STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and STEPHEN K. YAMASHIRO, et al., Respondents, and WASTE MANAGEMENT OF HAWAII, INC., Intervenor.	CASE NO. CE-01-186 DECISION NO. 347 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 4, 1993, Complainant UNITED PUBLIC WORKERS, AFSCME LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). The UPW filed the complaint against Respondents STEVEN Y. YAMASHIRO; DONNA FAE K. KIYOSAKI; RICHARD WURDEMAN, ESQ.; SPENCER KALANI SCHUTTE; TAKASHI DOMINGO; JIMMY ARAKAKI; KEOLA CHILDS; and JIM RATH (collectively Employer). UPW alleged that Respondents unilaterally implemented a decision to subcontract the operation of a sanitary landfill in West Hawaii to WASTE MANAGEMENT OF HAWAII, INC. (WMI). UPW alleged that the Respondents thereby violated Sections 89-13(a)(1), (3), (4), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On June 28, 1993, WMI filed a Petition for Intervention with the Board. On July 14, 1993, the Board granted the petition in Order No. 951.

Thereafter on July 7, 1993, Respondents filed a motion to dismiss certain respondents from this proceeding. After hearing arguments on the motion, the Board dismissed RICHARD WURDEMAN, Esq.; SPENCER KALANI SCHUTTE; JIMMY ARAKAKI; TAKASHI DOMINGO; KEOLA CHILDS; and JIM RATH as Respondents in Order No. 954 on the basis that they were not individuals who represented one of the employers or acted in their interest in dealing with public employees.

On September 7, 1993, the UPW filed a First Amended Prohibited Practice Complaint with the Board. In its Amended Complaint, the UPW included an allegation that Respondents breached a 1992 oral agreement between the County, by then Mayor Lorraine Inouye, and the UPW to have the County operate the West Hawaii landfill, thereby violating Sections 89-13(a)(1), (7), and (8), HRS. The UPW also realleged its previous contentions: that the County's decision to contract out the bargaining unit work constituted a modification to various contractual provisions of the Unit 1 agreement in violation of Section 1.05 of the contract and Sections 89-13(a)(1), (7), and (8), HRS; that Respondent YAMASHIRO discriminated against the UPW in violation of Sections 89-13(a)(1), (3), (7), and (8), HRS; and the Employer failed to negotiate with the UPW prior to its unilateral decision to contract the operations of the West Hawaii landfill to WMI in violation of Sections 89-13(a)(1), (3), (5), (6), and (7), HRS.

On August 9, 1993, the UPW filed a Motion for Interlocutory Order with the Board. Extensive hearings were held in Hilo and Honolulu, Hawaii commencing on August 10, 1993 and ending with closing arguments on September 28, 1993. The evidence and arguments presented for the hearing on the case-in-chief were considered for the Motion for Interlocutory Order. All parties were afforded full opportunity to present witnesses, exhibits and arguments before the Board.

On October 1, 1993, the Board denied the UPW's Motion for Interlocutory Order on the basis that the County of Hawaii would suffer irreparable harm if the WMI contract was nullified and the West Hawaii landfill was not operational by October 9, 1993. By contrast, the Board found that the employees would be minimally affected by the commission of any alleged prohibited practices. The Board found that the balance of irreparable harm and the public interest favored the denial of UPW's motion.

On October 15, 1993, UPW filed Proposed Findings of Fact and Conclusions of Law. Respondents and Intervenor, by and through their attorneys, filed closing and post hearing briefs, respectively. Thereafter, on October 18, 1993, Respondents filed a motion to strike UPW's Proposed Findings of Fact and Conclusions of Law. Respondents argue that the UPW never requested permission to file proposed findings of fact and conclusions of law prior to the close of the hearing in accordance with Administrative Rules Section 12-42-8(g)(17)(B) and thus the submission should be stricken.

That rule provides:

> Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings of fact and conclusions of law, or both, within such time as may be fixed by the board, but not in excess of 15 days from the close of the hearing.

Thus, Respondents contend that the UPW's document should be stricken altogether or treated as a closing brief rather than proposed findings of fact and conclusions of law. UPW filed a memorandum in opposition to Respondents' motion and contended that it was entitled under the foregoing rule to file proposed findings of fact and conclusions of law or a brief. In addition, UPW argued that the Chairperson's reference to written submissions due on October 15, 1993 included the filing of proposed findings and conclusions. Intervenor filed a joinder in Respondents' motion to strike UPW's findings of fact and conclusions of law.

After reviewing the arguments of counsel and the relevant portions of the transcript, the Board grants Respondents' motion to strike because of Complainant's noncompliance with Administrative Rules Section 12-42-8(g)(17). However, as it would be unduly harsh to strike Complainant's submission in toto, the Board will treat UPW's submission as a closing brief instead of proposed findings of fact and conclusions of law.

