STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Petitioner, and DEPARTMENT OF EDUCATION, Respondent.	Case No. CE-05-4 Decision No. 22

ERRATA

The following corrections to the Decision of the Hawaii Public Employment Relations Board in the above-entitled matter are to rectify typographical or editing errors or omissions in said Decision. They do not alter the findings, conclusions, or orders of the Board in any respect. The corrections, except in item 5, are made in the following manner; Material to be deleted is bracketed; new material is underscored.

1. The first two full sentences beginning on page 9 of the Decision are corrected as follows:

"It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, [and application] by deferral of matters concerning contractual interpretation and application to the arbitration process agreed to by the parties. The Board, in all cases where such deferrals are made, shall retain jurisdiction for the limited purpose of determining whether the arbitrator's award is within the scope of his powers, the proceedings were expeditious, lawful and fair, and the award is consistent with Chapter 89."

2. The second sentence of the paragraph which begins, in the body of the Decision, on page 13 is corrected as follows:

"Under Wisconsin law it is an unfair labor practice to breach a collective bargaining agreement and the Wisconsin Board,

keeping in step with the NLRB, defers to arbitration unless arbitration would be [fuitless] fruitless or the parties jointly waive arbitration."

3. That portion of the Decision which begins with the second sentence in the final paragraph on page 17 and ends on that page is corrected as follows:

"The concept which emerges from these decisions clearly, regardless of the facts of the cases [of] or the governing statutory provisions, is the fact that class size presents a hybrid issue. It involves [both] policy making and also has a direct impact on working conditions."

4. The second to the last sentence in the first paragraph which ends on page 27 is corrected as follows:

"We find no evidence to support the HSTA's allegation that the DOE intended to or did in fact interfere with, restrain or coerce its employees."

5. The number 178,985 which appears on page 27 should be corrected to 178,785. Note: the error here being corrected was merely a typographical one which in no way affected the calculations of the average class size ratio.

Sonia Faust

Sonia Faust, Executive Officer
Public Employment Relations Board

Dated: October 30, 1972

Honolulu, Hawaii

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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Petitioner, and DEPARTMENT OF EDUCATION, Respondent.	Case No. CE-05-4 Decision No. 22

DECISION

Appearances:

For Petitioner: Thomas P. Gill, Hawaii State Teachers Association

For Respondent: Wayne K. Minami and Lawrence Kumabe, Attorney General's Office, State of Hawaii

This case involves a prohibited practice charge brought by the Petitioner HAWAII STATE TEACHERS ASSOCIATION (hereinafter HSTA) against the Respondent DEPARTMENT OF EDUCATION (hereinafter DOE).

The HSTA was certified to be the exclusive bargaining representative for the some 9,769 members of Unit 5 ("teachers and other personnel of the department of education") on May 27, 1971.

After protracted and trying negotiations during which an impasse was declared and a strike had been authorized, a contract was agreed to on the early morning of the day set for the strike, February 17, 1972. The collective bargaining agreement was signed by the parties on February 29, 1972.

This decision caps a prolonged and bitter dispute between the parties over the interpretation and implementation of Article VI of the Collective Bargaining Agreement. This Article is entitled "Teaching Conditions and Hours". In relevant part, it provides, under sub-part A as follows:

"ARTICLE VI TEACHING CONDITIONS AND HOURS

A. Class Size Committee

1. A joint class size committee shall be established within four (4) weeks after the execution date of this agreement. the [sic] committee shall consist of two (2) representatives appointed by the Employer and two (2) representatives appointed by the Association.

   Alternates or replacements of committee members shall be the sole prerogative of the party involved. No decision of the committee shall be binding if one or more of the committee members is not present when the decision is made. Further, the committee is authorized to hear and investigate complaints regarding class size and make recommendations to the Superintendent regarding such complaints.

2. Beginning with the 1972-73 school year, the Employer agrees to reduce the average class size ratio by approximately one student. Based on current Employer practices, this would require a minimum of 250 positions for the 1972-73 school year. These teaching positions shall be in addition to presently allocated positions, additional positions required by increased student enrollment and additional teaching positions created in the preparation time and duty-free lunch provisions of this Agreement.

   The current proportion (15%) of these positions shall be used to increase the number of counselor and bargaining unit supportive staff positions. The remainder shall be assigned to classroom teacher positions.

3. It is recognized in fulfilling the obligations set forth in the class size and preparation period articles that bargaining unit positions allocated for the school year 1972-73 shall not be reduced to implement said articles.

4. The committee established in Section A-1 above shall have the authority to recommend

> to the Superintendent specific changes to be made to accomplish the objectives set forth in Sections A-2 and A-3. The Superintendent shall implement the recommendations in each case as soon as possible."

The DOE without prior negotiation, conference or consultation with the HSTA set in motion an operation to remove some 169.5 classroom positions which were used as "support" positions back into the classroom. The "support" positions were used for such purposes as counselors, registrars, traveling art and music teachers and other supportive services to regular classroom teachers. The DOE has maintained that its plan, in part, is a partial implementation of the agreement to reduce the classroom teacher-pupil ratio because more teachers are in the classrooms.

