

In the Matter of)
)
GEORGE R. ARIYOSHI, Governor) Case No. DR-03-36
of the State of Hawaii,)
)
) Decision No. 117
Petitioner.)
)

This case was initiated on June 1, 1979, when the Governor of the State of Hawaii (hereafter the Employer or Petitioner) as public employer and party to the Unit 3 collective bargaining agreement, by his attorney, filed a petition with the Board for a declaratory ruling. In his petition, the Employer requested the Board to determine whether an arbitration decision rendered on March 8, 1979, by Arbitrator Roy M. Miyamoto was in violation of Subsection 89-9(d), Hawaii Revised Statutes (hereafter HRS). Arbitrator Miyamoto determined in his decision that the summer duties of the school administrative services assistants (hereafter SASAs) as a class constituted a temporary assignment of significant duties of other positions, for which additional compensation was required under the Unit 3 collective bargaining agreement.

The instant petition for declaratory ruling was premised upon the supposition that the Employer's refusal to authorize expenditures under the terms of the arbitration award could subject the Employer to a prohibited practice charge under Subsections 89-13(a)(7) and (8), HRS.

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1979, on the petition for a declaratory ruling. On August 2, 1979, the Employer submitted a post-hearing memorandum in support of his petition.

Upon a full review of all exhibits, memoranda and arguments submitted, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The Petitioner George R. Ariyoshi, Governor of the State of Hawaii, is a public employer as defined by Subsection 89-2(9), HRS, of collective bargaining unit 3 (non-supervisory employees in white collar positions).

In the 1969¹ session of the Hawaii State Legislature, the positions of public school secretaries were deleted by the removal of Section 77-15 from the Hawaii Revised Statutes.² Those positions were subsequently reclassified and repriced in 1969 and 1970 by the Department of Personnel Services as school administrative services assistants (SASAs). The Chief of the Classification Division of the Department of Personnel Services, Mr. Clement Kamalu, stated during the HPERB hearing that the summer duties were considered in the SASA reclassification.

Q. So, in the study of the school administrative services assistant positions, Mr. Kamalu, did you consider all the duties, including both summer duties and duties during the regular school year?

A. That's right. We were fully aware that -- and, I think it is common knowledge, as to the school year as well as the difference between the school year and work year for the subject positions.

¹The memo in support of the petition and the post-hearing memo differ as to the precise date of reclassification.

²Section 77-15 had provided for the classification of school secretaries into four distinct levels.

And, in our review, we considered the full range of the work year of the positions in classifying them. As we looked to the regular and recurring duties that were performed -- not just only during the school year, but also throughout the summer months as well. (Emphasis added) Tr. p. 19.

The SASAs have been and currently are employees in collective bargaining unit 3.

Prior to the Fall of 1973, principals and vice-principals, though technically considered ten month employees, performed their duties during the entire year. Following that date, under the terms of the collective bargaining agreement for educational officers, these positions were limited to performing their duties during the ten months of their employment unless the individual principal or vice-principal agreed to the summer duties and received additional compensation.

Beginning in 1974, certain duties were performed during the summer months by the entire class of SASAs.

The Employer stated in his post-hearing memo:

"The summer duties performed by he [sic] assistants are not principal's duties.³ . . . the duties performed by the SASA during the summer fall within the SASA's classification and do not justify the pay of a principal's classification. The summer duties are based on instructions the principal left for the SASA and the other clerical and support staff at the school." (Emphasis added) pp. 8-9.

At an unspecified subsequent date, a grievance was filed on behalf of the SASAs as a class. The grievance alleged

³ This statement contradicts an earlier assertion made by the Employer in the memo submitted with his petition:

"The summer duties performed by the SASA are seasonal or cyclical duties that allegedly occur each summer during the principal's absence. . . These summer duties were a major part of a principal's or vice-principal's classification." p. 3.

that the SASAs' performance of significant duties and responsibilities during the summer months without additional compensation constituted a violation of Article 12 of the Unit 3 bargaining agreement.⁴

Under Article 11 of the Unit 3 agreement,⁵ the unresolved grievance was submitted to Arbitrator Roy M. Miyamoto.

⁴Article 12 states in pertinent part:

D. An Employee assigned temporarily to a higher position shall be compensated from the first day of the assignment for all hours worked at the lowest step in the higher pay range exceeding his existing rate; but if the difference between such rates is less than the difference between his existing rate and the next increment step in the lower pay range, his compensation shall be increased to the next step in the higher pay range; provided that if an Employee's existing rate is at the maximum step, the difference between his existing rate and the next lower step of the pay range shall be used to determine the adjustment of his compensation.