Based upon a thorough review of all exhibits, testimony presented at the hearing and arguments, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The UPW is an employee organization and the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 1.

Respondent STEPHEN K. YAMASHIRO is the mayor of the County of Hawaii and a public employer as defined in Section 89-2, HRS.

Respondent DONNA FAE K. KIYOSAKI is the chief engineer of the Department of Public Works, County of Hawaii.

Intervenor WMI contracted with the County of Hawaii to construct and operate a sanitary landfill in West Hawaii at Puuanahulu.

The UPW and the County of Hawaii are parties to a multi-employer collective bargaining agreement covering bargaining unit 1 employees for the period July 1, 1989 to June 30, 1993. The contract has been extended twice, most recently to January 15, 1994.

At the commencement of the proceedings, the County of Hawaii operated two landfill sites for solid waste disposal, one in Hilo since 1986 and the other at Kealakehe in Kona since 1967. The County does not provide curbside garbage pickup services and residents are permitted to dispose of their trash at the landfills or at the transfer stations located throughout the County where it is eventually hauled to the landfills.

In October 1991, the Environmental Protection Agency (EPA) promulgated new federal guidelines for solid waste management. The regulations, referred to as Subtitle D, set forth

minimum federal criteria for municipal solid waste landfills, including location restrictions, facility design and operating criteria, groundwater monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure requirements. The effective date of most of the regulations is October 9, 1993.

The new federal requirements significantly increase the compliance requirements on municipalities nationwide, including the facility design and construction criteria for new landfills built after October 9, 1993, which require the installation of an impermeable, composite liner system for landfill cells. The regulations also provide for new operational criteria which includes the installation and/or implementation of mechanisms and systems to monitor and control the exclusion of hazardous wastes, meet specified air quality criteria, control explosive gases, control access to the landfill sites, control surface water run-on and run-off, provide for daily cover, control on-site disease and vectors, and meet requirements relating to monitoring and controlling surface water pollutants. Neither the Hilo nor the Kealakehe landfills meet the new EPA design or operational specifications.

In addition to the new stringent federal requirements, pursuant to Chapter 342H, HRS, the State of Hawaii will promulgate rules and regulations to implement the federal regulations.

The West Hawaii site in Puuanahulu was selected in 1990 for development of a new landfill since it was clear that the Kealakehe landfill would soon be beyond capacity and was plagued by subterranean fires. In late 1991, Galen Kuba, then chief of the

Solid Waste Division of the Department of Public Works, prepared a report regarding the requirements of Subtitle D. Kuba performed a cost analysis and recommended that the County pursue the private operation of the West Hawaii landfill. Kuba believed that the County lacked the expertise to operate the landfill under the new regulations, lacked the ability to respond quickly to environmental emergencies and that private operation of the landfill was preferable due to concerns about financial liabilities. Then Chief Engineer Bruce McClure supported Kuba's recommendation.

In the spring of 1992, Mayor Lorraine Inouye considered the impending federal regulations and visited the Waimanalo Gulch landfill on Oahu which is run by WMI. Later, Inouye met with Gary Rodrigues, Executive Director of the UPW, to discuss the construction and operation of the new landfill. Rodrigues agreed to the private construction of the landfill but not the private operation of the landfill.

Chief Engineer Bruce McClure, by letter dated June 1, 1992, informed Rodrigues of the County's inclination towards the private construction and operation of the West Hawaii landfill. By letter dated June 8, 1992, Rodrigues agreed to the ongoing private construction of the landfill but objected to the private operation of the landfill. In the summer of 1992, Inouye met once with Rodrigues and others and then met again with Rodrigues and several members of the County Council to discuss the operation of the landfill. After the meeting, Inouye decided that the County would operate the landfill. Inouye indicated that she was not conducting

contract negotiations with the UPW over the landfill matter and she did not inform the other public employers of her decision.

By letter, dated August 5, 1992, McClure wrote to consultant R. M. Towill Corporation to stop work on developing a request for proposals (RFP) for the private construction and operation of the landfill and to instead develop an RFP for a turnkey facility, meaning one which is privately constructed and county-operated.

In the primary elections held in the fall, the UPW supported the re-election of Inouye in the Democratic primary for Mayor. The Hawaii Government Employees Association (HGEA) supported YAMASHIRO. YAMASHIRO defeated Inouye in the primary election and later won the general election. Inouye did nothing more with regard to the landfill and left the matter to the new administration.

YAMASHIRO took office in December 1992. There were no documents in the County files evidencing a commitment to UPW to have the new landfill managed and operated by the County. YAMASHIRO realized that the existing landfill at Kealakehe had to be closed by October 1993 and the bid proposals for the construction of the landfill were in the process of being proffered to bid.

