STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LINDA CROCKETT LINGLE, Mayor, County of Maui, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-01-121 DECISION NO. 382 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and LINDA CROCKETT LINGLE, Mayor, County of Maui and COUNTY OF MAUI, Respondents.	CASE NO. CE-01-297

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 13, 1996, the COUNTY OF MAUI (County or Employer) filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) in Case No. CU-01-121 with the Hawaii Labor Relations Board (Board). The Employer alleged, inter alia, that the UPW breached the ground rules in the renegotiation of the Task Work (Uku Pau) Agreement by publicly disclosing the content of negotiations discussions. The Employer alleged that Gary Rodrigues, UPW State Director, stated in

an article appearing in the Honolulu Advertiser that the talks had stalled because the County had failed to provide data to support its demand for more pickups in a day. In addition, Rodrigues stated that the County claimed that recycling programs have reduced the amount of trash produced by each household. The Employer also alleged that on or about January 9, 1996, Rodrigues was interviewed by a Maui radio station and he addressed a substantive portion of the negotiations with the County. Thus, the County alleged that the Respondent violated Sections 89-13(b)(2) and (4), Hawaii Revised Statutes (HRS).

Thereafter, on February 20, 1996, the UPW filed a prohibited practice complaint against LINDA CROCKETT LINGLE, Mayor, County of Maui and the County in Case No. CE-01-297. The UPW contends that on or about January 5, 1996, Respondent LINGLE made public announcements in the media regarding the privatization of residential refuse pickup in Maui County. UPW further contends that the Respondent implemented her decision to privatize the refuse pickup and disposal work and has thereby violated Sections 89-13(a)(1), (5), and (7), HRS.

At the prehearing conference held in Case No. CU-01-121, the parties agreed to consolidate the cases for disposition. In addition, LINGLE was substituted as the Complainant in Case No. CU-01-121.

The Board commenced the hearings on the consolidated cases on March 20, 1996. After the hearing, the UPW filed a motion to amend its complaint to include an allegation that Respondent LINGLE unilaterally implemented her decision to subcontract all

refuse and disposal work covered by the Uku Pau Agreement to a private contractor. The UPW alleged that forty (40) or more refuse collectors and drivers in bargaining unit 01 were displaced by Respondent's actions and that Respondent informed bargaining unit members of the decision without bargaining with the UPW. The UPW thus contended that Respondent failed to bargain in good faith over the decision to subcontract and its impacts in violation of Sections 89-13(a)(1), (3), (5), and (7), HRS. The Board granted the UPW's motion to amend its complaint by Order No. 1314 issued on April 9, 1996.

On April 4, 1996, the UPW filed a motion for interlocutory relief contending that the Employer engaged in inherently destructive conduct when she decided to privatize refuse collection and disposal work on the island of Maui because the UPW refused to agree to modifications proposed by Respondent to the Uku Pau Agreement. In addition, the Union contended that Respondent refused to negotiate over the decision to privatize bargaining unit work performed by approximately forty-one (41) employees of the solid waste division, Department of Public Works and Waste Management, County of Maui. The UPW moved that the Board enjoin Respondent from (1) unilaterally implementing her decision to privatize refuse collection and disposal work in Maui County currently performed by bargaining unit 01 employees under the existing Uku Pau Agreement with the UPW; (2) threatening to privatize or contract out bargaining unit 01 work during negotiations over amendments to the Uku Pau Agreement between Maui County and the UPW; and (3) refusing to negotiate over the decision

to privatize refuse collection and disposal work and its full impact on bargaining unit work and unit 01 employees.

A further hearing on the case-in-chief was conducted on April 11, 1996.

Thereafter, the Board conducted a hearing on Complainant's motion for interlocutory relief on April 15, 1996, pursuant to an agreement between the parties. The parties submitted written memoranda on April 4, 1996, April 12, 1996, and April 15, 1996 in support of and in opposition to the motion.

After reviewing the record and considering the arguments presented on the motion, the Board orally granted Complainant's motion. Subsequently, on May 17, 1996, the Board issued a written order granting Complainant's motion for interlocutory relief pending a final resolution of the case. The UPW filed its post-hearing memorandum on June 4, 1996 and the Employer submitted its post-hearing brief on June 7, 1996.

Based upon a thorough review of the record before the Board in this case, the Board makes the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

Complainant UPW is the exclusive representative of employees in bargaining unit 01, as defined in Section 89-6, HRS.

Respondent LINGLE is the Mayor of the County of Maui and thus, is the public employer as defined in Section 89-2, HRS, of employees of the County of Maui who are included in bargaining unit 01.

The UPW and the County of Maui are parties to a collective bargaining agreement, effective July 1, 1993 to June 30, 1995, covering bargaining unit 01 employees of the State of Hawaii and the various counties. The agreement was extended from July 1, 1995 through January 31, 1996, pursuant to a Memorandum of Agreement, dated June 29, 1995, and extended again from February 1, 1996 through June 30, 1996, pursuant to a Memorandum of Agreement, dated January 31, 1996.

The UPW and the County of Maui have been parties to successive collective bargaining agreements applicable to bargaining unit 01 employees since the 1970's. Historically, the terms and conditions of work for those engaged in refuse collection and disposal work in the County of Maui, County of Kauai and the City and County of Honolulu have been negotiated as separate Uku Pau Agreements between the UPW and each county.

