

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
)
HAWAII FIRE FIGHTERS)
ASSOCIATION, LOCAL 1463,)
IAFF, AFL-CIO,)
)
Complainant,)
)
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,)
)
Respondents.)

Case No. CE-11-49

Decision No. 111

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER

This case involves prohibited practice charges filed by the Hawaii Fire Fighters Association (hereafter HFFA or union) against the Governor of the State of Hawaii and the mayors of the counties of Hawaii, Maui, Kauai and City and County of Honolulu. The charges arose as a result of the failure of implementation and legislative funding of the cost items contained in the final offer, whole package interest arbitration award won by the HFFA in April, 1979.

The HFFA specifically charged that the Governor and the mayors violated Subsection 89-13(a)(5), Hawaii Revised Statutes (hereafter HRS), (failing to bargain in good faith) in that while they participated in the arbitration proceedings provided for in Subsection 89-11(d), HRS, they allegedly intended before, during and after said proceedings not to carry out "or otherwise effectuate any decision adverse to them."

The HFFA also alleges that the Governor and mayors failed to participate in good faith in the arbitration procedure set forth in Section 89-11, HRS. This charge, if proven, would be a violation of Subsection 89-13(a)(6), HRS. In support of this charge against the Governor, the HFFA alleges that he:

a. Has failed and refused and continues to fail and refuse to enter into and sign an agreement pursuant to the decision of the arbitration panel;

b. Deliberately withheld submission of all items requiring moneys for implementation to the State legislative body until such time when he knew that such items would not and could not be considered by such body;

c. Urged disapproval of such items although his was and is an affirmative duty to ". . . take whatever action is necessary to carry out and effectuate the decision."

In connection with the charge of failing to participate in Section 89-11 arbitration in good faith, the HFFA charges the mayors with failing and refusing to sign an agreement "pursuant to the decision of the arbitration panel" and failing and refusing to submit cost items contained in the arbitration award to the county legislative bodies for implementation.

Finally, the HFFA alleges that the above acts or omissions of the Governor and mayors constituted the additional prohibited practice of refusing or failing to comply with provisions of Chapter 89, HRS. Subsection 89-13(a)(7).

The Board held hearings on these charges on June 6, 7, and 8, 1979, and based upon the entire record of the proceedings, makes the following

FINDINGS OF FACT

Respondent George R. Ariyoshi is the Governor of the State of Hawaii.

Respondents Frank F. Fasi, Herbert Matayoshi, Elmer F. Cravalho and Eduardo E. Malapit are, respectively, the mayors of the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai.

The Governor and the four mayors are the public employers of employees in Unit 11 (firefighters).

The HFFA is the exclusive representative of Unit 11.

Unit 11 consists of approximately 1,390 employees, of which number approximately 180 are employed by the State.

The State fire fighter employees work at airports throughout the State and are paid out of a special fund generated by landing fees.

The remaining employees in the unit work for the counties with the largest number being employed by the City and County of Honolulu.

On January 15, 1979, this Board determined and issued formal notice that negotiations between the public employers and the HFFA for a new contract had reached impasse. State's Exhibit 9. On January 17, 1979, pursuant to Subsection 89-11(d), HRS, the Board appointed a mediator to assist the parties in resolving their impasse.

Despite mediation efforts, the impasse continued. The parties submitted the dispute to arbitration.

Subsection 89-11(d), HRS, was adopted as Act 108 SLH 1978, as an amendment of Chapter 89. It applies only to impasses in Unit 11 and requires that such impasses be

submitted to arbitration. The law permits the parties to fashion their own type of arbitration proceeding. If they fail to agree on a particular mode of arbitration, the parties are required to select a tripartite panel to which they must submit complete final offers.

Each party's final offer must "constitute a complete agreement and shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions it is proposing for inclusion in the final agreement."

The arbitration panel may not modify the parties' final offer.

Among the new provisions the HFFA proposed as part of its final offer package for the new agreement was one containing a cost of living allowance (COLA) feature to be paid in the second year of the contract in addition to a proposed seven per cent increase for that year. Their wage offer for the first year was for a seven per cent increase which was identical to the employers' offer for that year.

The employers' package contained no COLA provision. Its wage proposal was for a seven per cent wage increase the first year and a seven per cent increase the second year.

