STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and JOHN D. WAIHEE, III, Governor of the State of Hawaii and the STATE OF HAWAII, Respondents.	CASE NO. CE-07-176 DECISION NO. 338 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On September 18, 1992, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent JOHN D. WAIHEE, III, Governor of Hawaii and the STATE OF HAWAII, more specifically by and through James Yasuda, Chief Negotiator of the Office of Collective Bargaining (OCB), hereinafter collectively referred to as "STATE", violated Sections 89-13(a)(5) and (7), Hawaii Revised Statutes (HRS), by refusing to ratify and implement a tentative agreement concerning salary adjustments for bargaining unit 7 employees at the University of Hawaii (UH).

A hearing was held on November 4, 1992, at which time the parties were afforded full opportunity to call and cross-examine

witnesses, submit exhibits and present oral argument. Post-hearing briefs were submitted by the parties on December 7, 1992.

Upon a thorough review of all exhibits, testimony presented at the hearing, and arguments made orally and in writing, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The UHPA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 7, as defined in Section 89-6(a)(7), HRS.

The Board of Regents (BOR), University of Hawaii, is the public employer, as defined in Section 89-2, HRS, of employees in bargaining unit 7.

James Yasuda (Yasuda) is the Chief Negotiator of the Office of Collective Bargaining, and the governor's designated representative, as defined in Section 89A-1, HRS.

Section 89-6(b), HRS, provides that the public employer (Employer Group) for purposes of negotiations involving bargaining unit 7, includes the governor or his designated representatives of not less than three together with not more than two members of the BOR.

The Employer Group and the UHPA are parties to a collective bargaining agreement (CBA) effective July 1, 1989 to June 30, 1993. Joint Exhibit (Ex.) 16.

On or about July 19, 1989, the UHPA filed a prohibited practice complaint with the Board (Case No. CE-07-128) alleging

that the BOR unilaterally adjusted or attempted to adjust the salaries of bargaining unit 7 employees without first negotiating with UHPA.

Case No. CE-07-128 was subsequently withdrawn after the parties agreed to negotiate temporary procedures governing salary adjustments. As a result of these negotiations, a document was drafted entitled, "A Proposal For Procedures Governing Salary Adjustments At the University of Hawaii", dated April 12, 1990. On May 14, 1990, a memorandum of understanding adopting these procedures was executed by the UHPA and the full Employer Group. Joint Exs. 1 and 2.

The temporary procedures lapsed on September 30, 1990, and representatives of the UHPA, BOR and UH became involved in negotiations to develop permanent procedures to govern salary adjustments. Transcript (Tr.) p. 31.

During the 1991 legislative session, State Senator Michael McCartney introduced Senate Bill (S.B.) No. 1865, which provided for an appropriation of $4,900,000 to the UH for salary adjustments for UH employees, where warranted, based on principles of retention, market, equity, or merit. Employer's Exhibit (Emp. Ex.) 1.

By letter dated February 14, 1991, Senator McCartney requested input from Yasuda, as Chief Negotiator, as to OCB's "understanding, insights, and opinions on the implications and potential ramifications on not only negotiations occurring at the University, but also collective bargaining in general" in the event S.B. No. 1865 was to be enacted. Emp. Ex. 1.

By letter dated February 21, 1991, from Yasuda to McCartney, Yasuda responded as follows:

> It is my understanding that S.B. No. 1865 authorizes the University of Hawaii to adjust the salaries of faculty and staff on the basis of retention, market, equity or merit, in a manner consistent with the applicable collective bargaining contracts and makes appropriations for such adjustments.
>
> This bill appears to circumvent the intent of Section 89-10, Hawaii Revised Statutes, which states that during the life of the agreement the parties shall not reopen any provision in the contract which is defined as a cost item. Therefore, no cost items can be negotiated during the term of the faculty (Bargaining Unit 7) contract which runs through June 30, 1993. S. B. No. 1865 does provide for an unspecified appropriation to fund salary adjustments for certain individuals in the University of Hawaii system. As Section 89-2, Hawaii Revised Statutes, defines cost item as the implementation of a term and condition of employment which requires an appropriation by a legislative body, the bill appears to be in conflict with existing statutes.
>
> Potentially, the passage of this bill would have a far reaching impact in terms of public sector collective bargaining. What we would envision is that other exclusive representatives would seek similar measures allowing for negotiations of and appropriations for special salary adjustments. Accordingly, the unions and the employers would first negotiate the master agreements as is the current practice. Soon thereafter the exclusive representatives would be pushing for negotiations via the memorandum of agreement route for additional salary adjustments for many of their members. The unions, in essence, would be getting "two bites of the apple." Collective bargaining for government employees would be a never ending process.
>
> If our interpretation is substantiated, I would certainly be opposed to the proposed measure. Thank you for allowing me this opportunity to comment on this bill.

Emp. Ex. 2.

The OCB was not involved in negotiations convened to establish a permanent procedure, except for a meeting held with representatives from UHPA, BOR and UH in July of 1991. At the meeting, Yasuda raised cost item concerns regarding the special salary adjustments and discussed other alternatives similar to that of repricing. Tr. pp. 20-23. In subsequent discussions with the UH, Yasuda reiterated his cost item concerns. Tr. p. 97.