In Department of Public Works, County of Maui v. United Public Workers, Local 646, (8/9/86), Arbitrator Ted T. Tsukiyama described the meaning and history of "uku pau" as follows:

> The "taskwork" (uku pau) system has been in existence prior to the first collective bargaining agreement between the parties. "Uku pau" is a colloquialism for the piece work contract work system under the refuse collection operations where a certain quantum of work is determined and designated as the equivalent of an 8-hour day's work, which can be completed at the will and pace of each work crew. We are indeed indebted to the Union's Post-Hearing Brief for its interpretation of the word and meaning of "uku pau", that is, in the Hawaiian language the word "uku" means "flea" and "pau" means "finish or complete", thus to "uku pau" means "to jump around like a flea to quickly finish the work." The "uku pau" systems differ in each county in which the applicable work unit may be measured by

> poundage as in Honolulu, by housing units as in Kauai, or by route as is the case in the County of Maui. Each county (except County of Hawaii) has formulated and adopted an "uku pau" agreement in writing with the Union.

Thus, the Uku Pau Agreement permits refuse collection workers to end their workday once they finish their task work or their assigned refuse collection routes.

Commencing in 1983, the parties to the Unit 01 agreement incorporated the Uku Pau Agreements into the master agreement pursuant to Section 51.02 and agreed that modifications to any Uku Pau Agreement would be submitted and negotiated in the same manner as proposals to modify the Unit 01 agreement under Section 51.04. The term or duration of the Uku Pau Agreements and the Unit 01 agreement are co-terminous.

Relevant portions of the Unit 01 agreement state:

> 51.02 For the purpose of efficiency of operations, the parties agree to recognize the existing refuse collection task work (uku pau) system as a method of determining a day's work in the applicable jurisdictions.
>
> 51.04 Modification to existing Task Work Agreements titled "Task Work Policies for Refuse Collective Operations" of the County of Maui, "Policies and Procedures on Task Work for Refuse Collection" of the City and County of Honolulu, and "Task Work Policies for Refuse collection Operations" for the County of Kauai shall be made through negotiations between the applicable Employer and the Union. Submission of proposals and commencement of negotiations shall be made in accordance with Section 66.02 of this Agreement or as provided for in Section 63.01 of this Agreement.
>
> 66.02 Notices and proposals shall be in writing and shall be presented to the other party between July 1 and August 30, 1994. When any such notice is given, negotiations for a new Agreement shall commence on or about

September 1 following the giving of such notice.

On September 13, 1994, Raymond Kokubun (Kokubun), Director of Personnel Services for the County of Maui, submitted five (5) proposals to modify the Uku Pau Agreement to the UPW. The County sought (1) to exclude Molokai employees from uku pau and change the starting times for all uku pau employees from 5:30 a.m. to 7:00 a.m., (2) to delete the overtime pay requirements of 1,750 accounts, (3) to modify the standard amount of trash pickups from 350 accounts to 24,000 pounds per route, (4) to permit the employer to introduce new technology and methods of refuse pickup through "consultation", and (5) to reduce the crew size from three to two employees, if a third crew member was not immediately available.

The UPW sought no changes to the existing Uku Pau agreement with the County of Maui.

On May 12, 1995, the parties commenced bargaining over the proposed contract modifications. Peter Trask was the spokesperson for the Union's negotiating committee which consisted of four employees from the island of Maui. Kenneth Taira, Deputy Director for Personnel Services, County of Maui, was the spokesperson for the Employer. The UPW rejected Maui County's proposal to remove the Molokai refuse collection and disposal system from the Uku Pau Agreement. In addition, the UPW rejected an Employer proposal to reduce the refuse crew size from three employees (consisting of a driver and two collectors) to two employees. According to the Employer, the UPW rejected each proposal without explanation.

At the initial session, Taira transmitted a set of bargaining "ground rules" which the parties used in their regular Unit 01 negotiations. Rules 9 and 10 of the ground rules state, in relevant part:

> 9. The parties may summarize the progress of negotiations through their newspapers, negotiations bulletins, and meetings.
>
> 10. There shall be no public announcement or news media releases on the content of negotiations discussions prior to impasse except by mutual agreement. (Emphasis added.)

Taira believed the rules were intended to permit the parties to maneuver in negotiations and to avoid having bargaining issues surface in public thereby making it difficult for negotiators to reach agreement. There was no discussion between the parties about the ground rules at the bargaining table.

After the initial bargaining session, Raymond Kokubun, Director of Personnel Services, became the spokesperson for Maui County.

On June 20, 1995, the County announced that employees in the highways division of the Department of Public Works and Waste Management would not be allowed to perform temporary assignment work as refuse crew leaders (drivers) and refuse collectors. Previously, temporary assignments were routinely granted from the highways division and were recognized as constituting a term and condition of work covered by the Uku Pau Agreement. UPW v. Department of Public Works, County of Maui, Grievance of Paul Kaina (Arb. Ishida, 4/14/86). County officials did not negotiate this change in temporary assignments with the UPW before implementing it.