A majority of the arbitration panel selected the HFFA's package and issued an award on April 11, 1979 which stated:

"The Award is that the final-offer proposal of the Firefighters is concluded by the Panel, upon careful consideration of the several statutory criteria and of the thorough and helpful presentations of counsel for the parties, to be the more reasonable and shall be effectuated by the parties. This brief statement of the Award is issued at this time due to the necessities

of the parties for legislative action. The Award will shortly be followed by a detailed analysis and explanation describing and justifying it."

On Thursday, April 12, 1979, Francis Kennedy, Jr., business manager of the HFFA, phoned the State's Director of Personnel Services, Donald Botelho, to arrange for a meeting. Mr. Kennedy's call was prompted by rumors he had heard that an effort would be made to "ice box" the funding of the cost items contained in the award in the State Legislature which was scheduled to adjourn on Friday, April 20, 1979.

Mr. Kennedy indicated during his testimony that the reason he wanted a meeting on April 12 was that he wanted the public employers, through their authorized representatives, to sign the Unit 11 agreement.

A meeting was held on April 12, 1979, with representatives of all public employers and the HFFA present. At no time was any representative of a public employer asked to sign a Unit 11 agreement. There was a dispute over whether the award had altered the existing salary chart for Unit 11 and Mr. Botelho recommended that the parties defer further discussion about the form of the agreement and concentrate on preparing cost data for timely submission of the cost items to the State Legislature.

On the point of timely submission to the Legislature, there is much dispute. Mr. Kennedy firmly believes that the Governor's representatives made a promise to have the cost items submitted to the Legislature no later than Monday, April 16, 1979. Neither Mr. Botelho nor the State's Chief Negotiator Mr. Robert S. Taira denies making such a commitment but neither man recalls making a promise that the cost items would be submitted by April 16.

The actual submission of the cost items were to be done by Governor Ariyoshi.

Mr. Botelho's testimony indicates that he was genuinely concerned about a timely submission and that he and the other state members on the negotiating team--Budget Director Eileen Anderson and Chief Neogotiator Taira--completed their workup and report of the cost item figures for the Governor on April 16.

On April 16, 1979, Mrs. Anderson had a conversation with the Governor during which he asked that she prepare a letter, for his signature, addressed to the Speaker of the House and the Senate President. The Governor wished the letter to express his concern about the COLA feature of the firefighters' award. The draft was prepared and hand carried by Mrs. Anderson to the Governor's office on the evening of April 16. Mrs. Anderson made a recommendation that the Governor might wish to consult with the Attorney General about the letter. This consultation apparently took place on April 17, 1979.

The letter, dated April 18, 1979 and sent to the Speaker of the House and the President of the Senate by the Governor, read as follows:

I have sent under separate cover the figures for the arbitrated cost items for members of Unit 11, Fire Fighters.

Under Section 89-11(d), Hawaii Revised Statutes, I am legally required to submit such cost items. I have done so with grave reservations.

I am bothered by, among others, that portion of the arbitrated agreement which provides for wage increases in an amount unknown to us at this time and based upon factors over which we have no control. Financial planning under such circumstances becomes very difficult. The amount of the increase also appears to be higher than what State and Counties can afford.

As you well know, we are also in negotiation with all the rest of the bargaining units. I am very concerned about the impact this Fire Fighters agreement will have on our negotiations.

Based on the foregoing, I urge your very careful examination of the cost items. I want you to know that I cannot support approval of the cost items by the Legislature.

With warm personal regards, I remain,

Yours very truly,

/s/ George R. Ariyoshi

George R. Ariyoshi

The cost items in the firefighters' award and the Governor's letter were transmitted to the Legislature on the morning of Wednesday, April 18, 1979.

On the morning of April 16, 1979, a meeting was held in Honolulu under the auspices of the Hawaii State Association of Counties. Honolulu City Council member George Akahane is president of the Association. In attendance at said meeting was Mr. Akahane and the chairmen of each of the county councils and the finance committee chairmen of each of the county councils. According to the testimony of Mr. Akahane, those present at this meeting reached consensus that they would oppose COLA and further that they would poll the members of their respective councils to determine the views of the councils on COLA. A poll was taken on April 16 and 17 and the consensus of all those polled in the four county councils was that they opposed COLA.

