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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of Petition for Declaratory Ruling by the Hawaii Federation of Teachers, Local 1127, AFL-CIO	)	Case No. DR-05-6 Decision No. 38

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RULING

This petition for a declaratory ruling was filed by the Hawaii Federation of Teachers (hereinafter Petitioner). The petition requested a ruling to determine when the next election for the exclusive bargaining representative of Unit 5 can be held in light of the contract bar contained in Section 89-7, Hawaii Revised Statutes (hereinafter HRS), and mediator-arbitrator Sam Kagel's decision.

Briefs were filed by the Petitioner and the Hawaii State Teachers Association (hereinafter HSTA). Pursuant to Chapter 89, the Hawaii Public Employment Relations Board (hereinafter Board) sitting en banc held a hearing on September 24, 1973, in Honolulu. The Board has completed a review of the record, exhibits and briefs submitted by the parties and hereby makes the following findings of fact, conclusions of law and declaratory ruling.

FINDINGS OF FACT

The HSTA is an employee organization certified by this Board as the exclusive bargaining representative of Unit 5 (teachers and other personnel of the Department of Education under the same salary schedule).

The Petitioner is an employee organization within the meaning of Chapter 89, HRS, and a principal rival of the HSTA.

The facts that lead to the issue raised in the instant proceeding include the following:

On April 2, 1973, after an unfruitful series of negotiations under the reopening clause of the existing contract with the Board of Education (hereinafter BOE), the HSTA began a strike despite a prior circuit court injunction. On April 16, 1973, the HSTA and BOE were finally successful in ending the strike by mutually agreeing to submit their differences to the final and binding decision of mediator-arbitrator Sam Kagel. The Kagel decision was rendered on June 25, 1973. Among the provisions was an extension of the existing BOE/HSTA contract by 6 months, altering the initial termination date of August 31, 1974, to February 28, 1975.

On July 31, 1973, the Petitioner, a rival union of the certified HSTA, filed a petition for declaratory ruling thereby seeking a decision by this Board as to whether the 6-month extension operates as a contract bar to a union election.

CONCLUSIONS OF LAW

I. IS THIS MATTER PROPERLY BEFORE THE BOARD SO THAT A DECLARATORY RULING MAY BE EFFECTIVELY RENDERED?

The HSTA's primary objection to the alleged timeliness of this petition is based upon the Board's Rules of Practice and Procedure, Rule 1.09(f)(1). That rule states that the Board can refuse to issue a declaratory ruling for good cause. Four non-exclusive situations are spelled out that are proper

grounds for the Board to refuse a ruling. The HSTA relies on the first which states: "The question is speculative or purely hypothetical and does not involve existing facts, or facts which can reasonably be expected to exist in the near future." On the basis of this rule, the HSTA argues that the issue in question is speculative and hypothetical since the Petitioner must first produce evidence of an interest of at least 30 per cent of the employees in Unit 5. Additionally, a petition for a proposed election cannot be made earlier than 90 and not less than 60 days prior to the expiration of the contract. Moreover, the HSTA argues that the Petitioner may decide that it would be in its best interest not to seek an election or that a merger of the two unions may occur.

The HSTA's contentions are without merit. The key phrase in HPERB Rule 1.09(f)(1) is, "facts which can reasonably be expected to exist in the near future." In light of the bitter historical conflict between the HSTA and Petitioner, it appears most reasonable to assume that a valid petition for decertification and an election will be filed in the future by the Petitioner.

The Board, therefore, holds that the facts, although argued by the HSTA to be speculative and hypothetical, can in fact be reasonably expected to exist in the near future and therefore the matter is properly before this tribunal so that a declaratory ruling may be properly made.

II. DOES THE SIX-MONTH EXTENSION OF THE EXISTING CONTRACT OPERATE AS A BAR TO A UNION ELECTION?

The answer is no.

Based upon a policy of fostering union-management peace and stability, the NLRB has established the Contract Bar Doctrine. This Doctrine prohibits a union election when an existing valid contract of a definite duration is in effect. Pacific Coast Ass'n of Pulp & Paper Mfg., 121 NLRB 990, 42 LRRM 1477 (1958). During the term of the contract any union challenge is precluded.[1] However, an election can be properly held provided a petition is filed during the 30-day open period that begins 90 days and ends 60 days prior to the contract expiration date. During this 30-day open period, a rival union can file for an election.

Section 89-7, HRS, incorporates the Contract Bar Doctrine and the 30-day open period rule as law in our Collective Bargaining in Public Employment statute. That section in relevant part reads:

> "No election shall be directed by the board in any appropriate bargaining unit within which. . .(2) a valid collective bargaining agreement is in force and effect, except upon a petition as provided herein not more than ninety days, but not less than sixty days, prior to the expiration of the agreement."