By letter dated June 21, 1995, Kokubun indicated to Gary Rodrigues, UPW State Director, that the UPW had rejected all of the County's proposals at the first negotiation meeting held on May 12, 1995 without providing any explanation or offering any counter-proposals. The County provided reasons for its proposed changes and further proposed to extend the Uku Pau Agreement to January 31, 1996 in order to allow the parties to negotiate in good faith. The County further indicated that if an agreement was not reached by January 31, 1996, the County would not extend the Agreement and would be free to seek other methods to collect refuse.

On June 29, 1995, the County implemented a change from a two-day pickup system in Molokai to a one-day pickup. The Employer did not negotiate this change with the UPW prior to implementation.

David Goode, Deputy Director of the Department of Public Works and Waste Management, admitted to a course of unilateral changes which Respondents undertook during the uku pau negotiations.

> Q. All right, there you go. Your department implemented unilaterally a change to the two-day Molokai pickup to a one-day pickup; is that correct? Exhibit 20.
>
> A. Just a moment. Correct.
>
> Q. And that wasn't negotiated with the Union in advance, was it? It was not negotiated; is that correct?
>
> A. That's correct.
>
> Q. And in September you issued a memo, Exhibit 21?

A. Yes.

Q. In which you prohibited or you announced that highway division employees would not temporarily be assigned to perform refuse work, correct?

A. That's correct.

Q. All right, and that was implemented unilaterally, it wasn't negotiated with the Union, was it?

A. That's correct.

Q. And on September 19, Exhibit 22, you implemented a memo or a change where you would have a two-man crew instead of a three-man crew, correct?

A. In certain situations.

Q. Yes. And that was not negotiated with the Union in advance, was it?

A. That's correct.

Q. You just did it right? You just did it.

A. Correct.

* * *

Q. All right. So you're aware that between the May 1995 meeting at least four separate unilateral changes had been implemented by the County without any negotiations with the Union; is that correct?

A. Maybe three.

Q. As shown by these documents?

A. I think I agreed to three of them.

Transcript (Tr.) of hearing held on 4/11/96, pp. 148-49, 151.

By letter dated June 30, 1995, Gary Rodrigues responded to Kokubun's letter dated June 21, 1995, stating that the County appeared to be deliberately violating Sections 51 and 66 of the Unit 01 Agreement and Chapter 89, HRS. In addition, Rodrigues stated, "Your lack of knowledge clearly indicates you should resign your job because taxes are being wasted paying you."

On September 19, 1995, Maui County implemented its proposal for a reduced refuse crew size in certain situations. Maui County did not negotiate to impasse the proposed change in crew size prior to implementation.

On October 18, 1995, the UPW filed a prohibited practice complaint with the Board in Case No. CE-01-275, challenging the above series of unilateral changes implemented by Maui County without prior negotiation.

In October or November 1995, LINGLE met with WMI and other County officials, including Kokubun and Goode, and discussed WMI's experience at the Waimanalo Gulch landfill on Oahu and the landfill at Kealakehe on the island of Hawaii. They also discussed the contracting out and privatization issues.

By letter dated November 7, 1995, Kokubun wrote the UPW and offered to meet to resume the uku pau negotiations.

Thereafter, on November 21, 1995, the UPW and County negotiators convened their second bargaining session. County negotiators narrowed the focus of their proposed changes by withdrawing their proposal on new technology and methods of refuse pickup, and changing their proposal to reduce the refuse crew size from three (3) to two (2) (i.e., making the reduction optional). The parties exchanged their respective views on these issues.

On December 1, 1995, at the third bargaining session, Maui County negotiators decided to withdraw three more of their proposals after the UPW negotiating committee rejected them. Maui County thus withdrew all proposals except for the change in the

work standard from 350 accounts per day per route, to 12 tons per day.

In a letter dated December 7, 1995, Kokubun informed Peter Trask that the County of Maui had decided to focus their effort on one change in the Uku Pau Agreement (i.e., a modification to the standard of refuse pickup each day). Under the existing Uku Pau Agreement, refuse crews are assigned to 350 residential pickups per day (or 1,750 accounts per week). Maui County proposed that production level be increased to 500 residential pickups per day or 2,500 accounts per week. In his letter of December 7, 1995, Kokubun set December 22, 1995, as a "deadline" for a response from the UPW to the new proposal. On December 21, 1995, Peter Trask responded to Kokubun's letter confirming that the negotiable issues had been reduced by Maui County's withdrawal of all but one proposal for modification to the Uku Pau Agreement.

Raymond Kokubun, in a letter to Peter Trask dated December 27, 1995, informed the Union that Maui County was considering the issuance of a request for proposals for private refuse collection. Kokubun submitted a proposal regarding changes to the overtime and routes sections of the Agreement. Kokubun also stated that time was of the essence and the urgency the Employer felt over these negotiations and the lack of progress.

LINGLE decided to issue a request for proposals (RFPs) after the third bargaining session held on December 1, 1995, with the UPW. LINGLE's motivation for her decision was "because there was no movement or there appeared to be no movement on the part of the Union with respect to amending the Uku Pau Agreement." LINGLE

consulted with Raymond Kokubun before making her decision; Kokubun confirmed that a "causal connection" existed between LINGLE's decision to issue a request for proposal and the UPW's failure to grant Maui County a "concession" in uku pau negotiations by December 21, 1995. At this point, the parties had not reached an impasse in negotiations.

