

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. DR-01-53
)	
STEPHEN K. YAMASHIRO,)	DECISION NO. 362
)	
Petitioner,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND DECLARATORY
and)	RULING
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Intervenor.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On August 2, 1993, STEPHEN K. YAMASHIRO (YAMASHIRO, County or Employer), Mayor of the County of Hawaii filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board). YAMASHIRO seeks a ruling from the Board declaring that pursuant to Sections 89-9(d) and 89-10(d), Hawaii Revised Statutes (HRS), the public employer has the right to hire or not to hire as he deems necessary. The Employer admits that it imposed a freeze on the filling of vacant positions by hiring, promotion and temporary assignments.

The Board issued a notice of receipt of the petition for declaratory ruling and a deadline for filing petitions for intervention on August 6, 1993. The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a Petition for Intervention with the Board on August 17, 1993. Thereafter, on August 18, 1993, the UPW filed a motion to dismiss the petition. UPW contended that the petition was time-barred and in the alternative, the UPW argued

that the petition should be denied because it involves an interpretation of Section 1.05 of the Unit 01 collective bargaining agreement.

On August 26, 1993, the Board granted the UPW's intervention in the proceedings by Order No. 958 because the UPW had alleged a sufficient interest for its participation in the proceedings and its petition for intervention was timely filed.

The Board conducted a hearing on UPW's motion to dismiss on September 13, 1993. On March 14, 1994, the Board denied UPW's motion to dismiss in Order No. 1021. The Board found that it had the discretion to entertain the subject petition because the question before the Board was one of statutory construction, i.e., to declare whether or not the imposition of a hiring freeze is a management right. The Board further found that its authority to render an interpretation of Chapter 89, HRS, was not usurped by the pendency of a related matter before an arbitrator.

Thereafter, on March 31, 1994, the UPW filed a Motion for Hearing on Petition for Declaratory Ruling with the Board. According to the affidavit of counsel filed in support of the motion, UPW contends that the Board's Administrative Rules permit the Board to conduct a hearing on a declaratory ruling petition where good cause exists. UPW argues that a full hearing should be held in this case because petitioner failed to provide a true and accurate factual account of the dispute in question and that a determination without a hearing will not permit a fair disposition of the petition.

In support of its motion for hearing, the UPW submitted over 500 pages of transcripts from the arbitration of a related matter which purportedly establishes that the Mayor has not in fact implemented a freeze on jobs. UPW alleges that Mayor YAMASHIRO and his administration have been filling many of the positions with political supporters and friends of YAMASHIRO's. The UPW thus argues that a hearing will establish an appropriate factual basis for the Board declarations.

Subsequently, on April 4, 1994, the UPW filed Supplemental Exhibits in Support of its Motion for Hearing. The exhibits are documents which the UPW submitted to the Arbitrator in the related arbitration case.

After reviewing the record and the arguments of counsel, the Board hereby denies the UPW's motion for a hearing in this case. Administrative Rules Subsection 12-42-9(h) refers to hearings in Declaratory Ruling proceedings before the Board and provides:

(h) Hearing:

(1) Although in the usual course of processing a petition for a declaratory ruling no formal hearing shall be granted to the petitioner, the board may, in its discretion, order such proceeding set down for hearing.

(2) Any petitioner who desires a hearing on a petition for declaratory ruling shall set forth in detail in a written request the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such request for hearing is dependent upon factual assertion, shall accompany such request by affidavit establishing such facts.

Based upon its review of the moving papers, the Board finds that the UPW has not presented an adequate basis to find that a hearing should be granted in this case. The issue presented by the Petitioner in this case was simply to determine whether management has the right to impose a hiring freeze. It appears that the UPW is attempting to broaden the scope of this proceeding by the introduction of materials which are under consideration by the Arbitrator in the related proceeding. The UPW is attempting to establish that there is in fact no hiring freeze in effect and that the Employer is violating the Unit 01 contract as well as other laws in its filling of vacancies. These allegations are already before the Board in a related prohibited practice case, Case No. CE-01-204, UPW v. Yamashiro, et al. Granting the UPW's motion in this case would unduly broaden the scope of these proceedings, therefore the Board hereby denies UPW's motion for a hearing.