KIYOSAKI was appointed Chief Engineer for the County in January 1993. KIYOSAKI reviewed the letter to Towill and a draft of a consultant contract with Browning-Ferris Industries of Hawaii (BFI) to train employees at the West Hawaii landfill. Initially, the County decided to pursue a parallel path of soliciting bids on both the construction and operation of the new landfill, and a

construction-only contract. The County had R. M. Towill prepare a request for proposals on an integrated construction and operation bid which would be a turnkey operation.

On February 5, 1993, KIYOSAKI contacted Jack Konno, UPW Hawaii Division Director, and told him that the RFPs would be published for the private construction and operation of the new landfill. KIYOSAKI told Konno that there had been no final decision but the County was keeping its options open. Konno indicated that he was already aware of the RFP because of an encounter with YAMASHIRO. The County published an RFP for the construction and operation of the West Hawaii landfill in February 1993. A meeting was scheduled for February 11, 1993 at 10:00 a.m., with Rodrigues, Konno, YAMASHIRO and KIYOSAKI. Konno later canceled the meeting.

The County received the construction-only bid and also considered the bids that had been submitted by the two private contractors, WMI and BFI. KIYOSAKI, Kuba and others prepared a cost analysis to determine whether privatization was prudent and cost effective. The County considered different scenarios to assist in deciding whether a privately constructed and operated landfill was fiscally responsible as compared to a County-run operation.

The County then asked both WMI and BFI to refine their initial bids. The request to supplement the RFPs was to make clear that the contractor would assume total responsibility for the landfill; further, the County wanted bids that were not subject to

adjustment based upon a reduction in the amount of solid waste received at the landfill.

BFI's supplemental bid did not provide for closure and post-closure monitoring because the company did not want to commit to a figure without an approved closure plan. In addition, BFI's bid did not provide for groundwater monitoring and methane control monitoring. WMI's supplemental bid indicated that WMI would be responsible for liabilities that arose due to WMI's actions. Such responsibility would include both the period during which the landfill was being operated by WMI and the post-closure operations.

After considering the liability, cost of future construction, closure and post-closure monitoring costs, unknown Subtitle D required financial responsibility requirements, and the advantage of having one contractor primarily responsible for the operation, KIYOSAKI recommended that the County enter into negotiations with WMI for a complete construction and operation contract. KIYOSAKI's first concern was the County's liability in view of the new federal regulations.

KIYOSAKI informed WMI on March 23, 1993 that it had been selected to construct and operate the West Hawaii landfill. Prior to implementing the decision to privatize the operation of the landfill, the County officials did not negotiate the subject with the Union. YAMASHIRO indicated that he did not consider the topic to be a mandatory subject of bargaining.

After conferring with Michael Ben, Director of Personnel Services, KIYOSAKI sent Rodrigues a letter inviting UPW to consult on the matter on April 1, 1993. KIYOSAKI explained that the County

was entering into negotiations with WMI for the private construction and operation of the landfill and that the County planned to retain all existing solid waste employees at their present baseyards. KIYOSAKI urged Rodrigues to contact her by April 8, 1993 because of the federal deadlines involved. Rodrigues responded by letter dated April 2, 1993, stating that the UPW was aware that the County had notified WMI of its intent to award the contract to the company. Further, UPW would consider itself at impasse in its negotiations with the State and counties if Hawaii County continued in its attempt to contract out the operations of the landfill.

On April 5, 1993, Konno sent a request for information to KIYOSAKI regarding the landfill. The information was transmitted to Konno on or about April 13, 1993. KIYOSAKI responded to Rodrigues' April 2, 1993 letter on April 15, 1993. KIYOSAKI indicated that the County offered to consult with the Union prior to the publication of the RFPs in February 1993. The landfill construction, operation and closure agreement between the County and WMI was entered into on April 21, 1993.

According to the agreement, WMI assumed complete and total responsibility for the construction, operation and closure of the new landfill. The County will compensate WMI based on the amount of waste received at the landfill in various increments, and the County will not pay WMI any other fees. The County is responsible for operation of the scale house, but WMI is responsible for the maintenance and repair of all facilities and structures at the site, including the scale house building. WMI agreed to

provide liability protection for the County to the extent that WMI's parent company will defend and indemnify the County from any claim arising from the construction, operation, management, and closure of the landfill. In addition, WMI agreed to carry environmental liability insurance, general liability insurance and a payment and performance bond and will comply with financial security requirements which will come into effect by March 1994. Also, WMI agreed to provide increased insurance coverage and other evidence of financial responsibility in the event the County decides that more is required. WMI's parent company executed a guaranty in conjunction with the contract guaranteeing all obligations and agreeing to pay all costs and expenses of the County in enforcing the guaranty. In addition, WMI's fixed per ton contract price includes WMI's absorption of closure and post-closure costs, monitoring expenses, and fixes the cost of construction of the landfill cells over the life of the agreement. The contract also permits the County to compare the operations of the Hilo and the West Hawaii landfills with the option of terminating the contract within five years. The County Council approved the contract.

