STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO, Petitioner, and FRANK F. FASI, Mayor of the City and County of Honolulu, Employer.	Case Nos. RA-02-15 RA-03-16 RA-04-17 RA-13-18
In the Matter of HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO, Petitioner, and FRANK F. FASI, Mayor of the City and County of Honolulu, and UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO, and HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, and GEORGE KAISAN and ARTHUR OHELO, and MTL, INC., Intervenors.	Case Nos. DR-02-12 DR-03-13 DR-04-14 DR-13-15 Decision No. 143

ERRATA

After due consideration and further deliberation on this case, the Board is of the opinion that since it went through a complete evidentiary hearing and was able to report findings of fact and formulate a response to the remand

ERRATA
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question, it was erroneous to say in the third full paragraph on page 11 of Decision 143 that the Board did not have jurisdiction on the remand issue.

All that was required of the Board on the remand issue was to find facts upon which the Secretary could deny federal funds. The Court's remand directions specifically noted that "in the event, and as part of the record before the Board, an official communication is received from the Secretary of Labor concerning the question whether federal funds would or would not be cut off should MTL employees be determined to be public employees within HRS Section 89-2(7), then such communication may be considered as persuasive evidence under Section 89-20."

In the second full paragraph on page 11 of Decision 143, the Board concluded that in view of an official communication from the Assistant Secretary of Labor and the absence of contravening facts, it could not find grounds for the jeopardy of federal funds. By so concluding, the Board answered the remand question. Consequently, the Board believes that all material beginning with the third full paragraph on page 11 of Decision 143, up to and including the last paragraph on page 13, is contradictory to the Board's conclusion and are hereby stricken from said Decision.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: January 15, 1981

Honolulu, Hawaii

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO, Petitioner, and FRANK F. FASI, Mayor of the City and County of Honolulu, Employer.	Case Nos. RA-02-15 RA-03-16 RA-04-17 RA-13-18
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Board Decision 85, 1 HPERB 744 (1977) was appealed to the First Circuit Court, State of Hawaii.[1] By decision

[1]Hawaii Government Employees' Association vs. Mack H. Hamada, et al., Civil No. 53212, and United Public Workers vs. Hawaii Public Employment Relations Board, Civil No. 53221 (consolidated).

dated May 15, 1979, the Honorable Robert Won Bae Chang ruled as to said Decision 85:

> . . .the decision of the Board with respect to HRS Section 89-20 is reversed and remanded with directions that the Board hold further evidentiary hearings and make necessary findings of fact and conclusions of law in accordance with this opinion. The Court reserves decision on all other issues raised in this appeal.

A hearing on the remand was held by the Board on April 21, 1980.

On May 27, 1980 a brief was filed by Intervenors Hawaii Teamsters and Allied Workers, Local 996, and George Kaisan and Arthur Ohelo (hereafter collectively referred to as Teamsters). On May 28, 1980 Employer and Intervenor Frank F. Fasi, Mayor of the City and County of Honolulu (hereafter City), filed a brief. Intervenor MTL, Inc. (hereafter MTL), filed a joinder in the briefs of the aforementioned parties.

On June 9, 1980 Petitioner Hawaii Government Employees' Association (hereafter HGEA) filed an answering brief to which Intervenor United Public Workers (hereafter UPW) filed a joinder.

On June 20, 1980 Teamsters filed a reply brief in which the City and MTL, Inc. joined.

On June 23, 1980 the Board heard oral arguments on the briefs. The Board, having reviewed the record on remand herein, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

At hearing the City offered into evidence a Comparative Wage and Salary Study (Interv. City Ex. R-2) and a Comparison of Benefits (Interv. City Ex. R-3). The tables compared wages and salaries of comparable jobs, to the extent possible, between MTL and the City, and comparative benefits

of MTL and the City in such areas as retirement, medical coverage, life insurance, etc. The table of wages and salaries shows generally higher amounts for MTL than for comparable City positions. The comparison of benefits shows that the impact of transfer on an employee from MTL to the City would result in a mixture of gains, losses, and "no change." These exhibits were admitted into evidence over the objections of HGEA and UPW. (4/21/80 Tr. 101, 116)