⁵Article 11 provides in pertinent part, the following:

H. Step 4. Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or his representative of its desire to arbitrate with ten (10) working days after receipt of the Employer's decision at Step 3. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

If agreement on an Arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawaii Public Employment Relations Board to submit a list of five (5) Arbitrators. Selection for an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator. No grievance may be arbitrated unless it involves in alleged violation of a specific term or provision of the Agreement. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 3.

At the arbitration prehearing conference, the parties stipulated to the following:

Footnote Continued

If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

The Arbitrator shall render his award in writing, no later than thirty (30) calendar days after the conclusion of the hearings or if oral hearings are waived then thirty (30) calendar days from the date statements and proofs were submitted to the Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:

1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
2. His power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.
3. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty.

The fees of the Arbitrator, the cost of transcription, and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of any transcript that it requests.

(a) The proceedings may be treated as a class grievance.

(b) ". . . The arbitrable issues under said Article 12 are

1. Whether there was a temporary assignment by competent authority to SASA of significant duties and responsibilities of the principal and/or vice-principal.

2. If yes as to 1 above, whether such duties and responsibilities were assumed by SASA.

3. If yes as to 1 and 2 above, what, if any, additional compensation should be paid to SASA by the DOE." (Emphasis added) Petitioner's Exhibit No. 3, p. 2.

Following the arbitration hearing, Arbitrator Miyamoto determined that the SASAs performed significant duties and responsibilities during the summer months of another position without additional compensation. The arbitrator concluded on March 8, 1979, that Article 12 of the Unit 3 collective bargaining agreement which provided for additional compensation for temporary assignment of additional duties was violated by the Employer's refusal to pay the SASAs for their summer duties. Consequently, Arbitrator Miyamoto awarded temporary assignment compensation to the SASAs.

The Employer subsequently appealed Arbitrator Miyamoto's decision under Subsections 658-9(4) and 658-10(2), HRS, to the Circuit Court.

Apparently after the Arbitrator rendered his award, four SASAs requested⁶ temporary assignment pay from the Department of Education (hereafter DOE) for duties performed during the period June 13, 1977 to August 16, 1977.

⁶ It is unclear when the four SASAs made their request.

That request from the SASAs prompted DOE Superintendent Charles G. Clark, on May 30, 1979, to write to the State's Director of Personnel Services inquiring about the propriety of granting temporary assignment pay to the SASAs. Petitioner's Ex. No. 1.

In a response to DOE Superintendent Clark's inquiry, the Director of Personnel Services concluded on June 1, 1979:

"...it is my determination that the four SASAs should not be granted temporary assignment pay for the period June 13, 1977 to August 16, 1977 since the duties and responsibilities allegedly performed and claimed to be the significant duties and responsibilities of the principal and vice-principal classifications are in fact within the SASA classification." Petitioner's Ex. No. 2.
(Emphasis added)

On June 1, 1979, the Petitioner filed the instant petition with this Board for a declaratory ruling as to whether the arbitrator's award was in violation of Subsection 89-9(d), HRS, which, inter alia, makes matters concerning classification nonnegotiable.⁷

CONCLUSIONS OF LAW

The initial question presented by this case is whether HPERB has jurisdiction to entertain the request for the subject declaratory ruling, based upon its authority to interpret the

⁷ Subsection 89-9(d) provides in pertinent part:

"Excluded from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable." (Emphasis added)

prohibited practice provisions of Subsections 89-13(a)(7) and (8),⁸ and Subsection 89-9(d), HRS.

Petitions for declaratory rulings may be brought to this Board pursuant to Section 91-8, HRS, which provides:

§91-8 Declaratory rulings by agencies.
Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
(Emphasis added)

The Petitioner argues that the Board has jurisdiction to entertain the request for a declaratory ruling because HPERB has exclusive jurisdiction over all prohibited practice violations pursuant to Chapter 89, HRS. The Petitioner maintains that his failure to implement the arbitration award and his refusal to authorize expenditures under it may constitute a violation of the final and binding arbitration provisions of the Unit 3 collective bargaining agreement. A violation of the terms of a collective bargaining agreement is a prohibited practice under Subsection 89-13(a)(7) and (8), HRS. Hence, the Employer argues, his failure to take action to implement the award may constitute a prohibited practice. Though no

⁸These Subsections provide as follows:

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

* * *

- (7) Refuse or fail to comply with any provisions of this chapter; or
- (8) Violate the terms of a collective bargaining agreement."

prohibited practice charge has been filed with the Board, the Petitioner claims that one could be filed under Subsection 89-13(a)(7) and (8), HRS.⁹ Thus, the Petitioner contends that the Board has declaratory ruling jurisdiction because of the possible prohibited practice charge and because HPERB has exclusive jurisdiction over all prohibited practice violations.