The HSTA made futile attempts to ascertain that the DOE was in fact taking "support" teachers and putting them back into the classroom. The DOE did not provide the HSTA with any information about its plan of putting "support" teachers into the classroom. Being thus frustrated, the HSTA filed the present prohibited practice charge against the DOE on May 24, 1972, alleging violations of Sections 89-13(a)(1), (5), and (8), Hawaii Revised Statutes.[1] During the pre-hearing conferences, the HSTA was permitted to file interrogatories against the DOE. The answers to the interrogatories clearly indicated the plan of the DOE. Thereafter, the HSTA amended its prohibited practice charge on July 7, 1972, alleging that the plan of the DOE to transfer the 169.5 "support" positions

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[1]Sec. 89-13(a)(1). "Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter."; Sec. 89-13(a)(5). "Refuse to bargain collectively in good faith with the exclusive representative as required in Section 89-9"; Sec. 89-13(a)(8). "Violate the terms of a collective bargaining agreement."

constituted prohibited practices under Section 89-13, Hawaii Revised Statutes. The DOE in its answer of July 21, 1972, denied that its plan was a prohibited practice. There were other delays in the proceedings because the parties asked, without objections of either party, to introduce amended papers. A hearing was conducted by Stephen K. Yamashiro, a Hearings Officer of this Board, on August 3, 4, 7 and 8, 1972.

On August 30, 1972, the Hearings Officer issued his Findings of Fact, Conclusion of Law and Recommendations[2] to which both parties filed exceptions on September 15, 1972.

We, having reviewed the entire record, the findings, conclusions and recommendations of the Hearings Officer and the briefs and exceptions submitted by the parties, hereby affirm the Hearings Officer's Findings of Fact, Conclusions of Law and Recommendations to the extent they are consistent with this Decision. We also find that the Hearings Officer committed no prejudicial errors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The HSTA is an employee organization and exclusive representative within the meaning of Chapter 89, Hawaii Revised Statutes.

The DOE is a public employer thereunder.

The historic facts of this controversy include the following.

After certification of the HSTA as the exclusive bargaining representative for Unit 5 for the purpose of collective bargaining with the DOE on "wages, hours and other

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[2]A copy of which is attached hereto.

terms and conditions of employment", negotiations were begun but reached an impasse at which time the HSTA submitted notice of the impasse and its request for mediation to the Board. The Board forthwith declared an impasse and requested the Federal Mediation and Conciliation Service to provide mediation assistance. In November, 1971, the impasse remained unresolved and the Board invoked the fact-finding procedures pursuant to Section 89-11, Hawaii Revised Statutes. On December 1, 1971, the fact-finding panel issued its findings of fact and recommendations to the parties on such issues as salary increases, work time specifications, work day, work load (class size), transfer and assignment, teacher evaluation and non-professional duties. The HSTA did not accept the recommendations of the fact-finding panel on salary increases, work week, class size and non-professional duties. The DOE accepted in whole the recommendations of the fact-finding panel. There was no mutual agreement between the parties to submit the remaining issues in dispute to final and binding arbitration. The fact-finding panel's recommendations were made public in accordance with Section 89-11. The HSTA submitted its notice of intent to strike upon the expiration of the sixty-day cooling-off period as required by Section 89-12. The strike was scheduled to begin on February 17, 1972, however, the parties reached a pre-dawn agreement and the strike was called off. The parties signed the collective bargaining agreement on February 29, 1972. The effective period of the contract is from February 29, 1972 through August 31, 1974.

The HSTA alleges that the DOE is violating the terms of the collective bargaining agreement and is, thereby, interfering, restraining or coercing its employees in the exercise of rights guaranteed under Chapter 89. The alleged contractual

violations concern Article VI, Teaching Hours and Conditions, and Article XX, Maintenance of Benefits. The HSTA contends that Article VI A 2 requires that 250 new teaching positions be hired in order to reduce the average class size ratio by approximately one student beginning with the 1972-73 school year. The HSTA further submits that this requires a new base of 7,007 teaching positions plus positions required by increased student enrollment and to implement the preparation time and duty-free lunch provisions of the contract. The DOE intends to discontinue its prior practice of assigning classroom teaching positions to temporary support positions. The HSTA argues that the DOE's intention to abolish the 169.5 temporary "support" positions and place the teachers occupying them into classroom teaching positions will not fulfill the contractual provision calling for a minimum of 250 new positions. Furthermore, the HSTA alleges that such action is in violation of Article VI A 3, of the contract which provides that bargaining unit positions allocated for the school year 1972-73 shall not be reduced to implement the class size and preparation period articles. Additionally, the HSTA contends that the abolishing of temporary support positions, which were utilized as a means to provide preparation periods or duty-free lunch periods will have the effect of adversely altering the working conditions of various teachers and would be in violation of Article VI, X and Y of the contract, which provide for preparation periods and duty-free lunch periods, and Article XX C, which provides for maintenance of teacher benefits which were in existence prior to the effective date of the agreement.

The DOE denies that it is committing any prohibited practice alleged by the HSTA.The DOE contends that there has

been no breach of Article VI A of the Agreement since that article, because it interferes with the employer's rights and responsibilites, is void and in violation of Section 89-9(d), Hawaii Revised Statutes, and Article IX, Section 3 of the State Constitution.

Section 89-9(d) provides:

> "Excluded from the subjects of negotiations are matters of classification and reclassification, 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. The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31 and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies."

The subject constitutional provision states:

> "The board of education shall have power, in accordance with law, to formulate policy, and to exercise control over the public school system through its executive officer, the superintendent of education, who shall be appointed by the board and shall serve as secretary to the board." (Emphasis added)

Moreover, the DOE points out that the HSTA's interpretation of the contract provision on class size is invalid and illegal because it would involve a "cost item" under Section 89-2 which requires the approval thereof by the Legislature and an appropriation of necessary funds. The DOE also

denies that, by not renewing the temporary support positions, the working conditions of teachers in the schools affected will be adversely altered in violation of Article VI X and Y and Article XX C of the contract.

