STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO, Complainant, and GEORGE R. ARIYOSHI, Governor, State of Hawaii; FRANK F. FASI, Mayor, City and County of Honolulu; DANTE CARPENTER, Mayor, County of Hawaii; HANNIBAL TAVARES, Mayor, County of Maui; and TONY KUNIMURA, Mayor, County of Kauai, Respondents.	CASE NO. CE-11-100 DECISION NO. 242 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 7, 1985, the HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO [hereinafter referred to as HFFA, Firefighters or Union], filed a prohibited practice complaint with the Hawaii Labor Relations Board [hereinafter referred to as Board] against Respondents GEORGE R. ARIYOSHI, Governor of the State of Hawaii; FRANK F. FASI, Mayor of the City and County of Honolulu; DANTE CARPENTER, Mayor of the County of Hawaii; HANNIBAL TAVARES, Mayor of the County of Maui; and TONY KUNIMURA, Mayor of the County of Kauai.

In its complaint, Complainant alleges that Respondents have engaged in prohibited practices by refusing to bargain in

good faith in violation of Subsection 89-13(a)(5), Hawaii Revised Statutes [hereinafter referred to as HRS], and by violating the terms of the collective bargaining agreement between the parties in violation of Subsection 89-13(a)(8), HRS. Upon a federal judicial determination that the Federal Fair Labor Standards Act (FLSA) is applicable to State and municipal employers and their employees, Complainant sought to have negotiations with respect to the application of the FLSA and the resulting effect upon the existing collective bargaining agreements between the parties. Complainant alleges that the Respondents' refusal to enter into negotiations thereon constitutes prohibited practices.

The complaint states that Complainant "sought to have negotiations with respect to the application of FLSA and the resulting effect upon the existing collective bargaining agreement between the parties. . . Petitioner has been informed that in connection with the application of FLSA, Respondents have unilaterally prepared plans, schedules and procedures which would modify and/or terminate existing rights, benefits and/or perquisites, contrary to the provisions of the collective bargaining agreement between the parties."

Respondents filed a Motion for Particularization of the Complaint on October 21, 1985.

In Order No. 567, dated October 30, 1985, the Board granted said Motion for Particularization.

Complainant's Particularization, dated November 7, 1985, specifies that Section 8 (Prior Rights, Benefits and Perquisites) of the collective bargaining contract provides that

existing rights, benefits and perquisites ". . . shall not be modified or terminated except by agreement of the parties." Further, Section 42, Duration, of said agreement provides, in part, that modification or amendment of said agreement can be done only during the period June 1, 1986 to June 30, 1986, and then, only where notice is given in writing and is accompanied by specific proposals.

The Particularization notes alleged violations in the following areas:

1. Overtime Computation. Section 19, Overtime, provides in Subsection D3, that "Leaves with pay shall be considered time worked for the purpose of computing overtime." Complainant alleges that under Respondents' plan of FLSA implementation, overtime will be based upon actual hours worked.

2. Taking Compensatory Time Off. At the present time, and based upon past practice, compensatory time off may be "banked" and used at anytime beyond the work period during which it is earned. Under Respondents' plan, compensatory time off must be taken within the same period in which it is earned.

3. Holiday Premium/Overtime Set-Off. Holiday premium is paid pursuant to Section 24, Holidays. Subsection B3 provides that when an employee is required to work on his designated holiday, he ". . . shall be paid, in addition to his straight time pay, at the rate of one and one-half times his hourly rate of pay for all hours worked on the holiday. . . ." Payment of overtime is provided for in Section 19, Overtime. Nowhere in the agreement is provision made for any offsetting of one against the

other, and holiday premium and overtime are paid as two separate and distinct compensations. However, where overtime is earned during a work period in which holiday premium is also earned, Respondents, by their implementation plan, will set off any overtime earned against such holiday premium and will pay only the difference.

4. Overtime/Change in Schedule. Section 19, Overtime, provides in Subsection B that if a change in schedule results in an employee being scheduled to work more than 504 hours during a nine-week cycle, ". . . all such excess hours shall be considered overtime occurring at the beginning of the new schedule. . . ." Respondents' plan will have any determination of overtime made at the end of the new schedule.

Respondents filed a Motion to Dismiss Complaint, dated February 10, 1986. At the outset of hearings held on July 29, 1986, said motion to dismiss was denied orally by the Board. Transcript [hereinafter referred to as Tr.] Vol. I, p. 16.

At the close of hearings on July 29, 1986, Respondents renewed their motion to dismiss as to the portion of the complaint and particularization charging that the collective bargaining contract was violated of Subsection 89-13(a)(8), HRS. This motion was taken under advisement. Tr. Vol. I, p. 142.

Hearings were held on July 29 and October 27, 1986 with the parties being afforded full opportunity to present evidence, examine witnesses and present all arguments. Complainant and Respondents submitted written briefs to the Board on December 9 and December 10, 1986, respectively.

Based on a full consideration of the record in this case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant HFFA is and was, at all times relevant, the exclusive representative, as defined in Section 89-2(12), HRS, of bargaining unit 11 as defined in Section 89-6(a)(11), HRS.

Respondents ARIYOSHI, FASI, CARPENTER, TAVARES and KUNIMURA were, at all time relevant, the employers as defined in Section 89-2(9), HRS, of bargaining unit 11 members employed by the State of Hawaii, City and County of Honolulu, County of Hawaii, County of Maui and County of Kauai, respectively.

This controversy has its genesis in the case of Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), which made the FLSA applicable to traditional government functions. As a result, state and municipal government employees were covered by FLSA for the first time. The original compliance deadline was October 15, 1985.

The FLSA contains certain requirements on overtime and the payment of overtime that must be met. These provisions are in Section 7 of the FLSA. In addition to these statutory requirements, the FLSA, as amended, grants to the employers the freedom to designate the work period used to calculate overtime payments and recognizes any collective bargaining agreement reached regarding the amount of compensatory time off that can be accumulated. Tr. Vol. I, pp. 101-102; Tr. Vol. II, pp. 5-12.

Francis Kennedy, Jr., Business Manager for the HFFA, testified as to the communications which occurred between Complainant and Respondents immediately subsequent to the issuance of the Garcia decision as follows:

On April 9, 1985, the HFFA sent a letter to James Yasuda, Chief Negotiator of the Office of Collective Bargaining (OCB), State of Hawaii, informing him of the Garcia decision and asking that the parties attempt to reach an agreement as to the retroactivity of rights granted in Garcia to the employees in bargaining unit 11. The letter closes with the words, "Please advise us at your earliest convenience if you are willing to enter into such an agreement or make some other arrangement with us which will protect the rights of our members." Petitioner's Exhibit 2.

Kennedy received a response from Yasuda, dated April 22, 1985, which states:

> In view of the uncertainties on interpretation and implementation of the decision (even at the federal level), we (public employers) find it is premature to begin any discussions on this matter. Petitioner's Exhibit 3.

Kennedy testified that the HFFA insisted on at least talking to the governmental entities regarding the implementation of the FLSA. On May 14, 1985, the HFFA met with individuals of the OCB staff. Kennedy alleged that at this meeting the governmental entities were urged to negotiate, even if on an informal basis. Tr. Vol. I, p. 21. Kennedy testified that the governmental representatives' response at the meeting was to take the HFFA's proposals under advisement. Tr. Vol. I, pp. 21-22.

Subsequently, and at the request of HFFA, a meeting was held on July 2, 1985 between the HFFA and employer representatives at the Hawaii Institute for Management and Government. Kennedy testified that the HFFA again explained its position that the FLSA and the implementation thereof was negotiable under Chapter 89, HRS. The HFFA submitted a written proposal at this time. Petitioner's Exhibit 4. Said proposal is a three-page document containing substantive proposals regarding hours of work, work period, compensatory pay, holidays, work schedule, etc. Tr. Vol. I, pp. 20, 22.

Subsequently, the HFFA received an invitation from the Civil Service Department of the City and County of Honolulu for a consultation meeting on the implementation of the FLSA. The HFFA objected that negotiations rather than consultation was called for and no meeting pursuant to the invitation occurred. Tr. Vol. I, p. 23.

The HFFA subsequently attended a meeting regarding the City's implementation plans on July 23, 1985 with inconclusive results. Tr. Vol. I, p. 24.

On July 25, the HFFA had another meeting with the OCB staff. Kennedy described the meeting as an informal, off-the-record orientation session in which issues such as the exclusion of captains, exclusion of leave time and hourly rates were discussed. Tr. Vol. I, pp. 24-25.

Subsequently, the HFFA, according to Kennedy, received a document which he described as the Hawaii County Fire Department's plans to change the work schedules to comply with the

FLSA. The HFFA called the OCB to object and subsequently it was informed that Hawaii County would not implement that schedule. Tr. Vol. I, p. 25.

At that point, Kennedy testified the HFFA obtained a commitment from the OCB that the Employers would not implement their own plans without giving at least ten days' notice to the HFFA. Tr. Vol. I, pp. 25-26.

Kennedy testified that at that point, because the Employers as a group seemed uncertain as to how to proceed, the HFFA notified the OCB that it considered itself free to discuss implementation issues with any of the county jurisdictions separately, the City and County of Honolulu, in particular. Tr. Vol. I, p. 26.

Kennedy testified that on August 5, 1985, the City and County of Honolulu announced plans to proceed with implementation of the FLSA. Under these plans, Kennedy testified that employees with the rank of captain or above would be excluded from FLSA coverage; a 27-day work period would be implemented; there would be no change in schedule; hours worked in excess of the FLSA minimum would be deemed overtime but that leaves taken would not be counted as time worked; and that holiday pay would be deducted or credited against overtime liability. At a meeting held on the following day, the HFFA made its position known that the announcement violated the understanding that negotiations would occur before implementation. Tr. Vol. I, pp. 26-27.

The HFFA then met with the fire chief of the City and County of Honolulu. As a result, according to Kennedy, the fire

chief indicated at a meeting on August 28, 1985 in the Managing Director's office that implementation of the plan and included schedules would subject the City and County of Honolulu to lawsuits. The Managing Director was thus unwilling to implement the plan, according to Kennedy. Tr. Vol. I, p. 28.

About a week after the August 28 meeting, Kennedy met with Cynthia Bond of the Civil Service Department, City and County of Honolulu, to work out figures on various implementation plans proposed by the parties. Tr. Vol. I, p. 29.

Subsequently, Yasuda, via letter dated September 12, 1985, scheduled a meeting with Kennedy scheduled for October 3, 1985 regarding implementation of the FLSA. However, on the afternoon of October 2, the Civil Service Department of the City and County of Honolulu called to inform Kennedy that the Managing Director had approved the original plan that Civil Service had presented to the HFFA on August 5, 1985. Tr. Vol. I, p. 30.