Mr. Akahane testified that he met later in the day on April 16 with Speaker of the House James Wakatsuki and Senate President Richard Wong and learned from them that they had determined not to act on funding the firefighters' award before adjournment of the Legislature.

Mr. Akahane, on April 16, 1979, also met with Governor Ariyoshi. He says his meeting with the Governor

was to determine how and to whom to transmit the views of the counties on the COLA issue. Mr. Akahane says the result of the meeting was that the Governor advised him to send those views in the form of a letter to the Governor. Mr. Akahane stated that he did not discuss his views with the Governor nor did the Governor discuss his with Mr. Akahane.

On April 18, 1979, Mr. Akahane sent the following letter to Governor Ariyoshi and the Governor sent copies of the Akahane letter to Speaker Wakatsuki and President Wong:

April 18, 1979

Honorable George Ariyoshi
Governor
State of Hawaii
Honolulu, Hawaii 96813

Dear Governor Ariyoshi:

I am writing to you to communicate the position of the Hawaii State Association of Counties on the proposed cost of living allowance (COLA) for government employees. The Association opposes the COLA increase for the reasons set forth below.

On Monday, April 16, 1979, the Council Chairmen and Finance Committee Chairmen of the four counties met with the Civil Service Department of the City and County of Honolulu and later with the leaders of the State Legislature. After discussing the ramifications of the COLA proposal, the Council Chairmen were requested to confer with the members of their respective councils.

The four counties unanimously rejected the COLA proposal. Wage increase derived from such an allowance is not conducive to fiscal control by the counties. Since the allowance is tied to the consumer price index as published by the U.S. Bureau of Labor Statistics, the counties shall be required to expend undetermined amounts each year on government employee contracts in addition to regular wage increases. The salary increases that the employers are offering already take into account increases in the cost of living. Therefore, to add a COLA provision tends to compound the effects of the cost of living.

The unpredictable nature of inflation and the yearly adjustment of the allowance cannot be easily incorporated in the counties' budget

planning process. Our duty to provide responsible fiscal leadership is unmitigated by political pressure to provide a cost of living allowance to county employees.

I would like to emphasize that the Association does not oppose wage increases for county employees. They work diligently to provide vital services that affect the daily lives of our citizens, and their regular wage increases are amply justified. However, we cannot support the COLA proposal, for its effects on the counties' fiscal integrity may become increasingly burdensome. The unforeseen consequences of the COLA proposal will impair our efforts toward sound financial planning and management.

Governor, as the State's Chief Negotiator, we commend you for your leadership on this issue, and as the legislative bodies representing our four counties, we now offer our support.

Sincerely,

/s/ George Akahane

GEORGE AKAHANE
President
Hawaii State Association of Counties

The State Legislature adjourned without acting on the cost items in the Unit 11 award.

The County of Maui's Managing Director sent the Unit 11 cost item data for his County to the Maui County Council on or about April 20, 1979, without comment. That body took no action.

The Mayor of Kauai sent the cost items to Kauai's Council on April 23, 1979, without comment. That body took no action.

The Mayor of the City and County of Honolulu sent the cost items to the City Council on or about April 23, 1979. He made no comment except to point out that Section 89-10(b), HRS, provides that:

" . . . The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the State legislature or legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining."

The Honolulu City Council has taken no action on the cost items.

The Mayor of the County of Hawaii transmitted the cost items to the Hawaii County Council on April 23, 1979. In his letter of transmittal Mayor Matayoshi said, in part:

The transmittal of this information does not constitute an endorsement of the arbitrated cost items, particularly COLA. I wish to restate my objection to the cost of living (COLA) provision which will severely affect the financial ability of the County to provide a balanced program of services to the people. The award of COLA to Unit 11 will force employers to provide for similar terms to settle all other contracts. The resulting financial cost will be too great a burden for the County.

The Hawaii County Council has taken no action on the cost items.

On March 1, 1979, Chief Negotiator Taira asked for an Attorney General opinion on two questions:

1. When the decision of the arbitration panel is issued, are all parties to the dispute required to have their designated representatives sign the collective bargaining agreement resulting therefrom? What steps can be taken if one or more parties refuse to sign said document?
2. Must all five (5) legislative bodies pass appropriate legislation to fund cost items? Must this action be taken before July 1, 1979, the first day of the two-year contract? If one of the five (5) legislative bodies fails to pass such a measure by July 1, 1979, do all parties go back to the bargaining table? If so, do they begin negotiations all over again? Or, are negotiations confined only to cost items? Can those jurisdictions, which obtain legislative approval and funding support, proceed to implement the new agreement, while other jurisdictions are forced to wait because of legislative inaction?