The issues in the instant case will be stated in seriatim. They involve alleged violations of the collective bargaining agreement on the part of the employer, which the HSTA claims are prohibited practices pursuant to Section 89-13 (a)(8) and, consequently, result in an interference of the subject employees' rights guaranteed under Chapter 89, a prohibited practice under Section 89-13(a)(1). Another issue presents a threshold jurisdictional question.

This jurisdictional question is the following: Does this Board have jurisdiction in a dispute involving interpretation and application of contractual provisions when the contract in question provides for final and binding arbitration of disputes over the interpretation and application of such provisions?[3] The issue is brought into sharp focus under Chapter 89 of the Hawaii Revised Statutes because Section 89-13 states that it is a prohibited practice to violate the terms of a collective bargaining agreement and Section 89-5 (b)(4) requires the Board to conduct proceedings on prohibited practice charges.

We are of the opinion that under our statute this Board has jurisdiction over prohibited practice charges, including those involving alleged breaches of contracts, and that in the exercise of such jurisdiction the Board has

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[3]In the instant case both parties urged that the Board had jurisdiction. Their contract provides for arbitration of disputes involving violations, misinterpretations or misapplications of the terms of the agreement. Article V.

discretion to require the parties to utilize their contractual arbitration procedure. It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties. The Board, in all cases where such deferrals are made, shall retain jurisdiction for the limited purpose of determining whether arbitrator's award is within the scope of his powers, the proceedings were expeditious, lawful and fair, and the award is consistent with Chapter 89.

We believe that the following reasons and authorities support our conclusion as to this jurisdictional question.

The Board's jurisdiction with respect to prohibited practices is contained in Section 89-5(b)(4), which requires the Board to:

> "Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper; . . ."

Violations of a collective bargaining agreement are prohibited practices under Section 89-13, which states:

> "Sec. 89-13. Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
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> * * *
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> (8) Violate the terms of a collective bargaining agreement.
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> * * *
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> "(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
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> * * *
>
> (5) Violate the terms of a collective bargaining agreement."

Chapter 89 also contains the following provisions:

> "Sec. 89-10. Written agreements; appropriations for implementation; enforcement. (a) . . . The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter."

> "Sec. 89-11. Resolution of disputes; grievances; impasses. (a) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance."

While federal decisions under Section 10(a) of the National Labor Relations Act have clearly established that the NLRB has jurisdiction over unfair labor practice charges, even when a contract in dispute provides for grievance arbitration, our statute differs from the NLRA and the procedures we establish must comport with the requirements of our law.

In relevant part, the federal statute provides:

> "Sec. 10(2). The Board is empowered . . . to prevent any person from engaging in any unfair labor practice. . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement. . ." (Emphasis added)

Chapter 89, Hawaii Revised Statutes, is silent as to whether the existence of a contractual grievance arbitration procedure can interfere with the Board's jurisdiction. This is especially significant under Chapter 89 because of three provisions in the Chapter: (1) Sec. 89-11(a) authorizing the parties to negotiate contractual grievance procedures culminating in final and binding arbitration to be invoked in cases concerning the interpretation of a written agreement;

(2) Sec. 89-13(a)(8) and (3) Sec. 89-13(b)(5) providing that violation of a collective bargaining agreement is a prohibited practice, an allegation of which almost always would lead to a need for contractual interpretation.

It is clear that when it provided for grievance arbitration, the Legislature hoped to foster resolution of disputes by arbitration. Senate Standing Committee Report No. 745-70. But it is apparent that the Legislature did not intend, by providing for such arbitration, to oust the Board of jurisdiction over violations of Section 89-13(a)(8) and (b)(5). Rather, it is clear that the Legislature intended to place the duty of resolving prohibited practice cases squarely on the shoulders of the Board. In the committee report cited above, the following statement is included:

> "Your Committee has reviewed the proceedings utilized by the Hawaii Employment Relations Board for the prevention of unfair labor practices and finds that the same proceedings can effectively be utilized by the Hawaii Public Employment Relations [Board] for the prevention of prohibited practices. Your committee has included violations of an agreement among the list of prohibited practices. The proceedings applicable to prohibited practices shall be utilized to remedy any violations of an agreement. . . ."[4]

The most recent decision by the Hawaii Employment Relations Board on the question at hand was made in the case of I.L.W.U. Local 142, Complainant vs. Kilauea Sugar Co, Ltd., Respondent, Case No. 68-6 (1968). This case had been decided prior to the enactment of Chapter 89 and would thus constitute a part of the procedures reviewed by the Senate Committee on Public Employment and referred to in Senate Standing Committee Report No. 745-70.

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[4]This intent was adopted in Conf. Com. Rep. No. 25-70.

In said case a breach-of-contract unfair labor practice charge was brought to the Board.

The Hearings Officer's decision, in significant part, stated:

> ". . .[I]t is clear that on the Federal level, the existence of an arbitration procedure in a collective bargaining agreement, and failure to exhaust such procedure, will not oust the jurisdiction of the NLRB to remedy any unfair labor practice charges.
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> "Before our own Board, in Amalgamated Clothing Workers of America, Local 809, and Hawaii Textile Manufacturing Company, Ltd. (1962), HERB Case No. 62-2, it did hold that 'The complainant must exhaust its remedies under the collective bargaining agreement before filing a complaint before this Board.' However, in view of the more recent decisions of the Federal Courts and in the National Labor Relations Board, Supra,[5] it is the opinion and conclusion of the undersigned Hearings Officer that this Board ought not to avoid jurisdiction over a matter merely because a party had failed to exhaust the arbitration procedure provided for in a collective bargaining agreement. This Board is charged with the administration of the Hawaii Employment Relations Act to prevent certain unfair labor practices committed by either management or labor. This function and authority of the Board should not be restricted or limited by private agreement between the parties."