At the meeting of October 3 held at the OCB, all employer jurisdictions were represented. Yasuda informed the HFFA, according to Kennedy, that all of the Employers were unanimous in their position that the implementation plans were not negotiable, due to monetary and scheduling concerns. Tr. Vol. I, pp. 31, 79-80. At this point, the HFFA left the meeting. Tr. Vol. I, p. 31.

The HFFA then prepared the instant prohibited practice charge, preparatory to the actual filing on October 7, 1985.

The HFFA subsequently received a letter from Loretta Fukuda, Director of Civil Service, City and County of Honolulu,

dated October 7, 1985, announcing the City's plans for FLSA compliance. The letter announced that employees of the rank of captain and above are excluded from FLSA coverage; that the City elected to utilize the special overtime exemptions allowed under Section 7(k) of the FLSA; that the schedule for 56 hours for firefighters is 27 consecutive days and 28 consecutive days for 40-hour firefighters; that FLSA overtime payments will be made after 204 hours of actual work; and that offsets from FLSA liability allowable for certain premium payments; e.g., holiday work will be applied in accordance with law. Fukuda sent a letter to Tom Hayakawa, Field Station Director, U. S. Department of Labor, Wage and Hour Division, announcing these implementation plans. Petitioner's Exhibit 6A.

Thereupon, the HFFA received three letters from governmental agencies regarding intentions to implement the FLSA. The HFFA received a memo, dated October 8, 1985, from James Takushi, Director of the State Department of Personnel Services, directed to all department heads regarding plans to implement the FLSA in view of the October 15, 1985 compliance date. The letter provides that as of the compliance date, all FLSA overtime shall be compensated in cash provided that an employee who elects compensatory time off in lieu of cash payment must take the compensatory time off within the pay period in which the overtime is earned. In a letter dated October 9, 1985 to Francis Kennedy from Wayne Yamasaki, Director of the State Department of Transportation, Yamasaki announced the Department of Transportation's plans for FLSA compliance efforts. The HFFA also received a

memo, dated October 15, 1985, from Frank Kahoohanohano, Fire Chief of the City and County of Honolulu, to all personnel regarding FLSA implementation plans.

Said implementation plans were not issued pursuant to negotiations between the HFFA and the Employers. Tr. Vol. I, p. 35.

In a letter dated December 5, 1985, signed by Yasuda; Fukuda; Takushi; Manabu Kimura, Director of Personnel Services, County of Maui; Harry Boranian, Director of Civil Service, County of Hawaii; and Herbert Doi, Director of Personnel Services, County of Kauai, Kennedy was informed that in light of November 1985 amendments to the FLSA, all letters regarding compliance plans of the various jurisdictions were rescinded. Petitioner's Exhibit 11. Tr. Vol. I, p. 37. The new FLSA compliance deadline was April 15, 1986.

Subsequently, Kennedy had some discussions on the phone with Yasuda. These discussions were followed by a letter from Yasuda to Kennedy, dated March 21, 1986, requesting a meeting between the two parties on April 1, 1986. The letter states that the Employers are willing to consult with the Union on the various issues relating to FLSA amendments and to negotiate on the subject of work periods for employees under the 7(k) partial exemption. Petitioner's Exhibit 12.

At the meeting on April 1, the HFFA informed the Employers that it considered that all matters relating to the implementation of the FLSA were negotiable under the collective bargaining law and that it was not willing to negotiate on some

issues and consult on the rest. Tr. Vol. I, pp. 38, 44. Kennedy stated that the parties at this point came to an understanding that the Employers would take whatever actions they deemed necessary to meet the compliance deadline of April 15, 1986 and that the HFFA would await the outcome of its complaint filed with this Board to determine whether the Employers proceeded in a proper manner. Tr. Vol. I, p. 38. Kennedy felt that major issues which required negotiation included, besides work periods, type of hours to be included in computing overtime, whether any other benefits such as holiday pay would be deducted to meet overtime obligations by the Employer and how holiday schedules would be laid out. Tr. Vol. I, p. 40.

Thereafter, the HFFA again received a series of letters from governmental agencies announcing implementation plans pursuant to FLSA amendments. By letter dated April 4, 1986, Yamasaki announced to Kennedy that the special overtime provision of 204 hours in a 27-day work period in accordance with Section 7(k) of the FLSA would be utilized. Petitioner's Exhibit 13. Kennedy also received a copy of a letter dated April 3, 1986 from Fukuda to Hayakawa, announcing that the City and County elected to utilize the special overtime exemptions allowed under Section 7(k) for firefighters. Fifty-six-hour firefighters' schedules would be 27 consecutive days, and 40-hour firefighters' schedules would be 14 consecutive days. Petitioner's Exhibit 14. Kennedy also received a copy of a letter, dated April 3, 1986, from Kimura to Hayakawa with contents similar to those in the letter from Fukuda to Hayakawa. Petitioner's Exhibit 15. Kennedy also

received letters from Fukuda, dated April 4 and April 14, respectively, which read as follows:

April 4, 1986

Mr. Francis Kennedy, Jr.
Hawaii Fire Fighters Association
2305 S. Beretania Street, Rm. 202
Honolulu, Hawaii 96826

Dear Mr. Kennedy:

This is to inform you that the City will begin compliance with the Fair Labor Standards Act on April 15, 1986 as required by the FLSA Amendments of 1985. You should be aware of the following:

- All BU 11 employees below the rank of captain are covered. Captains and above meet the white collar exemption tests of Part 541, CFR.

- The City is electing to utilize the special overtime exemptions allowed under section 7(k) of the Act for fire protection personnel. The work period for 56-hour firefighters is 27 consecutive days; for 40-hour firefighters it is 14 consecutive days.

- FLSA overtime payments will be made after 204 hours of actual work in 27 days for 56-hour workers and after 86 hours of actual work in 14 days for 40-hour employees.

- Offsets from the FLSA liability allowable for certain premium payments (e.g., holiday work) will be applied in accordance with law.

- The existing practice for the use of compensatory time off for <u>contractual</u> overtime credits will continue, but with a ceiling of 480 hours (if also FLSA

hours) as required by the Amendments.

If you wish to consult further, please contact Cynthia Bond at 523-4005 to arrange for a meeting.

Sincerely,

/s/ Loretta K. Fukuda

LORETTA K. FUKUDA
Director of Civil Service

cc: OCB
Fire Department

April 14, 1986

Mr. Francis Kennedy, Jr.
Hawaii Fire Fighters Association
2305 S. Beretania Street, Room 202
Honolulu, Hawaii 96826

Dear Mr. Kennedy:

In our April 4, 1986 letter to you, we inadvertently indicated that the FLSA overtime threshhold (sic) for 40-hour employees would be 86 hours in a 14-day work period. That is the 14-day threshhold (sic) for law enforcement employees under the 7(k) partial exemption, but for fire protection employees the correct 14-day threshhold (sic) is 106 hours of work.

We regret any inconvenience this error may have caused.

Sincerely,

/s/ Loretta K. Fukuda

LORETTA K. FUKUDA
Director of Civil Service

cc: Fire Dept.
OCB

None of these implementation plans were announced pursuant to negotiations with the HFFA. Tr. Vol. I, p. 44.

To Kennedy's knowledge, all governmental jurisdictions have made operational implementation plans without negotiations with the HFFA. Tr. Vol. I, p. 44.

The collective bargaining agreement in effect at the time of this controversy remains in effect until June 30, 1987. Petitioner's Exhibit 1. Initiation of negotiations for the new contract was to occur June 1 to June 30, 1986. Tr. Vol. I, p. 45.

According to Kennedy, the Employers are willing to negotiate the implementation of the FLSA for the period beginning with the July 1, 1987 contract but refuse to negotiate FLSA implementation for the period April 16, 1986 through June 30, 1987. Tr. Vol. I, p. 46.

Kennedy averred that even during the term of an existing agreement, the employer is compelled to negotiate over any adoption of new practices, procedures or policies that affect wages, hours and conditions of employment even if such new adoptions are beneficial to bargaining unit members. Tr. Vol. I, pp. 86-87, 90.

The attorney for the City and County of Honolulu objected when the attorney for the Union attempted to elicit testimony from Kennedy regarding provisions in the implementation plan for exempting employees of the rank of captain and above from FLSA coverage. Tr. Vol. I, pp. 46-47.

Through Kennedy's testimony, however, the HFFA established that the subjects of employee coverage, which is related to the exclusion of employees of the rank of captain and above

from FLSA coverage (Tr. Vol. I, pp. 46-47); work cycle, which is related to the matter of choosing a work period on which FLSA overtime payment is based (Tr. Vol. I, pp. 47-54); compensable hours of work, which is related to the matter of whether only actual hours of work will be regarded as compensable hours for overtime payments (Tr. Vol. I, pp. 54-57); the crediting of holiday pay or premium pay against overtime compensation (Tr. Vol. I, pp. 57-58); and the subject of compensatory time off (Tr. Vol. I, pp. 58-59) are covered by the collective bargaining contract and all have been traditionally matters that have been negotiated between the HFFA and the Employers. Tr. Vol. I, p. 59.

Kennedy agreed, upon cross-examination by the Employers, that after FLSA implementation, bargaining unit members receive at least as much overtime pay as is required under the contract and at times possibly more. Tr. Vol. I, pp. 60-62. However, Kennedy stated his position that he did not agree that compensatory time provisions contained in the contract and as allowed under the FLSA, as amended in 1985, were the same or that the FLSA provisions preserved contract compensatory time provisions. Tr. Vol. I, pp. 64-66.

Kennedy explained that under the collective bargaining contract, there is a nine-week cycle of 24-hour shifts. The maximum total hours is 504 hours during the nine weeks. Overtime occurs as long as an employee works a shift they are not scheduled to work. Once the schedule is made and posted, any work

performed outside of the scheduled work time is overtime. Overtime is calculated at the beginning of the new cycle rather than at the end of the work period or work schedule as would occur under the FLSA. Tr. Vol. I, pp. 68-70.

Under the FLSA implementation plans currently in effect, overtime is paid for hours worked beyond 204 hours in a 27-day work period. Two hundred and four hours in a 27-day period bears the same ratio as 504 hours does to a nine-week period. Tr. Vol. I, p. 70. Thus, if no holidays occur within the 27-day period, the employee receives overtime after 204 hours under the FLSA whereas overtime would occur after 216 hours under the contract. Tr. Vol. I, p. 71. The HFFA could possibly get more through negotiations on these matters, Kennedy testified. Tr. Vol. I, pp. 71-72.

Firefighters currently work a 56-hour week. Under the FLSA, overtime is required after 53 hours of work. Through negotiations, the HFFA would apparently like to see the work week reduced to 53 hours per week. Tr. Vol. I, p. 73.