By letter dated December 27, 1995, Kokubun withdrew the County's modified proposal transmitted earlier and stated:

> You should also be aware that in planning for alternatives should negotiations fail, we will be issuing a request for proposals regarding refuse collection. If negotiations fail, we must have an alternative ready to go to protect the health and safety of our citizens.

As of December 21, 1995, the UPW and the County of Maui were not at impasse in uku pau negotiations. On January 5, 1996, Respondent LINGLE issued a news release to announce that the Department of Public Works and Waste Management had issued an RFP to coordinate residential refuse pickup for the island of Maui on a privatized basis effective July 1, 1996.

The Employer testified that one of her primary reasons for soliciting proposals was there appeared to be no movement from the Union to amend the Uku Pau Agreement. Kokubun also testified that there was a causal connection between the anticipated inability to get the concession the Employer wanted and the RFPs issued by the Employer. According to the Employer, the RFP was developed to analyze the extent and cost of entering a contract. The RFP was developed by Goode after studying other jurisdictions to determine what they were doing to solve their solid waste problems.

On or about January 5, 1996, LINGLE issued a news release which stated:

> Request for Financial Proposal for refuse pick-up
>
> The Department of Public Works and Waste Management has issued a RFP (Request for Proposal) to operate the residential refuse pick-up for the island of Maui. The request excludes Hana and some remote areas of the island.
>
> The current system employs county workers represented by the UPW. The contract agreement with the UPW expired in June of 1995 and was mutually extended to January 31, 1996. Although negotiations are continuing between the county and the union, there is a possibility that no agreement will be reached.
>
> Mayor Linda Crockett Lingle said, "While we continue to negotiate in good faith, and expect the union to do the same, the health and welfare of the community is our highest priority. We are hopeful that an agreement can be reached. In the event this does not happen, our obligation to the public requires that we continue to provide residential refuse collection.

In a January 6, 1996 news article published in the Honolulu Advertiser, reporter Edwin Tanji stated:

> Maui Mayor Linda Crockett Lingle last night said she is moving to hire a private operator to pick up residential trash on Maui because of stalled talks with the United Public Workers.

The Advertiser news article also reported on the status of uku pau negotiations based on statements attributed to LINGLE in her press release and statements made by Goode. The article stated in relevant portions:

> A contract with the UPW was extended to Jan. 31 and negotiations are continuing. But Lingle said, "There is a possibility that no agreement will be reached."
>
> A major issue apparently involves county efforts to set up an automated trash pickup system, as has been set up on Lanai and in

> some parts of Honolulu. The automated system allows a single operator to pick up household trash in designated containers.
>
> The request for proposals seeks an operator able to provide automated pickup beginning April 1, Deputy Public Works Director David Goode said. He said he could not comment on whether automated pickup was an issue in the UPW contract talks.

Edwin Tanji testified that he did not interview the Mayor, but gleaned the information in the article from the press release issued on January 5, 1996.

Tanji called Rodrigues before and after his news article initially appeared. When Rodrigues returned Tanji's telephone call, he asked Tanji, "how did you get the mayor's statement?" Tanji referred to the press release and stated he wanted "to allow him (Rodrigues) the opportunity to react to the Mayor's announcement."

On January 9, 1996, a news article appeared in the Advertiser with a headline, "Union fights privatizing of Maui trash collection." Regarding the statement attributed to LINGLE that she had taken the action "because of stalled talks with the United Public Workers," Tanji reported as follows:

> Rodrigues said the talks have been stalled because the county had failed to provide data to support its demand that trash collection crews can make more pick ups in a day. The county is claiming that recycling programs have reduced the amount of trash put out by each household, he said.

Maui radio station KNUI news director Fred Guzman testified that Rodrigues was "interviewed at our request for a reaction to comments attributed to Mayor Lingle regarding the possibility of privatizing refuse collection on Maui." Rodrigues

expressed concern on his part to Guzman that there had been "a threat of privatization." The following statement was attributed to Rodrigues:

> The recycling does not have any major impact on the size of the load. So, if Maui County merely wants to increase the length of the workday, they should come right out and say it and not use recycling as an excuse. We're going to give the County a week to supply the information. Since the Mayor is making such a big deal of it, we're going to be filing a complaint with the Labor Relations Board charging the County with bad faith bargaining because under the law they are required to provide us with the information.

The parties met on January 8, 1996, for their fourth bargaining session, during which Maui County's proposal to increase refuse pickups from 350 to 500 per day was discussed. Kokubun believed that the proposal was intended to bring Maui County into parity with Kauai County. The Union's negotiating committee from Maui remained unconvinced about the need for a modification which would increase their hours of work because the Employer did not provide the "facts and figures" to support their position. The Union requested additional information supporting the Employer's requests for modification. Kokubun asked the Union to focus its request for information to specific items in connection with the outstanding issue of pickup standards.

On January 19, 1996, Kokubun transmitted a partial response to the Union's request for information. The Employer explained the reasons why an adjustment in the 1,750 accounts per week standard was appropriate. Kauai had a standard of 3,000 accounts per week. Also, the average household waste per week had decreased from 71.25 pounds per account in 1989 to 53.78 pounds per

account presently, a 28 percent decrease. The standard in the City and County of Honolulu was 12 tons per day. The Employer also suggested further negotiating sessions.