On April 11, 1994, YAMASHIRO filed its Brief in Support of Petition for Declaratory Ruling with the Board. The UPW filed its brief with the Board on May 9, 1994.

Based upon the record in this case, the Board makes the following findings of fact, conclusions of law and declaratory ruling.

FINDINGS OF FACT

STEPHEN K. YAMASHIRO is the Mayor of the County of Hawaii and the public employer as defined in Section 89-2, HRS, of the employees of the County of Hawaii including those in bargaining unit 01.

The UPW is the exclusive representative as defined in Section 89-2, HRS, of the employees of the County of Hawaii included in bargaining unit 01.

On December 15, 1992, Mayor YAMASHIRO approved Circular No. 92-20, regarding the Filling of Positions. The memorandum to all department and agency heads from Michael R. Ben, Director of Personnel states:

With the exception of positions in the Department of Water Supply, Office of the County Council, and cabinet type positions, as well as federally and state funded positions, all positions not yet filled are to remain vacant until further notice from this office. This "freeze" is effective immediately and includes CVE positions.

Also, positions currently filled on a temporary basis shall not be extended for additional periods of employment. Employees currently serving temporary appointments shall be allowed to work up to the designated appointment end date. E.g., an employee serving a 90-day appointment shall be allowed to complete the 90-day period; however, no extension thereafter will be allowed.

Departments and agencies who believe that the public's health or safety will be affected or that an undue hardship will result from the non-filling of any position may submit a request to the Mayor describing its concerns and justification for filling the position. The request shall be in memorandum form with a designated approved/disapproved space provided on the bottom of the memorandum for the Mayor's signature.

If the department's or agency's request is approved, the position shall be filled on a limited term or emergency basis for 30 calendar days. Any extension thereafter will once again need the approval of the Mayor. The extension request shall be in memorandum form with a designated approved/disapproved space provided on the bottom of the memorandum for the Mayor's signature.

This statement was later modified by Circular No. 92-23, which provided that temporary assignments to positions could be used where prior approval from the Mayor had been obtained.

On January 13, 1993, the UPW, through Jack Konno, Hawaii Division Director, filed a class grievance against the Mayor claiming that the policy placed a freeze on the filling of vacant positions and promotions, and ceased to temporarily assign employees to perform the duties of the frozen positions. The UPW claimed that the Mayor's actions violated various sections of the contract.

The matter was referred to arbitration. On August 2, 1993, the County of Hawaii filed the instant petition for declaratory ruling.

DISCUSSION

The issue before the Board is whether the Employer's freeze on the filling of vacant positions by hiring, promotion and temporary assignments is a valid exercise of management's rights.

The Employer contends that under Subsection 89-9(d), HRS, management has the right to hire and promote. The Employer contends that preventing the Mayor from instituting a hiring and promotion freeze in the face of financial necessity would force the hiring of employees and lock the County into the payment of costs over which the voters have no control. The Employer also contends that Mayor YAMASHIRO determined that the County's financial condition makes it necessary to drastically limit and control the hiring of new employees and the promotion of present employees. This strategy has been used to limit expenditures at the various

levels of government. Citing fiscal constraints, the COUNTY requests that the Board grant the County's petition by issuing a declaratory ruling that the power of the County to restrict and control hiring and promotion of employees through a "hiring freeze" is a management right pursuant to Section 89-9, HRS, which cannot be limited by collective bargaining.

According to the Employer, the UPW alleged that various provisions of the collective bargaining agreement have been violated by the implementation of the policy. The Employer however contends that there is no specific contractual provision which prohibits management from implementing a freeze on vacant positions. Thus Petitioner requests the Board to declare that the Employer has a right to freeze the filling of positions and by virtue of Subsection 89-9(d), HRS, no contracted provisions may limit that right.