Both HGEA and the City submitted into evidence virtually identical letters dated October 14, 1976 from Bernard E. DeLury, Assistant Secretary of Labor, U. S. Department of Labor, to Jerry Wurf, International President, American Federation of State, County and Municipal Employees (Ptr. Ex. R-1), and to William M. Kahane, Deputy Corporation Counsel, City and County of Honolulu (Interv. City R-4). In referring to the substance of Mr. DeLury's letters, the Board will hereafter, for convenience, cite only Mr. DeLury's letter to Mr. Wurf. Said letter stated in full as follows:

> This is in further response to your letter of July 3, 1975, concerning the petition filed with the Hawaii Public Employment Relations Board (HPERB) by one of your affiliates, the Hawaii Government Employee's [sic] Association.
>
> We are aware that a recent ruling by the National Labor Relations Board held that MTL, Inc., is an instrumentality of the City and County of Honolulu and therefore exempt from coverage under the National Labor Relations Act. In addition we understand the HPERB is currently conducting hearings on the status of MTL, Inc. employees under Hawaii's public sector law.
>
> In your letter and attachments you raised several concerns about the MTL, Inc. employees' bargaining unit and the impact of an HPERB decision affecting their current status. With respect to the Urban Mass Transportation Act of 1964, as amended, it was not the position of the Department in 1971 nor is it our present position that compliance with section 13(c) of the Act necessarily requires the preservation of the bargaining unit in existence at the time the 13(c) agreement is

executed. Neither was our opinion in 1971 intended to indicate that the continued existence of that unit provided the only legal alternative for compliance with the requirements of section 13(c). Therefore, we cannot conclude that a final decision under Hawaii state law that placed transit employees in a different bargaining unit would necessarily prevent the City and County from fulfilling its obligations under section 13(c).

Certainly a real issue under section 13(c) raised by the unit determination is the matter of the continuation of existing employee rights, privileges, and benefits. The section 13(c) agreement executed by the City and County of Honolulu, MTL, Inc., and the Hawaii Teamsters and Allied Workers Local 996, specify the substantive protections to be afforded the former employees of Honolulu Rapid Transit Company. The arrangements detail the signatories' specific responsibilities to the employees with respect to their collective bargaining rights and benefits.

Successorship obligations were set forth in paragraph 11 of the protective agreement dated December 28, 1970, between the City and County of Honolulu, MTL, Inc., and the Teamsters Union Local 996, which was executed in connection with the City's acquisition of the Honolulu Rapid Transit Company. That clause which has been included in subsequent protective agreement provides:

> This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of the arrangements made by the CITY to manage and operate the system. Any person, enterprise, body or agency, whether publicly or privately owned, which shall undertake the management or operation of the transit system, shall agree to be bound by the terms of this agreement and accept the responsibility for full performance of these conditions.

The City and County of Honolulu is bound by the terms of the 13(c) agreement and responsible for full performance of the conditions set forth therein. This reaponsibility includes any financial obligations that might result from any worsening of employee rights and benefits. The employees' pension, medical and health insurance benefits are among the categories of benefits which would require protection.

Further, paragraph 14 of the agreement provides:

> In the event any provision of this agreement is held to be invalid or otherwise unenforceable under State or local law, such provisions shall be renegotiated for purposes of adequate replacement under section 13(c) of the Act. If such a negotiation shall not result in mutually satisfactory agreement, either party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements which shall be incorporated in this agreement.
>
> If as a result of a final agency or court decision any provision of the 13(c) agreement is found to be invalid or unenforceable, renegotiations would be required pursuant to paragraph 14.
>
> Future compliance with the requirements of section 13(c) will of course require the continuation of collective bargaining rights and benefits, and the development of an employee protective arrangement with the transit employees' representative that satisfies the requirements of section 13(c).
>
> If we may provide you with additional information, please contact Mr. Lary Yud of my staff. Mr. Yud may be reached at 202-523-6495.

For the record, the Board notes that testimony was presented by Intervenor Arthur Ohelo and by John Chong, called as a witness on behalf of Mr. Ohelo. Despite extensive direct and cross examination of Mr. Chong, an MTL bus operator and assistant business agent for Local 996, the Board viewed both his and Mr. Ohelo's testimony as of a very tenuous nature, being personal opinion or speculation or without proper foundation. The Board, therefore, is unable to make any relevant findings of fact from their statements helpful to the issues herein.