In the case at hand the original HSTA/BOE contract had an August 31, 1974, termination date. An election petition filed prior to the 30-day open period under this original contract would clearly be denied under 89-7, HRS. However, this

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[1]The bar can only operate for a 3-year maximum. Thus, a 2-year contract operates as a bar for 2 years, a 3-year contract is a bar for 3 years, but a 4-year or longer contract is a bar only for 3 years. General Cable Corp., 139 NLRB 1123, 51 LRRM 1444 (1962).

August 31, 1974, termination date was changed to February 28, 1975, by the Kagel 6-month extension. Does this extension operate as a contract bar?

In order to further define the Contract Bar Doctrine, the NLRB has established the rule of premature extension. This rule was promulgated to prevent a certified union and mangement attempt to block a foreseeable union election by agreeing to a renewal or extension of an existing contract before a rival union could file for an election during the 30-day open period.

Under the rule of premature extension, a rival union will not be prohibited from seeking a new election if a petition is properly filed within the 30-day open period of the original contract even when an extension or renewal and resulting later termination date are made prematurely.

A contract is deemed prematurely extended if a later termination date is made before the 60-day insulation period, i.e., that period 60 days preceding the original termination.[2] Deluxe Metal Furniture Co., 121 NLRB No. 135, 42 LRRM 1470 (1958). Buckeye Village Market, Inc., 175 NLRB No. 46, 70 LRRM 1529 (1969). American Mfg. Co. St. Louis Cardoge Mills Div., 168 NLRB 981, 67 LRRM 1016 (1967).

This rule of premature extension has been accepted in the public sector of labor law. In A/SLMR No. 235 Assistant Secretary of Labor Usery held that a rival union's petition was not barred by a premature 2-month extension of an existing contract. 488 GERR A-5 (1973).

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[2]Under the premature extension rule any extension of the contract made by the union and employer prior to the last 60 days of the existing contract is premature. A valid extension can only be made during the 60-day insulation period in order that it operate as a contract bar. Deluxe Metal Furniture Co.

However, the rule of premature extension was not incorporated in our statute. Despite its absence, this Board hereby adopts this rule as a necessary ingredient of the contract bar doctrine which was adopted by our Legislature in Section 89-7, HRS. As stated above, the intent of the Doctrine of Contract Bar is to insure union-management peace and stability by prohibiting untimely intrusions by a rival union. This desire to maintain peace must also be balanced against the right of a rival union to challenge the incumbent's status as the exclusive bargaining representative at known and certain times and to allow the exercise of free choice by the employees to reelect or change their bargaining agent at predictable and reasonable intervals. Cushman's Sons, Inc., 88 NLRB No. 49, 25 LRRM 1296 (1950), Celanese Corp. of America, 83 NLRB 103, 24 LRRM 1039 (1949). To achieve this necessary balance the adaptation of the rule of premature extension as law becomes exceedingly compelling. Without the rule of premature extension, an incumbent union could insure its continual term as the exclusive bargaining representative indefinitely under the protection of the contract bar by repeatively renewing or extending the existing contract prior to the 30-day open period, thereby preventing a rival union's filing of an election petition. Intended as a shield for the incumbent union and management against untimely and unwarranted intrusions by a rival union, the contract bar cannot be used as a means to insure the incumbent's continual representation by means of premature extensions which block a rival union's right to seek an election. To the contrary, the rule of premature extension was promulgated in the private sector and adapted by the public sector to facilitate the proper balance between the contract bar's function of

fostering union-management peace and stability and to preserve the fundamental right of the employees to change their bargaining agent at known and specific periods of time.

In the case at hand, the extension of the HSTA/BOE contract came one year before the original contract's termination date and 10 months prior to the insulation period. Such an extension is premature since an extension or renewal can only be made during the insulation period, in this case between July 1 and August 31, 1974, in order that it bar an election. Consequently, under the preceding rationale the Petitioner is not barred by the 6-month extension. A petition for an election will be proper if filed no earlier than 90 days, but no later than 60 days prior to the original August 31, 1974, termination date of the HSTA/BOE contract. If a petition is so filed,[3] the Petitioner will be fully afforded the right to challenge the HSTA's claim to exclusive representation notwithstanding the 6-month extension.

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[3]It should be noted that pursuant to Section 89-7, HRS, and H-PERB Rule 2.06(b)(3) a petition for an election must be supported by a showing of interest of at least 30 per cent of the employees in a unit. See also H-PERB Rule 2.07.

RULING

In view of the foregoing, this Board rules that the 6-month extension fashioned by mediator-arbitrator Sam Kagel does not operate as a bar to a union election.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Carl J. Guntert, Board Member

John E. Milligan, Board Member

Dated: October 30, 1973

Honolulu, Hawaii

DISSENTING OPINION

My colleagues would adopt, by adherence to NLRB decisions, a premature extension doctrine identical to the doctrine enunciated by the NLRB[1] despite the fact that our law,[2] its legislative history, and the facts of this case do not warrant or support such a result.

