling on the question of the requirements of HRS §89-6(a) was denied.

15. The record in [sic] inadequate and insufficient for review of the duties and responsibilities of all contested positions pursuant to the requirements of HRS §89-6(c).

16. No petition for intervention was submitted by any other person or labor organization in the above-entitled case.

The Board has made substantially similar findings of fact herein.

The seventh proposed finding of fact is:

7. In the absence of a petition for any other unit, this Board did not determine whether a showing of interest for any other unit was satisfied by HGEA.

The Board finds that this finding is irrelevant and unrelated to the instant case.

The thirteenth proposed finding of fact is:

13. The testimony induced at the hearings and documents received therein presents a controversy over the inclusion or exclusion of the following positions: 23030, 3033, 20739, 20858, 28364, 3007, 7395, 9884, and 21847. All of these designated positions involved a change from a previous exclusion or inclusion to a slated exclusion or inclusion.

As to paragraph 13, the Board finds that position 23030 does not exist and that position 3033 previously was excluded but is now included and position nos. 21847 and 20858 previously were included but are now excluded. No other position listed in the HNA's proposed findings of fact has undergone any change of status. More important, the status of these positions was not disputed during the hearing.

The HNA's fourteenth proposed finding of fact is:

14. HNA also requested that a determination be made on all positions titled "Assistant Directors of Nursing."

With regard to paragraph 14, the Board finds that HNA did not request any determination to be made by the Board on all positions titled "Assistant Directors of Nursing."

RESPONSES TO THE HGEA'S PROPOSED
FINDINGS OF FACT

The first seven findings of fact proposed by the HGEA are approved of by the Board. In its own findings of fact, the Board has agreed or substantially agreed with all of them. The proposed findings are:

1. On April 2, 1979, HGEA filed a petition for certification as exclusive bargaining representative of Registered Public Nurses, Unit 9, an optional bargaining unit. The requested unit consisted of the unit previously certified in 1972, and presently covered by a collective bargaining agreement, namely, all Registered Public Nurses, excluding positions numbered RPN-V, 20162; RPN-VI; 20250, 20739, 20858, 28364; RPN-VII, 2218, 3007, 7395, 9884, 21847, 19660, 20030, 20458, 20934, 23413; and PRN-VIII, 3006.

2. HGEA submitted proof that the petition was supported by more than thirty per cent of the employees in said unit.

3. The petition was timely, in that it was filed ninety days prior to June 30, 1979, which is the expiration date of the current collective bargaining agreement between the Hawaii Nurses Association (HNA), the incumbent exclusive bargaining agent, and the public employers.

4. HNA filed a petition for intervention on April 20, 1979, which was approved by the Board on the same day. No other employee organization intervened.

5. The positions listed in Petitioner's Exhibit 1 constitute all the State positions now in Unit 9 for which HNA is currently the exclusive bargaining agent.

6. City and County of Honolulu position number HD215 is a non-supervisory nurse's position, now included in Unit 9.

7. The State positions appropriately excluded from Unit 9 are those listed in Petitioner's Exhibit 2.

The eighth and final proposed findings of fact submitted by the HGEA is the following:

8. The places, hours and other conditions of the balloting are to be the same as those in the election in the same unit between the same parties held in February 1972, subject to any changes therein required by changes in the facilities where the nurses are employed.

The Board disagrees with a portion of this proposed finding of fact and finds that the HGEA and the HNA have agreed as to the places and hours of the balloting but not as to all other conditions of balloting. Because the details concerning ordering and directing the actual election are ministerial matters, it is not a requirement that the Board treat this aspect of the case as a contested case and make findings of fact and conclusions of law thereon. The direction of election will cover the manner and conditions of balloting and, to the fullest extent possible, will be based upon agreement of the parties. Where, however, agreement cannot be reached, the Board will set the conditions of balloting.

RESPONSES TO THE HGEA'S PROPOSED
CONCLUSIONS OF LAW

The HGEA filed along with its proposed findings of fact eight proposed conclusions of law:

1. A question exists concerning representation of the employees in Unit 9.
2. The positions appropriately included in Unit 9 for purposes of the election of a representative are

those listed in Petitioner's Exhibit 1, which consists of all State positions now in Unit 9, and City and County of Honolulu position number HD215, a non-supervisory nurse's position.