On April 22, 1993, Rodrigues sent a letter to YAMASHIRO demanding that the County provide certain information and asking it to cease and desist from engaging in its unilateral course of conduct and to bargain in good faith as required by law. On May 4, 1993, the County responded to Rodrigues' April 22, 1993 request for information.

With regard to the bargaining history of contract language prohibiting the contracting out of bargaining unit work, the Union proposed contract language in 1976, 1979, and 1982 to prohibit contracting out. However, when the issue reached fact-finding in 1976 and 1979, the bargaining proposals were rejected by the fact-finding boards as being violative of management's rights. During the 1982 negotiations, the Union withdrew the proposal in return for Employer concessions on other proposals.

With respect to the operations at Kealakehe, the County intends to close its operation as a landfill by October 9, 1993. The County will continue to operate the transfer station at Kealakehe and will not displace any landfill workers. The Equipment Operator (EO) III's at Kealakehe will be affected by the new WMI operation at Puuanahulu because they will no longer operate bulldozers on the face of the landfill to move and compact trash, but will haul the trash from the transfer stations to the new landfill. No County employees will be laid off as a result of the closing of the Kealakehe landfill.

DISCUSSION

The Amended Complaint sets forth four counts:

I) That Respondents violated an agreement that had been negotiated between former Mayor Lorraine Inouye and the UPW that the County would not privatize the operations of the new landfill;

II) Respondents' actions have altered the terms of the existing agreement without the UPW's mutual consent in violation of Section 1.05 of the Unit 1 agreement and Section 89-13(a)(8), HRS;

III) YAMASHIRO's decision to have a private contractor operated the new landfill was in retaliation for the UPW's support for former Mayor Inouye in the 1992 mayoral primary; and

IV) Respondents refused to bargain with the UPW over the decision to have a private contractor operate the landfill.

While Complainant argues in its Amended Complaint that Respondents violated Sections 89-13(a)(1), (3), (4), (5), (7) and (8), HRS, UPW's brief only contains allegations of Sections 89-13(a)(1), (5), (7), and (8), HRS, violations. Thus, the Board will consider the UPW's brief to be controlling and base its decision upon the contentions contained therein.

Sections 89-13(a)(1), (5), (7), and (8), HRS, provide as follows:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
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> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
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> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; or
>
> (8) Violate the terms of a collective bargaining agreement.

COUNT I

At the outset, Respondents contend that the Board lacks jurisdiction over this claim because it is alleged in the amended

complaint which does not relate back to the filing of the original complaint. Thus, Respondents argue the matter is barred by the statute of limitations. Section 377-9, HRS, made applicable to the Board by Section 89-14, HRS, requires that prohibited practice complaints be filed within ninety days of their occurrence. According to Rodrigues' testimony, he was aware in late March of 1993 that the County of Hawaii violated Chapter 89, HRS, and the applicable collective bargaining agreement by its decision to contract out the operations of the new West Hawaii landfill. The subject complaint was filed on May 4, 1993. Thereafter, UPW orally moved to amend its complaint during the hearing in August 1993. The Board granted the amendment of the complaint during the hearings.

Administrative Rules Section 12-42-8(g)(10) permits the relation back of amended documents to the original filings. While Respondents correctly point out that Administrative Rules Section 12-42-43 regarding the amendment of complaints is silent as to the relation back of amended complaints, the Board construes its rules to provide for the relation back of an amended complaint as an amended document. Hence, the Board finds that the amended complaint relates back to its original filing and concludes that it has jurisdiction over Count I of the Amended Complaint.

In Count I, UPW argues that it entered into an oral agreement with the County of Hawaii, by then Mayor Lorraine Inouye, in 1992 that the County would operate the West Hawaii landfill at Puuanahulu. UPW contends that the Respondents' decision to

privatize the operation of the landfill violates the agreement and therefore violates Sections 89-13(a)(5) and (8), HRS.

The record indicates that then Mayor Inouye visited the sanitary landfill at Waimanalo Gulch on Oahu and met with Rodrigues at Orson's Restaurant in Honolulu. Rodrigues stated that the UPW was opposed to privatizing the operations of the new landfill and that he would never agree to it. Thereafter, Chief Engineer Bruce McClure sent a letter to Rodrigues announcing the County's inclination to privatize the operation of the new landfill. Rodrigues responded that the UPW agreed that a private contractor should construct the landfill initially and on an ongoing basis. However, Rodrigues made clear that the UPW did not support the private operation of the landfill.

Thereafter, two meetings were held between Inouye and Rodrigues with others present, including several Council members. As a result of the meetings, Inouye made a decision to hire a private contractor to design and construct the landfill and hire one of their personnel and, with their guidance, have the County operate it. After Inouye lost the primary election, she left the decision as to the nature of the landfill operation to the new administration. Inouye denied that she was having contractual negotiations with the UPW and further did not inform any other counties or the State Office of Collective Bargaining of her decision not to privatize the landfill operations. Moreover, the alleged agreement was not memorialized in writing.