The NLRB, through various decisions over the years, has adopted a contract bar doctrine to stabilize the employer-union relationship. The doctrine is self-imposed and discretionary.[3] It is clear that the related premature extension doctrine was adopted to assure employees a measure of freedom to change exclusive representatives. Pacific Coast Assn. of Pulp & Paper Mfrs., 121 NLRB No. 990, 42 LRRM 1477, 1479 (1958). Both policies are sound and should be given serious consideration by this Board. Our law clearly contains a contract bar. However, its parameters are not spelled out. Arguably, an initial 90-year contract could, under the language of our statute, act as a bar. This result would, of course, have to be rejected as unreasonable. It is, however, not at all clear that our law contains or contemplates a premature extension doctrine. It may fall to this Board to set the parameters of our law's contract bar and to determine whether it includes or permits a premature extension rule. However, the law and facts

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[1]Deluxe Metal Furniture Co., 121 NLRB No. 135, 42 LRRM 1474 (1958).

[2]Chapter 89, HRS, at Section 89-7, infra.

[3]BUREAU OF NATIONAL AFFAIRS, DEVELOPING LABOR LAW (C. Morris ed. 1971) p. 167

of this case make this, in my opinion, an improper instance in which to fashion the dimensions of such doctrines.[4]

Our law in pertinent part provides at Section 89-7, Hawaii Revised Statutes (hereafter HRS):

> "No election shall be directed by the board in any appropriate bargaining unit within which . . . (2) a valid collective bargaining agreement is in force and effect, except upon a petition as provided herein not more than ninety days, but not less than sixty days, prior to the expiration of the agreement."

Comparing our law to similar laws in other jurisdictions, one is struck immediately by the presence in theirs, but the absence in ours, of any qualifying contract durational limit, any hint of an intent to adopt the premature extension doctrine, or any language suggesting that a vote by the affected employees after the mere passage of a stated period of time can bring about a change of representative during the life of a contract. See, e.g., Sec. 14.20.560 Chapter 18, L., 1970, as amended by Ch. 71, L. 1972, and Ch. 113 L., 1972, Alaska; Section 3506, Ch. 1964, L. 1961, as amended, California; Section 7-471 P. A. 159, Connecticut; Section 1305 of Title 19, Delaware.

The law of the state of Michigan contains the clearest adoption of the doctrine of premature extension and it was in effect, and apparently served as a resource, when the Hawaii law was being drafted.[5]

The Michigan statute declares at Section 423.214, Act 336 L. 1947, as amended:

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[4]This Board's Rules and Regulations are silent on the subject.

[5]"Where the meaning of a statute is in doubt reference to legislation in other . . . jurisdictions which pertains to the same subject matter . . . may be a helpful source of interpretive guidance. . ." SUTHERLAND STATUTORY CONSTRUCTION (4th ed. by Sands 1972) Sec. 52.03, p. 337

> "No election shall be directed in any bargaining unit or subdivision thereof where there is in force or effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration: Provided, however, no collective bargaining agreement shall bar an election upon the petition of persons not parties thereto where more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later."

Had our Legislature adopted this or similar language, then we would have absolute clarity as to what was intended. From a review of the relevant legislative history of our law as set forth below, it is clear that the Legislature of Hawaii, for reasons which are not enunciated, deliberately rejected precise language respecting the durational aspects of the contract bar doctrine and the reference to the timeliness of renewals of contracts. The first draft of the bill which became our law stated at Section 6(h), S.B. No. 1696-70:

> "No election shall be directed by the Board in any bargaining unit where there is in force and effect a valid collective bargaining agreement; provided however, a collective bargaining agreement shall not bar an election, upon the petition of persons not parties thereto, after two (2) years have elapsed since the execution of the agreement or the last timely renewal, whichever was later."[6] (Emphasis added)

Our Legislature eliminated all of the language after the semicolon in the above portion of the draft from subsequent drafts. Such an amendment has significance in discerning legislative intent. Sutherland, supra, Sec. 48.18 pp. 224-225. And, on the basis of this amendment, a sound inference can be drawn that our Legislature rejected the premature extension doctrine.

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[6]The striking similarity between this language and the Michigan statute is inescapable. It is interesting that even in copying the Michigan statute in the first draft, as arguably the drafters did, they left out the words "which was not prematurely extended."

It would appear that the Legislature's intention respecting this Board's implementation of the pertinent portion of Section 89-7, HRS, incomplete as it is, left this Board with the task of applying the section in a manner that achieves reasonable and fair results.