3. The positions appropriately excluded from Unit 9 are RPN-V, 20162; RPN-VI, 20250, 20739, 20858, 28364; RPN-VII, 2218, 3307, 7395, 9884, 21847, 19660, 20030, 20458, 20934, 23413; and RPN-VIII, 3006.

4. Under HRS Section 89-6(a), the filing by HGEA of a petition for certification as representative of optional bargaining unit 9 requires that the employees in such unit be given an opportunity to vote for a separate unit or for inclusion in their respective units (1) through (4). If a majority of the employees in that optional unit desires to constitute a separate appropriate bargaining unit, they must be given an opportunity to vote on whether the supervisory and non-supervisory employees should be in the same unit.

5. The objections raised by HNA to the procedures of the Board in this case are dismissed.

6. The HNA claim that the Board could not process HGEA's petition before the close of the "open period", namely, May 2, 1979, is rejected.

7. The HNA claim that the hearing on the HGEA petition should be set aside, because ten working days written notice of the hearing had not been given, is rejected.

8. The HNA claim that a prehearing conference was not held, but must be held, is rejected.

The Board agrees with and adopts all of the HGEA's proposed conclusions of law except for number four. As the Board rules below, because of the failure of the HGEA to petition properly for a determination election, no election on the question of whether there shall be a vote for a separate unit will be held.

CONCLUSIONS OF LAW

I. THE HNA MOTION TO WITHDRAW NOTICE OF HEARING AND/OR TO AMEND A NOTICE OF HEARING.

Prior to reaching the substantive issues in this case, the Board reaches the following conclusions of law on

the issues raised by the HNA's Motion to Withdraw Notice of Hearing and/or to Amend a Notice of Hearing.

The first ground asserted by counsel for the HNA in support of his motion is that any investigation or hearing held during the 30-day open period provided for by Section 89-7, HRS, is untimely and inappropriate. Counsel has not cited any authority or reason in support of this contention.

Section 89-7, HRS, states that upon receiving a petition such as the one filed by the HGEA, this Board shall hold an election.² The rules permit, but do not require, an investigation and they in no way support the contentions by counsel that the commencement of the investigation must be put off until the 30-day open period has come to an end. In this case, the Board decided to keep the investigation open until the 30-day period has ended but there is no reason in law or common sense why it could not commence its investigation as soon as it was presented with a proper petition.

The second ground advanced by HNA in support of its motion is that the hearing date was set less than ten days after the date of the written April 12 hearing notice

²The section provides, in part:

Sec. 89-7. . Elections. Whenever, in accordance with regulations as may be prescribed by the board pursuant to chapter 91, a petition is filed by an employee organization after January 1, 1971, showing written proof of at least thirty per cent representation of the public employees in an appropriate bargaining unit, the board shall hold an election by secret ballot to determine whether and by which employee organization the employees desire to be represented for the purpose of collective bargaining.

and thus violated the requirements of Rule 1.08(c)(2) and (3) of the Board's Rules of Practice and Procedure.³

The notice of April 12, 1979, of a hearing to be held on April 26, 1979, admittedly gave counsel for the HNA only nine working days formal written notice. However, as explained above, on April 11, 1979, the HNA's counsel received actual oral notice of the April 26 hearing ten working days before said hearing. And, of special importance is the fact that he appeared at the April 26 hearing and participated fully therein.

It is a well-established rule of law that one having actual notice of a hearing is not prejudiced by, and may not complain of, failure to receive formal notice. In such a case, the failure to give notice does not affect the jurisdiction⁴ of the administrative body. 73 C.J.S. Public Administrative Bodies and Procedures, Section 131.

The law in Hawaii is clear that the right to notice is a personal one which may be waived by appearance. Kim Poo Kum v. Sugiyama, 33 Haw. 545 (1935):

The voluntary general appearance by the insurance company before the

³Said Rule provides, in relevant part:

(c) COMPUTATION OF TIME.

(2) LAST DAY OF ACT, EVENT, DEFAULT. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday in the State of Hawaii, in which event the period runs until the next day which is neither a Saturday, Sunday, nor a holiday.

(3) INTERMEDIATE SATURDAYS, SUNDAYS, HOLIDAYS. Intermediate Saturdays, Sundays and holidays shall not be included in a computation when the period of time prescribed or allowed is ten days or less.