On April 12, 1979, the Attorney General's office rendered an opinion which said, in effect, that an award need not be signed to have legal effect and that Subsection 89-10(b),

HRS, which provides as follows would govern the funding and failure to fund an award:

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the State legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining. (Emphasis added)

During the period of time between the submission of the final offers to the arbitration panel and the rendition of the award, the employer did not offer to negotiate with the HFFA in an effort to resolve the dispute. There is no evidence that the HFFA offered to negotiate either.

There were short form bills in the Legislature to provide appropriations to fund a Unit 11 agreement. Said bills had passed second readings and could have been used as vehicles to appropriate the cost items called for by the award.

CONCLUSIONS OF LAW

Subsection 89-11(d), HRS, provides in relevant part:

Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a complete final offer which shall constitute a complete agreement and shall include all provisions in any existing collective bargaining agreement not being modified, all

provisions already agreed to in negotiations, and all further provisions it is proposing for inclusion in the final agreement.

Within twenty calendar days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final offers. Nothing in this section shall be construed to prohibit the parties from reaching a voluntary settlement on the unresolved issues, with or without the assistance of a mediator, at any time prior to the conclusion of the hearing conducted by the arbitration panel.

* * *

The decision of the arbitration panel shall be final and binding upon the parties. The parties shall enter into an agreement or take whatever action is necessary to carry out and effectuate the decision. The parties may, at any time and by mutual agreement, amend or modify the decision.

Agreements reached pursuant to the decision of an arbitration panel as provided herein, shall not be subject to ratification by the employees concerned. All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies.

The HFFA failed to produce any evidence to support its charge that the public employers failed to negotiate in good faith. There was no evidence that the HFFA ever sought negotiations with the employer during the arbitration proceedings. During the arbitration proceedings, it appears that neither party attempted to negotiate. This is unfortunate because one of the strongest reasons given in support of passage of Subsection 89-11(d) (Act 108) was that its final-offer, whole package arbitration mechanism would induce bargaining. The mechanism did not induce bargaining; both sides appeared to be content to take their chances on the outcome of the arbitration proceeding. In doing so, without

more, neither side committed the prohibited practice of failing to bargain in good faith.

The request by Mr. Taira for an Attorney General opinion which came out the day after the award was received and which supported positions taken by the public employers and apparently by the County legislative bodies in this dispute is not evidence of bad faith. The parties are free to seek and receive legal advice from their counsel on matters in dispute without being guilty of a prohibited practice.

The HFFA totally has failed to establish that the public employers failed to bargain in good faith.

The evidence also fails to show that any public employer refused to enter into a written agreement to effectuate the arbitration award (assuming that such an agreement was required). No public employer appears ever to have been asked to enter such an agreement. The Board notes that the public employers take the view that an agreement is unnecessary because of the binding effect of the arbitration award. Assuming that were so, it would be totally pointless for the employers to refuse to sign an agreement which merely reflected the award if asked to do so. It would seem to be conducive to harmonious employment relations and to the maintenance of the "favorable political and social environment" sought to be fostered by Chapter 89, HRS, for the employers to signify their acknowledgment that the award is binding upon them by signing such an agreement. In this case, however, the HFFA has failed to ask the employer representatives to execute an agreement, there has been no employer refusal to execute one, and so no prohibited practice charge lies against the employers on this count.

The HFFA also failed totally to establish that any mayor failed to submit the cost items contained in the award to their respective County councils. The evidence established quite the opposite; all mayors transmitted the cost items to the appropriate County legislative bodies for funding within the ten-day limit set forth in Subsection 89-11(d), HRS.

We turn now to the charge that Governor Ariyoshi "deliberately withheld submission of all items requiring moneys for implementation to the State legislative body until such time when he knew that such items would not and could not be considered by such body."