A session was scheduled on January 25, 1996. On January 22, 1996, the Employer received a request that four refuse workers be given time off on the 25th to caucus prior to the meeting. The Employer, however, felt that this would create an undue hardship on the Department's operations. Since the meeting was scheduled for 1:00 p.m., the Employer suggested the caucus could begin at 10:00 a.m., when the workers would be off and still leave three hours before the scheduled meeting.

On January 24, 1996, the Employer was informed that the meeting was being called off by the Union because the Employer would not agree to the 8:00 a.m. release of four workers. The Employer subsequently relented and agreed that the four workers would have time-off to attend the caucus. The Union, however, did not attend the meeting because it felt approval for time-off was granted too late.

On January 29, 1996, Kokubun again asked to meet with the Union and the Union responded that Trask, the Union representative, would not be available anytime that week. The Union also indicated that Kokubun would be contacted on February 5, 1996 to arrange further sessions.

On January 31, 1996, the parties to the Unit 01 agreement extended the term of their agreement to June 30, 1996, thereby extending the term of the Uku Pau Agreement between the UPW and Maui County. In spite of the contract extension, Respondent LINGLE

did not cancel the request for proposals issued on January 5, 1996 for privatized refuse collection. The RFPs set February 20, 1996 as the date when the award would issue.

Four private companies submitted proposals in February 1996, including WMI, whose representatives had met with officials of the Maui County Department of Public Works and Waste Management in June 1995. Also, sometime in October or November 1995, Respondent LINGLE, Raymond Kokubun, and David Goode, Deputy Director of the Department of Public Works and Waste Management had met with representatives of WMI to discuss WMI's experience with privatization in county landfill operations on the Big Island and Oahu.

On February 5, 1996, the Employer was contacted and was informed that Trask was out on sick leave.

On February 12, 1996, not having heard from the Union, Kokubun wrote to Trask. Kokubun emphasized it was imperative that the Uku Pau Agreement be resolved. The Union did not respond to Kokubun's letter.

With respect to the proposals, Goode and the County's consultant recommended that the WMI proposal be selected. On February 23, 1996, Respondent LINGLE decided that contracting out refuse collection on Maui was in the best interests of the Employer because of the benefits of recycling, added efficiency, bulk items disposal, toxic waste pickup and cost savings. The County selected WMI as the successful bidder. Respondent began negotiations with WMI over the terms of the contract with Maui County on and after February 23, 1996.

The contract requires WMI to collect refuse and institute a residential curbside recycling program as well as a bulky item pickup service. The Employer contends that this was substantially different than the work being performed by Unit 01 members. In addition, all administrative and management functions, including payroll, billing, special customer requests and maintenance of vehicles would be WMI's responsibility. According to the Employer, since the WMI contract has a recycling component, it will extend the life of the Employer's landfill and bring the Employer closer to the State goal of reducing solid waste in the State by 50% by the year 2000.

The Employer considered the recycling portion of the contract to be very important. Presently, there are drop boxes in various locations in the County. Under the contract, WMI is obligated to provide curbside recycling services on a bi-monthly basis. In addition, the cost savings will be between $600,000 and $1 million for the first year and $6,000,000 to $8,000,000 over the seven year life of the contract. The present cost to the Employer for the refuse collection is $2,500,000.

LINGLE knew that her actions would mean there would be no further need to negotiate changes to the Uku Pau Agreement. The evidence in the record indicates that Respondent LINGLE unilaterally implemented her decision to privatize refuse collection and disposal work on Maui without any prior notification or bargaining with the UPW over the decision or its impact. LINGLE kept her selection of WMI and her specific plans to implement privatization a secret until March 19, 1996. At an employees'

meeting held on March 19, 1996 at the Kahului Community Center, LINGLE announced to forty-one (41) employees of the refuse division that they would no longer be employed in refuse collection and disposal after June 30, 1996, and that the uku pau system would be replaced by the private collection and disposal of refuse effective July 1, 1996 through a subcontract with WMI.

Respondent LINGLE told the County employees that her decision to privatize was made "because we couldn't reach an agreement in contract negotiations" with the UPW. Rodney Figueroa, a member of the UPW's negotiating committee in uku pau bargaining felt he was "losing a job" because he and others who were involved in negotiations "took a stand in bargaining and refused to grant the concession" which Maui County sought at the bargaining table. When asked how he felt about participating in negotiations in the future Figueroa stated, "why should I do it again, get into future Union negotiations because I already going to get burned once now by losing my job. If I do it again, I can lose my job again."

Respondent was aware that the decision to privatize meant that forty-one (41) refuse worker positions currently in bargaining unit 01 would be eliminated and replaced by WMI-offered jobs. At the meeting, LINGLE urged the affected County employees to apply for vacancies in other County positions and said that the "biggest difference is, you will work a normal, regular eight-hour day."

Under the existing uku pau system, refuse collectors and drivers normally complete their daily work in approximately four hours and are able to work at a second job. LINGLE also informed the employees that unless they submitted their application for

County vacancies by May 1, 1996, they would all be transferred to laborer positions in the highways division of the Department of Public Works and Waste Management, effective July 1, 1996. For refuse truck drivers such an involuntary transfer means a demotion to a lower job classification. LINGLE informed the affected employees that they would retain their "seniority" over other bargaining unit 01 employees.

