

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-184
	)	
UNIVERSITY OF HAWAII	)	DECISION NO. 366
PROFESSIONAL ASSEMBLY,	)	
	)	FINDINGS OF FACT, CONCLU-
Complainant,	)	SIONS OF LAW AND ORDER
	)	
and	)	
	)	
JOHN WAIHEE, Governor of the	)	
State of Hawaii,	)	
	)	
Respondent.	)	
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FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On April 29, 1993, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) filed a prohibited practice complaint against Respondent JOHN WAIHEE, Governor, State of Hawaii (State or Employer) with the Hawaii Labor Relations Board. UHPA alleged that the Employer, through its Chief Negotiator and Chief Spokesperson, engaged in surface bargaining during contract negotiations for bargaining unit 07.

UHPA contended that the Employer refused to make any substantive responses to UHPA's numerous proposals, refused to explain its rejection of proposals, refused to make counter offers, rejected or refused to respond to UHPA's cost proposals, refused to tender any cost proposals of its own, did not empower its spokesperson to discuss cost items, and in general, engaged in a course of conduct designed to appear to be bargaining but which was devoid of substantive discussion of the issues. UHPA also

contended that the Employer conditioned the negotiations of certain benefits (common items) on negotiations with other bargaining units.

Thus, UHPA contended that the Employer refused to bargain with the Union in good faith, thereby violating Section 89-13(a)(5), Hawaii Revised Statutes (HRS).

On June 1, 1993, UHPA filed an application for the issuance of a subpoena to Respondent JOHN WAIHEE, Governor, State of Hawaii with the Board. On June 4, 1993, the Employer filed a motion to revoke the subpoena contending that the information sought by the Union could be adduced from other available witnesses or in the alternative, the information was privileged and confidential. The Board conducted a hearing on Employer's motion to revoke the subpoena on June 14, 1993.

After hearing the arguments of counsel and reviewing the record, the Board granted the Employer's motion to revoke the subpoena on the basis that the information sought by UHPA could adequately be adduced from other available witnesses. The Board also indicated that if the Union was not satisfied that the testimony adduced from other witnesses adequately explained the actions of the State, the Union could again subpoena the Respondent and the Board would consider whether the Governor's testimony was required.

Thereafter, the Board conducted hearings on the merits of the case on June 16 and 22, 1993. The parties were afforded a full opportunity to examine witnesses and present exhibits. The parties submitted proposed findings of fact and conclusions of law to the

Board in their post-hearing submissions. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order. The Board hereby specifically rejects those proposed findings and conclusions submitted by the parties which have not been adopted as being, in whole or in part, unsupported by the record in this case or immaterial to the Board's decision.

#### FINDINGS OF FACT

Complainant UHPA is the exclusive representative, as defined in Section 89-2, HRS, of the faculty of the University of Hawaii (UH) and community college system included in bargaining unit 07.

Respondent WAIHEE is the Governor of the State of Hawaii and a public employer<sup>1</sup> for the purposes of negotiations for bargaining unit 07.

On or about October 30, 1992, representatives from UHPA and the Employer commenced negotiations on a successor collective bargaining agreement for the contract which would expire on June 30, 1993. Chief Negotiator for the State Office of Collective Bargaining (OCB) James H. Yasuda (Yasuda) appointed James H. Takushi (Takushi), Director of Personnel, UH, to serve as chief spokesperson for the Employer in the Unit 07 negotiations. Transcript of hearing held on June 22, 1993 (Tr. II), p. 58.

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<sup>1</sup>Section 89-6(b), HRS, provides that the public employer for the purposes of negotiations for bargaining unit 07 is the governor or his designated representatives of not less than three together with not more than two members of the board of regents of the University of Hawaii.

Takushi has extensive experience in negotiations and has also previously served as State Director of Personnel Services and Chief Negotiator. Id. at 12, 57-58. Takushi negotiated the first Unit 07 contract (Id. at 12) and was the spokesperson for the BOR and OCB during the negotiation of the 1989-1993 Unit 07 contract. Transcript of the hearing held on June 16, 1993 (Tr. I), p. 57. Takushi had system-wide authority to speak for the Employer on non-cost items. Tr. II, p. 64. Takushi was also authorized to make cost offers for the Employer. Id. at 12-13. Yasuda indicated that since Takushi was handling the specifics of the day-to-day negotiations he would defer to Takushi's judgment about the timing of offers. Id. at 21.

J.N. Musto (Musto), UHPA's Executive Director, served as Chief Negotiator for UHPA. Tr. I, p. 150. David Miller, UHPA's secretary, served as recorder for the UHPA negotiating committee and took notes of the bargaining sessions. Id. at 130; Complainant's (C's) Exhibit (Ex.) 2.

