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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of THE BOARD OF EDUCATION, STATE OF HAWAII, Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	Case No. CU-05-9 Decision No. 24

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

This case involves a prohibited practice charge filed on October 13, 1972, by the Board of Education of the State of Hawaii (hereinafter BOE or the Employer), a public employer within the meaning of Chapter 89, Hawaii Revised Statutes, against the Hawaii State Teachers Association (hereinafter HSTA). The HSTA was and is at all times material the duly certified exclusive collective bargaining representative for all members of Unit 5.

The prohibited practice charge alleged that the HSTA "has refused to meet at reasonable times and negotiate in good faith with respect to salaries, fringe benefits, preparation periods and workload levels to be effective for the school year 1973-74, thereby violating Article XXIII A.1 of the collective bargaining agreement entered into by the State of Hawaii and violating sections 89-13(b)(2), 89-13(b)(4), and 89-13(b)(5), H.R.S."

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The above cited Article of the collective bargaining agreement provides in pertinent part, as follows:

"ARTICLE XXIII DURATION

A. This Agreement shall be effective from the 29th day of February, 1972, to the 31st day of August, 1974, and from year to year thereafter, unless modified or terminated as follows:

1. Between August 1st and August 15th in 1972, either party may give written notice of its desire to amend or modify this Agreement with respect to salaries, fringe benefits, preparation periods and work load levels, to be effective for the school year 1973-74.

Upon such written notice, negotiations shall commence on said topics no later than September 15, 1972.

B. Failure of the parties to reach a satisfactory agreement if the contract is opened shall mean that the Association is free to invoke the procedures provided by law for the resolution of a dispute which has reached an impasse in collective bargaining, with the right to strike at the end thereof in accordance with the provisions of Chapter 89, Hawaii Revised Statutes."

The subject statutory provisions which the HSTA is alleged to have violated are the following:

"89-13(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * * * * * * * * * *

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

* * * * * * * * * * *

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement."

It shall be dispositive of the charges of violation of Sections 89-13(b)(4) and 89-13(b)(5), Hawaii Revised Statutes, and the alleged violation of the subject contractual provision if the HSTA is found to be in violation of Section 89-13(b)(2).

The union, in part, has defended itself against the above charges by asserting that an impasse exists between the parties. Also, it denies that it has failed to bargain in good faith.

In a case closely related to the instant one, the Employer filed a petition with the Board requesting a declaratory ruling as to whether the HSTA's initial and only proposals on preparation periods and workload constituted negotiable matters, it being the Employer's position that both proposals interfered with management rights as preserved in section 89-9(d), Hawaii Revised Statutes. In a separate opinion, this Board will rule that both proposals do interefere with management rights and hence cannot be agreed to by the parties. Since these proposals are, in this sense, not negotiable they will not be dealt with herein to determine failure to negotiate in good faith or with respect to the existence of an impasse. It is the conclusion of this Board that impasse and failure to bargain charges cannot rest upon failure to achieve agreement or make a good faith effort to achieve agreement respecting non-negotiable subjects. Thus the only proposals which will be considered in this decision are those respecting wages and fringe benefits.

The original HSTA proposal on these subjects, dated September 13, 1972 were the following:

> "ARTICLE XVII, SALARIES
>
> Amend Article XVII, Section C, to read:
>
> In addition to the 5.5% across-the-board increase above the 1971-1972 salary schedule, subject to the 1973 Legislative approval, teachers shall be granted a 20% across-the-board salary increase for the 1973-1974 school year; but in no event shall the salary increase for both 1972-73 and 1973-74 be less than a 26.6% across-the-board increase."

"(NEW) ARTICLE XXIV, FRINGE BENEFITS

Add Article XXIV, to read as follows:

A. The Employer shall provide full family coverage for Group Hospitalization and extended major medical coverage benefits for all bargaining unit members. Such plans shall include provisions to cover prescription drug costs, dental care, including orthodontic work for adults and children, optical costs, in- and out- patient psychiatric care.

The Employer shall bear the full cost for such coverage with a carrier(s) approved by the Association.

B. Long-term disability insurance will be provided by the Board to each teacher. Benefits shall be payable on the 21st calendar day of disability at seventy (70%) per cent of the monthly salary. Benefits shall continue until termination of disability."

The Employer's counter proposals on these matters were:

"EMPLOYER'S COUNTER-PROPOSAL

ARTICLE XVII SALARIES

Amend Article XVII, Section A, to read:

The Employer offers a 5.5% across-the-board increase above the 1971-1972 salary schedule to be effective September 1, 1973 subject to the approval of the 1973 Legislature.