The record indicates that there was no pending grievance filed by the UPW that was being resolved through the discussions

between Rodrigues and Inouye. There was no notice sent either pursuant to Section 1.05 of the contract or Chapter 89 requesting either consultation or mutual consent with the decision. Also, there was no formal meeting of the County Council where there was a majority of the Council ratifying any alleged agreement.

Based upon the facts in the record, the Board finds that Inouye agreed with Rodrigues that she would not privatize the operations of the new West Hawaii landfill. There is, however, no evidence that any binding agreement between Inouye and Rodrigues was reached pursuant to Section 1.05 of the collective bargaining agreement nor was there settlement of a grievance. The preponderance of evidence establishes that Inouye and Rodrigues met with the Council members and Inouye realized that she did not have enough Council votes to support her initial inclination to privatize the operation of the landfill. The Board concludes that Inouye's decision to have the County operate the landfill was not a negotiated settlement of a grievance or a mid-term agreement which was binding on Respondents. Inouye concedes that she made an executive decision and left the matter for the new administration to deal with.

COUNT II

UPW contends that the Respondents' decision to privatize the operation of the landfill violates Section 1.05 of the contract because the County failed to negotiate or consult over the subject matter. UPW argues that Section 1.05 has been interpreted to require employers to obtain mutual consent from the Union before

implementing mid-term changes in policies and practices affecting conditions of work of Unit 1 workers covered by the agreement.

UPW alleges that KIYOSAKI informed WMI on March 23, 1993 that it had been selected to construct and operate the West Hawaii landfill at Puuanahulu prior to providing UPW an opportunity to consult on the subject matter. UPW contends that all landfill workers at Kealakehe have customarily and historically been employed and retained in accordance with the merit principles which apply to all County civil service workers and WMI's employees are not governed by the merit principles. UPW submits that Hawaii County's contracting out the West Hawaii landfill operations have changed Section 14.01 of the Unit 1 contract, pertaining to the maintenance of prior rights, because landfill workers whose employment has heretofore been governed by the merit principles will no longer enjoy the rights and benefits of Hawaii's civil service laws. UPW also contends that the Respondents have changed Sections 16.04, referring to temporary assignments, and 47.01, pertaining to training, respectively, of the Unit 1 contract. Moreover, UPW argues that Sections 16.03, 16.04, and 16.06 are changed since work opportunities through temporary assignments and promotions will no longer be available for Unit 1 workers. In addition, Unit 1 equipment operators will no longer do dozer work at the new landfill.

Section 1.05 of the collective bargaining agreement reads as follows:

> The Employer agrees that it shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in

> wages, hours or other conditions of work contained herein may be made except by mutual consent.

Respondents contend that the UPW reads the foregoing contract provision too broadly. Respondents contend that the first sentence of the paragraph states that the Employer shall consult when formulating and implementing personnel policies, practices and any matter affecting working conditions. Respondents argue that the County offered to consult with the Union, but these efforts were rebuffed.

With regard to the Employer's duty to consult over personnel policies, practices and matters affecting working conditions, the Board finds based upon the record that the County contacted the Union in early February regarding the publication of the RFPs. Thereafter, a meeting was scheduled with the Union but was later cancelled. Later, KIYOSAKI offered to consult with the Union pursuant to Section 1.05 of the contract, over the decision to privatize the landfill operation by letter dated April 1, 1993. The UPW Executive Director, however, clearly stated that he did not consider the matter to be the subject of consultation, but rather, demanded bargaining over the issue. Thus, the Board finds that Respondents did not violate Section 1.05 of the contract with regard to the consultation requirement.

The second sentence of Section 1.05 provides that any change or modification in wages, hours or other conditions of work which are specifically set forth in the contract requires mutual consent or negotiations. Respondents contend that the contract

sections referred to by UPW are not changed or modified by the County's decision to contract with WMI.

Respondents rely on Arbitrator Ted Tsukiyama's interpretation of Section 1.05 of the Unit 1 contract in Department of Water, County of Kauai and UPW (1987). In that case, UPW grieved Kauai County's implementation of a table of organization which created new positions, reallocated other positions, and effected other personnel changes. Tsukiyama disagreed with the UPW's contention that anything that constitutes a change in the wages, hours and working conditions requires mutual consent. Tsukiyama stated that Section 1.05 merely provides that contract provisions pertaining to wages, hours, and working conditions may not be changed without mutual consent. He found the implementation of the table of organization did not change anything in the contract and therefore was not violative of Section 1.05.