On October 30, 1992, Musto presented the Union's contract proposals to Employer. Tr. I, p. 30; C's Ex. 2 (Session #1, p. 3). The Union proposed a substantial number of changes to the existing agreement in a full cover-to-cover proposed contract. Tr. I, p. 107; C's Ex. 1, pp. 1-72. The Union proposed, inter alia, a four percent salary increase. Tr. II, p. 60. The Employer submitted one proposal to amend Article II, Non-Discrimination. Tr. I, p. 30; C's Ex. 1.

Representatives of the Employer and UHPA conducted thirteen formal negotiating sessions between October 30, 1992 and

April 28, 1993. C's Ex. 2. In bargaining session two, Takushi indicated that the Employer was satisfied with the existing contract and was reluctant to propose changes. Tr. I, pp. 31, 42; Tr. II, pp. 58-59; C's Ex. 2 (Session #1, p. 1). During bargaining sessions two, three and four, the Union and the Employer discussed UHPA's proposals several times to determine the application of the proposals. Tr. II, p. 60; C's Ex. 2.

During bargaining sessions five through nine, the parties clarified, rejected and accepted proposals or counter-proposals. C's Ex. 2. The Employer and UHPA each submitted counter-proposals on eight articles in the contract. C's. Ex. 1.

During bargaining session five held on February 3, 1993, Musto asked Takushi about the negotiability of "common items" such as holidays, per diem for travel, auto allowance, and health fund premiums. C's Ex. 2 (Session #5, p. 3). Takushi stated that the common elements would be kept common to be fair to everyone. Id. at 14. Also during session five, Takushi rejected some of UHPA's proposals. Id. at 6, 7.

With respect to common items, the Employer considers certain cost items to be "common" to all bargaining units, e.g., health fund premiums, holidays, per diem, mileage, etc. Tr. II, pp. 13-15, 46-48. As part of its negotiating style and strategy, the Employer preferred that common items be uniform for all employees to the extent possible. Id. at pp. 14-15, 46-49. In order to maintain the uniformity of these items between bargaining units, the Employer can attempt to jointly negotiate common cost items with UHPA and other bargaining units. Id. at 14-15. The

Employer recognizes that there is no requirement that the common items be bargained for jointly, it is merely an Employer preference. Id.

In the past, UHPA successfully negotiated increases for some common cost items which were higher than the increases negotiated by other bargaining units, e.g., merit pay. Tr. I, p. 185.

At the start of bargaining session ten on April 12, 1993, Musto provided a counter-proposal to Employer's cost/non-cost item proposal. C's Ex. 2 (Session #10, p. 1); R's Ex. 1 (Attachment). During that session, the Employer rejected most of the Union's proposals by declaring "no change in present language" as its position. Tr. I, pp. 64, 148-49; C's Ex. 2. Also during that session, Takushi stated the Employer's official policy on salaries was zero and zero or "no pay increase at this time." Tr. I, p. 136; Tr. II, pp. 29-30, 40, 60, 68-73, 79-81, 86; C's Ex. 2. Takushi indicated that the Employer would make a formal offer in writing on salaries. C's Ex. 2 (Session #10, p. 7); Tr. II, p. 75.

During these negotiations, the economic climate for the State of Hawaii was tenuous. The Council on Revenues predicted a -0.5% growth for the State of Hawaii. Tr. I, p. 49. At the same time, the Employer group decided not to propose a decrease or reduction in salaries to reflect the predicted negative growth. Tr. II, pp. 11, 41, 48-49.

The development of the Employer's cost item proposals was based upon several factors: the Council on Revenues' economic projections (Id. at 10, 45); the estimated tax revenues for the

State of Hawaii (Id. at 7, 8); and the input from the various counties (Id. at 8). The Employer also considered external factors such as the impact of Hurricane Iniki, military base closings, the closing of Hamakua Sugar Company, and the problems of Hawaiian Airlines, which would impact the Employer's ability to fund the proposal and also considered the public's acceptance of the negotiated settlement. Id. at 9, 59.

Thus, the Employer attributes the late formulation of the salary offer during negotiations in part to the difficulty in determining what monies would be available and the Employer's hope that economic conditions would improve. Id. at 9, 11.

The Employer, however, considers that not proposing a salary offer means no change to existing language. Id. at 11.

Yasuda met with Takushi during the last week or week-and-one-half of April to discuss possible salary offers and the timing of the offers. Id. at 18-19, 54. Yasuda instructed Takushi to formally offer zero and zero to the unit and informally propose two percent and two percent effective January 1st of each year (two-and-two) for consideration as an off-the-record possibility. Id. The reason that two-and-two was offered off-the-record was to allow the Employer to determine the total cost impact of the offers after learning how many bargaining units would accept such a settlement. Id. at 42-44. Yasuda testified that any offer made prior to the last week-and-a-half of April was unauthorized because the Employer had not yet reached any conclusion on any numbers up to that point in time. Id. at 34.

Yasuda instructed all spokespersons to make the foregoing proposal to the respective bargaining units at approximately the same time. Id. p. 16. In some cases, the spokespersons asked Yasuda to present the salary proposal during negotiations. Id. In other cases, the spokespersons felt that they could make the proposals. Id.