The Petitioner also argues that the Board has jurisdiction over the declaratory ruling petition because of the ruling made by the Hawaii Supreme Court in Frank Fasi v. State of Hawaii Public Employment Relations Board, et al.; Hawaii State Teachers Association (HEA-NEA) v. Hawaii Public Employment Relations Board, et al.; Hawaii Government Employees' Association, et al. v. Hawaii Public Employment Relations Board, et al. (hereafter the Aiu case), Case No. 6119 (February 27, 1979).

The Aiu case involved a collective bargaining agreement which gave promotional preference to the individual with seniority if the applicants for a promotion otherwise were equal. When Mr. Aiu, the more senior employee, was denied a promotion, his union initiated a grievance on his behalf. Prior to the designation of an arbitrator to hear the grievance, the employer filed a petition for a declaratory ruling with HPERB as to the validity, under Subsection 89-9(d), HRS, of the seniority preference provision of the collective bargaining agreement. HPERB ruled that the portion of the contract

⁹In fact, four SASAs made a request to the DOE Superintendent for additional payment under the terms of the arbitration award. Their request was refused. These four SASAs arguably could file a prohibited practice against the Employer.

in question was valid and enforceable. On appeal, the Circuit Court held that the pending arbitration of the grievance had divested the Board of jurisdiction to entertain the request for a declaratory ruling. In reversing and remanding the case to the Circuit Court, the Supreme Court in Aiu held that HPERB had jurisdiction to issue the declaratory ruling. The Supreme Court delineated the Board's authority under Section 91-8, HRS, stating:

In order to fall within the scope of §91-8, the question presented by the petition had to relate to a statutory provision or a rule or order of the Board. The words "statutory provision" are limited by their context, and do not embrace every provision of the statute laws of the state. We think it is fairly implied, from the provision of §91-8 giving orders disposing of petitions for declaratory orders the same status as other orders of the Board, that the question presented by the petition had to be one which would be relevant to some action which the Board might take in the exercise of the powers granted by Chapter 89. The applicability of §89-9(d) to the collective bargaining agreement between C&C and UPW was thus before the Board in the context of the possible actions which the Board might take with reference to the disputed provision of the agreement. (Emphasis added)

In applying Section 91-8, HRS, to the facts of the Aiu case, the Court determined that HPERB had declaratory ruling jurisdiction, stating:

The wilful failure of an employer to observe the terms of a collective bargaining agreement is defined by §89-13(a)(8) as a prohibited practice, with respect to which §89-5(b)(4) empowers the Board, upon complaints by employers, employees and employee organizations, to "take such actions with respect thereto as it deems necessary and proper." Since the meaning and effect of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between C&C and UPW was a

question which related to an action which the Board might take in the exercise of its powers. The applicability of §89-9(d) to the collective bargaining agreement is therefore a question which was properly placed before the Board by the petition pursuant to §91-8.

* * *

If the Board had jurisdiction to take action with respect to a prohibited practice, it had jurisdiction to declare what would constitute a prohibited practice.
(Emphasis added)

Aiu established that the Board has declaratory ruling jurisdiction in situations in which it would have prohibited practice jurisdiction and that in the exercise of this jurisdiction, it would be proper for the Board to inquire into the validity of a collective bargaining agreement underlying a prohibited practice charge and to consider the effect of Subsection 89-9(d), HRS, on the validity of said contract.

In the present case, Article 11 of the Unit 3 collective bargaining agreement provides for arbitration that is final and binding upon the Employer.¹⁰ The Employer has intentionally refused to observe and enforce the arbitration decision. That failure to comply with the terms of the award and in effect the collective bargaining agreement may constitute a prohibited practice under Subsection

¹⁰ The Court in Aiu also ruled upon the issue of whether the binding arbitration provision of the collective bargaining agreement divested HPERB of jurisdiction, stating:

"We think it is not arguable that any collective bargaining agreement could deprive the Board of its statutory authority to take action with respect to prohibited practices, although the terms of existing agreements might well be relevant to the determination whether a prohibited practice existed." p. 9.

89-13(a)(7) and (8), HRS. Therefore, the Board has declaratory ruling jurisdiction under the Aiu case and Section 91-8, HRS, to determine whether the employer's action of refusing to enforce the award could constitute a prohibited practice.