⁴There is no question that the Hawaii Public Employment Relations Board has jurisdiction of the subject matter of the representation proceeding filed by the HGEA. Sections 89-7 and 89-5, HRS. The issue raised by the objection to the mode of notice concerns jurisdiction over the person of the HNA.

circuit court in opposition to the application of appellee to make it a party defendant, together with its subsequent appearance before the same court at the hearing on appeal demanding the right to be permitted to introduce evidence upon the issues theretofore determined by the jury, was wholly inconsistent with any other attitude on the part of the insurance company than a complete and voluntary surrender and submission to the general jurisdiction of the court for all purposes. These acts, in our opinion, constituted a clear waiver of appellant's constitutional right to require the service upon it of summons or other judicial process as a prerequisite to the court's jurisdiction over it.

In another Hawaii case, the Supreme Court said in Estate of R. W. Holt, 15 Haw. 580 (1904):

The appellees further contend that the granting of letters of administration to Bruce Cartwright was void because there was no publication of notice of the hearing as required by a rule of court then in force and because, therefore, the court had no jurisdiction of the parties. That the court had jurisdiction of the subject matter is clear and undisputed. Whether any rule of court required publication of notice in such a case as this, or whether, if it did, publication was in fact made in this instance, is immaterial. The present petitioner's predecessors in interest had actual notice of all the proceedings, appeared and submitted themselves to the jurisdiction of the court,--the appointment was made on their own petition; they certainly are bound and so is their grantee or assignee. (Emphasis added)

To similar effect is the ruling of the Supreme Judicial Court of Maine in Kovack v. Licensing Board, City of Waterville, 173 A.2d 554, 559:

[5] Whatever rights the appellant may have had on the grounds of inadequacy of notice were waived by his appearance and participation in the hearing.

Counsel's participation in this case went beyond merely making a special appearance to object to the jurisdiction of the Board over the person of the HNA because of faulty service of notice.

He filed a petition for and was granted, on behalf of his client, intervenor status in this case. This act was certainly a concession that HPERB had personal jurisdiction over his client in this case. He also, during the course of the proceedings, indicated his desire to call witnesses and to raise issues not raised by the HGEA and to ask the Board to rule on the propriety of inclusions and exclusions of persons in the present bargaining unit. Additionally, pursuant to Board Rule 1.08(g)(24) on May 1, 1979, in the same proceedings he asked for and was given leave to file proposed findings of fact and conclusions of law. These acts were inconsistent with a special appearance and constituted a waiver of any objection the HNA may have had as to insufficiency of formal notice.

Counsel additionally asserted, in support of his motion, that the Board's notice was faulty because it failed to comply with the provisions of Section 91-9.5, HRS, which state:

[\$91-9.5] Notification of hearing; service.
(a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(b) Unless otherwise provided by law, if service by registered or certified mail is not made because of the refusal to accept service or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing.

Assuming that Section 91-9.5, HRS, was applicable to these proceedings, counsel's full participation after actual notice constituted a waiver of any rights he may have had to formal notice under said section.

Moreover, Section 91-9.5, HRS, provides for the forms and amount (15 days) of notice to be given in contested cases. When the Board, on April 11, decided to hold a hearing on April 26, it could not tell whether there was any contest as to any issue because of the failure and refusal of counsel for the HNA to state what his client's positions were respecting any issues in the instant case. Thus, at the time notice of the hearing was given, it was not notice of a contested case. The Board was merely continuing its investigation in a more formal manner. The contested nature of the proceeding did not emerge until April 26 when counsel for the HNA for the first time began to state his positions. Thus, when the notice of the April 26 hearing was given, it was not notice of a contested case and Section 91-9.5, HRS, was inapplicable.

Moreover, Section 91-9.5 states what kind of notice shall be given "unless otherwise provided by law." The Board believes that its rules are law within the above quoted phrase and that they, rather than Section 91.9-5, HRS, govern the mode and amount of notice to be given in the unique kinds of cases it processes as part of various statutory responsibilities imposed upon it.

Section 89-5(b)(3), HRS, states:

(b) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(3) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation. (Emphasis added)

Pursuant to this statutory authority conferred upon the Board to establish procedures for the conduct of elections, it promulgated Rule 2.13. Rule 2.13 contains a specific provision as to when hearings in representation cases are to be

held; i.e., not less than ten days nor more than 20 days after the service of notice. A rule so promulgated pursuant to statutory authorization has the force of law. Baldeviso v. Thompson, 54 Haw. 125, 130, 504 Pac.2d 1217 (1972); State v. Kimball, 54 Haw. 83, 89, 503 Pac.2d 176 (1972).