The evidence has established that the sixtieth legislative day (the day the Legislature was scheduled to adjourn) was Friday, April 20, 1979. The evidence further establishes that the Governor submitted the cost items on the fifty-eighth legislative day, Wednesday, April 18, 1979. It further has been established that, if the Legislature had wished to act on the cost items prior to adjournment, the Governor's submission was timely (even if the Governor's submission had been untimely, the Legislature could have acted upon it if it wished to do so). There was more than 48 hours left within which to satisfy the requirements of Section 15, Article III, of the State Constitution (as amended in 1978). There were vehicle bills available which would have made this possible.

But more important than any of these facts concerning the time of the Governor's submission is the fact that on April 16, 1979, the legislative leadership had already decided to adjourn the session without acting on the cost items in the award. This decision makes the timing of the submission of

the cost items by the Governor irrelevant. One may speculate that the eleventh hour submission of the cost items by the Governor made it easier for the legislative leaders to carry out their intention not to act on the cost items, but prohibited practices cannot be established on the basis of speculation. Moreover, even if the submission were an eleventh hour one, the submission was not so late that the Legislature could not have acted upon the cost items if it had desired to do so.

The Governor's timing of the submission of the cost items simply was not causally related to the legislative failure to act on said cost items. The failure of the Legislature to act on the cost items was solely the result of the decision of persons in the Legislature. If they had willed otherwise, the cost items might now be funded regardless of the time the Governor's messages were sent down.

The Governor's letter to the Speaker and the Senate President which is set forth in its entirety above has caused the HFFA to charge that the Governor:

urged disapproval of such [cost] items although his was and is an affirmative duty to ". . . take whatever action is necessary to carry out and effectuate the decision."

To be sure, however one reads the Governor's letter, one must conclude that he is not urging the Legislature to approve of the cost items. It is not a purely neutral letter of transmittal. In it, the Governor takes a position against COLA.

In the view of the Chairman of this Board, this letter had absolutely no impact whatsoever upon the recipients who had decided not to approve of COLA two days before they received the letter.

There is no evidence that the Governor knew, prior to the writing of this letter, that the Legislature would adjourn without acting on the cost items. Neither is there any evidence that he did not know this fact. It is a unique characteristic of this case that the evidence is full of gaps and much is left to guessing and speculation. Prohibited practices cannot be based upon guesses and speculation. But more important than the Governor's knowledge or lack of knowledge of legislative intentions when he wrote this letter is the fact that the letter, which is worded rather carefully and innocuously, cannot by any stretch of the imagination be regarded as having a causal connection to the legislative inaction on the cost items.

The Chairman of the Board views the Governor's letter as merely placing on record the Governor's already well-known opposition to COLA. He does not regard the letter as being capable of having significant impact on the independent minded Legislators of this State.

In the circumstances, it might have been more prudent for the Governor to transmit the cost items without comment. The writing and transmitting of the letter, however, did not constitute a refusal on the part of the Governor to participate in good faith in the arbitration procedures set forth in Section 89-11, HRS.

A different question might be presented if a causal connection could be established between the Governor's letter and legislative action. If such a connection had been established, then the Board would have to examine the extent to which, if at all, Section 89-13, HRS, could hinder the expression by any party to a Section 89-11(d) arbitration

proceeding of his honest opinion about the desirability or undesirability of a rendered award.

The Chairman is inclined to believe that honest and fair comment about an award is lawful although such comment may not always make for good employment relations.

This has been one of the most frustrating cases ever to come before this Board. It has been frustrating because of the undue reliance by the HFFA in the presentation of its case upon innuendo, suggestion, and insinuation rather than hard evidence. The function of this Board is to get at the truth in the cases brought to it and that is almost impossible to do when the charging party fails to make a genuine effort to obtain and present factual material in support of its charges. One cannot help but wonder if the charges in this case were pursued more in the interest of generating a climate of sympathetic publicity rather than in the interest of getting at the truth.

No attempt was made by the HFFA to put on evidence against the mayors, for instance. Yet, charges were brought against them.

Serious charges were brought against the Governor, but no one from his office or legislative offices was called by the HFFA to establish what had happened to the cost items transmittals between April 16 and April 18.

These are just examples of how anemic the HFFA's presentation was. Perhaps the real reason for the lethargic prosecution of this case is that all along the HFFA has known that the real reason its cost items were not funded is because legislative leaders, perhaps at both the State and County levels, made the key decisions not to act on the cost items

and these persons are beyond the reach of Chapter 89.