As previously noted in the findings of fact herein, the SASA summer duties and the proper compensation for those duties were presented to the arbitrator, who determined that those duties constituted a temporary assignment of significant duties and responsibilities of another position. The Petitioner contends that throughout the arbitration process, he consistently maintained the position that the summer duties were an inseparable part of the SASA classification. Most of the record presented reflects this position, that the matter of the SASAs' summer duties was regarded by the Employer as being one of classification. Matters of classification and reclassification are excluded from the scope of negotiations under Subsection 89-9(d), HRS. Thus, Petitioner urges that the arbitration award is unenforceable because it, in effect, makes negotiable and subject to arbitration a portion of the SASA classification¹¹ in violation of Subsection 89-9(d), HRS.

The Petitioner's conduct in refusing to comply with the SASA arbitrator award may not constitute a prohibited practice if it reflects a bona fide and plausible interpretation of the award or a bona fide and plausible claim that the award, or

¹¹The Board has noted in its findings of fact that all parties to the arbitration agreed and stipulated as to the arbitrability of the temporary assignment to the SASAs of significant duties and responsibilities of another position. However, if 89-9(d) applies to the instant situation, then Section 1-6, which provides that any agreements made in contravention of a prohibitory law are void, would apply.

part of it, is void. The present situation is parallel to that in Aiu where a breach of the collective bargaining agreement was claimed to constitute a possible prohibited practice. The Supreme Court noted that the claim of invalidity of a portion of the collective bargaining agreement could be raised before HPERB, stating:

"The applicability of §89-9(d) to the collective bargaining agreement. . . was thus before the Board in the context of the possible actions which the Board might take with reference to the disputed provision of the agreement."

Thus, the applicability of HRS 89-9(d) to the SASA arbitration award is properly before HPERB as a defense against a possible prohibited practice charge which might be brought against the employer.

HPERB, therefore, has jurisdiction to entertain the Petitioner's request for a declaratory ruling and to review not only the applicability of HRS 89-13(a) to Petitioner's conduct but also the applicability of HRS 89-9(d) to the SASA arbitration award.

The present case diverges from the facts of Aiu in that the SASA grievance has gone to arbitration; an arbitration decision has been rendered, and a motion to vacate that arbitration decision has been filed with the Circuit Court pursuant to Chapter 658, HRS. While this Board is of the opinion that it has jurisdiction over the subject declaratory ruling petition, nothing which has come to its attention during the course of these proceedings is instructive as to whether such jurisdiction in any way precludes a court from acting pursuant to Chapter 658. If the exercise of jurisdiction by this Board would be in conflict with the Court's exercise of

jurisdiction, then perhaps this Board's jurisdiction would be exclusive because of the provisions of Section 89-19, HRS:

Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.

An ex parte proceeding is, however, an inappropriate medium in which to explore this question of potentially conflicting jurisdiction and the Board declines to rule on whether the jurisdiction it has to review the arbitration award in this declaratory ruling case is concurrent or exclusive.

In the present case, the evidence presented was limited by the fact that the proceedings were ex parte. No evidence was presented either by the SASAs or their union. Therefore, the Board, in the exercise of its discretion, declines for good cause to determine whether the arbitration award is in contravention of Subsection 89-9(d), HRS, because there is not adequate evidence to permit the Board to make a ruling on the merits of this case.

In view of the foregoing, the Board concludes that while it has jurisdiction over the subject matter of the instant case, there is insufficient evidence before it concerning the merits of the case. The Board, thus, must decline to act upon the petition for a declaratory ruling.

ORDER

The declaratory ruling petition is denied.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


John E. Milligan, Board Member

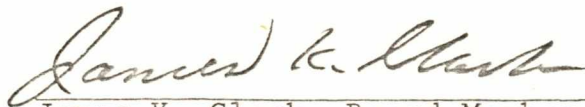
Dated: October 10, 1979

Honolulu, Hawaii

CONCURRING OPINION OF MEMBER CLARK

I concur in the findings of fact and in the order denying the petition.

My reasons for denying the declaratory ruling petition differ in one significant respect from that of the majority. In my view there was an assignment by competent authority of some of the summer duties of educational officers to the SASAs without additional pay. This was a temporary assignment for which the SASAs were entitled to receive additional pay under the terms of the Unit 3 contract. Failure to give them temporary assignment pay constituted a breach of the Unit 3 contract. Because I view the Employer's action as making a temporary assignment of principals and vice-principals' duties to the SASAs, it follows that I do not view the summer duties so assigned to them as falling within their present classification. Accordingly, Subsection 89-9(d), HRS, does not come into play at all because classification is not an issue in this case.



James K. Clark, Board Member

Dated: October 10, 1979

Honolulu, Hawaii