CONCLUSIONS OF LAW

To be initially resolved is the procedural matter of who has the burden of proof in this proceeding.

The City cites HRS §91-10(5), concerning rules of evidence in administrative procedure, which states that:

> In contested cases:
>
> * * *
>
> (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

It is the City's position that these are contested cases under HRS §91-9, and that HGEA, joined by UPW, initiated these proceedings when the cases were originally before the Board. Therefore, HGEA and UPW have the burden of proving their contention that HRS Chapter 89 must apply, that HRS §89-20 does not apply, and that facts do not exist upon which the Secretary could deny federal funds. (City Op. Brf. at 5)

HGEA argues that Judge Chang already ruled, in substance, that the burden rested on the Intervenors,[2] citing the following from the Court's decision:

> To invoke HRS Section 89-20, it is necessary that there be a finding that federal funds would be jeopardized by the application of any provision of HRS Chapter 89. (HGEA's emphasis)

HGEA contends that under Board Rule 1.08(g)(23), it is "the charging party, in asserting a violation of the Act or the rules, . . ." (HGEA's emphasis) which has the burden of proof. HGEA argues that it filed petitions for unit clarification and for declaratory ruling, neither of which constitutes a charge of violation of the Act or the rules.

HGEA further argues that:

> Board Rules and Regulations have the force of law. Board Rule 1.09 clearly does

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[2]In Civil No. 53212, HPERB, MTL, the City, and Teamsters are designated as Intervenor-Appellees.

> not treat petitions for declaratory rulings as contested cases, since it reserves the right to "deny the petition in writing. . . or issue a declaratory order on the matters contained in the petition" without a hearing. (HGEA Ans. Brf. at 7)

The Board hereby reaffirms its oral ruling made at hearing that the City, MTL, and Teamsters have both the burden of going forward with the evidence and the burden of persuasion to determine whether or not HRS §89-20 is applicable. (4/21/80 Tr. 15-16)

For the proper background to proceed to the substantive issues in this remand proceeding, the Board feels it essential that Judge Chang's decision be presented here in its entirety:

> The Hawaii Government Employees' Association, Local 152, AFSCME, AFL-CIO (HGEA) filed a petition with the Hawaii Public Employment Relations Board (Board) to include employees of MTL, Inc. (MTL), within the certifications establishing HGEA as the exclusive representative of bargaining units 2, 3, 4 and 13, under Hawaii Revised Statutes (HRS) Chapter 89, on the ground that they are public employees within the meaning of that Chapter. Thereafter, HGEA filed a second Petition for Declaratory Ruling governing the status of the employees covered by the foregoing petition, claiming that they are public employees.
>
> United Public Workers, Local 646, AFSCME, AFL-CIO (UPW) intervened in the proceedings as the certified exclusive representative of Unit 1 employees under said Chapter 89, contending that certain employees of MTL are public employees falling within Unit 1. The City and County of Honolulu (City), MTL, the Hawaii Teamsters and Allied Workers, Local 996 (Teamsters), George Kaisan and Arthur Ohelo intervened in opposition to the petitions.
>
> The Board held hearings and rendered its decision on November 1, 1977, as follows:
>
> > Although MTL, Inc., is an instrumentality of the City and County of Honolulu and its employees are, in fact, employed by the City in the operation of its public bus system, said employees are not, at this time, "public employees" within the meaning of Chapter 89, HRS. Only the Legislature or the City Council of the City and County, on the facts in this case,

> can make them public employees for purposes of Chapter 89.
>
> As this Board indicated during the hearing herein the UMTA issue; i.e., whether federal funds would be jeopardized by a decision of this Board in this case, is properly one for the Secretary of Labor of the United States to rule upon in the first instance.
>
> The unit determination (RA) cases are dismissed.

HGEA and UPW appealed the decision of the Board to this Court pursuant to the Hawaii Administrative Procedure Act (HAPA), HRS Section 91-14, seeking reversal on the grounds that MTL employees are public employees within the meaning of Chapter 89.