As the next ground in support of his motion, counsel for the HNA claimed that the Board should not hold any hearing because it had failed to hold a prehearing conference in accord with Board Rule 2.18. This argument was wholly without merit. The prehearing conference spoken of in Rule 2.18 has reference only to prehearing conferences held prior to hearings held pursuant to Rule 2.17 on objections to and challenges to elections which already have been conducted. It has absolutely no applicability to pre-election hearings. Rules 2.17 and 2.18 provide:

2.17 Notice of Hearing on Challenges or Objections. The notice of hearing on challenges or objections shall be prepared by the Board or hearings officer and shall be served upon the parties involved and shall fix the place of hearing at a time not less than ten days nor more than twenty days after the service of the notice of hearing.

2.18 Prehearing Conference. At least five working days prior to the scheduled hearing, the Board or hearings officer shall hold a prehearing conference for the purpose of arriving at a settlement or clarification of issues, and to the extent possible, agree on facts, matters or procedures as will facilitate and expedite the hearings or adjudication of the issues.

The final ground in support of the HNA's motion was that counsel for the HNA did not believe that a hearing in this case should be held because of certain issues arising under Section 89-6, HRS, concerning optional units and the number and kinds of elections which are required to be held in such units. He asserted, quite accurately, that he had filed a declaratory ruling petition with the Board to have

the issues he raised on these matters ruled upon. The Board, however, dismissed his declaratory ruling petition because the issues raised therein could be taken up in the instant case.

For all of the foregoing reasons, the HNA's Motion to Withdraw Notice of Hearing and/or to Amend a Notice of Hearing was denied.

II. Exclusions and Inclusions from the Unit

Unit 9 has been in existence for more than seven years and during that entire period has been represented by the HNA. Until this matter came on for hearing, the HNA gave every impression of accepting the unit as it is presently composed. The HGEA petitioned for the unit as it presently exists; the public employer considers the present unit and the exclusions from it appropriate.

During the hearing in the instant case, the HNA stated that position nos. 3007 (assistant chief of the Public Health Nursing Branch, RPN VII), 7395 (cottage life administrator, RPN VII), 9884 (hospital nursing and medical facilities consultant, RPN VII) and 21847 (chief of the School Health Services Section, RPN VII) which are presently excluded positions should be included in the unit. The HNA, however, failed to seriously pursue this matter and did not produce evidence which would support a change in the status of these positions.

This Board is disinclined to entertain as part of an election case eleventh hour requests for inclusions and exclusions in an established unit in the absence of substantial evidence which demonstrates clearly that changes in the unit are warranted. Any other approach invites unreasonable delay, frivolous contentions interposed to create such delay, and frustration of the processing of election petitions.

The Board finds that no reason has been presented to it which would justify changing the unit and thus rules that the unit as presently composed is an appropriate one in which to conduct the representation election.

III. Separate Election of Optional Unit

Section 89-6(a), HRS, states in relevant part:

Because of the nature of work involved and the essentiality of certain occupations which require specialized training, units (9) through (13) are designated as optional appropriate bargaining units. Employees in any of these optional units may either vote for separate units or for inclusion in their respective units (1) through (4). If a majority of the employees in any optional unit desire to constitute a separate appropriate bargaining unit, supervisory employees may be included in the unit by mutual agreement among supervisory and nonsupervisory employees within the unit; if supervisory employees are excluded, the appropriate bargaining unit for such supervisory employees shall be (2) or (4), as the case may be.

Unit 9 is an optional unit.

It is the position of the HGEA that the law clearly requires that in addition to being able to vote for the employee organization by which they wish to be represented, the employees in Unit 9 also must be permitted, at this time, to vote as to whether they wish to have an optional unit.

The Board disagrees. The statute rather than being clear is silent on this point. However, the rules of this Board speak to the issue and make it clear that once an optional unit has been established by the vote of the affected employees in a determination election, it continues in existence until a petition is filed for a new determination election. And, that new determination election petition must itself be supported by a 30 per cent showing of interest. Rule 2.06(b).

In this case, the HGEA secured from more than 30 per cent of the employees in Unit 9 a showing of interest which evinced an intention to have a representation election in Unit 9. However, the form of that showing of interest cannot be regarded as evincing an intention on the part of the signatories to also have an optional unit determination vote taken.