I do not believe that the 6-month extension of the original 30-month contract between the HSTA and the BOE by mediator-arbitrator Sam Kagel creates a contract of unreasonable length which in any way seriously encroaches upon employees' rights to change their exclusive representative at reasonable intervals if they so desire. Further, I believe the 6-month extension did lead to stability, current as well as future, between the contracting parties in a most marked way. It was part and parcel of a mediation-arbitration resolution of an on-going strike. I feel it would be unwise for this Board to undo any part of this imposed settlement. While I am not eager to encourage settlement of negotiating disputes by third parties, preferring that the contracting parties settle their differences themselves, I feel that, given the difficult facts which were present during the April, 1973, teachers' strike, the mediator-arbitrator's services and solutions were required. They were rendered and given. If this Board were to overturn the resolution thus arrived at, it would be weakening the results of the mediation-arbitration process and would discourage parties from honoring them.

Even more to the point, I believe that there is a gross element of unfairness in treating the Kagel extension as a premature extension. The majority's opinion does not <u>ipso facto</u> eliminate the extension, it merely prevents the extension from acting as a bar to an election. Under the contract, before it was extended by Mr. Kagel, the HSTA had, under Article

XXIII (the duration clause) of the contract the right, if it so chose, to give notice to the employer in June, 1974, of its desire to amend, or modify the agreement. If it gave such notice, it then could have commenced negotiations. The effect of the Kagel extension was to eliminate the right to reopen soon after the June notice, for the Kagel extension was embodied in a portion of the mediation-arbitration Opinions and Decisions which totally replaced the aforesaid Article XXIII. Under the new duration clause written by Mr. Kagel, the right to give a June, 1974, notice of a desire to amend or modify the contract was eliminated and in its place, Mr. Kagel substituted the dates September 16 through September 30, 1974, as the time in which the union could give notice of its desire to commence negotiations. Under the majority opinion, the HSTA then will be stuck with having lost its previous right to reopen negotiations prior to August 31, 1974, and will, if Petitioner should replace it as the exclusive bargaining agent, never have the right it once had to reopen negotiations on wages, hours of work and terms and conditions of employment for the people it represents for the remainder of its tenure as the exclusive representative. This fact alone conceivably could weaken its potency in the minds of Unit 5 members. The unfairness in this situation lies not in the conceivability of Petitioner's inheriting the Kagel-extended contract or in winning the right to represent the unit; it lies in what the HSTA lost because of the imposition of the extension, if the extension is not permitted to act as a bar to an election.

Moreover, I believe that the 6-month extension in this instance brings the subject contract into compliance with the terms of Section 89-10(c), HRS, which provides:

> "Because effective and orderly operations of government is essential to the public, it is declared to be in the public interest that in the course of collective bargaining, the public employer and the exclusive representative shall make every reasonable effort to conclude negotiations, and include provisions for an effective date, a reopening date, and an expiration date, at a time to coincide, as nearly as possible, with the period during which the appropriate legislative bodies may act on the operating budget of the employers." (Emphasis added)

The imposition of the premature extension doctrine in this instance would defeat the intent of Section 89-10(c). The contract, prior to the imposition of the 6-month extension, would have ended on August 31, 1974, a date which would not coincide with legislative action upon the Governor's operating budget. The 6-month extension of the contract to February, 1975, is part of a carefully worked out timetable with negotiations scheduled to commence and be concluded in time for submission of cost items to the 1975 Legislature.

The 1968 Constitutional Convention and the voters of the State made certain key amendments to the Constitution of Hawaii which must be considered in construing Section 89-10, HRS, respecting State employees.

Said amendments are contained at Section 4 and Section 5 of Article VI of the Constitution. The thrust of these amendments, for the purposes of this case, are the following:

1. The State's operating budget was put on a fiscal biennuim basis;

2. Regular sessions during odd-numbered years, e.g., 1973, 1975, were made the money years; that is, the years when the Legislature would act upon the Governor's operating budget.

The extension, in my opinion, rather than being out of step with our law brings the BOE/HSTA contract into accord with it; and Section 89-10(c), HRS, further convinces me that this is not the right case in which to apply a premature extension doctrine.

As I noted before, the NLRB's contract bar and premature extension doctrines are self-imposed and discretionary, and the NLRB may waive them as the facts of a given situation demand in the interest of fairness. See, United Brotherhood of Carpenters & Joiners v. Vincent, 286 F.2d 127 (2nd Cir. 1960).

In the case before this Board, I do not believe we have a situation in which we should, in the exercise of our discretion, impose a premature extension doctrine even if Section 89-7 permitted us to do so.

Considering the legislative history cited above, perhaps our Legislature should reconsider the relevant portion of Section 89-7, HRS, and decide the questions which the incompleteness of said statutory language creates.

Mack H. Hamada, Chairman

Dated: October 30, 1973

Honolulu, Hawaii