Prior to announcing the various changes in hours of work, and other terms and conditions of employment affecting bargaining unit 01 employees on March 19, 1996, Respondent failed to notify or negotiate with their exclusive bargaining agent, the UPW.

Respondent LINGLE was also aware that as a consequence of her decision to privatize, Maui County would no longer need to bargain with the UPW over the Uku Pau Agreement because the entire concept of uku pau would cease to exist in Maui County after June 30, 1996.

After making her announcement to bargaining unit 01 employees on March 19, 1996, Respondent LINGLE sent a letter via facsimile to the UPW informing the Union of the decision to subcontract with WMI. The letter states:

> We previously informed you in a letter dated December 27, 1995, of our intent to seek proposals from the private sector on collecting our refuse and recyclables. The response was much better than we expected.
>
> The Department of Public Works after reviewing all the proposals, recommended that I accept the proposal from Waste Management Inc., based upon the scope of work involved. The proposal amounts to a significant change in the County's operation as it relates to solid waste disposal. The proposal is a comprehensive one covering sold waste pickup,

curbside recycling, and hazardous waste disposal. According to their analysis, the proposal submitted by Waste Management Inc. will help us to achieve certain objectives and goals, and to meet federal mandates that we have had difficulty achieving. In addition, Waste Management Inc.'s proposal will save Maui County over one-half million dollars annually. After reviewing all the options available to me, I have decided to approve the Department's recommendation.

No employee will be laid off as a result of our out-sourcing of refuse collection. The department will be reorganized and all employees will be reassigned new duties and responsibilities within the County without loss in pay.

The Department of Public Works and Waste Management will be contacting you by letter to outline the reorganization plan. I am certain you have concerns on how this will affect your members and would want to discuss them. Because I am equally concerned, I want to minimize any impact this decision will have on our affected employees. I am therefore suggesting that you or your representative meet with representatives of the Departments of Public Works and Waste Management, and Personnel Services, to discuss any specific concern(s) you may have after you receive their reorganization plan.

Also on March 19, 1996, LINGLE issued a press release announcing the privatizing of trash collection beginning on July 1, 1996. The press release stated, in part:

The county had been continuously trying to negotiate a new contract with the United Public Workers Union (UPW) leadership in Honolulu since May 1995, and had placed numerous proposals on the table. The union leadership has rejected them all with no counter proposal or constructive reply at any time.

In order to reach an agreement with the union, the county had reduced its proposal to only one request, to change the number of pickups from 350 per day, per crew, to 500. The county felt this was extremely reasonable

> since the UPW has an agreement of 600 pickups per day with the County of Kauai. The union leadership refused to even respond to this one request.
>
> The 350 pickup standard was established in 1989 when there was no limit to the amount of trash people could set out for collection. Since that time, the county by ordinance has restricted the number of trash containers to six per account. Today, the average crew finishes their pickup route in approximately four hours.

On March 20, 1996, Gary Rodrigues requested Respondent LINGLE "to cease and desist from undertaking unilateral changes in wages, hours of work, and terms and conditions of employees." The Union requested bargaining over "the decisions to privatize and its impacts." The UPW also submitted a request for information and asked for a response within seven days.

LINGLE testified that her decision to go ahead with contracting out was a significant change in the nature of the County's operations to solve its solid waste problem. Goode also testified that the contracting out was a fundamental change in the County's operations.

On March 21, 1996, Respondent LINGLE, in a radio news broadcast, announced her reasons to privatize. She said, "And we based that decision on our perception of the union leadership's inability and unwillingness to negotiate sincerely with us. And I want to make clear that the distinction, when I say the union, I'm talking about the union leadership in Honolulu."

Respondent LINGLE never responded to the UPW's request for bargaining and the Employer issued bulletins on April 1, 1996, announcing to County employees the changes the decision to

privatize would bring. On April 12, 1996, Maui County officials completed their negotiations with WMI and Respondent LINGLE signed the contract to privatize refuse collection and disposal work on Maui.

DISCUSSION

The Employer contends that the UPW State Director breached the negotiations guidelines agreed upon by the parties in violation of § 89-13(b)(2), HRS. The Employer alleges that the parties agreed to certain ground rules at the outset of negotiations. Ground Rule No. 10 states, "There shall be no public announcement or news media releases on the content of negotiations discussions prior to impasse except by mutual agreement." The Employer contends that Rodrigues breached this agreement on two occasions. In the article in the Honolulu Advertiser, on Tuesday, January 9, 1996, Rodrigues was reported as saying that the County claimed that recycling programs have reduced the amount of trash put out by each household. The Employer further contends that Rodrigues' statement cast the Employer's position in a false light.

The Employer also claims that Rodrigues violated the ground rules on a second occasion in a KNUI radio broadcast by disclosing the contents of the negotiations. Thus, the Employer contends that the Union violated Section 89-13(b)(2), HRS, by failing to bargain in good faith.