Although the legislative bodies hold the pursestrings when it comes to funding agreements, their members are not public employers subject to the jurisdiction of this Board.

In its legislative wisdom, the State Legislature reserved unto the respective legislative bodies the right to fund or not to fund arbitration awards when they passed Act 108. This it had a right, perhaps even an obligation to do. But in reserving that right, it created false expectations in Unit 11. It would have been better not to call the mechanism created by Subsection 89-11(d) "final and binding arbitration," it should have been called what it really is, advisory arbitration.

The rejection of the cost items in this case has been a disaster for collective bargaining. Unit 11 employees are demoralized. Arbitration has been converted from a meaningful strike substitute into a reckless gamble for unions. The status of the noncost item portions of the Unit 11 agreement is in doubt. Was the Legislature's action a rejection of the cost items? Is Section 89-10, HRS, to be read into 89-11(d) when there is a rejection? Many problems, most of them unanticipated, have come to the surface in the aftermath of the Legislature's inaction on the Unit 11 cost items. The act of listing some of them should not be regarded as an attempt to fix fault anywhere. Rather, it is an attempt to invite careful consideration of the true worth of the mechanism created by Subsection 89-11(d), HRS, and of whether it should be scrapped in favor of a more straightforward law or salvaged in some fashion.

The parties and the Legislature of this State are invited to consider the statement of legislative findings and policy contained in Section 89-1, HRS:

[§89-1] Statement of findings and policy. The legislature finds that joint-decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method of dealing with disputes and work stoppages, and to maintain a favorable political and social environment.

The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other terms and conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a public employment relations board to administer the provisions of this chapter.

In no way has the rejection of the cost items in the Unit 11 award been consistent with those findings or that laudable statement of public policy.

Notwithstanding the breach of the spirit and policy of the collective bargaining law implicit in the legislative refusal to act upon the Unit 11 cost items,

there has been no breach of the letter of the law by any party in this case.

No prohibited practices were committed by the Governor or the mayors.

ORDER

This case is dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada
Mack H. Hamada, Chairman

Dated: June 15, 1979

Honolulu, Hawaii

CONCURRING OPINION OF MEMBER MILLIGAN

I concur in the findings of fact and in the conclusions of law that none of the Respondents in this case committed a prohibited practice. I concur also in the order of dismissal.

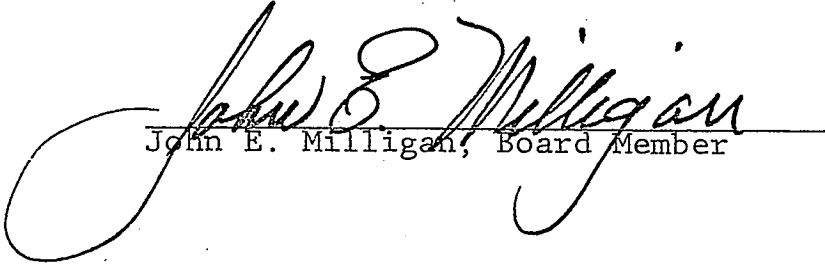
My reasons for finding that the Governor's transmittal of his letter of April 18, 1979 to the Speaker of the House and the President of the Senate did not constitute a prohibited practice differ from those of Chairman Hamada in one respect. I view the Governor as wearing two hats under the laws of our state: he is, on the one hand, a public employer whose conduct is governed by Chapter 89, HRS, and, he is, on the other, the governor of all the people with certain responsibilities and rights conferred upon him by the Constitution of the State of Hawaii.

Section 5 of Article IV of the Constitution, which is concerned with the subject of Executive Powers, in my judgment elevates statements and recommendations concerning the affairs of the State made by the Governor to the Legislature beyond the reach of any restrictions which otherwise might be placed upon them under Section 89-13, HRS. The constitutional provision states, in relevant part:

Section 5. The governor shall be responsible for the faithful execution of the laws. He shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion. He shall, at the beginning of each session, and may, at other times, give to the legislature information concerning the affairs of the State and recommend to its consideration such measures as he shall deem expedient. (Emphasis added)