UPW argues that the Respondents' actions affected Sections 12 pertaining to layoffs, 14.01 relating to the preservation of prior rights, 16.03 and 16.04 regarding temporary assignments, 16.06 pertaining to promotions and 47.01 relating to training. Respondents' brief argues that the changes may have affected the bargaining unit but did not amend or change specific contract provisions pertaining to wages, hours or conditions of work. The Board adopts Respondents' discussion as its basis for rejecting the UPW's arguments on this issue.

Respondents further argue that in previous years, the UPW attempted to negotiate a "no subcontracting out of bargaining unit work" provision and was unsuccessful. A review of the proposals

from 1983 indicates that the UPW in fact withdrew its proposal in return for employer concessions. Hence, it is clear from the record that the contract does not specifically prohibit the subcontracting of work performed by Unit 1 members. The Board further finds that there is no change or modification to the existing contract provisions cited by UPW to warrant negotiation of the County's decision.

COUNT III

UPW argues that Respondents' decision to privatize the operation of the landfill was in retaliation for the UPW's support of Inouye in the democratic primary for Mayor in 1992. UPW contends that the Union engaged in lawful political activities which are protected as concerted activities by Chapter 89, HRS. UPW further relies upon Section 3.01 of the collective bargaining agreement which prohibits discrimination against the employees on the basis of lawful political activity. UPW also cites YAMASHIRO's refusal to sign the extensions of the UPW contracts to January 1994 as evidence of his anti-union animus. UPW also accuses YAMASHIRO of favoritism since the scale house employees belonging to HGEA white-collar bargaining units were retained at the new West Hawaii landfill. UPW contends that the reason for keeping the HGEA employees is because HGEA supported YAMASHIRO in the primary election for Mayor.

Respondents and Intervenor argue that there is insufficient proof to support UPW's claim of political favoritism. The briefs of Respondents and Intervenor cogently set forth the County's analysis of considerations in reaching the conclusion to

privatize operations, i.e., cost factors and the reduction of liability, etc. On the other hand, UPW bases its claims of retaliation upon the fact that the HGEA-represented employees are retained and employees represented by UPW were not hired. The Board notes there is good reason to retain the scale house operations under County control because the cost of WMI's services are dependent upon the tonnage of solid waste accepted at the landfill. It appears to be in the County's best interest to ensure that its employees are weighing the solid waste. In the same way, HGEA employees work at the scale house at the WMI operation of the landfill at Waimanalo Gulch landfill on Oahu to weigh the waste entering the landfill.

The Board finds that UPW's allegations of YAMASHIRO's anti-Union animus to be speculative and without merit. Moreover, YAMASHIRO's non-signing of the UPW contract extensions occurred after the filing of the complaint and do not lend support to UPW's allegations that political favoritism lead to the County's decision to privatize the landfill operations.

COUNT IV

The UPW argues that the County's unilateral decision to contract out the operation of the West Hawaii landfill affects working conditions of Unit 1 workers who are bulldozer operators at Kealakehe since the bulldozing work at Puuanahulu will be performed by WMI employees. UPW argues that the Employer thus affected the availability of temporary assignments and promotional opportunities which are currently available to Unit 1 employees. Prior to implementing its decision to contract out the West Hawaii landfill to

Intervenor, the Respondents did not submit a proposal to amend the Unit 1 collective bargaining agreement and negotiate the subject. Respondents unilaterally implemented their decision to contract out the landfill to WMI and refused the UPW's April 22, 1993 request to bargain on the subject. In addition, UPW argues that the merit principles which apply to County landfill workers will no longer apply to employees at the Puuanahulu landfill.

Personnel Director Michael Ben testified that the decision to contract out is nonnegotiable. However, he admitted that the effect of any contracting out decision might be negotiable and there were items that required consultation with the Union. Thus, he advised KIYOSAKI to write to UPW on September 2, 1993, to indicate that the parties would like to meet to discuss the possible effects of the County's decision to privatize on Unit 1 employees.

Respondents' decision to contract out the operations of the landfill did not substantially alter the basic operations of the County's solid waste program. Waste is received at 21 transfer stations which are owned and operated by the County and transported for disposal to the Hilo landfill and the new landfill at Puuanahulu. Respondents' decision to contract out merely replaces existing county employees by WMI employees to do the same work under similar conditions. EPA regulations imposing stringent conditions to the removal of hazard waste will not change the conditions of employment of equipment operators and landfill attendants at the landfill since County employees are already involved in hazard waste identification and removal.

The Board has previously held that all matters affecting wages, hours, and working conditions are negotiable and bargainable subject only to the limitations set forth in Subsection 89-9(d), HRS. Hawaii State Teachers Association, 1 HPERB 253 (1972). Subsection 89-9(d), HRS, is the management's rights clause which excludes from the subjects of negotiations matters which would interfere with the rights of the 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 reasons; (4) maintain efficiency of government operations; (5) determine methods, means and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The test as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether it has a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 63 (1977).