The HFFA has at no time filed a grievance or sought arbitration under the provisions of the contract regarding FLSA implementation, feeling it would be "useless" with respect to the refusal to negotiate. Tr. Vol. I, pp. 75, 89.

Manabu Kimura, Personnel Director for the County of Maui, was the chief spokesperson for the 1985-87 collective bargaining negotiations for the Employers. Tr. Vol. II, p. 45. He testified for Respondents regarding communications between the

HFFA and the Employers with respect to FLSA compliance and implementation.

Kimura testified that upon receiving the HFFA's letter (Petitioner's Exhibit 2) requesting negotiations over FLSA implementation in April of 1985, the Employers met and discussed whether the FLSA provisions mandated the Employers to negotiate or not. They agreed that the subject matter of the FLSA provisions covers minimum wages and certain hours and working conditions and, as such, is negotiable under Chapter 89, HRS, but that because there was an existing collective bargaining agreement at the time of FLSA application, no negotiations were necessary. Tr. Vol. II, pp. 46-47. When federal standards became applicable, the Employers sought minimum compliance without violating the Agreement, for which they felt no negotiations were necessary. The Employers were unanimous as to this position and the Union was so informed. Tr. Vol. II, pp. 47, 65-66. Kimura thus expounded a position under which the contract was deemed to be followed where changes in working conditions, wages and hours were not lower than contract standards.

Upon amendment to the FLSA, the Employers rescinded implementation plans. This was by letter dated December 5, 1985. Petitioner's Exhibit 11. This was after the Union had filed prohibited practice charges with the Board. After the amendments, the Employers met again and developed a new implementation plan under which the Employers took the position that since the law gave the Employers an option in choosing a work

period, that subject would be negotiable. Tr. Vol. II, pp. 48-50.

The Employers also decided that under the FLSA, if contractual overtime was earned, that "could be" offset against FLSA overtime. They also took the position, which they communicated to the Union, that without an agreement, the Employers were precluded from providing compensatory time off to Firefighters. Tr. Vol. II, pp. 50-52. In the March 21, 1986 letter to the Union, the Employers offered to negotiate the issue of work period in the meeting scheduled for April 1, 1986, on the basis that the federal government gave employees an option in choosing a work period of between seven and 28 days. At the meeting, the Employers also indicated that compensatory time off was also being offered as a negotiable item. Tr. Vol. II, pp. 52, 67-68, 71.

The Firefighters walked out of the meeting on April 1 after having communicated to the Employers the Union's position that it wanted to negotiate all of the provisions of the implementation of the FLSA and not just those chosen by the Employers. Tr. Vol. II, pp. 52-53.

The possibility of not applying for the 7(k) exemption was not discussed. Kimura termed such application "an option for the employer" with consequences that would be "horrendous" if the Employers did not opt for the exemptions. Tr. Vol. II, p. 53. The Union was notified, however, that the implementation date for the FLSA was April 15, 1986 and that the enforcement date was October 1986. Tr. Vol. II, p. 54. Had the Employers not elected

the 7(k) exemption, firefighters and police officers would be treated as other employees covered under the FLSA and would be eligible for overtime after 40 hours of work per week, payment of which would be prohibitive to the Employers. Tr. Vol. II, p. 56.

It was Kimura's understanding that, prior to the November 1985 amendments to the FLSA, compensatory time off was not permitted to be granted in lieu of FLSA overtime cash payment. After the amendments, the FLSA permitted compensatory time off in lieu of overtime payment but only if an agreement providing therefor was reached with the Union. Tr. Vol. II, pp. 59, 61. The FLSA, as amended, also provides a maximum ceiling above which compensatory time off is not permitted. Tr. Vol. II, p. 61.

Kimura stated that he did not know whether there was any provision in the FLSA regarding a time within which compensatory time has to be taken. Tr. Vol. II, p. 62.

This testimony was elicited after Kimura had testified that, during 1985-87 contract reopener negotiations, the Union had not put forth any proposals regarding FLSA provisions, except insofar as the subject matter of wages and hours of work are covered by the FLSA. Specifically, the Union has put forth a proposal to shorten the workweek to 48 hours. Tr. Vol. II, p. 54. Petitioner's Exhibit 5. Other proposals which impact on the FLSA put forth by the Union concern wages (Section 27 of the contract) and scheduling (Section 18 of the contract). Tr. Vol. II, p. 55. Kimura testified that the Union's proposal for a

shorter workweek would, in effect, lower the threshold for overtime payment. This proposal is being negotiated in reopener negotiations. Tr. Vol. II, p. 57.

Thus, Kimura did not take the rigid position that Union proposals do not cover FLSA terms and conditions but only that the proposals do not specifically state that any provisions of the FLSA are to be negotiated. Tr. Vol. II, p. 63.

Customarily, parties at negotiations do not specifically state whether any given proposal involves a given law. Tr. Vol. II, p. 64.

Kimura's testimony regarding reopener negotiations at pp. 54-57 of Tr. Vol. II, apparently referred to 1985-87 contract reopener negotiations. However, the subject was taken up at hearing later in reference to 1987 contract bargaining negotiations. Apparently, the Union elicited from Kimura testimony regarding the subject matter of negotiations during reopening negotiations of the current contract, and negotiations for the contract to take effect July 1, 1987. The Union attempted to elicit from Kimura testimony that proposals put forth by the Union during both negotiations concerned items covered under the FLSA. Kimura agreed that some of the proposals were items covered by the FLSA. Tr. Vol. II, pp. 69-70.

Cynthia Bond, branch chief for the personnel research and services branch of the Department of Civil Service, City and County of Honolulu, from 1984 through 1986, was responsible for administering or coordinating employee benefits and personnel research and in that capacity was assigned the project of

administering City and County of Honolulu compliance with the FLSA as it affected the Union. Tr. Vol. II, pp. 9-10. She testified on the Employers' view as to how the benefit packages are structured under the collective bargaining agreement and how the FLSA was reconciled therewith. Bond explained the Firefighters' work schedule under the contract as follows:

The majority of the employees covered by the Unit 11 collective bargaining agreement work an average of 56 hours a week. Their schedule in the contract is a nine-week schedule in which their normally scheduled hours are 504 hours. Again, that averages to 56 hours per week. Firefighters work 24-hour shifts. Basically, it is a nine-day cycle that repeats itself, with 24-hour shifts that start at 8 a.m. In the nine-day cycle, employees work the first day, are off the second day, work the third day, are off the fourth day, work the fifth day, and are off the sixth, seventh, eighth and ninth days. Thus, within nine days, they work three periods of 24 hours each. This cycle repeats itself. Tr. Vol. II, p. 10.

After the November 1985 amendments to the FLSA, Bond testified that the Employers took the position that the determining of a work period from the range of seven to 28 days under the 7(k) exemption was negotiable. Bond testified also that under the 1985 amendments, any employer wishing to offer the use of compensatory time off in lieu of overtime would have to negotiate those terms with an agent of the affected employee. So the Employers acknowledged at the April 1 meeting that this was also a negotiable issue. Tr. Vol. II, pp. 10-11.

Bond testified that no compliance plan is required to be filed with the federal Department of Labor, but if the Employer chooses to use the 7(k) exemption, he is required to advise the Department of Labor of that fact and also of the scheduling that the employer has opted to apply. Tr. Vol. II, p. 13.

Bond stated that under the FLSA compliance plans, firefighters are getting paid more money for overtime than they do under the contract. Tr. Vol. II, pp. 13-14.

Bond explained the Employers' selection of a 27-day work period by noting that the FLSA permits the employer who executes the 7(k) exemption to determine a work period of anywhere from seven to 28 calendar days. The contract provides for a nine-week cycle which is not acceptable under the terms of the FLSA. Thus, the Employers took the nine-day work schedule, that repeats itself, and arrived at a 27-day period, a multiple of nine. Tr. Vol. II, p. 14.

Bond testified as to the workings of the FLSA and the contract as to overtime payment as follows:

The general provisions of the FLSA require overtime payment for work beyond 40 hours in a seven-day period. For certain classes of work, i.e., police and firefighters, there are higher overtime thresholds because of the nature of their work. The FLSA allows the employer, in order to minimize its overtime obligation and to recognize the nature of the type of work of police and firefighters, to consider a longer work period. The threshold for firefighters is on the average 53 hours per week,

or with the selection of the 27-day work period, 204 hours per 27 days.

In contrast under the contract, in a 27-day work period, if an employee works every scheduled work shift, he or she would be working 216 hours, or 56 hours per seven-day period. Overtime thus occurs after 216 hours of work, in contrast to the overtime threshold of 204 hours under the FLSA, or 53 hours per week.

Thus, overtime would be paid under the FLSA for hours between 204 and 216, i.e., 12 hours at time-and-a-half, or six hours more pay. If an employee works over 216 hours in 27 days, the employee would be eligible to receive both FLSA and contractual overtime. Computers figure out which gives the employee more money and pays the higher of the two.

If an employee works over 204 hours in a 27-day period and there are no offsets from FLSA overtime, the employee would be paid more under the FLSA than under the contract. Tr. Vol. II, pp. 15-16, 40.

However, on cross-examination, Bond stated that the 204 hour threshold under the FLSA is based on actual hours of work, whereas under the contract the 216-hour threshold includes holidays. The offsetting of the holiday premium was termed an "add-on," for which the employer can take credit against overtime liability under the FLSA. Tr. Vol. II, pp. 24-25, 40.

The contract overtime provision for holidays is still applicable and still paid. The offset just limits employer liability under the FLSA. Tr. Vol. II, p. 25. The offset was

not negotiated with the Firefighters by the Employers. Tr. Vol. II, p. 26.

Bond agreed on cross-examination that under the contract, anytime a firefighter works other than a scheduled work day, he or she receives overtime, whether the end of the period has been reached and total hours worked during the period totaled up or not. Thus, an employee could work less than a full work schedule, yet end up with overtime for working on a non-scheduled day. Tr. Vol. II, p. 27.

Bond was presented with a hypothetical question in which an employee works the 27-day work period; he works a non-scheduled work day, so receives overtime under the contract; later during the 27-day period, he misses a scheduled work day, so that total hours add up to 216 hours. When asked if the employee receives overtime, Bond responded that the employee would be paid overtime under the contract, with the implication that overtime would not be paid under the FLSA. Tr. Vol. II, p. 28. If a holiday occurs, he receives payment for it under the contract, Bond stated, again with implication that no pay is received therefore under the FLSA. Tr. Vol. II, p. 28.

Vacation and sick leave time is counted for overtime purposes under the contract, but not under the FLSA. Tr. Vol. II, p. 30.

Bond stated that, in effect, the Union wanted the Employers to use the FLSA threshold for overtime payment but then to include the contract provisions regarding non-offsets of premium payments. Tr. Vol. II, pp. 39-40.