Should the 1973 Legislature approve a 5.5% across-the-board increase above the 1971-1972 salary schedule retroactive to September 1, 1972, the Employer offers a 5.5% across-the-board increase above the amended schedule, for 1971-72, to be effective September 1, 1973 subject to the approval of the 1973 Legislature."

"EMPLOYER'S COUNTER-PROPOSAL

ARTICLE XXIV FRINGE BENEFITS

The Association proposal appears to be identical to the Association's initial proposal submitted on July 9, 1971, and upon which no conclusion or agreement was reached. Since the economic situation of the State of Hawaii has not changed substantially, the proposal is rejected."

On September 25, 1972, the HSTA presented counters on fringe benefits as follows:

"ASSOCIATION, Counter Proposal, 9/25/72

FRINGE BENEFITS

A. 1st paragraph - no change

2nd paragraph:

The Employer shall bear the full cost of such coverage with carrier(s) jointly agreed upon by the Employer and the Association.

B. No change."

"ASSOCIATION, Counter Proposal, 9/25/72

FRINGE BENEFITS

B. Long term disability insurance will be provided by the Employer to each teacher. Benefits shall be payable on the twenty-first calendar day of disability at seventy (70%) per cent of the monthly salary. The combination of long term disability insurance sick leave, and Social Security benefits shall not exceed the disabled teacher's monthly salary. Benefits shall continue until termination of disability.

The same date the employer responded with these counter proposals on salaries and fringe benefits:

"9/25/72, EMPLOYER'S COUNTER-PROPOSAL

ARTICLE XVII SALARIES

Amend Article XVII, Section A, to read:

The Employer offers, 5.5% across-the-board increase above the 1971-1972 salary schedule to be effective September 1, 1973 subject to the approval of the 1973 Legislature.

Should the 1973 Legislature approve a 5.5% across-the-board increase above the 1971-1972 salary schedule retroactive to September 1, 1972, the Employer offers the 5.5% across-the-board increase above the 1971-1972 schedule, if amended, to be effective September 1, 1973 subject to the approval of the 1973 Legislature."

"9/25/72 EMPLOYER'S COUNTER-PROPOSAL

ARTICLE XXIV FRINGE BENEFITS

In answer to the Association's proposal dated September 25, 1972 on fringe benefits, the Employer proposes no increase in benefits at this time."

The Association made a final counter on fringe benefits on October 11, 1972:

"ASSOCIATION, Counter Proposal, 10/11/72

FRINGE BENEFITS

A. No Change.

B. The Employer shall provide long term disability insurance for all teachers. The plan shall provide for a monthly income benefit equal to seventy percent (70%) of the employee's monthly salary, the benefit to be payable to an employee who is disabled, commencing on the twenty-first calendar day and continuing while so disabled, but not beyond age sixty-five (65). Such disability benefit shall be reduced to the extent that the total of the disability benefit and the following benefits exceed seventy percent (70%) of the employee's monthly salary:

1. Sick leave benefits
2. Social Security benefits
3. Benefits under Workmens Compensation
4. Retirement benefits under the State Retirement System."

The parties had an informal first meeting on September 13, 1972. They met additionally on September 18, (9:14 a.m.), September 19 (10:30 a.m.), September 20 (10:00 a.m. and 2:14 p.m.), September 25 (10:00 a.m. and 7:30 p.m.), October 11 (7:30 p.m.), October 12, 1972 (7:30 p.m.). The absence of meetings for the 15 days between September 25 and October 11 was because of the refusal of the HSTA to meet which was protested by the BOE.

According to the Answer filed by the HSTA:

"2. The Petitioner demanded meetings on the following dates and times but Respondent refused to attend on basis that teacher members of the bargaining team were not released from school during the day, and Respondent did not desire to negotiate with staff members only:

September 26, 1972	10:00 A.M.
September 26, 1972	7:30 P.M.
October 12, 1972	10:00 A.M.
October 13, 1972	7:30 A.M.

3. Respondent offered to meet with its full committee in attendance at 7:30 P.M. on OCtober 13, 1972. Respondent's committee was present but Petitioner

failed to show.

> 4. Respondent, on October 17, 1972, offered in writing to meet further and asked that Petitioner indicate the time and place when its committee would be available for futher negotiations. Petitioner has failed to respond. A copy of said letter is attached hereto as Exhibit "A".
>
> 5. On October 31, 1972, Respondent filed notice of impasse in accord with HRS 89-11(b), and said matter is now before the HPERB."