In view of the foregoing, it would appear that the Legislature intended the Board to take the responsibility for

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[5]The cases relied on by the Hearings Officer were NLRB v. Acme Industrial Co., 64 LRRM 2069 (Sup. Ct. 1967); N.L.R.B. v. C & C Plywood Corp., 64 LRRM 2065 (Sup. Ct. 1967); Wagner Iron Works, 35 LRRM 2588 (CA 7, 1955), Cert. denied, U.S. Sup. Ct., 1956; NLRB v. Auto Workers, 29 LRRM 2433 (CA 7, 1953). In a later case even more definitive of the rule garnared from the above federal cases by H.E.R.B. Hearings Officer, it was firmly held that an arbitration provision does not oust the NLRB of jurisdiction. NLRB vs. Strong, 393 US 357, 70 LRRM 2100 (1969). In said case it was decided that the jurisdiction of the NLRB was not displaced by the presence of an arbitration provision and where necessary, the Board may interpret a contract, give effect to its terms, and proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable through arbitration.

settling prohibited practice cases.[6] However, the language which confers this duty upon the Board is broad enough to permit the Board considerable leeway in determining whether, when faced with prohibited practice charges involving situations for which arbitration has been provided, to commit the parties to their contractual remedy.[7] This procedure would best seem to foster legislative intent and the Board would not be an impotent bystander.

The practice in Wisconsin is also informative. Under Wisconsin law it is an unfair labor practice to breach a collective bargaining agreement and the Wisconsin Board, keeping in step with the NLRB defers to arbitration unless arbitration would be fuitless or the parties jointly waive arbitration.

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[6]This conclusion is abundantly supported by the literal wording of the statute and the committee report statements. The absence of the language underscored in Section 10 (a) of the LMRA, supra, does not detract from this conclusion. In this connection, a decision by the Michigan Board is significant. Therein, although the Michigan statute was similar to the federal statute, it did not contain the underscored words of Sec. 10(a) of the L.M.R.A., supra. Nevertheless, it was decided that the existence of an arbitration agreement did not divest the Board of unfair labor practice jurisdiction. University of Michigan, Respondent, and Local 1583, Council 7 American Federal of State, County and Municipal Employees, AFL-CIO, charging party. Case No. C71F-114.

[7]In any discussion of deferral to arbitration one frequently encounters the trilogy decided by the Supreme Court. United Steelworkers v. American Mfg. Co., 363 US 564, 46 LRRM 2414 (1960); United Steelworkers v. American Mfg. Co., 363 US 574, 46 LRRM 2416 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960). All of these cases involved alleged breaches of collective bargaining agreement. They were brought to court under Section 301 of Title III of the NLRA giving federal district courts jurisdiction over breach of contract actions. In the three cases the courts firmly enunciated a policy of deferring to arbitration. While these cases are relevant they are not controlling because they deal not with the relationship of boards to arbitration procedures, but rather with the relationship of courts to such procedures. Their relevancy for the Board lies chiefly in the fact that the Board has to cope with breach of contract cases and to this extent the trilogy may provide significant policy guides.

Laborers' International Union of North America, Local No. 1440, Complainant, vs. D.L. Bordley Company, Inc., Respondent, Case I, No. 13524, CE-1285, Decision No. 9526-A, Case II, No. 13525, CE-1286, Decision No. 9527-A.

In view of the above reasons, it is clear that the Board has jurisdiction over prohibited practice charges, including those involving alleged breaches of contract, regardless of the presence of a grievance arbitration provision in a collective bargaining agreement. It appears further that in the exercise of this jurisdiction, the Board may require parties to utilize negotiated grievance arbitration procedures when and to the extent appropriate.

We now move to the substantive issues in dispute. The HSTA's charges primarily concern alleged violations of various contractual provisions on the part of the employer; the DOE has asserted in its defense that the provision on class size is illegal since it concerns a matter upon which it may not negotiate because of the provisions of Section 89-9(d), Hawaii Revised Statutes. The DOE also asserts that said contractual provision violates that part of the State Constitution which vests the authority to make policy for the DOE in the Board of Education.

The Constitution of the State of Hawaii in Article IX, Section 3, grants power to the Board of Education:

> ". . . in accordance with law, to formulate policy, and to exercise control over the public school system through its executive officer, the superintendent of education, who shall be appointed by the board and shall serve as secretary to the board." (Emphasis added)

Whatever power the Board of Education possesses respecting its control of the DOE must be exercised "in accordance with law". The term "law" includes, of course, Chapter 89,

Hawaii Revised Statutes. Thus, when the Board of Education exercises its powers, they must be exercised in accordance with Chapter 89. Moreover, it is not at all apparent that the contractual provision in dispute conflicts with Article IX, Section 3 of the Constitution.

The issue then which clearly emerges as the lodestar in this case is whether the subject contractual provision violates Section 89-9(d), Hawaii Revised Statutes, which sets forth limitations on the matters upon which the parties may negotiate.

The thrust of legislative intent underlying Chapter 89 is contained in the Section 89-1, "Statement of findings and policy", which declares:

> "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 for dealing with disputes and work stoppages, and to maintain a favorable political and social environment."