The Board holds that under Rule 2.06(b), which applies to the situation in which there has been a valid determination that there shall be an optional unit, a petition for a representation election supported by a showing of interest supporting only a representation election is, by itself, insufficient to call for a determination election also. A new determination election following a prior, valid determination election can be held only upon the filing of a petition for a determination election supported by a showing of interest which reveals a desire on the part of the affected employees to call for a determination election.

In view of the foregoing, in this case, no determination election will be conducted to determine whether Unit 9 shall continue to exist. The unit will continue to exist and there will be an election to determine whether the employees in Unit 9 desire to be represented by the HNA or the HGEA for collective bargaining purposes or desire no representation.

The Board finds that a question of representation exists in Unit 9 and directs an election according to the terms and conditions set forth below.

DIRECTION OF ELECTION

Pursuant to the petition filed by the HGEA, the Board, having ascertained that there is a question concerning

the representation of Unit 9 employees for the purposes of collective bargaining, hereby directs that an election be conducted under the following terms:

1. SECRET BALLOT ELECTION. An election by secret ballot shall be held, under the supervision of the Board, among the employees in Unit 9, the existing optional appropriate bargaining unit of Registered Professional Nurses. The election shall be conducted on the dates and at the times and places indicated in section 8 below to determine whether a majority of the employees in Unit 9 desire to be represented, for purposes of collective bargaining, by the HGEA or the HNA, or whether they desire no representation.

2. UNIT COMPOSITION. Unit 9 includes all employees classified as Registered Professional Nurse (hereafter RPN), or Anesthetist, or Mental Health Supervisor except for: Position Number 20162 classified as RPN V; Position numbers 20250, 20739, 20858, and 28364 classified as RPN VI; Position numbers 2218, 3007, 7395, 9884, 21847, 19660, 20030, 20458, 20934, and 23413 classified as RPN VII; and Position number 3006 classified as RPN VIII. Also excluded are part-time employees classified as Registered Professional Nurse, or Anesthetist, or Mental Health Supervisor working less than twenty hours per week and temporary employees working for a duration of three months or less.

3. ELIGIBLE VOTERS. The eligible voters shall be all employees in Unit 9 who were employed during the payroll period ending May 15, 1979, including employees who did not work during the designated payroll period because they were ill, on authorized leave with or without pay (including maternity leave), and also including employees on leave for service in the United States military or the National Guard who appear in person at the polls.

Employees hired after said payroll period but prior to the date of election shall be eligible to vote provided that the Employer and the parties agree that their names be added to the list manually by the Board.

Employees who are hired as of the date of the election shall be eligible to vote; however, all such votes shall be considered challenged ballots.

4. INELIGIBLE VOTERS... Employees who have retired, resigned or have been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election shall be ineligible to vote.

5. LIST OF EMPLOYEES. On or before May 29, 1979, the Employers shall submit to the Board seven (7) copies of a list of Unit 9 employees by polling places, listing the employees by name, social security number, position number, classification and home address.

6. NOTICE OF ELECTION. The Employer shall post copies of the Board's Notice of Election in conspicuous and usual posting places at the work sites. Such posting shall be at least seven (7) working days before the election.

7. FORM OF BALLOT. The ballot shall contain the names of the employee organizations in the following wording and order from left to right:

- (1) No Representation
- (2) Hawaii Nurses Association, Inc. (Constituent Organization of the American Nurses Association)
- (3) Hawaii Government Employees' Association, Local 152, AFL-CIO (AFSCME/HGEA)

8. PLACE, DATE AND TIME OF ELECTION. The election on the Island of Oahu for employees at the various work sites shall be held on June 18, 1979, at the following polling places and times:

Polling Place: LEAHI HOSPITAL

6:45a.m.-7:45a.m.
2:45p.m.-3:15p.m.

Leahi Hospital
Wilcox Building, Leahi Hospital
Hale Mohalu
Diamond Head Health Center
Kapahulu Health Center
Kaimuki High School
Kaiser High School
Kalani High School
McKinley High School
Hawaii School for Deaf and Blind
University of Hawaii

Polling Place: HAWAII STATE HOSPITAL

6:30a.m.-7:30a.m.
3:00p.m.-3:30p.m.

Hawaii State Hospital
Windward Health Center
Windward Mental Health Center
Castle High School

Polling Place: MALUHIA HOSPITAL

6:30a.m.-7:30a.m.
3:00p.m.-3:30p.m.