The Employer negotiating team similarly scheduled a meeting which it attended but which the HSTA did not. This meeting was scheduled for 8:30 a.m. on October 12, 1972. Each party knew in advance that the other party's negotiating team would fail to attend the BOE October 12 and the HSTA October 13 meetings. This behavior epitomizes the childlike manner in which both parties behaved regarding meeting times. The behavior has its genesis in a now lenghty and stormy relationship between the parties which has become increasingly marked by rancor and intransigence on both sides since the second half of 1971.

The genesis of the problem HSTA has faced in getting teacher participants on its negotiating team released from duty during the work day without loss of pay* from the employer results from a contractual provision agreed to by the parties and included in their collective bargaining agreement and the way in which the HSTA implemented, on its part, the provision. To be sure, the BOE, once the HSTA had got itself into a bind because of these

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*Cf. Section 89-8(c) which permits employee participation, with pay, in negotiations. The HSTA limited its rights under this section by its contract.

actions, took a "you set it up that way, you live with it" attitude. The subject contract provision reads:

ARTICILE XXI RELEASE TIME:

"A. The parties have agreed that Act 212 SLH, 1971, shall be administered by the parties as including time off with pay for all teachers, including committee members and grievance representatives, with the approval of the Association, for the following purposes:

1. Participation in collective bargaining including contract administration activities, grievance handling and processing, arbitration processing and Association training sessions for any of these activities.

2. Paticipation in meetings, conferences, and training sessions conducted by the Association or the National Education Association.

B. The maximum allowable release time with pay shall be limited to 500 total days per school year with the total maximum cost to the employer limited to $11,375 per school year. For the school year 1971-72, this figure shall be prorated to cover the period starting with the effective date of this Agreement and ending with the last day of the school year. No additional pay shall be given to individuals for days they would not otherwise be working such as vacations, holidays and weekends."

The bulk of the money to be spent under the above provision was used by the HSTA to, in effect, pay the salary of Joan Husted, a bargaining unit member, released with pay on a full time basis to act as the HSTA's chief negotiator and contract administrator. Miss Husted offered to go on leave without pay for the second semester, but the BOE refused.

CONCLUSIONS OF LAW

It is the opinion of this Board that, with respect to the charge of failure to bargain in good faith, it must consider all the facts in the case and that while often a single fact standing alone will not support a finding of failure to bargain in good faith, a cumulative array of facts evincing an attitude of, for example, unreasonable adamancy will, under some circumstances,

support a charge of a failure to bargain in good faith.

The leading statement on the question of making the determination as to whether there has been a failure to bargain in good faith is found in the case of NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1st Cir. 1953), 33 LRRM 2133, enforcing, 32 LRRM 2225. The delicate issue is a mixed question of fact and law; an appropriate test is whether the party charged with a failure to bargain had no sincere desire to reach an agreement.

Delay itself standing above often is not enough to justify a finding of failure to bargain. (32 LRRM 2225)

In the context of this case the problem was not merely one of delay. It was apparent throughout the proceedings that more than delay was involved in the HSTA insistence that teachers be released during working hours for negotiations. It was obvious that the HSTA was determined to delay on this issue indefinitely and that with respect to freeing those people whom it was willing to, even with the obstacle created by Article XXI of the contract, it did not utilize an expedited procedure which a BOE personnel official, Mr. George Mau, said would have been open to them so that released teachers would not have to wait ten days after applying for leave to take their leave. There is an unyielding adamancy in the HSTA's attitude toward the whole question of getting together a large, representative group of employees to sit in on and report on negotiations. There is clear evidence of stubbornness in its behavior evincing a desire to create an impasse and thus position itself for a strike. For this desire to get into a strike position, the HSTA should not be too heavily faulted because under sections 89-11 and 89-12, Hawaii Revised Statutes, pertaining to impasses and strikes, a union must navigate through a rather rigid set of provisions to obtain the threat-of-a-strike clout which it may believe is necessary to get concessions from an employer.

It is the opinion of this Board that all of the facts adduced at the hearings held herein, commencing November 16, 1972, indicate that the HSTA had at the time of the filing of the unfair labor charge no intention to engage in meaningful negotiations until it could, in contradiction of Article XXI of its contract with the BOE, have a full component of paid teachers at the bargaining table* or meet only when it wanted to, that is, at night. For this reason the Board finds the HSTA has failed to bargain in good faith in violation of section 89-13(b)(2), Hawaii Revised Statutes. In so ruling, we also find that the BOE acted in bad faith particularly with respect to the refusal to change Miss Husted's leave status. However, in weighing the fault of the parties we find that the HSTA's fault was greater.

This finding does not pass even implicitly upon the substance of the proposals and counter proposals. That they were far apart and barely made any movement at all toward common ground reflects, in our opinion, hard bargaining rather than a failure to bargain.