Negotiations between the UHPA, BOR and UH culminated in the drafting of a document entitled "Tentative Agreement, Memorandum of Understanding, Procedures and Criteria Governing Special Salary Adjustment at the University of Hawaii," (Tentative Agreement), dated January 16, 1992. The document was initialed by representatives of the UHPA, BOR and UH. Joint Ex. 3.

The tentative agreement was then submitted to the respective parties for ratification, as is normal under the circumstances. Tr. pp. 55, 65, 71. Ratification on the part of UHPA was accomplished by approval from the UHPA Board of Directors. Ratification on the part of the public employer is subject to approval from the Employer Group which includes the BOR and OCB. Tr. p. 71. Ratification by the BOR was accomplished when Regents Richards and Ushijima signed the tentative agreement. Tr. p. 45. The STATE did not ratify the tentative agreement.

Thereafter, Musto and Yasuda corresponded explaining their respective positions with regard to the viability of the tentative agreement. Joint Exs. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

DISCUSSION

Conceptually, there is no question that salary adjustments for UH faculty, based on equity, retention, merit and market factors are necessary in order to maintain excellence in the curriculum of the university.

The threshold issue is whether these salary adjustments, as embodied in the tentative agreement, are cost items and as such, constitute a provision barred from being reopened during the current CBA. Section 89-10(c), HRS, provides, in part:

> . . .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. [Emphasis added.]

Section 89-2, HRS, provides, in part:

> "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. [Emphasis added.]

While there was a significant amount of testimony about salary adjustments being funded entirely by so-called "soft money", monies from outside the State such as federal and private grants, or a mixture of "soft money" and "state money", which is derived from the state general fund, the critical issue is whether overall implementation of the tentative agreement would require new or additional appropriations by the Legislature.

Clearly, salary adjustments constitute a matter affecting wages. Although there may be individuals who are able to receive

adjustments funded entirely by "soft money", the overall implementation of the tentative agreement would nevertheless require some appropriation from the Legislature. In support of this characterization, the tentative agreement itself refers to "appropriations by the State of Hawaii" and "special appropriations to effectuate these salary adjustments." Joint Ex. 3 at p. 2. Moreover, S.B. No. 1865, introduced during the 1991 legislative session, provided for a $4.9 million appropriation to cover salary adjustments during the term of the current 1989-1993 CBA.

Salary adjustments, pursuant to the tentative agreement, therefore constitute "cost items", as defined in Section 89-2, HRS, and the implementation of the same would constitute a reopening of cost items during the term of the current CBA, which is expressly prohibited by Section 89-10(c), HRS.

Consequently, the STATE's refusal to ratify the tentative agreement was clearly appropriate and indeed mandatory under the circumstances.

We are not, therefore, compelled to address the issue of whether the STATE is bound by an agreement reached between the UHPA and a minority (two votes held by the BOR) in the Employer Group. However, assuming arguendo that the tentative agreement was a valid subject for reopening, the STATE would not have breached its duty to bargain in good faith.

Complainant's reliance on N.L.R.B. v. Alterman Transport Lines, Inc., 587 F.2d 212, 100 L.R.R.M. 2269 (8th Cir. 1979) is misplaced.

In Alterman, Mr. Alterman, owner of the company, authorized the management bargaining team to negotiate on his behalf. The team became, in effect, an alter ego of Alterman himself. His subsequent entry into the negotiations process and ensuing conduct established a breach of the duty to negotiate in good faith.

Section 89-6(b), HRS is clear in that the Employer Group, for purposes of negotiations and, by implication, ratification of any agreement, cumulatively consists of five (5) votes, three (3) of which are held by the governor or his representatives, for all practical purposes the OCB chief negotiator, and two (2) votes held by the BOR.

There is nothing in the record to indicate that the STATE authorized the BOR to negotiate on its behalf or that the STATE manifested approval of the agreement or somehow waived its right to ratification. The minority was not, as in Alterman, an alter ego of the Employer Group.

CONCLUSIONS OF LAW

Pursuant to Sections 89-5 and 89-13, HRS, the Board has jurisdiction over these complaints.

A cost item provision may not be reopened during the term of a collective bargaining agreement, under Section 89-10(c), HRS.

The tentative agreement, negotiated by and between the UHPA, BOR and UH constitutes a cost item provision, and is therefore prohibited from being reopened during the term of the current CBA.

A public employer or its designated representative's refusal to bargain collectively in good faith with the exclusive representative constitutes a prohibited practice under Sections 89-13(a)(5), HRS.

A public employer's refusal to ratify and implement a cost item provision reopened during the term of the current CBA does not constitute a violation of Sections 89-13(a)(5) and (7), HRS.

ORDER

The instant prohibited practice complaint is dismissed.

DATED: Honolulu, Hawaii, May 6, 1993.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

RUSSELL T. HIGA, Board Member

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Sherri-Ann Loo, Deputy Attorney General
Joyce Najita, IRC
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