In the Hawaii Government Employees Association case, supra, the Board indicated that there must be a conclusive showing of the impact of an issue on the employment relationship to compel negotiation and adopted the National Labor Relations Board's interpretation of a similar provision of the National Labor Relations Act. A mere remote, indirect or incidental impact is not

sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially and significantly affect the terms and conditions of employment.

In Decision No. 26, Department of Education, 1 HPERB 311 (1973), the Board found a work load proposal which would have fixed the maximum number of students per teacher or team of teachers to be non-negotiable. The Board referred to its previous holding in Decision No. 22 stating:

> In that case, we held that "wages, hours and other terms and conditions of employment: which are negotiable, and the rights of the employer reserved in Section 89-9(d) were not mutually exclusive categories. We found that class size was a hybrid issue; it involved both policy making and had a significant impact on working conditions.
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> We determined therein that the provision calling for a reduction in the average class size ratio throughout the statewide class size ratio throughout the statewide educational system by approximately one student was negotiable. In reaching our decision, this Board balanced the employer's broad right to establish educational policy, unfettered by a collective bargaining agreement on the one hand, against the direct impact the average class size ratio had on the teachers' working conditions. Notwithstanding its admitted relation to educational policy, we found in that instance that the element of impact on teachers' working conditions was great, while the imposition of an average, statewide class size ratio had minimum impact on the DOE's right to establish educational policy.
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> While we held that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concomitantly expressed the view that said section should not be too liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective operation of the public school system. Therefore, we further found that other issues raised in that case,

> which dictated the number of teachers the employer was to hire in order to implement the reduction and which dictated the assignment of teachers to specific roles, were in violation of Section 89-9(d).
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> * * *
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> Here, again, we are faced with a hybrid proposal, which involves both educational policy making and has a significant impact on working conditions. Therefore, while the workload proposal is admittedly a significant term and condition of employment, we must determine, nevertheless, whether the proposal so interferes with management's right to establish educational policy and operate the school system efficiently as to render it non-negotiable under Section 89-9(d).
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> * * *
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> Therefore, it is our opinion that the specific proposal on workload which is here at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with DOE's responsibility to establish policy for the operation of the school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations. Hence, the DOE and the HSTA may not agree to the subject workload proposal because such agreement would interfere substantially with the DOE's right to determine the methods, means, and personnel by which it conducts its operations and would interfere with its responsibility to the public to maintain efficient operations.

Id. at p. 321.

In Decision No. 26, the Board found the Union's reopening proposal which entailed the scheduling of preparation periods during the instructional day to be non-negotiable. In its discussion, the Board stated:

> While we find that preparation periods constitute a condition of employment, the specific issue herein concerns the scheduling of preparation periods. It is our opinion that the scheduling of preparation periods is, in effect, the scheduling of work, which has been and should remain, the right of the DOE as an employer. Inasmuch as preparation periods are periods of work like any other for which teachers are being compensated, the DOE should continue to have the freedom to schedule preparation periods in the same manner as any other period of work, at any time during the teachers' work day (whether within or outside of the students' instructional day) as it deems feasible.
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> * * *
>
> Therefore, we find that the portion of the reopening proposal on preparation periods, which calls for the scheduling of such periods within the students' instructional day, would interfere with the employer's rights to assign employees and to determine the methods, means and personnel by which it operated the public school system in a manner necessary to maintain efficient operations. Hence, that particular portion of the proposal on preparation periods may not be agreed to by the parties.

Id. at pp. 323-24.

In Decision No. 102, Hawaii Fire Fighters Association, 2 HPERB 102 (1979), the Board held that the Union's company staffing proposal for the various fire fighting installations would require adopting minimum staffing standards for each fire station. The Board found that the proposal would directly interfere with management's rights to determine personnel by which its operations are to be carried out, assign and transfer its personnel, relieve employees because of lack of work and maintain efficient operations so as to preclude negotiations on the subject. The Board stated:

> This ruling is made with full appreciation that manning levels obviously have an impact on working conditions. However, in

> striking a balance between the mandate in Subsection 89-9(a), HRS, that working conditions be negotiated and the prohibitions on agreements on certain subjects contained in Subsection 89-9(d), HRS, it is clear that the scales tip heavily against negotiability in this case because of the magnitude of interference with management's rights the HFFA minimum manning proposal would present and the absence of a showing by the HFFA of sufficient justification for such interference as would warrant a different conclusion.

Id. at p. 213.

The Board finds based upon the foregoing authorities that Respondents' decision to contract with WMI for the private operation of the West Hawaii landfill at Puuanahulu was a valid exercise of its management rights. The Board appreciates the arguments of Respondents' counsel supporting the County's decision to engage the services of a private contractor. The Board will not second guess the calculations of the County at this stage nor their premises in deciding to contract with WMI.

However, in the absence of an adequate defense an employer commits an illegal refusal to bargain and thus a prohibited practice under Chapter 89, HRS, when it unilaterally contracts out or assigns to nonbargaining unit personnel work which has been performed exclusively by bargaining unit employees.