There remains to be determined the matter of whether an impasse exists between the parties, and, if so, what the effective date of the impasse is. Essentially, with respect to the problem of determining the date of the impasse difficulty is presented by the language of section 89-11(b) Hawaii Revised Statutes:

> "A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth an impasse procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement. In the absence of such a procedure, either party may request the assistance of the board by submitting to the board and to the other party to the dispute a clear, concise statement of each issue on which an impasse has been reached together with a certificate as to the good faith of the statement and the contents therein. The board, on its own motion, may determine that an impasse exists on any matter in a dispute. If the board determines on its own motion that an impasse exists, it may render assistance by notifying both parties to the dispute of its intent.

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*Staff negotiators had the authority to negotiate a contract. The teacher presence was evidently intended to produce a type of democratic process and build good public relations with the unit.

The board shall render assistance to resolve the impasse according to the following schedule:

(1) MEDIATION. Assist the parties in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of the public, from a list of qualified persons maintained by the board, within three days after the date of the impasse, which shall be deemed to be the day on which notification is received or a determination is made that an impasse exists." (Emphasis added)

HSTA filed its notice of impasse on October 31, 1972 and contends that the date of this ex parte notification should be the date of the impasse.

The Board disagrees.

When both parties file a joint statement of impasse and it readily appears, to the satisfaction of the Board, that an impasse does in fact exist then the date of the impasse normally is the date of notification. Even if an ex parte notice is filed, if the Board is readily convinced that an impasse exists, the date of the impasse ordinarily is the date notification is received.

There are cases when notice is received and it is not made in good faith and the Board rejects the notification and finds that no impasse exists. The requirement of the certificate of good faith implies that the Board must determine if an impasse exists. See also Board Rule 4.05.

In this case, notification of the impasse was received on October 31. Thereafter, the parties were informed that because the employer contested the existence of an impasse, and the good faith of the notice was put in question, members Guntert and Milligan would talk to the parties and thus make an investigation as to whether an impasse existed.

The impasse was declared by HSTA to exist as to all four items subject to reopening negotiations and the employer put into issue before the Board the negotiability of two of these items. Thus it was necessary for the Board to conduct formal hearings in the declaratory ruling case and the instant case

before the question of impasse could be resolved. The hearings took place in November. It was in December that the Board determined that two of the four issues in negotiation, as presented in the hearing for declaratory relief, could not be agreed to because of the provisions of section 89-9(d), Hawaii Revised Statutes.

If the Board were to permit, on these facts, the date of impasse to be October 31, even though mediation and fact-finding could take place, the 60-day waiting period --- termed, usually, the cooling-off period --- would be foreshortened. This would be manifestly against expressed legislative intent to protect the public from hasty strikes. Senate Standing Committee Report 745-70. Moreover, it would be violative of the express language of the statute which mandates a full 60 day cooling-off period after the publication of the fact-finders' report.

The above cited Committee Report states:

> "Your Committee deems that a cooling-off period of sixty days is necessary to allow the legislative bodies sufficient time to review the findings and recommendations of the fact-finding board and recommendations of the public employer and to act in whatever manner it deems to be consistent in the public interest."

To accept the HSTA position in this case would defeat the purposes of the statutory scheme for the peaceful resolution of disputes and avoidance of strikes. One of the essential goals of this Board is to assist the parties in the establishment of labor relations stability in the public sector in Hawaii. In view of the foregoing, it is the opinion of this Board that, under the circumstances of this case, the date of impasse shall be the date of this decision wherein we hereby and now determine that an impasse exists on the items of wages and fringe benefits.

Even if the existence of an impasse at the date of the filing of the notice of impasse were to be disputed, the Board at this time, on its own motion, in accord with section 89-11, Hawaii Revised Statutes, finds that an impasse exists as to the

above two items and that this impasse results from the intransigence and bitterness, obvious to this Board, which has developed between the parties and which has caused their positions to become even more hardened and deadlocked than they were in October.

ORDER

In view of the foregoing it is hereby ordered:

(1) That the Hawaii State Teachers Association cease and desist from refusing to bargain in good faith as to negotiable items which are the subject of the reopening provision of the contract;

(2) That the parties return to negotiations with the presence of a mediator.

It further is found that an impasse exists between the parties with respect to wages and fringe benefits and that the date of the impasse is the date of this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

By Mack H. Hamada
Mack H. Hamada, Chairman

By Carl J. Guntert
Carl J. Guntert, Board Member

By John E. Milligan
John E. Milligan, Board Member

Dated: December 21, 1972

Honolulu, Hawaii