At the start of session 11 on April 23, 1993, Musto was upset because the news media called him to inquire as to his response to the two-and-two percent salary offer. Tr. I, p. 154; C's Ex. 2. Musto indicated to the newscaster that no offer had been made; however if made, it would have been rejected. C's Ex. 2 (Session #11, p. 1.)

Thereafter, Takushi met with Musto and informally asked Musto to consider whether two-and-two would be acceptable to UHPA. Tr. I, pp. 34, 136, 150, 170-172; Tr. II, pp. 40, 60, 66, 68, 83-84, 89. Musto rejected the informal two-and-two offer because it was too low. Tr. II, pp. 83-84. Musto clearly indicated to Takushi that the Union was interested in a step movement of approximately four percent. Tr. II, pp. 61, 72, 83. Musto told Takushi that if there was an offer which was better than two-and-two, to bring the proposal to the bargaining table but to forget about the two-and-two. Id. at 84.

Takushi indicated that he did not formally put zero and zero on the table again after the meeting with Yasuda because Musto told him that there was no use in proposing two-and-two because it was too low. Id. at 73. Although Takushi stated at session ten



that a formal salary offer would be made in writing, he never submitted a written salary offer to UHPA. Id. at 75.

On Wednesday April 28, 1993, Musto told Takushi, during a caucus, that the Union would have difficulty in ratifying any settlement at that point because the legislative bills containing the Unit 07 cost items had to be decked by noon on Friday, April 30, 1993 in order to be passed. Tr. I, pp. 157-58. The parties caucused in the afternoon and Takushi left to attend another meeting. Id. The session ended at approximately 6:00 p.m. with no further meetings scheduled. Id. at 160.

Later that night at approximately 9:00 p.m., Takushi telephoned Musto and invited him to wait with him near the HGEA bargaining session to see if any offer might be forthcoming. At that time, Takushi didn't feel that UHPA would be given an offer but felt that UHPA should be positioned to receive an offer similar to that given the other bargaining units. Tr. I, p. 161. Although Musto had sent his bargaining team home, he indicated that the team would meet if there was an offer to consider. Id. Musto refused to accompany Takushi but told him to call him back if there was an offer. Id. There was no further offer made to UHPA. Id.

Takushi testified that he called Musto after April 28, 1993 and told him that they should meet as soon as possible because of the legislative deadline but Musto did not respond in a positive manner. Tr. II, p. 63. Takushi indicated that Musto expressed concerns again about ratification. Id. at 64.

UHPA filed this complaint on April 29, 1993.

Four other bargaining units accepted the salary offer, entered into new collective bargaining agreements and submitted the cost items to the State Legislature in a timely manner. Id. at 16-17, 27.

The only tentative agreement reached in the UHPA negotiations was an amendment to the first clause of the agreement regarding non-discrimination which is required by federal law. Tr. I, pp. 23, 168.

DISCUSSION

Section 89-13(a), HRS, sets forth the prohibited practices of a public employer or its representative and provides in relevant part as follows:

Prohibited practices; evidence of bad faith.

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

\* \* \*

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in Section 89-9, HRS; . . . .

Pursuant to Administrative Rules Section 12-42-8(g)(16), the charging party, in asserting a violation of Chapter 89, HRS, has the burden of proving the allegations by a preponderance of the evidence.

UHPA alleges, inter alia, that the Employer appointed a spokesperson with little or no bargaining authority, refused to adequately respond to the Union's contract proposals and refused to tender cost item proposals in a timely fashion. UHPA also contends that the Employer refused to bargain over common items. UHPA

therefore contends that the Employer engaged in a course of bargaining which constituted surface bargaining and violated Section 89-13(a)(5), HRS.

UHPA relies upon the Ninth Circuit Court's definition of surface bargaining as "going through the motions of negotiating" without any real intent to reach an agreement in K-Mart Corp. v. NLRB, 626 F.2d 704 (9th Cir. 1980).

Surface bargaining refers to the pretense of bargaining and does not satisfy the good-faith requirement. More than presence at meetings and a willingness to talk is required to meet the good-faith obligation. 48 Am.Jur.2d 2358, Labor and Labor Relations.

Section 89-9(a), HRS, requires the parties to negotiate in good faith and provides as follows:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental and longevity steps and movement between steps within the salary range, the amounts of contributions by the State and respective counties to the Hawaii public employees health fund to the extent allowed in negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

In Decision No. 24, Board of Education and HSTA, 1 HPERB 278 (1972) (HSTA case), the Board enunciated the test to determine whether a party failed in its duty to bargain in good faith:

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

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

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

Id. at 284-85.

In the HSTA case, the Board found that there was an "unyielding adamancy" in the union's attitude which evinced a desire to create an impasse and position itself for a strike. Thus, the Board held that the union had no intention of engaging in meaningful negotiations and concluded that the HSTA therefore failed to bargain in good faith.