Maluhia Hospital
Kalihi-Palama Mental Health Center
Lanakila Health Center
Kinau Hale
Liliuokalani Building
State Prison
Halawa Prison
Detention Home
Farrington High School
Roosevelt High School
C&C Health Dept.

Polling Place: WAIMANO TRAINING SCHOOL
AND HOSPITAL

6:30a.m.-7:00a.m.
3:00p.m.-3:30p.m.

Waimano Trng. Sch. and Hosp.
Leeward Health Center
Aiea High School
Pearl City High School
Radford High School

Polling Place: WAIPAHAU HEALTH CENTER

1:30p.m.-2:00p.m.

Waipahu Health Center
Waipahu Mental Health Center
Nanakuli Maternity and Infant Care Center
Ewa Mental Health Clinic
Wahiawa Mental Health Clinic
Haleiwa/Waiialua Mental Health Center
Waianae Mental Health Clinic
Campbell High School
Leilehua High School
Mililani High School
Waianae High School
Waipahu High School

The election in the County of Kauai for employees at the various work sites shall be held on June 19, 1979, at the following polling places and times:

Polling Place: KAUAI DISTRICT OFFICE 8:30a.m.-9:00a.m.

Public Health Nursing Office
Lihue-Kapaa School Complex
Kauai Mental Health Clinic

Polling Place: KAUAI VET. MEMORIAL HOSPITAL 10:30a.m.-11:00a.m.

Kauai Vet. Memorial Hospital
Waimea Public Health Nursing Office
Waimea School Complex

Polling Place: SAM MAHELONA HOSPITAL 1:30p.m.-2:00p.m.

Sam Mahelona Hospital
Kapaa Public Health Nursing Office

The election in the County of Maui for employees at the various work sites shall be held on June 19, 1979, at the following polling places and times:

Polling Place: MAUI MEMORIAL HOSPITAL 6:45a.m.-7:45a.m.
2:00p.m.-2:30p.m.

Maui Memorial Hospital
Maui Mental Health Clinic
Public Health Nursing Office
Lahaina Public Health Nursing Office
Makawao Public Health Nursing Office
Baldwin High School
Maui High School

Polling Place: KULA SANATORIUM 9:30a.m.-10:00a.m.

Kula Sanatorium

The election in the County of Hawaii for employees at the various work sites shall be held on June 19, 1979, at the following polling places and times:

Polling Place: HILO HOSPITAL 6:30a.m.-7:30a.m.
2:30p.m.-3:30p.m.

Hilo Hospital
East Hawaii Mental Health Clinic
Keaukaha Maternity and Infant Care Clinic
Public Health (Hilo) Office
Hilo High School
Pahoa High School

Polling Place: KONA HOSPITAL

8:30a.m.-9:00a.m.

Kona Hospital
Kona Health Center
Konawaena High School

9. OBSERVERS. Each party hereto will be allowed to station an equal number of authorized observers, to be approved beforehand by the Board, at the polling places during the election to assist the Board in conducting the election and to challenge the eligibility of voters.

No observer or any other person while present in the polling place during the time of voting shall engage in any activity designed to influence the voters in their choices or wear or display any campaign material.

10. NO CAMPAIGNING. There shall be no campaigning within 100 feet of the entrance of the building in which the voting is being conducted.

11. MAIL BALLOTS. Eligible voters working at the following locations shall cast ballots by mail:

Kahuku High School (Oahu)
Hawaii Youth Correctional Facilities
Waimanalo Health Project
Kailua High School
Kalaheo High School
Hana Hospital (Maui)
Kaunakakai Public Health Nursing Office (Molokai)
Kalaupapa Settlement (Molokai)
Lanai Community Hospital (Lanai)
Kau Hospital (Hawaii)
Kohala Public Health Nursing Office (Hawaii)
Kohala Hospital (Hawaii)
Kohala Public Health Nursing Office (Hawaii)
Honokaa Hospital (Hawaii)
Honokaa Public Health Nursing Office (Hawaii)
Honokaa High School (Hawaii)

The Board will mail ballots to such eligible voters. All mail ballots must be received by the Board no later than 4:30 p.m. on June 28, 1979.