If the Governor were not the governor but were instead an employer in the private sector, then I would have considered his letter of April 18, 1979 to be a violation of Subsection 89-13(a)(6) [refusal to participate in good faith in the arbitration procedures set forth in section 89-11] had the evidence in this case convinced me, as it did not, that the Governor's letter had had any impact upon its recipients.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


John E. Milligan, Board Member

Dated: June 15, 1979

Honolulu, Hawaii

OPINION OF MEMBER CLARK, CONCURRING
IN PART AND DISSENTING IN PART

I agree with and adopt the findings of fact made by my fellow board members. I make the following additional findings of fact:

1. The cost to the State of Hawaii to fund the Unit 11 cost items for included employees would have come to a total of \$195,720 for fiscal year 1979-80 and \$472,573 for fiscal year 1980-81;
2. The costs for State funding of comparable increases for excluded personnel would have been \$1,835 for fiscal year 1979-80 and \$5,216 for fiscal year 1980-81;
3. State personnel in Unit 11 are not paid out of general revenues. They are paid out of special funds generated by landing fees;
4. Unit 11 is a separate and distinct from the other 12 units created by Section 89-6, HRS. It is a unit for which a unique arbitration procedure was established as a substitute for the right to strike.

With these facts in mind, I find the Governor's letter of April 18, 1979 to be a very disturbing document and consider its transmittal under the circumstances to be a prohibited practice.

In the letter, the Governor expresses concern about the impact the Unit 11 award will have on negotiations with the other 12 units. This impact, I submit, is something within the power and responsibility of the Governor and his

negotiators to eliminate or minimize. If there is an impact, it will be because these negotiators let it happen.

As early as December 29, 1978, when the HFFA's second attempt to go to impasse was turned down by my fellow board members, I dissented. In my dissent I commented, in part, as follows:

Another issue has emerged in these negotiations and should be laid to rest. The employer appears to be reluctant to move in Unit 11 negotiations because of its concern as to what it should do with the other 12 units. While I appreciate that the employer must operate in the context of its total employment relationships, I do not believe it was the intention when Chapter 89, HRS, was passed that all units had to be treated identically. Act 108 certainly makes Unit 11 unique.

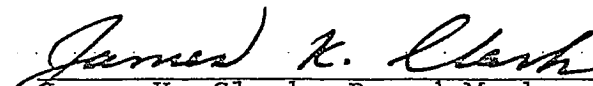
Another part of the Governor's letter which I find disturbing is the assertion in it that, "The amount of the increase also appears to be higher than what State and Counties can afford." (Emphasis added) I cannot understand how the Governor can make this statement to the Legislature when the costs to the State are only \$195,720 for fiscal 1979-80 and \$472,573 for 1980-81 and are paid out of landing fees. I think the State could certainly afford this amount of increase for the some 170 firefighters it employs.

My reason for examining the statements in the Governor's letter is that I attach greater weight to the letter than my colleagues do. They take the view that the legislative leadership had already made up its mind not to act on the Unit 11 cost items before the Governor wrote the letter and so view the letter as having no effect. Because, in their view, the letter had no effect, its writing and transmittal were innocent acts of no legal consequence under Chapter 89, HRS.

I have a very different view of the matter. If the Governor did not know the Legislative leaders already had made up their minds not to act on the cost items, his letter of April 18, 1979 clearly was written to influence them not to fund the Unit 11 award. This action would be inconsistent with the Governor's obligation to take steps necessary to effectuate the award and would be a violation of Subsection 89-13(a)(6) and (7). If, on the other hand, the Governor knew before he sent the letter down what the Legislature was intending to do, then I view his letter as an unnecessary gesture of accommodation to the legislative will, making it a little easier (in the public relations arena) for the legislative leaders to do what they were determined to do. We have no evidence as to what the Governor knew or intended when he wrote the letter but we do have the letter and I view it in and of itself as being inconsistent with the Governor's obligation as a party to the 89-11(d) arbitration proceedings to "take whatever action is necessary to carry out and effectuate the decision."

Accordingly, I dissent from the conclusion of law that the Governor did not commit a prohibited practice and I dissent from the dismissal of the case against him. I agree, however, with the dismissal of the charges against the mayors. (It should be noted that no charge brought against Mayor Matayoshi can be fairly said to relate to the letter of non-support of the Unit 11 award he sent to his County Council.)

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


James K. Clark, Board Member

Dated: June 15, 1979

Honolulu, Hawaii