In Decision No. 82, George R. Ariyoshi, et al., 1 HPERB 747 (1977) (Ariyoshi case), the Board considered whether the union had bargained in bad faith. The Board discussed good faith bargaining and stated:

Good faith bargaining has been defined variously as:

[T]he connotation of the phrase 'duty to bargain collectively' . . . is the obligation of the parties to

participate actively in the deliberations so as to indicate a present intention to find a basis or agreement, and a sincere effort must be made to find a common ground. NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686, 12 LRRM 508 (9th Cir. 1943).

'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-155, 38 LRRM 2042 (1956), (J. Frankfurter, concurring and dissenting opinion).

A finding of good faith bargaining is based upon consideration of the totality of circumstances, or the respondent's entire course of conduct. General Electric Co., 150 NLRB 192, 57 LRRM 1491, 1500 (1964); NLRB v. Stevenson Brick & Block Co., 393 F.2d 234, 68 LRRM 2086 (1968).

Id. at 752.

In the Ariyoshi case, the public employers charged the firefighters union with refusing to bargain in good faith because the union withdrew its tentative agreement on matters discussed and withdrew its proposals on issues which it certified an impasse had existed. The Board noted that such actions might normally appear to evince an obstructive attitude towards settlement but the union

continued to seek negotiations with the employers. Thus, the Board found based upon the totality of the union's conduct that its actions constituted movement away from a deadlocked position towards one upon which there could be agreement and the union's actions evinced an effort to find a basis for agreement. Therefore, the Board held that the union did not commit a prohibited practice by refusing to bargain in good faith.

In this case, the Union charged that the Employer engaged in a course of conduct which constituted surface bargaining. The Union contended that the Employer never intended to bargain in good faith because it failed to designate a spokesperson with sufficient bargaining authority. The record clearly indicates that State Chief Negotiator Yasuda never attended any of the Unit 07 bargaining sessions. The evidence also indicates that Takushi was the spokesperson for the Employer and was authorized to present cost and non-cost proposals to the Union on the Employer's behalf. Yasuda believed that Takushi "could handle the negotiations" alone because of his "vast background in [collective bargaining]." Tr. II, pp. 12, 18. In addition, Takushi had been the spokesperson for the Employer in the previous round of negotiations with Unit 07.

Thus, with respect to Takushi's bargaining authority, the record demonstrates that Yasuda authorized Takushi to present the cost proposals to the Union on behalf of the Employer. Tr. II, pp. 12-13, 15, 18, 19, 45, 66, and 72. In addition, the record indicates that Takushi had system-wide authority to bargain over non-cost items. Accordingly, a majority of the Board finds that

the Employer empowered its spokesperson with sufficient bargaining authority by authorizing Takushi to present formal and informal salary and proposals to the Union and to negotiate over non-cost proposals. Hence, a majority of the Board concludes that the Union failed to prove that Takushi lacked sufficient authority to conduct negotiations on the Employer's behalf.

The Union also alleged that the Employer refused to adequately respond to the Union's contract proposals. The record indicates however, that as early as bargaining session two, Takushi stated that he felt the current contract was "good" and he did not want to "change a good thing." C's Ex. 2 (Session #2, p. 1). Two members of the UHPA's bargaining team, Professors Hayasaka (Tr. I, p. 31) and Muranaka (Id. at 107-08), recognized Takushi's "no change" position. In light of Takushi's obvious reluctance to change the contract, his "no change to present language" (NCPL) position indicated a clear rejection of the Union's proposals. C's Ex. 2 (Session #10).

In any event, despite Takushi's reluctance to modify the contract, the Employer submitted 14 counter-proposals to the Union, including three revised counter-proposals, covering Articles II, IV, V, VI, VII, XV, XVI, and XVIII of the contract. C's Ex. 1 (Tabs 2 through 8). After the Union submitted counter-proposals to the Employer's Article II proposal, the Employer responded with two counter-proposals. C's Ex. 1 (Tab 1). The parties eventually signed a tentative agreement for Article II. Tr. I, p. 23; C's Ex. 1 (Session #11, p. 2).

Section 89-9(a), HRS, provides that good faith negotiations do not require the parties to agree to a proposal or make a concession. Thus, based on the foregoing and a review of the notes of the negotiating sessions (C's Ex. 2), a majority of the Board finds that there was sufficient dialogue between the Employer and the Union during these negotiations to dispel the Union's charge that the Employer failed to adequately consider and respond to the Union's contract proposals. While the Union characterized the Employer's responses as mere flat refusals of language proposals without reasoned justification therefor, a majority of the Board finds that the record is insufficient to support a prohibited practice charge based upon a refusal or failure to adequately respond to the Union's proposals.