Because Chapter 89 is directly involved in the decision of the Board, the threshold question is whether Chapter 89 is applicable in this case. Section 89-20 reads as follows:

> If any provision of this chapter jeopardizes the receipt by the State or any county of any federal grant-in-aid or other federal allotment of money, the provision shall, insofar as the fund is jeopardized, be deemed to be inoperative.

Section 89-20 renders any provision of Chapter 89 inoperative if federal funds would be jeopardized by the application of that provision. The question is whether the receipt of federal funds would be jeopardized in the event MTL employees are held to be public employees within the meaning of Section 89-2(7). The Board decided that the question is properly one for the Secretary of Labor of the United States and thus the Board declined to issue any ruling or decision under Section 89-20.

To invoke HRS Section 89-20 it is necessary that there be a finding that federal funds would be jeopardized by the application of any provision of HRS Chapter 89. It is significant that the Legislature chose to employ the word "jeopardize" rather than requiring that federal funds be in fact terminated before HRS Section 89-20 becomes operative. According to Webster's Dictionary, to "jeopardize" is to expose to a risk or imminence of loss. Risk or imminence of loss are words of future occurrences, thus giving future applicability to the word "jeopardize." The provision is prospective in nature rather than retroactive, in that it seeks to <u>prevent</u> the possibile loss of federal funds <u>before</u> any loss occurs. The provision

would have little practical effect if it became operative only after federal funds were already discontinued. Where possible, courts should give practical meaning to the language used in a statute and employ ordinary definitions to commonly used words. Accordingly, this Court concludes that Section 89-20 must have reference to the possible future loss of federal funds.

In determining whether the receipt of federal funds would be in jeopardy under Section 89-20, the Board should consider the possible ramifications to the rights, privileges, benefits and interests of the employees of MTL. The Board need not attempt to "second guess" the Secretary of Labor. It need only make findings as to whether or not applying HRS Chapter 89 may adversely affect MTL employees in such a manner that there is a risk or possibility that funds could be terminated. If the Board finds that facts exists upon which the Secretary could deny federal funds, then the Board should conclude that jeopardy does exist. (Emphasis added)

The federal law under which the Secretary of Labor is authorized to determine that conditions have occurred to justify a denial of federal funds is found in 49 U.S.C. §1609(c) [Urban Mass Transporation Act, Section 13(c), hereinafter referred to as UMTA Sec. 13(c)], which reads as follows:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established

> pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.
>
> The Secretary of Labor is empowered to deny UMTA funds whenever the relevant employees are not accorded fair and equitable treatment as set forth in UMTA Section 13(c). If the application of HRS Chapter 89 to MTL employees results in violation of any of the UMTA Section 13(c) conditions, then the requisite jeopardy exists and Chapter 89 is inoperative.
>
> The Board is an appropriate tribunal to determine the applicability of HRS Section 89-20. Although the Secretary is the only party who may ulti0ately decide whether federal funds actually will be cut off under federal law, the Secretary is not the proper party to interpret and apply the Hawaii statute. However, in the event, and as part of the record before the Board, an official communication is received from the Secretary of Labor concerning the question whether federal funds would or would not be cut off should MTL employees be determined to be public employees within HRS Section 89-2(7), then such communication may be considered as persuasive evidence under Section 89-20. (Emphasis added)
>
> Accordingly, the decision of the Board with respect to HRS Section 89-20 is reversed and remanded with directions that the Board hold further evidentiary hearings and make necessary findings of fact and conclusions of law in accordance with this opinion. The Court reserves decision on all other issues raised in this appeal.

The Board views Mr. DeLury's letter as the most persuasive evidence in the record in reaching the conclusions herein.

HRS §89-20 speaks of the jeopardy of receipt of federal funds. UMTA Section 13(c) conditions the receipt of federal funds on protective arrangements for employees against a worsening of their positions with respect to their employment, such as the application of HRS Chapter 89 may cause to MTL employees.

Mr. DeLury's letter responded to this issue by pointing out that successorship obligations were set forth in the protective agreement dated December 28, 1970, between

the City, MTL, and the Teamsters upon the City's acquisition of the Honolulu Rapid Transit Company. That provision has been included in subsequent protective agreements. To reiterate, Mr. DeLury stated:

> The City and County of Honolulu is bound by the terms of the 13(c) agreement and responsible for full performance of the conditions set forth therein. This responsibility includes any financial obligations that might result from any worsening of employee rights and benefits.