The UPW responds that the Employer must prove that the UPW was engaged in bad faith bargaining in its overall conduct during uku pau negotiations. In addition, the UPW contends that it was LINGLE who initiated media attention to the uku pau

negotiations and Rodrigues' statements were made in response to LINGLE's purported comments. The UPW argues that on January 5, 1995, LINGLE issued a press release that Maui County would issue an RFP for privatization of refuse collection because of stalled negotiations with UPW. The UPW contends that the Employer's comments prompted news reporters and newscasters to call Rodrigues for a response. Thus, it was appropriate for Rodrigues to explain why the negotiations had stalled. The UPW, moreover, argues that Section 89-3, HRS, broadens the right of free speech which employee organizations enjoy and that such right in connection with employment-related disputes has been recognized as protected concerted activity. Consequently, the Union argues that Rodrigues' statements (and concedes that LINGLE's actions of January 5, 1996) constitute protected speech under Section 89-3, HRS.

After reviewing the conduct of the parties involved, the Board finds that LINGLE initiated the media attention by issuing a press release regarding the issuance of the RFPs. The news release, however, did not specifically address the content of the negotiations nor did the statement indicate that negotiations were "stalled." Edwin Tanji's Advertiser news article, however, included a statement describing status of negotiations with the UPW as "stalled" and further identifying automated trash pickup as an "apparent major issue." Tanji testified that he did not interview the Mayor and that the information was gleaned from the press release. Thereafter, Tanji sought Rodrigues' reaction to the Mayor's press release and reported that Rodrigues commented that

the talks were stalled because of the County's failure to provide data to support its position and about recycling.

In addition, the radio news director sought Rodrigues' response to LINGLE's announcement of privatization. Thus, again Rodrigues' statement was sought in response to LINGLE's announcement of the privatization plan.

Thereafter, LINGLE, in her press release, dated March 19, 1995, announcing the privatizing of the trash collection gave the Employer's blow-by-blow account of the uku pau negotiations.

After considering the evidence before the Board, the Board concludes that neither the Employer nor the Union committed prohibited practices by violating the ground rules by their public comment. Here, the Mayor issued a press release announcing the issuance of the RFPs and the news reporter included a discussion of a specific negotiation topic, automated trash pickup, as well as an opinion as to the status of negotiations in the article. While the Mayor had not included this discussion in her press release, there is no evidence that she tried to correct the report or attempted to contact the UPW to inform them that she had not discussed the matters with the media.

Thereafter, the media sought Rodrigues' reaction to LINGLE's plans to privatize. While Rodrigues specifically addressed several issues in the negotiations, the Board finds that Rodrigues' statements did not violate the ground rules since the Mayor had already placed the privatization of refuse collection and impliedly, the uku pau negotiations issues, in the public forum. Subsequently, LINGLE provided a detailed description of the

substance of the uku pau negotiations from the Employer's perspective to the media in her March 19, 1995 press release.

After reviewing the evidence presented, the Board finds that the Employer and the Union were each partly at fault for engaging in the discussions of the uku pau negotiations with the media. Thus, the Board finds that the Union and the Employer each failed to prove by a preponderance of evidence that the other party violated the ground rules of negotiations. Hence, those allegations are dismissed.

The UPW alleges in an amended prohibited practice complaint filed on April 10, 1996, that Respondent LINGLE engaged in inherently destructive conduct by threatening to and then implementing a decision to contract out refuse collection and disposal work performed by Unit 01 employees under the Uku Pau Agreement with Maui County in violation of §§ 89-13(a)(1), (3), and (7), HRS. The UPW also alleges that LINGLE unlawfully refused to negotiate over the decision to privatize bargaining unit work and its full impact in violation of §§ 89-13(a)(1) and (5), HRS.

The facts in the record before the Board clearly establish that the parties were engaged in negotiations over the Uku Pau Agreement and during the course of such negotiations, without reaching impasse, LINGLE decided to privatize refuse collection for Maui County. LINGLE admitted, under questioning by her own counsel, that her "motivation" for privatizing was "because there was no movement or appeared to be no movement on the part of the union with respect to amending the Uku Pau Agreement." Raymond Kokubun, the spokesperson for Maui County in uku pau negotiations,

testified that there was a "causal connection" between Respondent's decision to privatize and the employer's "inability to get the concessions" it wanted in uku pau negotiations. Thus, the Board finds that LINGLE's decision to privatize the refuse collection was reactive to the UPW's lawful exercise of rights expressly set forth in §§ 89-3[1] and 89-9(a), HRS, to engage in negotiations and that Respondent LINGLE's decision was unlawfully motivated and inherently destructive of the rights of bargaining unit 01 employees.

Section 89-9(a), HRS, states in relevant part:

> . . . the employer and the exclusive bargaining representative shall meet at reasonable times . . . and shall negotiate in good faith with respect to wages . . . and other conditions of employment which are subject to negotiations . . . but such obligation does not compel either party to agree to a proposal or make a concession.

The right of either party to stand firm on its substantive positions in bargaining has long been recognized. NLRB v. Reed & Prince Mfg. Co., 305 F.2d 131, 134, 32 LRRM 2225, 2228 (1953);

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[1]Section 89-3, HRS, states:

> Employees shall have the right to self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

Atlanta Hilton & Tower, 271 NLRB 1600, 1603, 117 LRRM 1224 (1984); Standard Roofing Co., 290 NLRB No. 27, 129 LRRM 1058, 1060 (1988). As the National Labor Relations Board (NLRB) stated in Atlanta Hilton & Tower, supra:

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." [Emphasis added].