UHPA further contended that the Employer refused to tender cost item proposals and failed to submit salary proposals in a timely manner. UHPA witnesses testified that the Employer never placed a salary offer on the bargaining table. However, during bargaining session ten, Takushi stated the Employer's official position was "no pay increase at this time." C's Ex. 2 (Session #10, p. 7). Dr. Miller's notes confirm Takushi's offer. Id.

The Union contends, however, that Yasuda only gave Takushi the authority to present salary proposals to the Union after meeting with him in late April. Tr. II, p. 68. Thus, Takushi lacked the authority to "put any cost item on the table" prior to the "last week or two of April 1993." Id. at 34, 36. Hence, the Union claims that Takushi's salary offer of zero and



zero at bargaining session ten, was not authorized by OCB and was invalid at the time it was made.

The Employer contends that Takushi was aware of the overall status of negotiations and that a zero and zero offer was being contemplated as a proposal. Thus, the Employer submits that Takushi's no salary increase offer was reasonably based and valid. Yasuda also indicated in his testimony that if no salary offer is made, a zero and zero offer is implied.

The Board finds a dispute in the testimony as to when Yasuda met with Takushi to authorize him to offer zero and zero and to informally discuss the possibility of a two-and-two settlement. Takushi testified that the meeting took place on or about April 17, 1993 whereas Musto testified that the meeting took place on or about April 24, 1993. Further, Musto testified that he met with Takushi and indicated that two-and-two was too low and if a salary offer was to be made, the offer should be made in writing. Takushi testified that Musto indicated that two-and-two was too low and if there was a better offer, to make an offer.

While there is a dispute in the evidence, the majority of the Board finds such dispute to be immaterial. The record here clearly indicates that there was never a written salary offer made to the Union as promised by Takushi. In addition, the parties met on Wednesday prior to the adjournment of the Legislature and the Employer did not present a salary proposal to the Union. The meeting ended with no further meetings being scheduled despite the forthcoming adjournment of the Legislature.

The Employer indicated that early in the negotiations the Employer group decided that there would be no negative offer given. Therefore, the Employer waited for months, hoping the Council on Revenues' projections and economic forecasts would improve without presenting a formal offer to the Union. While the majority of the Board appreciates the public employer's difficulty in developing cost proposals in hard economic times, the alternative of waiting and not making a proposal in this case or making an informal offer so late in the legislative session so as to not be able to be approved by the Legislature is inconsistent with an attitude and desire to reach an agreement. In addition, such action is inconsistent with the intent of Section 89-9(a), HRS, which provides that the employer and exclusive representative shall meet in advance of the employer's budget-making process in order apparently to permit the submission of negotiated cost items for legislative approval.

Based upon the facts in this case, the Board finds that the Employer failed to present a cost package, including a salary offer, to the Union prior to the adjournment of the Legislature. Although Takushi made an oral zero and zero offer on the table at bargaining session ten, such offer was not authorized by OCB. In addition, in the same session Takushi indicated that any formal offer would be given in writing. Thereafter, Yasuda authorized Takushi to offer zero and zero to the Union and to discuss informally with Musto the possibility of a two-and-two percent offer. While it may appear that Musto informally rejected the

offer, the Board majority believes that the offer should have been presented in writing to the Unit 07 negotiating team.

During a caucus in the last session on Wednesday, Musto indicated to Takushi that time was of the essence and still no salary offer or counterproposal was made by the Employer. The meeting ended with no further bargaining sessions scheduled despite the time concerns. Later that night Takushi invited Musto to wait outside of the negotiations for other bargaining units, however, Musto inquired whether an offer would be forthcoming and Takushi indicated that he did not know. Musto declined but asked Takushi to call if an offer was made. No call was made indicating that there was no further offer.

Under the facts of this case, the majority of the Board finds that it was unreasonable for the Employer to wait so long to authorize its spokesperson to offer zero and zero and an informal two-and-two to the Union. The Employer's reluctance to offer a negative or zero and zero figure and its desire to await new economic projections are inadequate justification for its actions. In this case Takushi indicated that any wage offer would be in writing. Thus, Takushi should have ensured that any offer was put in writing notwithstanding Musto's indication that the offer was too low and would be rejected.

In United Technologies Corp., 132 LRRM 1240 (1989), the National Labor Relations Board (NLRB) found that the employer bargained in bad faith where it engaged in delaying tactics, stated that it could submit a contract to the union on a take-it-or-leave-it basis, and made a unilateral change in a

mandatory subject of bargaining by transferring a bargaining unit employee without the notifying union or bargaining over the transfer. The NLRB also noted that after almost one year of bargaining, the employer had presented no economic proposals despite repeated prompting from the union and had never even discussed its economic demands internally. The NLRB stated at pp. 1241-42:

In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. Va. Holding Corp., 293 NLRB No. 16, slip op. at 7 [132 LRRM 1229] (Mar. 15, 1989); Port Plastics, 279 NLRB 362, 382 [123 LRRM 1320] (1986); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 [117 LRRM 1224] (1984). The Board examines not only the parties' behavior at the bargaining table, but also conduct away from the table that may affect the negotiations. Hotel Roanoke, above; Port Plastics above. Among other indicia that a party has bargained in bad faith, the Board also considers whether a party has engaged in delaying tactics and whether a party has made unilateral changes in mandatory subjects of bargaining. Atlanta Hilton & Tower above. In reviewing the totality of the Respondent's conduct here, we find that the Respondent violated the Act by refusing to bargain in good faith with the Union.