We are of the opinion that Section 89-9, which defines the scope of negotiations, must be viewed in the context of the legislative intent noted above.

Section 89-9, in relevant part, provides:

> "(a) The employer and the exclusive representative shall meet in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours and other terms and conditions of employment which are subject to negotiations under this Act and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession."

* * *

"(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representative of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.:

"(d) . . . The employer and the exclusive representative shall not agree to any proposal which . . . , or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualifications, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain effeciency of government operations; (5) determine methods, means and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies."

Section 89-9(a), (c) and (d) must be considered in relationship to each other in determining the scope of bargaining. For if Section 89-9(a) were considered disjunctively, on the one hand, all matters affecting the terms and conditions of employment would be referred to the bargaining table, regardless of employer rights. On the other hand, Section 89-9(d), viewed in isolation, would preclude nearly every matter affecting terms and conditions of employment from the scope of bargaining. Surely, neither interpretation was intended by the Legislature.

Bearing in mind that the Legislature intended Chapter 89 to be a positive piece of legislation establishing guidelines for joint-decision making over matters of wages, hours and working conditions, we are of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Section 89-9(d).

As joint-decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours and conditions of employment, even those which may overlap with employer rights as enumerated in Section 89-9(d), are now shared rights up to the point where mutual determinations respecting such matters interfere with employer rights which, of necessity, cannot be relinquished because they are matters of policy "which are fundamental to the existence, direction and operation of the enterprise". West Hartford Educ. Assn. v. DeCourcy, 80 LRRM 2422, 2429 (Conn. Sup. Ct. 1972).

We additionally note that Section 89-9(c) subjects all matters affecting employee relations to consultation with the exclusive representative, including such matters which may fall outside the parameters of bargaining because they interfere with employer's rights. This, too, in our opinion, reflects the Legislature's belief that employees' sharing in the decision-making process is the modern way of administering government and government is made more effective thereby.

In the instant case, we are primarily concerned with the question as to whether a provision calling for reduction of average class size ratio throughout the State educational system is a negotiable matter under Chapter 89, Hawaii Revised Statutes.

Decisions in other jurisdictions have dealt with class size provisions respecting fixed number of pupils to be assigned to a teacher. The concept which emerges from these decisions clearly, regardless of the facts of the cases of the governing statutory provisions, is the fact that class size presents a hybrid issue. It involves both policy making and has a direct impact on working conditions. West Irondequoit

Teachers Association, NY PERB No. U-0145 (1971) (class size a basic policy decision and not negotiable, but impact of policy decision negotiable); The Pennsylvania Labor Relations Board v. State College Area School District, Case No. PERA-C-929-C (1971) (class size a matter of inherent managerial policy and not negotiable); West Hartford Educ. Assn. v. DeCourcy, 80 LRRM 2422 (Conn. Sup. Ct. 1972) (class size involves questions of policy but defines amount of work expected of a teacher and so also constitutes a negotiable condition of employment).

Under a statute with a restrictive management rights provision, the Nevada Local Government Employee-Management Relations Board has held that the subject of class size is negotiable. In the Matter of Washoe County School District and the Washoe County Teachers Association, Item No. 3 (1971).

The Nevada Board held that the matter of class size was negotiable, even though it related to questions of management prerogative, because it also related significantly to the matters of wages, hours and working conditions.

In the instant case, the DOE contends that the provisions of Article VI of the contract calling for a system-wide reduction in average class-size ratio is not negotiable because it interferes with its "management rights" under Section 89-9(d).

Article VI A of the contract, in relevant part, provides:

> "Beginning with the 1972-73 school year, the Employer agrees to reduce the average class size ratio by approximately one student. Based on current Employer practices, this would require a minimum of 250 positions for the 1972-73 school year. These teaching positions shall be in addition to presently allocated positions, additional positions required by increased student enrollment and additional teaching positions created in the preparation time and duty-free lunch provisions of this Agreement.

> "The current proportion (15%) of these positions shall be used to increase the number of counselor and bargaining unit supportive staff positions. The remainder shall be assigned to classroom teacher positions."

The purpose of the above article is to reduce the average class size ratio by approximately one student. Average class size ratio, simply stated, is the number of students divided by the number of classroom teachers throughout the statewide public education system. It is obvious, following the reasoning in the decisions on class size in other jurisdictions that the provision on average class size ratio significantly affects conditions of employment, particularly work load.

The DOE has put forth its own interpretation of legislative intent regarding its rights under Section 89-9(d) which we find untenable in view of enunciated legislative policy that joint-decision making is the modern way of administering government. The DOE has not presented any evidence to show that the reduction of average class size ratio by approximately one student will in fact interfere with its rights pursuant to Section 89-9(d). Accordingly, insofar as the average class size ratio is a significant condition of employment and there is no evidence in the record to show that agreement on such a provision is an unlawful interference with the employer's rights, we find that the reduction of average class size ratio by approximately one student is negotiable and that such agreement is not in violation of Section 89-9(d).

The issues of class size ratio, insofar as it involves overall policy dealing with the level of quality in education desired by our Legislature and developed by the DOE is, in our opinion, a management prerogative not to be interferred with by the HSTA. However, insofar as the average

class size ratio constitutes a significant condition of employment, we believe that the matter is negotiable to such extent only.

Article VI A of the contract further provides that a minimum of 250 positions, in addition to presently allocated positions, is required to reduce the average class size ratio by approximately one student. Article VI A also provides that 15% of these positions shall be used to increase counselor and bargaining unit supportive positions.