Bond is not, and never was, a representative of the City or any employer in collective bargaining negotiations. Tr. Vol. II, p. 41.

Bond testified that prior to the 1985 amendment to the FLSA, Employers would not have been permitted to allow even contractual compensatory time, unless taken in the period earned. Overtime had to be paid. The amendments effective April 15, 1986 permit compensatory time off in lieu of cash payment provided the parties negotiate these terms. Bond averred that the contract has no language to allow for compensatory time off but only with respect to contractual overtime. Thus, she stated that there is no provision in the contract for the taking of compensatory time off between the two thresholds of 204 hours under the FLSA and 216 hours under the contract. Thus, overtime would have to be paid unless an agreement for compensatory time was negotiated with the Union. Tr. Vol. II, pp. 75-76, 79-81. Compensatory time is allowed after 216 hours currently, pursuant to a contractual provision providing that compensatory time in lieu of overtime pay can be taken. Tr. Vol. II, pp. 76-77. Thus, a new agreement is required before an employer can grant compensatory time in lieu of overtime for the 12 hours of FLSA overtime in a 27-day work period. Tr. Vol. II, pp. 78-79.

Complainant called Tom Hayakawa, field superintendent of the Wage and Hour Division of the Employment Standards Administration, U. S. Department of Labor, to testify as to the FLSA compliance process as it pertained to the firefighters. Hayakawa drew a distinction between mandatory and discretionary provisions

of the FLSA as it pertains to Employer compliance. Such provisions as Section 6, regarding minimum wage, and Section 7, regarding overtime, are mandatory provisions unless some sort of exemption or partial exemption applies; i.e., the Employer can choose to be governed either under the provisions of Section 7(a), providing for a 40-hour work week, or choose to be exempted from Section 7(a) under Section 7(k). This latter choice is termed an "option" for the Employer. Tr. Vol. I, pp. 99-100.

Election to use 7(k) is an option of the employer, from which the discretionary choice in work period follows. Tr. Vol. I, p. 102.

In Hayakawa's words, the FLSA "merely sets, for the most part, a floor then it leaves it up to the employer. In other words, if he elects to utilize the exemption from overtime, for example, for executives, yes, he can so opt to do so, providing that, of course, all the qualifications are met." Tr. Vol. I, p. 101.

Hayakawa further stated that the FLSA and regulations allow the Employer to take certain credits against overtime requirement. Where this option is granted the Employer, it is up to the Employer to elect whether he wishes to use that option or not. Tr. Vol. I, p. 101. Hayakawa further stated that the FLSA gives the employer the "right" to base overtime on actual hours worked. Actual hours is a "minimum" upon which overtime must be based. Tr. Vol. I, p. 102.

Hayakawa stated that, in areas where the employer is granted discretion under the FLSA, such discretionary provisions

of the FLSA do not negate statutory obligations to bargain collectively on subjects which are negotiable under state law. He suggested that the FLSA is not involved once compliance with the minimum floors established by the FLSA is met. He stated, "You can do whatever you want in collective bargaining as long as the result is not violative of something that is required under the [FLSA]." Tr. Vol. I, pp. 104-105.

Nothing in the FLSA prevents the employer from waiving the executive exemption and paying eligible employees overtime; although the employer does not have to waive the exemption, there is nothing to prevent him from doing that. Tr. Vol. I, pp. 106-107. Hayakawa likened this situation to an employer deciding to pay wages above the minimum wage. Tr. Vol. I, p. 107.

The same situation, Hayakawa testified, applies to the employer right to credit against overtime compensation any holiday premium pay. Nothing in the FLSA prevents the employer from waiving that right and paying a higher standard than required. Tr. Vol. I, pp. 107-108.

Similarly, Hayakawa testified that the FLSA does not prevent the employer from counting, for overtime purposes, hours other than actual hours worked, despite the fact that the FLSA and regulations provide that compensable hours of work is defined as actual hours of work. Tr. Vol. I, p. 108. Thus, testified Hayakawa, the employer could so expand the definition of compensable hours of work, though other considerations, such as that such a change could be considered by the Department of Labor as

an increase in base pay, would have to be taken into consideration. Tr. Vol. I, pp. 108-109.

The same discretionary right is granted the employer where the FLSA sets a maximum standard. Thus, where the FLSA mandates 480 hours as a maximum ceiling for the accumulation of compensatory time, the FLSA does not prevent the employer from utilizing a lower threshold, above which overtime must be paid. Tr. Vol. I, pp. 111-112.

When asked whether the FLSA necessarily negates the statutory obligations to negotiate or bargain collectively, Hayakawa replied that he did not think that law addresses that question. He stated that he could not answer whether the FLSA preempts state law. His focus in enforcement is merely on enforcing FLSA standards. Any agreements or other laws that go contrary or below the federal standards are not recognized. Tr. Vol. I, pp. 110-111. The FLSA is silent on whether employer options or rights are subject to collective bargaining. Yet, Hayakawa agreed that the FLSA recognizes collective bargaining in principle and the "sanctity" of collective bargaining. Tr. Vol. I, p. 111.

Hayakawa stated that he reviews compliance plans for the county and State jurisdictions. In the process of such a review, Hayakawa stated that he also reviews applicable collective bargaining agreements to see if there is anything within those agreements that violate FLSA standards. This occurs either through direct review or through discussion. Portions of the Firefighters' contract was reviewed in light of the compliance

posture of the City and County of Honolulu. Hayakawa's conclusion was that based on what he was told of how compliance was being handled, it was not necessary to amend the collective bargaining agreement to comply with the FLSA. Contracts are examined only insofar as they might violate the FLSA. Tr. Vol. I, pp. 113-114, 129-132.

The intent, Hayakawa stated, is not to disrupt an existing collective bargaining agreement. Tr. Vol. I, p. 115. He stated that "we have no jurisdiction in terms of being able to step in and change a collective bargaining agreement. We review and discuss it so that if we find anything in there that is violative of any of our statutes or regulations, we advise the parties and we hope they take care of the problem." Tr. Vol. I, p. 115. Hayakawa stated, "If we see nothing that is going to counter what we require, then our posture is hands off." Tr. Vol. I, p. 115.

Hayakawa termed the choice between Section 7(a) and Section 7(k) a discretionary choice, because if 7(k) is not chosen the Department of Labor would apply 7(a) automatically. Tr. Vol. I, p. 116. The choice of work period is also a discretionary choice, since if the choice is not exercised, the election to take the 7(k) exemption would automatically revert right back to Section 7(a) coverage. Tr. Vol. I, p. 117. As to the 480-hour maximum ceiling for compensatory time allowance, this ceiling will apply in the absence of affirmative action to set a limit. Tr. Vol. I, pp. 118-119. The only option the

employer has is to choose a higher standard, i.e., a lower maximum. Tr. Vol. I, p. 119.

While Hayakawa stated on direct examination that the FLSA does not address the question of whether the FLSA negates statutory obligations to negotiate or bargain collectively (Tr. Vol. I, p. 111), he did state on cross-examination that the choice to exercise the 7(k) exemption is a "right" that Congress gave to employers such as any other elective clause in the FLSA. Tr. Vol. I, p. 121. The same applies to premium pay offsets, Hayakawa stated. Nothing in the FLSA or in the regulation says the employer has to negotiate with the Union before the right is exercised. Tr. Vol. I, p. 121.

Hayakawa stated that where employer compliance is complicated by factors such as collective bargaining, the Department of Labor will recognize such practical problems and try to work with the employer so long as employee rights are not jeopardized. Tr. Vol. I, pp. 132-133. By the same token, if noncompliance occurs as a result of the employer not attempting to negotiate, such a situation is also taken into consideration in enforcement. Tr. Vol. I, p. 134.

That collective bargaining negotiations are holding up the employer's choice between Sections 7(a) and 7(k) is not a matter of consideration for the Department of Labor. If the choice is not made by the compliance deadline, 7(a) will be enforced automatically. Tr. Vol. I, p. 135. The Department of Labor will not tell the employer he will not have to negotiate because of impending deadlines. Tr. Vol. I, p. 136.

Hayakawa stated that he did not have the authority to extend the compliance deadline, and that such authority would only rest with the Department of Labor. Tr. Vol. II, pp. 5-6.

CONCLUSIONS OF LAW

The HFFA charges contained in its original complaint, filed October 7, 1985, are general in nature. See p. 2, supra.

The HFFA thus alleges violations of the duty to bargain in good faith and violations of the contract, in violation of Subsections 89-13(a)(5) and (8), HRS. These provisions read as follows:

> [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:
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> (8) Violate the terms of a collective bargaining agreement.

Complainant's allegations of contract violations were then particularized. See pp. 3-4, supra.

Complainant's legal arguments present two issues:

1. Have Respondents refused to bargain in good faith with Complainant with respect to the implementation of the FLSA?

2. Have Respondents in acting unilaterally modified and/or terminated existing rights, benefits and/or perquisites contrary to the provisions of the existing collective bargaining agreement?

With regard to the issue of the duty to bargain, Complainant notes Section 89-9(a), HRS, which requires that an employer and an exclusive representative "negotiate in good faith with respect to wages, hours and other terms and conditions of employment. . . ." Hawaii State Teachers Association and Department of Education, 1 HPERB 253 (1972).

Complainant notes that this Board ruled that collective bargaining is a continuous process, that is, one which is not necessarily limited to initial contract and/or contract renewal times. Citing SHOPO and Sanderson and Fasi, 3 HPERB 25 (1982); SHOPO and Toro and Fasi, 3 HPERB 71 (1982); Dennis Yamaguchi, 2 HPERB 656 (1981).

Complainant argues that the Board need not enter the exercise of determining whether issues in controversy herein are mandatory items for negotiation inasmuch as Respondents have conceded that these issues are "terms and conditions of employment" which are negotiable items under Hawaii Nurses Association and Ariyoshi, 2 HPERB 218 (1979). In support of this position, they note Kimura's statement that "the entire subject matter covered by FLSA, the subject matter is negotiable, yes." Tr. Vol. II, p. 57.

They then note Respondents' refusal to negotiate, citing Kimura's statement on behalf of all Employers regarding their refusal to negotiate because "we had a collective bargaining agreement in effect, that we were not required to negotiate . . ." Tr. Vol. II, p. 32.

Complainant argues that, while the taking of the 7(k) exemption under the FLSA may not have been negotiable, once Respondents chose such exemption, all related and included matters, such as length of work period, offsets against overtime payments, excluded "executive" employees, became negotiable and were negotiable. Complainant's Memo, p. 3.

Yet, Complainant argues that up to their letter of March 21, 1986 (Petitioner's Exhibit 12), Respondents had maintained that nothing was negotiable. By said letter, they then acknowledged that the subject of work periods was negotiable.