According to Employer's Brief, the County requests a declaratory ruling that the Mayor's limitation on hiring and promotions is among those management rights covered by Subsection 89-9(d), HRS, and may not be interfered with by any collective bargaining agreement, and is thus not arbitrable.

According to the Union, the Petitioner argues that this case involves a "hiring freeze" imposed for financial reasons but actually, the facts in the arbitration case indicate that the positions were filled. The UPW contends that two hires were not essential to the health and safety of the public and therefore did not conform to the criteria established by the Employer for filling positions. The Union submits that while the decision to reduce

staff was a management prerogative, the mechanics for termination or non-renewal of the employees as a result of the reduction of staff is a mandatory subject of bargaining. The Union also contends that YAMASHIRO's manner of handling the anticipated budget shortfall was likewise a mandatory subject of bargaining. The Union submits further that the criteria for determining which positions would not be subject to the freeze was negotiable.

The Union argues that since December 1992, YAMASHIRO has reassigned work which has normally and customarily been performed by bargaining unit 01 workers to those outside the bargaining unit. The UPW contends that approximately forty-two temporary workers have replaced bargaining unit 01 employees in the performance of a variety of jobs. The Union submits that such reassignment of duties outside of the bargaining unit on an indefinite basis gives rise to a bargaining obligation which the Employer has not fulfilled.

The Union also argues that YAMASHIRO's actions violate the merit principles and are inconsistent with Section 14 of the Unit 01 contract. The Union contends that YAMASHIRO's so-called freeze is nothing more than a subterfuge for the complete dismantling of the merit principles embodied in Chapter 76, HRS.

In addition, the UPW argues that it was improper for YAMASHIRO to make mid-term changes to the Unit 01 contract and to ignore the multi-employer bargaining which was in progress. The Union alleges that the public employers were involved in negotiations and attempted to address the budget shortfalls through negotiations. The Union argues that YAMASHIRO acted on his own in

trying to address the shortfall instead of acting in concert with the other public employers.

Thus, the UPW argues that Petitioner failed to establish a factual or legal basis to warrant a declaratory ruling. The UPW contends that the petition should be dismissed or in the alternative, the Board should grant the UPW a hearing. In the absence of the foregoing, the UPW argues that the Board should declare that YAMASHIRO was obligated to negotiate with the UPW under Subsection 89-9(a), HRS, before implementing the freeze and he should have done so in the context of the multi-employer bargaining.

After reviewing the arguments put forth by the UPW, the Board is of the opinion that the Intervenor raises issues which are outside the scope of the Petition. The Intervenor's arguments are tantamount to a prohibited practice charge. The Board notes that there is a prohibited practice complaint presently pending before it between the same parties which raises similar concerns, Case No. CE-01-204, United Public Workers and Stephen Yamashiro, et al. In addition, the pending arbitration attempts to address similar or related issues. Thus, the Board finds it appropriate to restrict its ruling in this case to the concerns raised by the Petition.

The facts indicate that YAMASHIRO instituted a hiring freeze shortly after he took office in 1992. The issue before the Board is whether the implementation of the hiring freeze was a valid exercise of management's prerogative. The Board finds that the institution of a hiring freeze because of fiscal constraints was a valid exercise of management's prerogative. However, as the

matter involves the hiring of employees in temporary jobs, these matters are subject to existing laws and contract provisions. Therefore, consideration of these matters and the filling of positions during a hiring freeze may properly be the subject of a grievance or prohibited practice charge. A finding to the contrary would ignore the existing provisions for the filling of vacancies by promotion or initial hires.

The Board 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 64 (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. 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 workload 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.

We determined therein that the provision calling for a reduction in the average 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.

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).

* * *

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 nonnegotiable under Section 89-9(d).

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 321.

In Decision No. 26, supra, 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.

* * *

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 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, 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 213.