12. ABSENTEE BALLOTS. Those eligible voters who will not be able to vote at their assigned polling places

on the day of their election because of illness, absence from the island on which their place of employment is located, or for other compelling reason, may submit a request in writing to the Board for an absentee ballot. If the Board finds the voter cannot otherwise vote, it shall mail a ballot to such applicant. All absentee ballots must be received by the Board no later than 4:30 p.m. on June 28, 1979.

13. VOTING ON DIFFERENT ISLAND OR BOARD OFFICE; CHALLENGED VOTES. If an employee from a neighbor island is on Oahu on election day, such employee may vote at the Board's office in Honolulu. If an employee from a neighbor island is on another neighbor island or an employee from Oahu is on a neighbor island, such employee may go to any polling place that is open and vote. If the employee will be away from the State of Hawaii or will be leaving the State of Hawaii on election day, such employee may vote at the Board's office in Honolulu prior to departure from the State. All votes cast under this paragraph shall be considered challenged ballots.

Except as hereinabove provided, if any voter assigned to a polling place on a given island shall cast a ballot at a different polling place on the same island, such ballot shall be null and void.

14. CONDUCT OF ELECTION. The election shall be conducted in each polling place by an agent of the Board who shall have custody of the official list of eligible voters, ballots and other election materials. Each voter shall provide reasonable identification.

When an employee has been properly identified, his name shall be crossed off the official list by an Employer's

representative and the employee organizations' observers shall each make a check mark, one before and one after the name. A ballot shall then be issued to such employee by the Board agent.

The Board agent shall observe the checking of each eligible voter's name on the eligible voters list at the polling place, give the voter an unmarked ballot, allow the voter to vote in secrecy and deposit the cast ballot into the ballot box.

If a voter spoils his ballot, it shall be returned to the Board agent who shall, in the presence of the observers, clearly mark said ballot "spoiled," place it in a "spoiled ballot" envelope, impound it and give the voter a new appropriate ballot.

The observers of the parties shall be allowed to view the eligibility list, handling of ballots and other procedures in the polling place, except the actual marking of the ballot by the voter. No observer shall handle any marked or unmarked ballots.

If any voter is challenged or his name is not on the official voting list, that voter shall be allowed to cast a challenged ballot.

15. CLOSE OF POLLING PLACE. At the close of the voting period at each polling place, the ballot box shall be opened by the Board agent, its contents removed and placed in a large manila envelope marked "Cast Ballots." Said envelope shall be sealed in the presence of the observers and the observers and the Board agent shall sign their names across the seal and transparent tape shall be placed over each signature. The sealed "Cast Ballots" envelopes from each polling place shall be delivered to the Board's office

in Honolulu by Board members or agents, who may be accompanied by observers of the undersigned parties.

16. DEFINITION OF BALLOTS. As used in this Direction of Election:

Total votes cast means all votes counted for any of the choices on the ballot and on the challenged ballots, if any, but shall not include such ballots deemed to be void in accordance with the procedures set forth herein.

A blank ballot means an unmarked ballot.

A mismarked ballot means a ballot determined by the Board or its agent to be marked in such a way as to prevent the determination of the intent of the voter in relation to the choice therein.

A challenged ballot means a ballot cast by a person whose identity is questioned, or whose name is not on the eligible voters list, or who has voted at the Board's office or whose ballot for other good and sufficient reason is questioned as having been improperly cast.

A void ballot means a ballot which is found to have been blank or mismarked, or improperly cast, or cast by an ineligible voter in accord with the procedures herein, or cast by a voter assigned to another polling place on the same island.

17. TALLY OF BALLOTS. On June 29, 1979, the Board shall proceed with the tally of ballots to determine which employee organization, if any, the majority of the employees in Unit 9 voting desires to have as their exclusive bargaining representative or whether they desire no representation.

The counting and handling of ballots shall be done at the Board office by the Board or its agents in teams of two. Each party shall be entitled to have one observer per counting

team plus two additional observers unassigned to a particular team. The ballots from each polling place will be counted separately.

The actual count shall proceed as follows:

(a) All mail ballots, after being checked that they have been received on time and that no other ballot has been cast by the voter concerned, will be counted separately.

(b) The sealed "Cast Ballots" envelopes from each polling place shall be opened by the Board or its agents in the presence of all observers and the ballots shall be segregated into three piles representing each choice on the ballot.