In Decision No. 199, University of Hawaii Professional Assembly and Board of Regents, 3 HPERB 562 (1984), the Board found that a faculty evaluation policy promulgated by the Board of Regents was a proper exercise of its management rights to determine the standards for work and maintain the efficiency of government operations. However, the Board determined that the impact of an "unsatisfactory" rating, without any resulting disciplinary action

stemming from the implementation of the procedures still has a material and significant impact on terms and conditions of employment. Thus, the Board found that negotiations should have taken place regarding the impact of the evaluation procedures prior to its implementation.

The Board has thus recognized that secondary impacts of managerial decisions on conditions of employment, if substantial, must be negotiated before the management decision may be implemented.

The Board finds that the effects of Respondents' decision to contract the bargaining unit work to WMI is negotiable because of the impact of the decision on the bargaining unit. The Board recognizes that no employees were ultimately laid off or transferred by the Respondents' decision to contract with WMI. However, the Board finds that there is a substantial impact on the terms and conditions of employment by the loss of job opportunities, in the form of promotions, transfers, and temporary assignments for bargaining unit members and the denial of the opportunity for bargaining unit expansion.

In this way the contracting of bargaining unit work without negotiations threatens the public policy underlying Chapter 89, HRS, for joint-decision making which is the essence of collective bargaining. Public Employers could conceivably, on the basis of economics or whatever legitimate management reason, unilaterally decide that it is more feasible to subcontract all types of bargaining unit work without negotiation. The Board believes that the Union has an interest in preserving its bargained-for work for

its members and consideration must be given to preserving the integrity of the bargaining unit and its expansion.

Respondents argue that the job duties of five Equipment Operators are at issue here. Placed into its logical context then, the WMI operation arguably can only help the present workers because their jobs will be more enjoyable hauling the trash in tractor-trailers rather than working the face of the landfill. While the Respondents view the impact of their decision to be insubstantial, the Board views the impact of Respondents' unilateral decision as being significant enough to require negotiation and the joint decision-making envisioned by Chapter 89. Although the decision appears to impact only the five EO III's, the principle underlying the privatization impacts the bargaining unit. The facts of this case indicate that management decided to proceed with the privatization of the landfill under tremendous time constraints. The Board does not substitute its judgment for the County's in the decision to privatize the operation of the landfill. The Board considers the County's decision to privatize to be a legitimate exercise of management's rights. The impact of the decision, however, should have been bargained over with the Union prior to the implementation of the decision.

The Board finds that Respondent, mistakenly believing the matter to be a nonnegotiable issue refused to bargain over the matter as demanded by the UPW. The Board concludes that Respondents refused to bargain in good faith with the Union in violation of Section 89-13(a)(5), HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to Sections 89-5 and 89-13, HRS.

An Employer commits a prohibited practice by violating a bargained for settlement of a grievance or negotiated agreement with the Union reached pursuant to Chapter 89, HRS.

The Union failed to prove that Mayor Inouye's decision to have the County operate the landfill at Puuanahulu was a negotiated settlement of a grievance or an agreement binding her successor, Mayor YAMASHIRO.

An Employer commits a prohibited practice by violating the terms of a collective bargaining agreement.

The Union failed to prove that the Employer violated Section 1.05 of the contract by failing to negotiate the decision to privatize the landfill. The Union failed to prove that the Employer's decision modified or amended the alleged sections of the contract to require negotiation.

An Employer commits a prohibited practice by discriminating against the Union or its members for engaging in protected concerted activities under Chapter 89, HRS.

The Union failed to prove that YAMASHIRO decided to privatize the West Hawaii landfill because of any animus against the Union.

An Employer commits a prohibited practice when it unilaterally implements a policy which has a material and significant impact on terms and conditions of employment, and fails to

negotiate the effects of the policy with the exclusive representative prior to its implementation.

The Employer wilfully refused to negotiate over the effects of its decision to privatize the West Hawaii landfill prior to the implementation of the decision and violated Section 89-13(a)(5), HRS.

ORDER

The Employer is ordered to cease and desist from committing the instant prohibited practices.

Because of the unique circumstances of this case, the Board fashions the following remedy. Rather than terminating the contract with WMI at this juncture, the Board orders the parties to meet and bargain over the impact of Respondents' decision to privatize the landfill on the employees' terms and conditions of employment. If the parties are unable to reach an agreement as to the impact on terms and conditions of employment for bargaining unit employees by April 1, 1994, the WMI contract shall be terminated, and the County shall assume full operation of the landfill.

The Employer shall immediately post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and STEPHEN K. YAMASHIRO, et al., AND WASTE MANAGEMENT OF HAWAII, INC.; CASE NO. CE-01-186
DECISION NO. 347
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, February 1, 1994.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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