We find the following factors to be especially significant. First, after almost 1 year of bargaining with the Union, the Respondent had not presented any economic proposals, despite repeated prompting from the Union, and had never even internally discussed its economic demands. Further, at the time Respondent withdrew recognition from the Union and had not completed drafting its proposed contract language, the Union could not have agreed to a contract prior to the withdrawal of recognition even if it capitulated to the Respondent's every demand.

Even though these negotiations involved the first collective-bargaining agreement

between the parties, we fail to find this factor to be a sufficient explanation for the Respondent's delay in presenting its counterproposals or its failure to present economic proposals. Rather, the totality of the evidence indicates that the Respondent's item-by-item review of the Union's proposals, its piecemeal submission of counterproposals, and its insistence on resolving all issues relating to contract language before discussing economic issues were delaying tactics, designed to frustrate the bargaining process.

In the United Technologies case, the NLRB found employer's failure to present any economic proposals to the union after almost a year of bargaining to be significant and consequently, the union could not have agreed to a contract even if it agreed to all of the employer's demands.

Similarly in this case, the Board majority finds that the Employer's failure to present the Union with a written cost proposal prior to the adjournment of the Legislature made any agreement improbable. Viewing the Employer's conduct, the Board majority can only conclude that the Employer attempted to use the legislative deadline as an incentive in reaching a settlement since the Unit 07 employees would get nothing if the deadline passed and the cost items were not appropriated by the Legislature.<sup>2</sup> The

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<sup>2</sup>Section 89-10(b), HRS, provides for the submission of cost items to the respective legislative bodies. If the State Legislature body is not in session at the time, the cost items are submitted in the governor's next operating budget. The section provides:

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost

natural consequence of the Employer's failure to tender the salary proposals to the Union in a timely manner was the inability to address the proposals on the negotiating table. Thus, the Board majority concludes that the Employer's actions constitute a wilful refusal to bargain in good faith in violation of Section 89-13(a)(5), HRS.

Lastly, the Union alleges that the Employer urged UHPA to bargain collectively with other bargaining units on the "common items." During bargaining sessions five and eight, Takushi indicated that certain cost items required collective bargaining with other bargaining units.

During bargaining session five, Takushi stated, "Common elements will be kept common. We will treat everybody fairly." Session #5, p. 14. During bargaining session eight, Takushi asserted, "We cannot have specific language. We must negotiate with other units." Session #8, p. 1. Nothing more was done.

The Employer concedes that there is nothing in Chapter 89, HRS, which requires the Union to bargain collectively with other bargaining units on any cost items. Tr. II, pp. 14, 46.

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items require appropriation by the State legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

Yasuda indicated that, "It would be more Employer preference or choice or decision" which causes certain cost items to be negotiated at the same rate. Id. at 14-15. He also stated that this "preference" in negotiating certain cost items "does not preclude anybody from trying to justify more or something different." Id. at 46-47, 48.

Based upon the evidence in the record, a unanimous Board concludes that the Employer refused to bargain over common items without adequate justification. The Employer's preference or desire to maintain the uniformity of common items across jurisdictions may appear logical because the negotiation of a common item in one unit might have a whipsaw effect on all other bargaining units. However, such preference or desire is not a justifiable reason to avoid negotiations over these subject areas. In the Board's view, the Employer should accommodate the concerns of the Union by addressing the merits of the common item proposals either directly with the Union or jointly with other bargaining units.

In the instant case, the Employer took the position that common items should remain common without considering the merits of UHPA's proposals or facilitating discussions with other bargaining units. In taking this position, the Employer knew or should have known that the natural consequence of such action would be to deny the Union the opportunity to negotiate over these subject areas. The Employer's action is thus presumed to be wilful. The Board therefore concludes that the Employer wilfully refused to bargain

in good faith over the common items and that such refusal constitutes a violation of Section 89-13(a)(5), HRS.

With respect to the remedy in this case, the Union contends that it is entitled to a bargaining order which compels the Employer to cease surface bargaining, to return to the table with a sincere desire to reach agreement and to make reasoned responses on the proposals which UHPA has made. UHPA contends that the Employer should be ordered to place competent persons on its team to discuss and decide technical details of language proposals. UHPA suggested that the Board order the Employer to place on the table before the mid-point of the legislature a comprehensive cost-item offer.