If the marking on any ballot is questioned, the Board or its agent shall determine the validity of the ballot. If the ballot is determined to be valid, it shall be included in the tally. If the ballot is determined to be invalid or a determination of its validity cannot be made, said ballot shall be placed in an envelope and the Board or its agent shall note on the back of the envelope that the marking on the ballot has been questioned and by whom. All questioned ballots shall be segregated and placed in a container supplied for that purpose.

(c) The number of ballots in each pile shall be counted and the total number in each pile entered on a tally sheet. At the completion of the tally for each polling place, the tally sheet shall be signed by a Board member or its agent and the observers. Each of the undersigned parties shall be given a copy of the tally.

At the completion of the tally of ballots from each polling place, including all mail ballots, the Board shall make a cumulative tally thereof which shall be furnished to

each of the parties. The cumulative tally shall include the number of votes cast for each choice on the ballot and the number of challenged ballots.

If the cumulative tally shows that one of the choices has received a majority of the total votes cast, this shall complete the count.

(d) If the number of challenged ballots is sufficient to affect the results of the election, the Board shall conduct an informal review of such ballots. Each envelope containing a challenged ballot will be reviewed by the Board and designated observers from each party.

If a challenged ballot is found to have been properly cast by an eligible voter in accord with this Direction of Election, and the parties agree, then such ballot shall be opened and counted.

If a challenged ballot is found to have been improperly cast or cast by an ineligible voter and the parties agree, then the challenged envelope shall be marked "void."

If the Board or a designated observer believes that a challenged ballot should not be opened or declared void because further investigation is required to establish its validity or the identification of the voter, such ballot shall remain a challenged ballot.

If, after the informal review of the challenged ballots, a new tally shows that the remaining challenged ballots are insufficient in number to affect the results of the election and no timely objection is filed, the Board shall issue forthwith to the parties a certification of the results of the election.

(e) If the number of challenged ballots remaining after the informal review is sufficient to affect the results

of the election, the parties shall be prepared for an investigation within five (5) working days after June 29, 1979, at which time the parties will present evidence concerning the eligibility of the challenged voters. The Board shall issue its decision as soon as possible after the close of the hearing. The decision of the Board as to challenged ballots shall be final and conclusive. A new tally sheet shall be issued promptly.

18. ELECTION RESULTS. (a) If the election results in a determination that a majority of the votes cast was for the HGEA or the HNA, the Board shall certify said employee organization as the exclusive bargaining representative for employees of Unit 9.

(b) If the election results in a determination that a majority of the votes cast was for no representation, the Board shall not issue a certification to either employee organization as the exclusive bargaining representative of employees in Unit 9.

(c) If the election results show that no choice on the ballot received a majority of the total votes cast, the Board shall conduct a run-off election pursuant to the Rules of the Board.

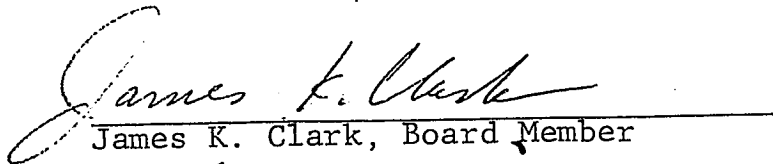
(d) If the results of the election are those specified in Rule 2.16(h) of the Rules of the Board, the Board shall declare the election inconclusive and conduct another election.

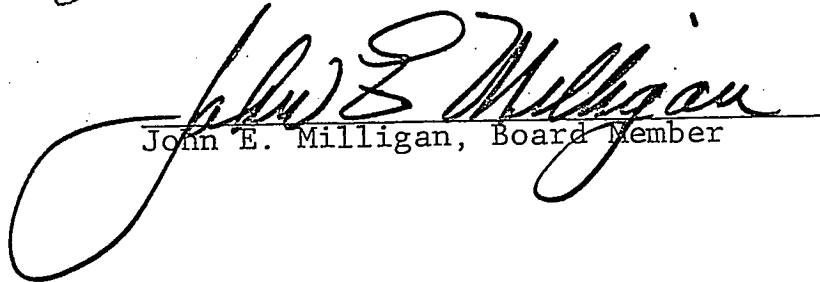
19. OBJECTIONS, CHALLENGES, REPORTS THEREON. Objections to the conduct of the election or conduct affecting the results of the election, and all other questions

arising out of the election shall be determined by the Board in accordance with Chapter 89, HRS, and the Rules of the Board.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: May 24, 1979

Honolulu, Hawaii