Complainant argues that Respondents chose to ignore the Complainant's requests to negotiate from the time when the Garcia decision was handed down by the United States Supreme Court in February 1985, although the employers were aware that the problem of FLSA compliance was something that had to be met somewhere along the line from the time it became obvious that government agencies were covered by the FLSA. Complainant's Memo, p. 3, citing Tr. Vol. II, p. 18.

Complainant notes that the selection of a work period within the framework of the 7(k) exemption, and likewise the "holiday premium" offset, were always part of the FLSA, specifically from February 1985.

Complainant argues that Respondents' offer, in their March 21, 1986 letter, to negotiate the work period could not be characterized as being in good faith as required by Section 89-9(a), because it occurred just 14 days from the FLSA compliance deadline. Moreover, the offer across the table at the

April 1 meeting to negotiate compensatory time off in lieu of overtime was not an offer in good faith. Complainant's Memo, p. 4.

Complainant disputes Respondents' position that any employer wishing to offer the use of compensatory time off in lieu of overtime would have to negotiate those terms (Tr. Vol. II, p. 12) on the basis that the November 1985 amendments to the FLSA, Section 7 or 6(b) provides that "a collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect. . . ."

Complainant disputes this position. First of all, it notes Hayakawa's statement that the Employers' position on the non-negotiability of FLSA compliance "you can do whatever you want in collective bargaining as long as the result is not violative of something that is required under the statute." Tr. Vol. I, p. 105.

Secondly, Complainant cites cases which recognize the existence of the duty to bargain despite application of federal statutes to a given subject matter.

Complainant thus argues that Respondents had an obligation to enter into good faith collective bargaining with Complainant on all matters involved in their implementation of FLSA. Complainant's Memo, p. 5.

As to its second charge, the modification and/or termination of collective bargaining agreement rights, Complainant

argues that by their implementation without negotiation, Respondents have unilaterally amended the collective bargaining agreement by effectively cancelling out such collective bargaining benefits such as the holiday premium.

Complainant thus cites the example where a firefighter who works the full work period totalling 216 hours. Where the FLSA overtime threshold is 204 hours, the firefighter is entitled to six hours of additional pay as FLSA overtime. If, however, the firefighter has received a holiday premium under the contract during the same period, such premium is offset against his FLSA overtime pay. The net effect is a loss, Complainant argues, to such firefighter of the holiday premium which he received, for the offset is, in fact, a "take-back" of such premium.

The Employers in response cite several arguments in support of their alleged refusal to negotiate and their position that the contract is not being violated.

The Employers argue that they are not required, pursuant to Chapter 89, HRS, to bargain collectively regarding the implementation of a federal law. While the Employers agree that, in general, wages, hours and conditions of employment are negotiable, the Employers' compliance with the FLSA was non-negotiable. They reason that the Employers, not the Union or employees, are responsible for both the implementation of and compliance with the FLSA. Such exclusive responsibility gives the Employers the sole authority on decisions such as whether or not to offset holiday or premium pay from FLSA overtime. Such compliance decisions are non-negotiable, the Employers argue.

Moreover, Chapter 89, HRS, does not require the Employers to vary the terms of its compliance with federal laws through collective bargaining. Because this implementation of the FLSA did not change or violate the terms of the contract, there was no need to reopen the contract for further negotiations. Public Employers' Memorandum, pp. 8-9.

In response to Complainant's position that all aspects of FLSA implementation must be negotiated, the Employers take the position that the matter of offsetting FLSA overtime from holiday pay or other salary premiums, and the use of the definition of "hours worked" under the FLSA to determine their FLSA overtime liability are non-negotiable since they involve direct compliance with the federal law, the failure of which would result in "sanctions," and, as a result, directly impact on management rights, as referred to in Subsection 89-9(d), HRS. Relevant language of Subsection 89-9(d), HRS, provides as follows:

> 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, which would be inconsistent with section 77-13.5, relating to the conversion to appropriate salary ranges, 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.

Public Employers' Memorandum at pp. 9-10. Thus, the exercise of these rights are not subject to negotiations. Employers' Memorandum, p. 13, citing Section 89-9(d)(4), HRS, and Board Decision No. 26, In Re Petition for Declaratory Ruling by the Board of Education, 1 HPERB 311 (1981).

The Employers take the position that the issues of the negotiability of the work period and taking of compensatory time are not in dispute since the Employers offered to negotiate these issues. Public Employers' Memorandum, p. 9.

The Union's proposals, the Employers argue, touch upon the Employers' rights to maintain the efficiency of government operations through the use of exemptions to achieve compliance with minimum expenditures and determine the methods, means and personnel by which the firefighting operations are to be conducted. Such issues, the Employers argue, concern management rights under Subsection 89-9(d), HRS, and as such are not subject to negotiation. Tr. Vol. I, p. 80; Public Employers' Memorandum, pp. 11-14.

The Employers further argue that under the various of provisions in Chapter 89 providing for collective bargaining, there is nothing which gives either party a right to reopen the existing agreement on a general basis upon the happening of an external event such as amendments to a federal law, that make the federal law applicable to the states for the first time. Public Employers' Memorandum, pp. 14-16. The parties, the

Employers note, have an existing agreement effective until June 30, 1987. No changes have been made to the contract itself and no benefits provided thereunder have been taken away, the Employers state, thus the duty to consult contained in Subsection 89-9(c), HRS, was met. Subsection 89-10(c), HRS, provides that an existing collective bargaining agreement shall not be reopened for negotiation to address cost items. Similarly, the Employers note Subsection 89-2(c), HRS, which provides that the implementation of cost items including wages, hours and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body. Public Employers' Memorandum, pp. 11-14, 16.

The Employers argue that nowhere in Chapter 89 is there any basis for compelling an unwilling party to renegotiate wages, hours and working conditions once the contract for a specific duration has been executed. Changes in the relationship between the parties as a result of the imposition of the FLSA consisted solely of actions to accommodate requirements imposed by federal law. It is not contended by the Employers that the subject matter that underlies FLSA is not negotiable, only that it is not negotiable during the term of an existing contract. The Employers argue that the appropriate time to engage in negotiations on the impact of the FLSA is in connection with negotiations of a new contract, which is to be effective July 1987, and which are now occurring. Public Employers' Memorandum, pp. 16-18.

In support of their position, the Employers cite federal law and cases. They note that under the Labor Management

Relations Act ("Taft-Hartley") Amendments of 1947, no union or employer is required to discuss a proposed modification that would take effect prior to the time for reopening provided for in the relevant provisions of the contract. NLRB v. Jacobs Manufacturing Co., 196 F.2d 680 (2nd Cir. 1952). Thus, the Employers note that most cases finding a failure to bargain collectively arise out of periods when contracts are being negotiated, rather than situations where negotiations are sought during the term of an existing contract. Public Employers' Memorandum, pp. 19-20.

The Employers cite a number of cases dealing with the effect on bargaining requirements as a consequence of external law changes on existing contracts under the National Labor Relations Act. They cite propositions as follow: A unilateral change in wages to comply with the FLSA does not violate Section 8(a)(5) [Refusal to Bargain] of the National Labor Relations Act, Standard Candy, 147 NLRB 1070, 1073 (1964) [Compliance with FLSA Minimum Wage]; no illegal refusal to bargain occurred where a unilateral pay increase was granted as a result of an increase in the minimum wage under the FLSA, Markle Manufacturing Co., 239 NLRB 1353 (1979); FLSA overtime requirements are applicable to employees, even if their employment contracts do not mention overtime, General Electric v. Porter, 208 F.2d 805 (9th Cir. 1953); collective bargaining agreements are not sacrosanct and can and should be modified and revised even if done unilaterally to comply with Civil Rights Act of 1964, Section 701, et seq., EEOC v. AT&T Co., 265 F. Supp. 1105, 1129 (D.C. Pa. 1973); and an

existing wage disparity provided for in the contract could immediately and unilaterally be equalized to comply with the Equal Pay Act, Laffey v. Northwest Airlines, 740 F.2d 1071, cert. denied, 105 S. Ct. 939, 83 L.Ed.2d 951 (1985). Public Employers' Memorandum, pp. 21-23.

Based on these cases, the Employers argue that their refusal to negotiate is justified. Public Employers' Memorandum, pp. 24-25.

Respondents further argue that nothing in the collective bargaining agreement requires reopening of the contract to renegotiate wages, hours and working conditions. In response to the Union's argument that Section 8,[1] regarding Prior Rights, Benefits and Perquisites, and Section 42,[2] Duration, create an

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[1]Section 8. PRIOR RIGHTS, BENEFITS AND PERQUISITES.

> Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by statutes, existing rules and regulations or past practices recognized as being legitimate and having general and uniform applicability throughout each jurisdiction, except as expressly superseded by the terms of this Agreement. Said rights, benefits or perquisites which pertain to subjects which are negotiable under the provisions of Chapter 89, HRS, shall not be modified or terminated except by agreement of the parties.

[2]Section 42. DURATION, of the Agreement shall be amended to read as follows:

> This Agreement shall become effective as of July 1, 1985 and shall remain in effect to and including June 30, 1987. It shall be renewed thereafter in accordance with the

obligation to bargain collectively regarding FLSA implementation, Respondents reply that no rights, benefits, and perquisites have been modified or terminated by the Employers. Employees have benefited not because of voluntary action of the Employers, but because the Employers are required by law to pay overtime after 204 hours of actual work. Public Employers' Memorandum, p. 26. Employers thus argue that Section 42 regarding duration is inapposite since any change which occurred in the parties' relationship is one mandated by law.

Footnote Continued

> statutes unless either party hereto gives written notice during the period June 1, 1986 to June 30, 1986 to the other party of its desire to modify, amend or terminate the Agreement. Notices served under this Section shall be in writing and shall be accompanied by complete specific proposals of the notifying party, together with the sections which the proposals seek to modify, amend or terminate.

The Employers also cite Section 43,[3] Entirety Clause, and Section 41,[4] No Strike or Lockout. Section 43 emphasizes the sanctity of the agreement on terms and conditions made by the parties for the full period of the agreement. Section 41 emphasizes the applicability of the contractual grievance procedure as it pertains to alleged violations of the contract. The Union has

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[3]Section 43. ENTIRETY CLAUSE.

> Except as modified below, the Employer and the Union agree that the terms and provisions herein contained constitute the entire Agreement between parties and supersede all previous communications, representations or agreements, either verbal or written, between the parties hereto with respect to the subject matter herein. The Employer and Union agree that all negotiable items have been discussed during the negotiations leading to this Agreement and, therefore, agree that negotiations will not be reopened on any item during the life of this Agreement except by mutual consent or as provided in Section 42; Duration.