Mr. DeLury also cited the paragraph in the agreement wherein renegotiation of the agreement for compliance with Section 13(c) is provided for.

In view of this official communication from the Assistant Secretary of Labor, and the absence of contravening facts in the record, the Board must conclude that it can find no present grounds upon which the Secretary of Labor could deny federal funds, and therefore the Board cannot conclude that jeopardy of federal funds exists.

With all due respect to the Court, the Board wishes to state for the record that it does not believe that it (the Board) has jurisdiction of the remand issue concerning federal funds.

In Kendler v. Wirtz, 388 F.2d 381 (3d Cir., 1968), certain railroad employees and the local union sued to enjoin the Secretary of Labor from certifying that "fair and equitable" arrangements had been made to protect the employees' interests with respect to proposed federal grants-in-aid to state and state agencies for the purpose of improving railroad commuter service. The Court of Appeals affirmed dismissal of the action. The decision stated, in part:

> A mere difference of judgment between a person disadvantageously affected by agency action and the responsible head of the agency over the merits of particular administration action as a means of achieving a legislative

> objective, when Congress has assigned authority to make and act upon such determinations to the agency, is not judicially reviewable. Panama Canal Co. v. Grace Line, Inc., 1958, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788; United States v. Carmack, 1946, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209; Adams v. Nagle, 1938, 303 U.S. 532, 58 S.Ct. 687, 82 L.Ed. 999; Williamsport Wire Rope Co. v. United States, 1928, 277 U.S. 551, 48 S.Ct. 587, 72 L.Ed. 985. Moreover, section 10 of the Administrative Procedure Act [footnote omitted] expressly excludes "agency action * * * by law committed to agency discretion" from judicial review. Nothing in the Urban Mass Transportation Act suggests that the exclusionary language of section 10 is inapplicable to the Secretary of Labor's required determination that protective arrangements adopted for the benefit of employees affected by a mass transportation project are "fair and equitable" and constitute "necessary" safeguards. To the contrary, the statutory standard is expressed in such general concepts that it requires and must contemplate the exercise of discretion in choice among various rational alternatives none of which can fully satisfy all demands of competing interests. Cf. Duesing v. Udall, 1965, 121 U.S. App. D.C. 370, 350 F.2d 748, cert. denied 383 U.S. 912, 86 S.Ct. 888, 15 L.Ed.2d 667. Moreover, the absence of any provision in the Mass Transportation Act for judicial review of the Secretary's determination suggests that Congress recognized that the Secretary of Labor is at least as competent as a court to achieve such an accommodation of diverse and often conflicting social and economic interests as must be made in determining what employee protective arrangements incidental to mass transportation projects are "equitable" and "necessary". We are concerned here with a type of determination that "does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment". Frankfurter, J., concurring in Driscoll v. Edison Light & Power Co., 1939, 307 U.S. 104, 122, 59 S.Ct. 715, 724, 83 L.Ed. 1134. 388 F.2d at 383.

The Appeals Court noted the particular matters disputed by the employees and the railroad, and continued in its decision:

> To state these objections is to disclose that the protective arrangements in dispute are substantial, though insufficient in the judgment

> of the appellants. Moreover, the greater protective measures they seek may well be disadvantageous to other groups of employees or substantially more burdensome to the carrier, or both.
>
> It is for the reasonable accommodation of unavoidably conflicting interests in such a situation as this that the Congress has seen fit to make the judgment of the Secretary of Labor as to what is fair and equitable controlling. Cf. United States v. George S. Bush & Co., 1940, 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 12, 59; Swayne & Hoyt, Ltd. v. United States, 1937, 300 U.S. 297, 57 S.Ct. 478, 81 L.Ed. 659. Relating the attempted administrative compliance with the legislative directive to the limited judicial reviewing function outlined earlier in this opinion, we hold that it would not be appropriate for a court to substitute its judgment for the Secretary's judgment that railroad employees are afforded fair and equitable protection by the arrangements that have been made for their benefit. 388 F.2d at 384.

Based on the foregoing, the Board believes that the Secretary of Labor has sole jurisdiction of the matters in the instant remand.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: January 8, 1981

Honolulu, Hawaii