While the contract language is clear that "new hires" were intended to meet the reduction in average class size ratio, the Hearings Officer concluded, and we agree, that the contract cannot dictate the number of employees the employer is to hire nor compel the employer to assign employees to specific roles. The number of persons to be employed by the DOE is clearly a managerial decision which must be made in consideration of a number of variables including existing resources and the number of students enrolled. Similarly, the decision to assign teachers to particular roles is also a managerial decision which must be made with consideration given to specific variables, e.g., the ability of the teacher and the needs of the school in which he is to be employed. Requiring the hiring of a minimum of 250 teachers and the assignment of 15 per cent of them to counselor and supportive staff positions clearly impinges upon the employer's right and duty to effectively manage the school system. Such requirements interfere with the employer's right to hire, transfer and assign its employees and to maintain efficiency of government operations and to determine the methods, means and personnel by which operations are to be conducted and constitute violations of Section 89-9(d).

Though we hold that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining,

we concommittantly believe that said section should not be too liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective management over operations of the school system. Therefore, while we hold that average class size ratio is a condition of employment, negotiation upon which does not per se interfere with employer rights under Section 89-9(d), we are of the opinion that the manner of implementing the reduction in average class size ratio involves decisions of inherent managerial policy and is not a proper subject of negotiation.

In view of the limitations imposed under Section 89-9(d), we find that the provisions calling for a minimum of 250 additional positions and specifying that a portion of these positions must be assigned to counselor and supportive staff positions, are clearly beyond the parameters of bargaining intended by the Legislature.[8] Accordingly, we find that the employer and the exclusive representative have not fulfilled their mutual obligation "not to agree to a proposal" which interferes with any of the employer's rights and have, thereby, failed to comply with the provisions of Section 89-9(d).

The employer's plans to implement the reduction in average class size ratio include the transfer of 169.5 temporary support positions back to classroom teaching positions. The record shows that the employer's practice for the past

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[8]The fact that the DOE, an instrumentality of the State, did agree to the invalid provisions cannot give rise to estoppel against the DOE to raise the illegality of the provisions in this dispute. Department of Insurance of Indiana v. Church Members Relief Ass'n., 26 NE 2d. 51, 53 (Ind. 1940); Aetna Ins. Co. v. O'Malley, 124 S.W. 2d. 1164, 1166-1167 (Mo. 1938); Godbold v. Manibog, 36 Haw. 206 (1942); reh. den., 36 Haw. 230 (1942).

several years has been to assign originally allocated classroom teaching positions to various temporary support positions. The decision to assign a classroom teaching position to a temporary support position is made at the school level in accordance with local needs. Teachers so transferred are assigned to support staff functions, such as, counselors, registrars, librarians, coordinators, remedial reading teachers, elementary band teachers and guidance personnel. The effect of using such support positions has been, in part, to provide preparation periods and duty-free lunch periods and to reinforce support staff services.

It is undisputed that the employer has the right to transfer its employees. However, policy decisions of the employer which affect employee relations are subject to consultation prior to change pursuant to Section 89-9(c). The decision to transfer these temporary support positions back to classroom teacher positions is a change in the employer's policy which affects employee relations. The record discloses that the employer did not make reasonable efforts to consult with the exclusive representative prior to effecting such transfer. On the contrary, the record shows that the employer did not reveal its plans to so implement the ratio reduction until it responded to Petitioner's Interrogatories to Respondent on July 5, 1972. It was at that time that the HSTA was informed of the employer's decision respecting the subject of temporary support positions.

While we believe that the employer is not required to negotiate about these transfers since they are outside the scope of bargaining under the limitations of Section 89-9(d), we find the employer's failure to consult with the exclusive representative about these transfers to be a violation of Section 89-9(c).

The HSTA alleges that by reconverting 169.5 temporary support positions back to classroom teaching positions the DOE has violated Articles VI A, X and Y and Article XX C of the collective bargaining agreement.

Article VI A provides that bargaining unit positions allocated for the school year 1972-73 shall not be reduced to implement the class size and preparation period articles of the agreement. Article VI X provides for preparation periods, for the hiring of additional teachers to accomplish this objective, and for the maintenance of preparation periods in effect at the time of the agreement. Article VI Y provides for duty-free lunch periods and for the maintenance of such benefits for teachers at the time of the agreement. Article XX C provides that nothing in the agreement should be construed so as to "eliminate, reduce or otherwise diminish any teacher benefit existing prior to its effective date."

The evidence in the record does not substantiate the HSTA's allegation that bargaining unit positions have been reduced. The evidence in the record shows that the employer, by filling 57 workload increase teaching positions, has brought the number of bargaining unit positions to 6,814, the number allocated for the 1972-73 school year. Thus, we find that the horizontal transfer of temporary support positions does not affect the number of bargaining unit positions and is not in violation of Article VI A.

It is undisputed that the effect of the existence of the 169.5 temporary support positions, in part, has been to provide preparation periods or duty-free lunch periods to certain teachers in various schools. There has been no evidence presented in the instant case to show that teachers, who were enjoying such benefits at the time of the agreement,

are not now receiving preparation periods and duty-free lunch periods. However, there is reasonable likelihood that unless additional personnel are hired and apportioned to these schools, teachers who had been enjoying such benefits would lose them because of the horizontal transfer of temporary support positions.