[4]Section 41. NO STRIKE OR LOCKOUT.

> The Union agrees that during the life of this Agreement the Union, its agents, or its bargaining unit members will not authorize, instigate or engage in any work stoppage, slowdown, sick out, refusal to work, picketing or strike against the Employer.
>
> The Employer agrees that during the life of this Agreement, there will be no lockout.
>
> The parties hereto agree that neither party shall be bound by the provisions of Section 17 of this Agreement entitled Grievance Procedure in the event of any violation by either party of this Section 41 entitled No Strike or Lockout. In the event of such violation, the aggrieved party may immediately pursue such remedies as are prescribed by law.

failed to pursue its remedies under the contract, the Employers argue. This alleged failure by the Union to exhaust its contractual remedies warrants dismissal of the complaint as it pertains to Section 89-13(a)(8), HRS, the Employers argue. Public Employers' Memorandum, p. 27.

Employers, moreover, contend that they have dispelled each allegation of a contract violation through evidence which shows that no violation has in fact occurred, or if they had occurred, it was not done wilfully.

Employers argue that the issue of the exclusion of employees with the rank of captain and above from FLSA implementation plans should be disallowed due to due process and notice requirements, in view of Complainant's failure to enumerate this charge in its complaint and particularization. Moreover, the Employers argue that the total weight of the evidence shows that the Union failed to prove that fire captains do not receive that to which they are entitled under the agreement. In excluding captains from FLSA coverage, employers merely utilize an employer's right given by federal law. Public Employers' Memorandum, p. 29.

The Union argues that the Employers disallowed the practice of "banking" compensatory time off, in violation of Section 8 and Section 42. The Employers argue, however, that the evidence in support of this charge only showed that the Employers' present implementation plan complied with FLSA requirements. These requirements sent a maximum amount of compensatory time off that an employee could "bank" before he would have to be paid for

those hours. The Union, Employers argue, never introduced any evidence which showed what the employees' compensatory time off rights were under the agreement and how the implementation plan affected those rights. The Employers further point out that they attempted to negotiate the issue with the Union. This proposal was presented at the bargaining table at the meeting on April 1, 1986, but no negotiations took place because of the Union's position that if all aspects of compliance with the FLSA were not considered negotiable, there was no point in discussing any specific part of the implementation plans. Public Employers' Memorandum, p. 34. The Employers assert the Union thus failed to prove by a preponderance of the evidence any such violation. Public Employers' Memorandum, p. 35.

Section 19(d)(3) of the contract allows leave with pay to be considered time worked when computing overtime. Section 19 and Section 24(b)(3), Holidays, do not permit setoffs against overtime by virtue of payment of holiday premiums. The Union charges that the Employer violated these provisions by using actual hours worked in computing overtime, and in offsetting holiday and other premium pay against FLSA overtime. The Employers argue that this allegation disregards a basic principle employed in FLSA implementation under which contract terms are used for contractual overtime and FLSA definitions are used to compute FLSA overtime. Public Employers' Memorandum, pp. 35-36. The evidence shows, Employers argue, only that FLSA requirements were used to compute FLSA overtime. No evidence was elicited

to substantiate the Employers' supposed violations. Public Employers' Memorandum, p. 36.

Section 19 states that whenever a new work schedule is implemented which requires an employee to work more than 504 hours during the nine-week cycle, those hours over 504 shall be considered overtime occurring at the beginning of the new schedule. The Union argues that FLSA implementation plans will require the determination of overtime to be made at the end, not the beginning, of the new schedule. The Employers argue that the Union provided no evidence of this charge. They assert that the only relevant testimony was Kennedy's statement that the FLSA, and not the Employers' implementation plan, would apply change-of-schedule overtime at the end of the work period or work schedule instead of the beginning. The Employers argue that implementation of mandatory federal requirements which affect contract provisions is not negotiable, and that if the FLSA requires such application to change of schedule overtime, then the charge of contract violations is invalid. Public Employers' Memorandum, p. 40.

Thus, the Employers argue that the evidence shows that the Employers followed the requirements of the contract at the same time they obeyed the federal mandate to comply with the FLSA. If employees did not receive a certain payment as required under the contract, it was only because they receive a greater payment as required by the FLSA. The Employers argue that FLSA implementation did not call for change or amendment to the contract, while the Union would require a "mix and match" of

terms and definitions from the FLSA and the contract. Thus, the Employers argue, the evidence shows that the manner in which they applied the contract and the FLSA is correct and logical. Public Employers' Memorandum, p. 41.

I. The Duty to Bargain

Cases make clear that compliance with Federal statutes as such is not a negotiable issue, but cases implicitly recognize a distinction between negotiation over compliance and negotiation over implementation of federal statutes. Based on this distinction, it appears that though compliance is not negotiable, where the employer has discretion under federal law, regulation, or administrative opinions in implementing federal law, the duty to bargain applies.

In Standard Candy Company, 147 NLRB 116 (1964), the NLRB held that the duty to bargain was not violated where the company raised the minimum wage from a $1.15 to a $1.25 an hour to comply with a new minimum wage rate established under the FLSA without notifying or negotiating with the union.

A federal district court, citing the Standard Candy case, stated, "Similarly, the National Labor Relations Board has adopted the position that where unilateral changes in collective bargaining agreements are essential to comply with Federal laws, these revisions would not constitute unfair labor practices. Equal Employment Opportunity Commission v. American Telephone and Telegraph Co., 365 F. Supp. 1105 (D.C. Pa. 1973) [hereinafter referred to as EEOC case].

The NLRB, in Southern Transport, Inc., 55 LRRM 1023 (1963), again ruled that an employer's adoption of wage changes were not unlawful, since the changes were made pursuant to a U. S. Department of Labor determination that the employer's operations were subject to the FLSA, and the method used to determine new rates was decided upon before election and certification of the objecting union. Id. at 1025. This case suggests that the duty to bargain can still be recognized even though the FLSA is applicable. It implies that if the union was certified before the changes occurred negotiations may have been mandatory. The same implication is made in General Electric Co. v. Porter, 208 F.2d 805 (9th Cir. 1953). Therein, the employer unilaterally initiated a change to a new arrangement under which firemen were paid a fixed monthly wage instead of being paid by the hour. No provision was made for overtime. The court held that under the FLSA the firemen would be eligible to receive overtime for hours worked over the 40-hour limit. The court held that even though the new contract did not express terms regarding overtime payment, this omission was not fatal. The court stated "the provisions of the Fair Labor Standards Act will be read into the contract to grant the employees the right to overtime compensation." Id. at 813-14. This case indicates that the FLSA does not merely override the collective bargaining contract but that it is to be harmonized with the collective bargaining contract as far as possible. Further evidence that contract rights are retained where the FLSA is applicable is present in the court's resort to its rationale that the change in scheduling created a

new contract when the employees accepted the new setup by reporting to work and working pursuant to the new schedule. Id. at 813.

It is clear that an employer cannot refuse, during negotiations, to discuss wages and economic benefits based on the mere fact that the employer's operations are covered by the FLSA. Such a stance, constitutes an unlawful refusal to bargain. Southern Transport, Inc., supra, 55 LRRM at 1025.

The one Federal court case cited by Complainant, Addison v. Huron Stevedoring Corp., 69 F. Supp. 956 (1947), indicates that FLSA application and collective bargaining rights should be harmonized where possible. The court stated:

> Collective bargaining agreements, though favored by the law, will not be permitted to do open violence to the policies of the Fair Labor Standards Act. [Citation omitted] The converse is likewise true. FLSA should not lightly override the policy of collective bargaining. FLSA establishes minimum standards. Collective bargaining has freedom to move unhampered above the floor FLSA establishes.

The view stated in Standard Candy and the EEOC case, wherein it is not a violation of the duty to bargain to unilaterally undertake actions to comply with the FLSA, could be termed the accepted view under case law. However, this strict view is best regarded as applying only to compliance actions where no employer discretion is possible.

In Standard Candy, no negotiations were necessary before applying the FLSA minimum wage. However, compliance with a quantitative standard, the FLSA minimum wage, leaves no room

for discussion and so negotiating would be pointless. Where there is room for more discussion in compliance, e.g., such as the employer's decision to offset overtime by holiday pay in the subject case, Standard Candy is not a basis for preventing negotiations. See also, Laffey v. Northwest Airlines, Inc., supra. Therein, the Second Circuit stated, "A court determination of an Equal Pay Act violation leaves nothing for the employer and union to bargain about." 740 F.2d at 1100. This implies that the duty to bargain applies in the converse situation, where application of federal law involves more than the meeting of quantitative standards and where implementation involves some measure of discretion.

In the EEOC case, the exclusive representative sought to intervene in a discrimination case brought by the EEOC against AT&T. The union sought to intervene on the basis that collective bargaining rights were not being recognized in the pending settlement. The court denied full intervention on the basis that the union's rights were adequately protected in the consent decree. The court stated:

> Equally important, the wording of the consent decree . . . makes it indisputably obvious that [the union's] rights were not infringed and in fact were more than adequately protected. The union's right to negotiate alternatives which are in full compliance with the applicable Federal statutes is categorically preserved. Consistent with and in furtherance of this position AT&T is legally obligated to bargain in good faith with [the union] and to endeavor to consider legally acceptable alternatives. Moreover, while there may have been some unilateral revisions of [the union's] current contracts, the changes were essential in order to rectify violations by

> AT&T of the Fair Labor Standards Act . . . , Title 7 of the Civil Rights Act . . . and Executive Order 11246 . . . " Id. at 1111. [Emphasis added.]

This quote indicates that unilateral changes in the collective bargaining contract were permissible only because they were "essential" in order to comply with the FLSA, Title 7 and an Executive Order. The court further noted: "The consent decree recognized and preserved collective bargaining except as required for compliance with federal law, executive order, and regulation." Id. at 1118. This implies a distinction between mandatory and discretionary compliance and that collective bargaining is not necessary only in relations to mandatory or essential compliance. The passage further indicates compliance with federal law does not automatically rule out negotiations.

Respondents herein apparently argue that federal provisions mandate compliance and because pre-compliance terms and conditions are preserved intact after compliance, bargaining is not necessary. However, the EEOC case makes clear that the compliance process must include an examination of the possibility for discretionary action. Once this is determined, the EEOC case makes clear that the duty to bargain is waived in regard to changes essential to or mandated by federal provisions, but that the duty to bargain applies where there are alternative means of compliance. The consent decree, in part, reads:

> D. This Decree shall not be interpreted as requiring the abandonment of any provisions in any Bell Company's collective bargaining agreement(s) except as required to maintain compliance with Federal law, Executive Orders and regulations promulgated pursuant thereto pertaining to discrimination

> in employment. All of the Bell Companies' obligations in this Decree are required for compliance with Federal law; provided, however, that nothing in this Decree is intended to restrict the right of the Bell Companies and the collective bargaining representatives of their employees to negotiate alternatives to the provisions of this Decree which would also be in compliance with Federal law.
>
> To the extent that any Bell Company has in effect a posting and bidding system, this system shall continue to be used. Provided, however, that such system will be modified to the extent necessary to conform with PART A, Section III of this Decree.
>
> Each Bell Company shall notify all appropriate collective bargaining representatives of the terms of this Decree and of its willingness to negotiate in good faith concerning these terms. [Emphasis added.] Id. at 1118.