Most recently in Case Nos. CE-07-187 and CE-07-194 (consolidated), University of Hawaii Professional Assembly and Board of Regents, the Board held that the subject of faculty parking at the University of Hawaii at Manoa (UHM) and University of Hawaii at Hilo (UHH) was non-negotiable. The Board stated:

Based upon the foregoing, the Board finds that the BOR's need to maintain UH parking operations as a self-supporting system renders the subject of faculty parking at UHM and UHH non-negotiable. The Board concludes that the BOR must be allowed to unilaterally adopt parking rules and regulations in order "to maintain the efficiency of government operations" as provided in § 89-9(d), HRS. Mandatory bargaining in this area would unduly interfere with the BOR's responsibility to establish policy for the operation and maintenance of UHM and UHH parking facilities. Notwithstanding UHPA's arguments to the contrary, the Board finds that negotiation

over the rates and allocation of spaces would substantially interfere with the BOR's right to efficiently manage facilities under its jurisdiction. In this regard, the Board notes that the BOR is responsible for maximizing the efficiency of UHM and UHH parking operations and providing for the safety and welfare of not only UHM and UHH faculty members but the entire university community.

See, Order Consolidating Cases for Disposition and Granting in Part, and Denying in Part, Respondent's Motions to Dismiss, p. 11.

In that same case, with respect to the issue of parking for faculty members who are required to use their personal vehicles in their work the Board further held:

However, the Board finds that the impact on the BOR's management rights under § 89-9(d), HRS, is not so great as to render parking for faculty members who are required to use their personal vehicles in their work non-negotiable. In this regard, the BOR concedes that as to those employees, the subject of parking is negotiable. Therefore, the Board finds the subject of parking is negotiable with respect to UHM and UHH faculty members who are required to use their personal vehicles in their work. The Board further finds that the BOR wilfully failed to negotiate with UHPA over parking for those faculty members. Accordingly, the Board hereby finds that the BOR, as a natural consequence of its actions, committed a prohibited practice when it failed to negotiate with UHPA regarding parking for those faculty members.

Id. at pp. 11-12.

Based upon the foregoing cases, the Board concludes that the imposition of a hiring freeze is a valid exercise of management's rights which are embodied in Subsection 89-9(d), HRS. On balance, the interests of the Employer in the efficiency of its operations in the face of economic hardship outweighs the impact of the hiring freeze on working conditions. In this instance,

because of grave fiscal concerns the Employer instituted the hiring freeze. Thus, the Board believes that the hiring freeze is not subject to negotiations because of the magnitude of interference with management's rights to assign employees and determine the methods, means and personnel by which it operates in a manner necessary to maintain efficient operations.

At the same time, however, the Board recognizes that the hiring freeze at issue also materially and significantly affects terms and conditions of employment. Thus, there must be good faith exercised by the Employer in the implementation of the hiring freeze. The hiring freeze at issue was coupled with a mechanism to hire employees on a limited term or emergency basis. It is the Board's view that the Employer cannot rely on the ban on hiring to unlawfully circumvent existing rules, collective bargaining contract provisions, and other laws governing the recruitment of employees. The Board finds that the propriety of those practices are not the subject of this petition since they are more properly addressed in the context of a prohibited practice complaint. This petition goes to the question of whether the Mayor's limitation on hiring and promotions is among those management rights covered by Subsection 89-9(d), HRS, and the Board answers in the affirmative.

The Employer further requests a ruling that such right may not be interfered with by any collective bargaining agreement and is thus not arbitrable. The Board finds that there is insufficient evidence in the record before it to base such a ruling. Given the nature of the allegations brought by the UPW, it is appropriate that these matters be raised before and resolved by

the Arbitrator or by the Board in the pending prohibited practice complaint.


CONCLUSIONS OF LAW AND DECLARATORY RULING

The Board has jurisdiction over the instant petition pursuant to Section 91-8, HRS, and Administrative Rules Section 12-42-9.

A public employer may in good faith impose a hiring freeze on promotions and hiring due to fiscal concerns as a valid exercise of its management rights embodied in Subsection 89-9(d), HRS.

DATED: Honolulu, Hawaii, February 2, 1995.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

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