While we are of the opinion that specific grievances on the loss of preparation periods or duty-free lunch periods are matters which can be more appropriately handled under the grievance arbitration provision of the agreement, we, nevertheless, direct the employer to restore benefits of preparation periods and duty-free lunch periods to any teacher who was receiving such benefits at the time of the execution of the agreement and who has since lost such benefits because of the transfer of the subject support positions.

With respect to the maintenance of benefits clause of Article XX C, the HSTA alleges that the horizontal transfer results in a loss of services provided by the supportive staff positions. The DOE, on the other hand, contends that there is no violation of said article as a result of the transfer because teachers were not entitled to the services provided by the 169.5 temporary support positions in the first place.

The 169.5 temporary support staff positions were originally allocated for classroom teaching functions according to legislative worksheets which accompany the budget act. While the issue has been raised that the conversion of such classroom teacher positions may be contrary to legislative intent, this is not a matter for the Board to determine.

Our determination concerns the question of whether the horizontal transfer of support positions back to classroom

teaching violates Article XX C of the contract. The effect of assigning classroom teaching positions to various support positions has been to reinforce staff services at various schools, in addition to providing preparation periods and duty-free lunch periods as discussed earlier.

We recognize that the employer does have the ultimate right to transfer its employees. However, under the facts of the instant case, we find that the employer's past practice of converting classroom teacher positions to supportive staff positions was construed as a benefit at the time of the negotiation and execution of the agreement. Such supportive staff positions, though temporary and variable in number from year to year, were provided in response to specific local school needs existing at the time of agreement. To the extent that supportive staff service alleviated such needs, it resulted in a real and tangible benefit to the teachers concerned. It is obvious that such needs on which the employer based its initial decision to convert classroom teachers to support service positions could not have totally disappeared. Thus, it is reasonable to conclude that the abolishment of the support services has resulted in a shifting of certain burdens back onto the classroom teachers and, thereby, created a loss of benefits.

Inasmuch as the abolishing of temporary support positions results in a decrease of staff services enjoyed by the teachers at the time of the execution of the agreement, we find that the horizontal transfer of such positions violates Article XX C of the agreement. Our determination should not be interpreted as requiring the employer to maintain 169.5 teachers in support positions should the needs for the level of support services provided at the time of the agreement

decrease or become subject to accommodation through some other means. Moreover, nothing in this opinion should be regarded as dictating how the support services are to be provided so long as they are continued. We do not intend herein to dictate what types of qualifications persons used to continue the subject benefits must possess. For instance, we do not require that such persons possess certification. Our sole concern is that appropriate support services be provided to continue the benefits derived therefrom at the time of agreement.

In short, the articles which provide for the maintenance of preparation periods, duty-free lunch periods and other benefits existing at the time of the agreement, do not preclude the employer from varying the methods by which it will provide such benefits. However, the employer by its agreement to said articles, is required to provide for the uninterrupted continuance of such benefits for the duration of the agreement.

This may impose some measure of hardship upon the DOE but it voluntarily entered into the agreement. It is no excuse to claim hardship because it knew that classroom teachers were used in support positions but did not know the exact number. Also it is not relevant to say that these positions were illegally moved from the classroom to support positions as the DOE has asserted. The parties have agreed to maintain all Unit 5 benefits that existed prior to February 29, 1972, and it is not for us to rewrite their agreement.

In this case, the HSTA has also alleged that the DOE, by violating the provisions of the collective bargaining agreement, has interfered, restrained or coerced its employees in the exercise of their rights guaranteed under Chapter 89, a

violation under Section 89-13(a)(1), Hawaii Revised Statutes. Here, the HSTA raises an issue which has not been supported by any authority or by the record in this proceeding. A preponderance of evidence in the record shows that the violations arose as a result of the DOE's misinterpretation of Article VI A and its belief that said article was an interference with its rights pursuant to Section 89-9(d). We find no evidence to support the HSTA's allegation that the DOE intended or did in fact interfere with, restrain or coerce its employees. Therefore, we find no merit in Petitioner's allegation that the DOE has violated Section 89-13(a)(1).

We now move to the difficult question regarding the method to be used to calculate the average class size ratio, in accord with the intent of the parties, so as to establish a firm foundation for the implementation of their agreement.

The parties disagree on what the average class size ratio existing at the time of agreement (February 17, 1972) was. The HSTA contends that the average class size ratio was 26.4 -- the total number of students less those in special schools (178,985) divided by the total number of classroom teacher positions (6,757). The DOE, on the other hand, submits that the average class size ratio as of that date was 27.4 -- the total number of students divided by the number of teachers actually in the classroom (6,512.33). The difference is the result of the HSTA's inclusion, and the DOE's exclusion, of temporary support positions and unfilled positions in calculating the total number of classroom teachers.

The class size ratio existing at the time of the agreement was not included in the contract. Mayor Elmer Cravalho of Maui County explained the reason for this omission in his testimony:

> "Because through some possibility, however remote it might be, that 26.4 could again be in error, and it could be lesser, and if we specified 26.4 and the current ratio was lesser, then in effect the reduction of one pupil on the pupil/teacher ratio would be ineffective. And what we wanted to accomplish is to be assured that whatever the ratio was at the present time, that there would be a reduction of one. Whether that figure was 26.4 or 30.4 or 14.4, there would be a reduction of one." (Tr. 587)

Although the specific ratio was omitted from the agreement because of a possibility of error, the record indicates that up to the time of agreement the parties utilized 6,757 as the number of teachers to compute the average class size ratio. The ratio of 26.4 and the computation of such ratio based on 6,757 teachers were made available to both parties. The employer based estimated contract costs on a ratio of 26.4. Furthermore, according to Mayor Cravalho, the 26.4 ratio was utilized in the final hours of negotiations.