The Employers submitted into evidence the Fair Labor Standards Act, pre-1985 amendments (Respondents' Exhibit 1), and Interpretative Bulletins issued by the U. S. Department of Labor, Wage and Hour Division, on Overtime Compensation (Respondents' Exhibit 2), Hours Worked (Respondents' Exhibits 3 and 6), and Overtime Compensation (Respondents' Exhibit 7). These bulletins, along with discussions with Tom Hayakawa of the U. S. Department of Labor, Wage and Hour Division of the Employment Standards Administration, were the basis for the Employers' decisions made in the process of FLSA compliance. As allowed under the FLSA, the Employers could choose to be exempt from the FLSA provision providing that overtime must be paid after 40 hours of work, instead subjecting themselves to Section 7(k) of the FLSA. Once the 7(k) exemption was chosen by the Employers, Hayakawa informed the Employers that a package of options had to be made by the

Employers before the April 15, 1986 compliance deadline. The Employers thus decided (1) that for the purpose of FLSA overtime only actual hours of work would be counted as overtime to the exclusion of paid leave time; (2) that a pay period of 27 days would be used for computation of overtime; (3) holiday pay would be offset against overtime pay due under the FLSA; (4) that employees of the rank of captain and above would be excluded from FLSA provisions; and (5) that compensatory time could be taken in lieu of cash payment for overtime accrued provided an agreement thereon was reached between the parties. The Employers claimed that the taking of these options is non-negotiable since they involved direct compliance with federal law and therefore directly impact on management rights.

On the other hand, the Union argued that the only direct compliance mandated by federal law was the choice to take the 7(k) exemption freeing the Employers from paying overtime after 40 hours, and that any electives made after the choice of the exemption were discretionary and therefore subject to negotiations. The employer terms the choice to offset holiday pay from overtime and to pay overtime only for "hours worked" as "rights" given to the employer by Congress. Public Employers' Memorandum at p. 13. These rights, the Employers argued, are not subject to negotiation. Public Employers' Memorandum at p. 13.

Examining the evidence in light of federal cases on the subject, the Board concludes that the duty to bargain applies to all aspects of FLSA implementation in the instant case, except for the election of the 7(k) exemption. This conclusion is

arrived at after formulating the rule, based on federal cases, that the duty to bargain does not apply only in regard to changes in wages, hours, and working conditions which are essential for federal compliance, where no discretion, choice, or latitude for departure is allowed for the employer. Where such discretion, choice, or latitude is reasonably apparent, the duty to bargain over issues of wages, hours, and working conditions affected in the process of implementation of federal mandates applies. The Board holds that a reasonable consideration of the FLSA, interpretative bulletins, the testimony of Hayakawa, and case law created a clear picture that (1) discretionary aspects of FLSA implementation are bargainable, and (2) aspects of FLSA implementation, besides the choosing of the 7(k) exemption, were discretionary.

The Board adopts this view in spite of the concern that inordinate costs could result from implementation of the FLSA based on union interpretations of the FLSA. This concern cannot in these circumstances eclipse the duty to bargain as the duty to negotiate does not encompass an obligation to agree. In consideration on the issue of the scope of bargaining, the Board has stated:

> We must, therefore, determine whether the employer was under a statutory duty to negotiate . . . pursuant to Sec. 89-9(a), HRS, or whether the employer was under a statutory obligation pursuant to Sec. 89-9(d), HRS, not to agree on a proposal which would interfere with its rights under the facts of this case.
>
> In the Board's initial decision regarding the scope of bargaining, it held that

> Sec. 89-9(a), (c) and (d), HRS, must be considered in relationship to each other. It was of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Sec. 89-9(d), HRS. HPERB Case CE-05-4, Decision 22 (October 24, 1972). Thus, a reduction in overall class size ratio was found to be negotiable, but provisions dictating the number of teachers the employer was to hire in order to implement the reduction in class size and the assignment of teachers to specific roles were found to be violative of Sec. 89-9(d)(2), (4) and (5), HRS. Said rulings were affirmed by Judge Norito Kawakami in HSTA v. HPERB, Civil No. 38086 and DOE v. HPERB, Civil No. 38097 (March 30, 1973). HGEA and Fasi, 1 HPERB 559 [Decision 62], 1975 at 567.
>
> The Board has further stated:
>
> > The Board has ruled that a broad construction of the management rights provision of Sec. 89-9(d), HRS, would divest the union of its right to bargain collectively under Sec. 89-9(a), HRS, and abrogate the intent of Chapter 89, HRS, to encourage joint decision making between the employer and employee organization. Conversely, a narrow construction of Sec. 89-9(d), HRS, would divest the employer of its inherent management's rights. A difficult but necessary balance must be achieved. HSTA et al, Decision 22, Case No. CE-05-4 (October 24, 1972). Fasi and HGEA, 1 HPERB 548 [Decision 60], 1975 at 553-554.

Respondents argue as alternatives (1) that management's rights prohibit negotiations on subject issues and (2) that the subjects are negotiable, but not during the pendency of the contract. On (2), see infra, II, Contract allegations. The management rights clause of Subsection 89-9(d), HRS, does not prohibit negotiations herein. All subjects are accepted subjects of contractual agreement between the parties. The prospect of inordinate cost or impracticality does not bring the subjects under the management

rights clause as agreement based on inordinate cost or impracticality is not required as such under the duty to bargain.

The Employers' reliance on the interpretative bulletins does not constitute evidence that their choice of electives was mandatory.

(1) Exclusion of captains and above. This exclusion was based on the Employers' interpretation of Section 13(a)(1) of the FLSA which states:

> 13(a) The provisions of Section 6 [Minimum wage] . . . and 7 [Maximum hours] shall not apply with respect to - (1) any employee employed in a bona fide executive, administrative, or professional capacity . . .

The Employer interpreted this statutory section to decide that the rank of captain and above would not be subject to the FLSA provisions.[5] It appears that the choice to interpret the statute to exclude captains and above was not mandatory but subject to discretion.

(2) Hours worked. In deciding that hours worked were to be only actual hours worked, the Employers relied on the interpretative bulletin on overtime compensation (Respondent's Exhibit 2). Section 778.102 reads:

> The Act does not generally require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more

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[5]The Employers did not submit this interpretative bulletin because the HFFA did not include in their complaint and particularization any charge regarding the failure to negotiate over the executive exclusion but only discussed it at the hearing-in-chief.

> than the maximum number of hours described in the Act are actually worked in the work week, overtime compensation pursuant to Section 7a need not be paid.

Interpretative bulletin, Part 785 (Respondent's Exhibit 3), states:

> The work week ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.

Both of these provisions could not be regarded as being phrased in mandatory language."

(3) Holiday offset. Regulations Part 778 (Respondent's Exhibit 2), Section 778.201 states:

> The extra compensation provided by the premium rates need not be included in the employees regular rate of pay for the purpose of computing overtime compensation . . .

Again this language is not mandatory in nature but allows for discretion.

(4) Work period and compensatory time. The Employers offered to negotiate the work period selection after the 1985 amendment to the FLSA. Although the Employers offered to negotiate on compensatory time when the firefighters attended the meeting on April 1, 1985, when implementation plans were first developed by the Employers before the amendments to the FLSA, the Employers took the position that all matters of implementation of the FLSA were non-negotiable.

Besides being phrased in permissive language, the interpretative bulletins are not of a legally binding nature.

In Skidmore v. Swift & Co., 323 U.S. 134 (1944), the U. S. Supreme Court held that the interpretative bulletin and

amicus curiae brief of the administrator of the Wage and Hour Division of the Fair Labor Standards Act were not binding on the court in its determination of what "hours worked" were for general fire-hall employees. The court stated:

> [The administrator's conclusions] are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. Id. at p. 139.

The Court in arriving at its conclusion stated that there is no legal formula to resolve cases of varied facts as to what constitutes hours worked. Whether any facts fall within or without of the FLSA is a question of fact to be resolved by such methods as scrutiny and construction of the agreement between the particular parties, practical construction of the working agreement, the nature of services, and all surrounding circumstances. Id. at 136-37. Again, this indicates that the collective bargaining contract is not completely overridden in the process of FLSA compliance. In the interpretative bulletin on overtime compensation (Respondents' Exhibit 2), p. 4, Sec. 778.4, it is stated that the interpretations contained therein are official interpretations which may be relied upon as provided in Section 10 of the Portal to Portal Act of 1947. That provision states in relevant part:

> (a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation

> under the Fair Labor Standards Act of 1938, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in Subsection B of this Section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. [Emphasis added.]
>
> (b) The agency referred to in Subsection (a) shall be - (1) in the case of the Fair Labor Standards Act of 1938, as amended - the Administrator of the Wage and Hour Division of the Department of Labor; . . .

The Respondents raise the issue as to whether the Firefighters' walkout constituted a waiver of the Employers' duty to bargain over work period and compensatory time.

After withdrawal of the original implementation plans on December 5, 1985 and the amendment to the FLSA, the Employers' negotiating stance changed. On March 21, 1986, they sent a letter to the Firefighters offering to negotiate the issue of work period and to consult on the remaining issues at a meeting scheduled for April 1, 1986. At the meeting on April 1, the Employers made a verbal offer to negotiate the issue of compensatory time, along with the previous offer to negotiate the work period. The firefighters walked out of the meeting on the basis that they felt the whole range of FLSA implementation was negotiable, not just piecemeal items.

Since the March 21 letter announcing the offer to negotiate on April 1, only contained the offer to negotiate work period, it would appear that the Union was not offered a meaningful opportunity or put on notice in regard to the offer to negotiate compensatory time. This offer was made at the meeting verbally 15 days before the FLSA compliance deadline of April 15, 1986. By walking out, the Union may have waived the Employers' duty to bargain regarding work period, but not compensatory time. However, the Board takes the position that the Union did not waive the duty to bargain over either the work period or compensatory time since it was clear that the Union's position was that it wanted to negotiate over FLSA implementation in its entirety.