However, the Board takes notice that the parties have entered into an agreement for Unit 07 covering the period from July 1, 1993 to June 30, 1995. The Board is also reluctant to issue what amounts to be defined ground rules for the negotiating teams, i.e., how to respond to proposals, who can sit on the negotiating teams, when to fashion or present a cost offer. The Board recognizes that collective bargaining negotiations are a dynamic process and the Board is reluctant to set any hard-and-fast deadlines for the submission of the Employer's cost package which would be applicable in every circumstance. The Board is reluctant to interfere with the parties' negotiations strategy but in this case is compelled to find that the Employer's cost package should be tendered in a manner as to give the parties a meaningful opportunity to negotiate prior to the adjournment of the Legislature. Thus, in this case, the Board majority finds based



upon the facts presented, that the Employer committed prohibited practices by engaging in surface bargaining and that a cease and desist order is an appropriate remedy in this matter.

#### CONCLUSIONS OF LAW

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

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

A public employer violates Section 89-13(a)(5), HRS, by engaging in surface bargaining where based upon the totality of circumstances, the employer's conduct evinces no sincere desire to reach an agreement.

The Union failed to prove by a preponderance of evidence that the public employer committed prohibited practices in this case with regard to the authority of the Employer's spokesperson. In this regard, the Employer's spokesperson was authorized to negotiate over cost and non-cost items. In addition, the Employer responded adequately to the Union's proposals by either rejecting them or by submitting counter-proposals.

The Employer engaged in surface bargaining by failing to submit a formal salary proposal to the Union prior to the close of the Legislature and by refusing to negotiate with the Union over common items. The Employer's conduct evinced an attitude which was inconsistent with a desire to reach agreement and thus precluded meaningful negotiations. The Employer's conduct therefore

constitutes a refusal to bargain in good faith and is violative of Section 89-13(a)(5), HRS.

ORDER

In accordance with the foregoing, the Board hereby orders and directs the following:

The Employer is directed to cease and desist from failing or refusing to submit a cost proposal to the Union in a timely manner so that the parties have a meaningful opportunity to negotiate.

The Employer is directed to cease and desist from refusing to bargain with the Union over common items.

The Employer shall, within thirty days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where Unit 07 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting.


The Employer shall notify the Board within thirty (30) days of the receipt of this decision of the steps taken by the Employer to comply herewith.

The Board hereby dismisses the instant prohibited practice complaint insofar as it contains allegations of surface bargaining relating to the authority of the spokesperson and the substance of the Employer's responses or rejection of the Union's proposals.

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY and JOHN WAIHEE; CASE  
NO. CE-07-184  
DECISION NO. 366  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, June 15, 1995.

HAWAII LABOR RELATIONS BOARD

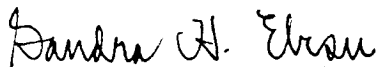
  
BERT M. TOMASU, Chairperson

Opinion, Concurring, in Part and Dissenting, in Part

I join Chairperson Tomasu's findings and conclusions that the Employer refused to bargain in good faith by failing to give a timely cost proposal to the Union and by refusing to negotiate over the common items.

However, the facts in this case also clearly support a conclusion that the Employer failed to bargain in good faith with the members of the bargaining unit 07 negotiating team as alleged by the Union. The record indicates that the Employer delayed submitting salary and other non-cost proposals to the Union. Talks on a successor contract began on October 30, 1992, yet it took the Employer nearly six months to offer any meaningful responses to proposals made by UHPA. In this regard, I believe that the Employer did not offer reasonable justifications for rejecting the Union's proposals. In my opinion, the Employer engaged in a course of conduct which did not demonstrate a sincere desire to engage in meaningful discussions and hence constitutes surface bargaining. See National Management Consultants, 146 LRRM 1050 (1993) where the NLRB found that the employer bargained in bad faith when it gave no

reason for rejecting the union's proposals, offered no counterproposals, and made no attempt to schedule any bargaining meetings.

  
SANDRA H. EBESU, Board Member

Opinion, Concurring, in Part and Dissenting, in Part

I concur with Chairperson Tomasu in finding that the Employer's spokesperson had sufficient authority to negotiate with UHPA. The evidence clearly establishes that Takushi, in addition to his vast background in collective bargaining, had system-wide authority to negotiate over non-cost proposals and that he had the authority, with the concurrence of OCB, to negotiate over the cost proposals. I also concur with Chairperson Tomasu in finding that the Employer's responses were sufficient in dispelling a prohibited practice charge.

I further concur with the majority of the Board that under the facts in this case, the Employer committed a prohibited practice by unreasonably refusing to negotiate over common items. The Employer's desire to maintain uniformity in negotiations over common items was conveyed to UHPA as a response to the Union's proposals and no further action was taken to negotiate over these proposals. Hence, the Union was precluded from engaging in any meaningful negotiations over its common item proposals.

However, I disagree with the majority of the Board in its finding that the Employer refused to bargain in good faith by failing to tender a timely cost item proposal to the Union.