In view of the evidence in the record, we find that the average class size ratio, as understood by both parties during negotiations and as finally agreed to in the contract, is the total number of students less those in the special schools (178,785) divided by the number of classroom teacher positions (6,757). Unless either of these figures is, in other respects, in error, the average class size ratio existing at the time of agreement was 26.4. In the absence of error, the employer is required to comply with the provision calling for a reduction of the average class size ratio of 26.4 by approximately one student.

The employer claims that it did not submit the average class size ratio reduction to the Legislature as a cost item because it believed that the average class size ratio existing at the time of the agreement was 27.4. Additionally, it intended to use the 169.5 temporary support positions to

implement the average class size ratio reduction. In light of HSTA's interpretation of the contract, i.e., that a minimum of 250 new teachers must be hired to implement the provision, the employer contends that if that is what was intended, it would have submitted the matter to the Legislature as a cost item pursuant to Section 89-2(6) and Section 89-10(b). It further contends that both parties' failure to submit the matter to the Legislature as a cost item makes the provision invalid and that the Board should make a determination to that effect.

Insofar as our concern herein is to remedy any violation of the contract alleged by the HSTA, we made no determination at this time whether or not the contract does in fact include cost items referred to in Section 89-2(6) and Section 89-10(b). The Board was not asked to render an opinion on cost items nor was the question of cost items in the contract brought before this Board prior to the Legislature's approval of the contract. We must, therefore, confine ourselves to the circumstances under which the agreement was reached.

Both Petitioner and Respondent agreed that the contract did not contain any cost items. In reaching this conclusion, the parties relied on the following definition of cost items rendered in Attorney General Opinion No. 72-10:

> ". . . those provisions the implementation of which requires new or additional appropriations.
>
> * * *
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> ". . . where sufficient funds and flexibility are accorded the executive branch by existing legislation to implement negotiated items, those items do not require appropriations and are not, therefore cost items."

Representations made on behalf of both the HSTA and the DOE before the legislative committee hearings on collective

bargaining contracts were that the subject contract contained no cost items as defined by the Attorney General's office. In approving the agreements, the Legislature relied on such representations.

House Concurrent Resolution No. 57 (1972), in pertinent part, provides:

> "WHEREAS, the State administration and both unions have testified before the House Finance Committee and a joint hearing of the Senate Ways and Means and Education Committees that their agreements may be implemented by funds and positions under existing appropriations; and . . .
>
> "WHEREAS, based on such information and advice the Legislature finds that there are no provisions the implementation of which requires new or additional appropriations during this session; now, therefore,
>
> " BE IT RESOLVED . . . that the Legislature affirm that the appropriations contained in Act 68, Session Laws of Hawaii 1971 and other existing statutes are deemed sufficient to implement the provision of both agreements and hereby approves said agreements; . . ."

The record shows that at the time of agreement and at the time representations were made to the Legislature that there were no cost items contained therein, the employer took into consideration "departmental savings", authorized positions which have not been allocated, the difference between authorized and allocated positions, and the flexibility which Act 68, Session Laws of Hawaii 1971, provides. Under Act 68, the Governor has the power to move money from any appropriation item in the budget to any other appropriation item, regardless of departmental jurisdiction. The Act further authorizes a number of extra positions under Section 39 and the re-creation of positions authorized by prior acts under Section 41.

Despite the employer's claim that it had a different interpretation from that of the HSTA regarding the reduction of average class size ratio, we are of the opinion that the

employer must meet the obligations required in the contract, into which it voluntarily entered, to the extent that funds and positions are available under Act 68. There is no evidence in the record that the employer does not have sufficient funds and positions available under Act 68 to reduce the average class size ratio of 26.4 by approximately one student.

ORDER

The Board, after due consideration of the foregoing and the record as a whole, hereby orders and directs that:

(1) The Employer immediately proceed to implement the reduction in average class size ratio of 26.4 by approximately one student to the fullest extent possible under Act 68, Session Laws of Hawaii 1971 and any other relevant authority or means possessed by it;

(2) The Employer immediately reconvert temporary support positions, the transfer of which has resulted in a loss of benefits -- preparation periods, duty-free lunch periods, or supportive staff services -- , or make other suitable arrangements to provide for the uninterrupted continuance of such benefits which existed at the time of agreement;

(3) The Employer not effect any change in any major matter affecting employee relations without consulting with the exclusive representative pursuant to Section 89-9(c).

(4) The Employer and the exclusive representative comply with the provision of Section 89-9(d), with respect to the issues presented in this case, in accord with this opinion.

Mack H. Hamada, Chairman

John E. Milligan, Board Member

Dated: October 24, 1972
Honolulu, Hawaii

DISSENTING OPINION

I dissent from my fellow Board members' conclusion that the subject of average teacher-pupil ratio in the public schools is a negotiable matter. In my opinion, the contractual provision on this subject which is at issue in this case constitutes an interference with "the rights of the public employer to . . . determine methods, means, and personnel by which the employer's operations are to be conducted, . . ." and hence is a violation of Section 89-9(d), Hawaii Revised Statutes. Since both parties to the contract are forbidden by said section from agreeing to such a provision, I find the provision void. Hence, there is no merit to the allegation by the HSTA that the DOE has engaged in a prohibited practice by allegedly violating said provision.

Carl J. Guntert, Board Member

Dated: October 24, 1972

Honolulu, Hawaii