Case law indicates that waivers must be strictly construed; to find a waiver, a union must clearly and unmistakably waive rights to bargain. Harnischfeger Corp. [NLRB General Counsel No. 30-CA-6224], 108 LRRM 1403 (1981). Before a waiver can be found, the union must be offered a meaningful opportunity to bargain. Ciba-Geigy Pharmaceuticals Div. v. NLRB, 114 LRRM 3650 (1983). Thus the union must be given a sufficient opportunity to bargain. M. A. Harrison Manufacturing Co., 106 LRRM 102 (1980). The union must be put on notice of employer's plans before a waiver can be found. United States Lingerie Corp., 170 NLRB 750, 67 LRRM 1482 (1968).

The Board concludes that the Union's position in wanting to negotiate all permissive aspects of FLSA implementation was reasonable and correct under the law. See Mar-len Cabinets, Inc., 108 LRRM 2828 (1981). (The employer refused to bargain in good faith where the entire spectrum of proposals put

forward by the employer was consistently and predictably unpalatable to the union.) The Union's action in walking out of the meeting is properly viewed as a tactic to preserve the full range of bargaining rights and to avoid the appearance of acquiescing to Respondents' position on negotiable items.

This conclusion is not affected by the Complainant's failure to file a grievance under the contract. Deferral to the grievance procedure is not appropriate where a case involves rights and obligations under Chapter 89. HGEA and Fasi, supra, at 1 HPERB 564.

Neither is the fact that the Union sought negotiations during the pendency of a contract bar to finding a violation of the duty to bargain. Respondents argue that under Chapter 89 and the contract, neither party has a right to reopen the existing agreement on a general basis upon the happening of an external event such as amendments to a federal law applicable to states. Public Employers' Memorandum, p. 16. In support of this view, Respondents cite a statement in NLRB v. Jacobs Manufacturing Co., supra, that, under the National Labor Relations Act,[6] neither party is required to discuss a proposed modification that would take effect prior to the time for reopening provided for in the

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[6]The Act, as quoted in the text, provides that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract . . . " Id. at p. 683.

relevant provisions of the contract. Public Employers' Memorandum, p. 20. This statement, while recognized in discussion in Jacobs, is of limited weight both as to the ultimate conclusions in Jacobs and as applied to this case. In Jacobs, the Second Circuit ruled that the contract reopening clause[7] was broad enough to mandate the duty to bargain over a pension plan, which was not discussed in the previous bargaining sessions. Id. at 682-684. In so holding, the court rejected the employer's position that, except as to subjects expressly reserved for further negotiations in a reopening clause, any fixed contract creates a static period for the term of the contract, even as to aspects of that relationship which were not covered by that contract or even discussed in the negotiations leading up to it. Id. at 685. The court held that the phrase "terms and conditions contained in a contract for a fixed period" (n. 5, supra) could not be given such broad effect as to negate the duty to bargain over terms and conditions "which were neither discussed nor embodied in any of the terms and conditions of the contract." Id. at 684. The Jacobs holding as applied to the instant matter thus prompts the conclusion that, although FLSA implementation involves terms and conditions not included as such in the contract, it falls under the duty to bargain under federal principles. (For application of reopener provisions in Firefighters' contract, see Part II, infra.)

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[7]The clause provided: "After the expiration of one year from the date hereof either party may request a meeting after fifteen days written notice, the purpose of which shall be to discuss wage rates of employees covered by this Agreement."

II. Allegations of Contract Violations

Complainant's allegation of contract violations are both general and particular. In the former category are the charges in the complaint that "Petitioner sought to have negotiations with respect to the application of FLSA and the resulting effect upon the existing collective bargaining agreement between the parties. . . . Petitioner has been informed that in connection with the application of FLSA, Respondents have unilaterally prepared plans, schedules and procedures which would modify and/or terminate existing rights, benefits and/or perquisites, contrary to the provisions of the collective bargaining agreement between the parties." Also of a general nature are the charges in the Particularization that Section 8, Prior Rights, Benefits, and Perquisites, and Section 42, Duration, have been violated by the failure to negotiate before FLSA implementation. In the latter category are Complainant's allegations in the Particularization as follows:

- Use of actual hours of work, exclusive of leave time, in computing overtime (Section 19 of the contract);

- Abolition of policy permitting banking of compensatory time; requirement that compensatory time be used within the same pay period;

- Offsetting of holiday premium pay from overtime payment (Sections 19, 24 of the contract); and

- Original implementation plan made determination of overtime at end of new schedule. Contract calls for such determination to be made at the beginning of the new schedule.

The Board concludes that the controlling contract provisions in the instant controversy are the Prior Rights and Duration clauses. In essence, these provisions require negotiations before modifications are made in areas made negotiable under Chapter 89. While FLSA implementation was not directed at modification of specific contractual provisions as such, it did, by Respondents' own admission, concern areas made negotiable under Chapter 89.

Modification of rights, benefits and perquisites have occurred, in the Board's view as expressed in Part I, supra, in a situation where the Employers had discretion to exercise a range of choice in the manner of FLSA implementation and had the capacity to choose to accept or reject certain permissive choices.

The existence of discretion in the manner of federal compliance acted to ensure that state law, and contracts formulated thereunder, were not completely overridden or preempted. In the process of FLSA compliance, choices still had to be made at the level of management subject to collective bargaining, and nothing in federal law mandated that these choices be made without negotiations. To that extent, the necessity to negotiate modifications to rights, benefits and perquisites was applicable, and thus violated by unilateral modification in terms and conditions prompted by FLSA implementation.

The fact that employees may be getting more pay after the unilateral implementation than before does not in itself negate the possibility of a contract violation. The contract provides, on its face in Sections 8 and 42 that modifications and amendments must be negotiated, not just "reductions" or "abridgments" to the contract.

It is enough that policies in the areas of compensatory time practice, use of actual hours in computing overtime, deduction of premium pay from FLSA overtime, and work schedule changes were adopted without negotiations to find contract violations under Sections 8 and 42.

In holding that the contract requires negotiations over FLSA implementation, a question is raised as to whether such a course raises conflicts with Subsection 89-10(c),[8] HRS, which prohibits reopening of negotiations in regard to cost items. In

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[8] §89-10(c) Written agreements; appropriations for implementation; enforcement.

* * *

The parties may include provisions for the reopening date during the term of a collective bargaining agreement, provided that such provisions shall not allow for the reopening of cost items as defined in section 89-2.

Section 89-2(6) provides:

§89-2 Definitions. As used in this chapter:
***

(6) "Cost items" includes wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body.

concluding that negotiations over FLSA implementation is necessary, the Board finds that no conflict with this statutory provision is created. The focus of the duty to bargain in this instance falls on issues relating to terms and conditions of employment which are antecedent to formulations relating to cost items as such. The duty to reopen bargaining in this case is similar to that found in NLRB v. Jacobs Manufacturing Co., Part I, supra, where a subject not specifically addressed in the pending contract [employees' pension fund], yet clearly related to terms and conditions of employment, was deemed to fall under the contract reopener provision.

In accordance with its conclusion that negotiations regarding FLSA implementation is required by Sections 8 and 42 of the contract, the Board denies Respondents' motion to dismiss contract claims. (Tr. Vol. I, p. 139)

After the Particularization was filed on November 7, 1985, implementation plans were rescinded on December 5, 1985 pursuant to amendments made to the FLSA, effective November 13, 1985. Thereafter, at hearings before the Board on July 29 and October 27, 1986, the firefighters also took up the issue of the exclusion of the rank of captains and above from FLSA coverage. The firefighters never amended their complaint to include the charge that this issue was to be included in their case. The Employers did not submit evidence on how they arrived at their decision to exclude the rank of captain and above from FLSA coverage on the basis that the issue was not before the Board.

Apparently, this change in issues occurred because of the withdrawal of original implementation plans by the Employers upon amendment of the FLSA. With the new implementation plans, issues for negotiations changed.

The Board finally concludes that the issue of the application of the administrative exemption as to FLSA coverage is also a bargainable subject under the order contained herein, despite Complainant's failure to specifically include the charges in its formal allegations. While the Board recognizes the shortcoming of Complainant's case in this regard, the equities and policy favoring collective bargaining as a means of resolving labor disputes dictate that the issue be placed on the bargaining table. Though all aspects of a Complainant's case should be formally presented in the complaint and particularization, the Board in this instance makes allowance for the failure to follow such a formal requirement. This action is based on the recognition that formulating specific areas in which to demand negotiations was a hit-and-miss proposition in light of the lack of federal regulations and guidelines concerning FLSA impact, amendments to the FLSA, and Respondents' stance as to the Union's right to participate in FLSA implementation. Moreover, the focus of the analysis herein is on the duty-to-bargain implementation of federal law, which right the Union has clearly asserted, rather than the duty to bargain specific aspects of employment relations. The policy favoring collective bargaining calls for discussion of the issue through negotiations.

As in regard to all issues of FLSA implementation subject to the duty to bargain, negotiations over this issue does not require agreement. Bargaining is required where union proposals are within an agency's administrative discretion and are not inconsistent with law or regulation. While bargaining must take place in good faith, there is no obligation to agree with the union's proposals. National Treasury Employees Union and Dept. of Treasury, U. S. Customs Service, 21 FLRA No. 2, pp. 6, 13-14 (1986).

The instant case, of course, only involves the Employers' refusal to negotiate during the period April 9, 1985, when the Firefighters initially requested negotiations, through April 15, 1986 when the FLSA, as amended, went into effect up through expiration of the current contract on June 30, 1987.

The Board concludes that, as set forth herein, the Respondents have violated Subsections 89-13(a)(5) and (8), HRS. Respondents' actions in refusing to negotiate the full range, apart from choice of work period, of FLSA implementation amounted to an unlawful refusal to bargain and a violation of the contract. These violations, moreover, were wilful, within the terms of Subsection 89-13(a), HRS, as they resulted from a deliberate policy and as a natural consequence of Respondents' actions in unilateral implementation of the FLSA. In re UPW and Tony T. Kunimura, 3 HPERB 507, 514 (1984).

ORDER

Respondents are ordered to bargain in good faith with Complainant in regard to subjects deemed negotiable herein, for the period covering April 15, 1986 to June 30, 1987.

DATED: Honolulu, Hawaii, April 9, 1987.

HAWAII LABOR RELATIONS BOARD

JAMES K. CLARK, Board Member

JAMES R CARRAS, Board Member

DISSENTING OPINION

I dissent from the majority's position that the subject of the exclusion of employees of the rank of captain and above from FLSA coverage is negotiable under the Board's order. Complainant, represented by presumably competent counsel, should be held to the standard requiring formal enumeration of particular charges in the complaint or particularization, or through amendment thereof. Having failed that, the Board should not now issue an order pertaining to that subject.

MACK H. HAMADA, Chairperson

HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO vs.
GEORGE R. ARIYOSHI, et al.
CASE NO. CE-11-100
DECISION NO. 242
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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