It is clear in this case that Takushi was aware of the economic conditions of the State during these negotiations. While not specifically authorized by OCB to make a salary offer, Takushi was aware that no salary offers had been proposed by OCB. Thus, during bargaining session ten, when pressed for an answer from the Union as to the Employer's salary offer, Takushi responded that the Employer's official position was no pay increase at that time. Dr. Miller's notes indicate that Gordon Chang from Budget and Finance and Jim Nishimoto from OCB were present during that session and there was no discussion as to the propriety of the offer after it was made.

Yasuda likewise confirmed in his testimony that when the Employer does not make a salary offer, the inference is that the status quo prevails or there is no change in the existing contract, i.e., no pay increase. Thereafter, Yasuda specifically authorized Takushi to formally offer zero and zero to the Union and to informally explore whether two-and-two would be acceptable. However, Takushi explained that no formal proposal was made during bargaining sessions 11, 12 and 13 because he had already given the Employer's "no pay increase" proposal during bargaining session ten. Tr. II, p. 73. Later, Takushi met informally with Musto and explored whether the Union would consider two-and-two as satisfactory. Musto quickly rejected the two-and-two because it was too low and the Union wanted a step movement in the faculty salary schedule which entailed an increase of at least four percent.

Thus, although the Union contends that the Employer refused to present a salary offer to the Union, the record in this case establishes that the Employer did in fact make offers to the Union which were either rejected or not countered. In viewing the Employer's conduct, including its conduct away from the negotiating table, as propounded in the cases relied upon the Board majority, Takushi made offers to Musto in a good faith effort to reach a settlement.

As to the delay in presenting cost item proposals, the Employer concedes that it did not submit any cost item proposal to the Union until April 1993. Tr. II, pp. 40-41. However, Yasuda explained that poor economic projections reported by the Council on Revenues attributed to the delay. Id. at 10-11. Yasuda stated that he received the economic projections as early as January and March of 1993. Id. at 45. He also stated that the Employer could have made an offer in February or March of 1993 but it would probably have been "like a minus proposal" or "even a zero and zero." Id. at 26.

Both the Employer and the Union knew of the negative (-0.5) growth prediction given by the Council. Tr. I, p. 49; Tr. II, p. 59. The Employer also considered the effects of external events, i.e., Hurricane Iniki, the closure of Hamakua Sugar Company and the base closure at Barber's Point, in determining its ability to fund the Union's cost proposals. Tr. II, pp. 9, 59. Rather than make a negative or zero and zero proposal to the Union, the Employer decided to wait and hope that the state's economic picture improved. Id. at 11, 26, 41.

The Union contends that the Employer intentionally delayed its salary offer in order to force the Union to accept a settlement in the face of the legislative deadline. The Union argues that the Employer's salary offer was given so late that it would not have been able to take any agreement to the membership for ratification prior to the adjournment of the Legislature.

Given the facts of this case, I am not convinced that the Employer's reluctance to make a formal salary offer during the early and middle phases of negotiations was unreasonable. Rather than propose a salary package which would entail a decrease in wages based on negative growth predictions, the Employer chose to await the outcome of new revenue projections to form the basis for its wage proposals. The evidence establishes that the revenue projections were pessimistic and the Employer's difficulty in formulating a cost package depended upon the priorities placed upon available funds by the Legislature.

In any event, I find that Musto found the zero and zero offer to be unacceptable and specifically rejected the informal two-and-two, in his comments at the negotiating table at the outset of session 11 and again, in the off-the-record discussion with Takushi. I find it especially significant that four other units which received the offer at approximately the same time as UHPA were able to have the cost items approved by the Legislature. In my view, the Employer had sound and reasonable justification for submitting its cost proposals when it did. By engaging in hindsight and second-guessing, the Board majority is treading

dangerously close to setting firm guidelines as to how negotiations should be conducted.

Furthermore, I recognize that labor negotiations entail a great deal more than simply two groups of people sitting across the table exchanging proposals during formal on-the-record sessions. Negotiations entail a delicate and complex process replete with personal dynamics, differences in priorities and negotiating styles, and philosophical differences. In order to facilitate meaningful progress in negotiations, at times it may be necessary for individual negotiators to gather informally in a more relaxed, less rigid and less structured setting. If either party chooses not to engage in informal or off-the-record discussions and desires only to negotiate in formal sessions by placing formal offers written or unwritten, on the bargaining table, ground rules should be clearly established at the commencement of the negotiations. Without any evidence of such an understanding in this case and given a past practice where the parties engaged in fruitful off-the-record discussions, I view the informal, off-the-record discussion between Takushi and Musto as further evidence of good faith negotiations between the parties.

Based upon consideration of the totality of the circumstances surrounding these negotiations, I cannot agree with the Board majority's finding that the Employer failed to demonstrate a sincere desire to engage in meaningful negotiations and reach agreement. While I conclude that the Employer refused to bargain in good faith with the Union over common items, such a



finding alone does not support an overall conclusion of surface bargaining.

  
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RUSSELL T. HIGA, Board Member

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