Atlanta Hilton & Tower, 117 LRRM at 1227. Likewise, an employer may not "compel" a union "to agree to a proposal or make a concession" in negotiations by threatening to privatize or by implementing a decision to permanently contract out bargaining unit work. International Paper Co., 319 NLRB No. 150, 151 LRRM 1033, 1052 (1995).

The evidence clearly establishes that LINGLE decided to issue a request for proposals after the third bargaining session held on December 1, 1995, when the parties were not at impasse in uku pau negotiations. The negotiators had met on three occasions and bargaining focused on the Employer's proposal to increase refuse pickups from 350 to 500 per day. On January 5, 1996, the County published the RFPs before a fourth bargaining session where UPW negotiators requested information on the impact of the proposed change in production standards. The Employer contends that it was uncertain whether an agreement with the UPW would be consummated.

However, on January 31, 1996, the parties extended the Unit 01 agreement to June 30, 1996. On February 23, 1996, LINGLE selected WMI as the private contractor and subsequently entered into a contract with WMI.

The UPW contends that LINGLE's actions are "inherently destructive" of the right of employees to engage in collective bargaining. The UPW relies on NLRB v. Great Dane Trailers, 388 U.S. 26, 33-34 (1967), where the U.S. Supreme Court declared:

> Some conduct . . . is so inherently destructive of employee interests that it may be deemed proscribed without the need for proof of an underlying improper motive . . . [Such conduct] carries with it "unavoidable" consequences which the employer may not only foresee but which he must have intended and thus be as its own indicia of intent. [Emphasis added].

The Court further stated that:

> . . . if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [Emphasis added].

In addition, the UPW argues that Respondent LINGLE's actions have had severe impacts on the rights of bargaining unit 01 employees.

> The impact of the respondent's conduct was correspondingly severe on the unit employees' exercise of their Section 7 rights. By resisting the Respondent's bargaining proposals and adhering to the Union's negotiating positions, the unit employees were exercising their fundamental statutory rights under Section 7 of the Act to assist the Unions and to bargain collectively through the Unions as their representative. The Respondent's permanent subcontracting rendered

> nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status.

International Paper Co., 319 NLRB No. 150, 151 LRRM 1033, 1052 (1995). LINGLE's actions would "inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." Swift Independent Corp., 289 NLRB No. 51, at 18, 131 LRRM 1173 (1988); remanded sub nom. Esmark v. NLRB, 887 F.2d 739 (1989).

In addition, LINGLE met directly with the employees to inform them of the privatization and that they would no longer be employed in refuse collection after June 30, 1996. LINGLE informed the employees that they would have to apply for other County vacancies by May 1, 1996 or they would be transferred to laborer positions in the highways division, effective July 1, 1996. This direct dealing with the employees indicates to the Board that the Respondent sought to undermine or interfere with the UPW's role in representing the subject employees. Thus, based upon the record and arguments presented, the Board finds that Respondent LINGLE engaged in unlawful interference with employees' rights and unlawfully discriminated against bargaining unit 01 employees in violation of Sections 89-13(a)(1), (3), and (7), HRS.

Further, the Board finds that Complainant proved by a preponderance of evidence that Respondent LINGLE violated her duty to negotiate over the decision and impact of contracting out bargaining unit 01 work currently performed by forty-one (41)

refuse crew leaders and collectors in Maui County. Thus, the Board concludes that LINGLE violated Section 89-13(a)(5), HRS, by her refusal to bargain in good faith.

An employer commits a prohibited practice when it unilaterally implements a policy which has a material and significant impact on terms and conditions of employment of covered employees and fails to negotiate either the nature of the action or its impact on the bargaining unit and employees of the bargaining unit prior to implementation. The evidence indicates that Respondent LINGLE's privatization of refuse collection and disposal work for Maui County will result in the displacement of forty-one (41) refuse collectors and drivers who must seek other employment within the County of Maui. Those who did not apply for existing vacancies by May 1, 1996 will be involuntarily transferred to laborer positions in the highways division of the Department of Public Works and Waste Management. In addition, all uku pau employees will be required to work under different working conditions, i.e., longer hours in their new positions, and may not have the opportunity to be employed in second jobs as currently permitted. Further, the Union also argues that the seniority of these employees will be affected and their relative rights to promotions, temporary assignments, and other work opportunity will be impacted in relation to other employees of the County of Maui.

Effective July 1, 1996, the uku pau system would cease to exist and the Uku Pau Agreement between Maui County and the UPW will be a nullity. While the number of bargaining unit 01 positions may remain constant, the UPW will, nevertheless, have

lost all forty-one (41) refuse worker positions in Maui County. These positions will be replaced by WMI jobs which will assume substantially the same role and function which have historically and customarily been exclusively performed by government employees for more than twenty-five (25) years.

While the Employer attempts to characterize the scope of services under the contract for residential refuse removal as significantly different from the existing system, the Board finds that the employees of the private contractor will be collecting and disposing of the solid waste and refuse from the residences in Maui County much like the uku pau employees. The Employer portrays recycling as an entirely different activity than being presently performed by the Unit 01 workers. The evidence indicates that presently, recyclables are picked up at drop boxes while the WMI contract provides for curbside recycling. The Board, however, finds that the scope of services performed is essentially the same since the solid waste will still be removed from County residences and whether the employees haul the waste to a landfill or to a recycling plant, the services to be performed by the private contractor's employees who are supplanting the Unit 01 workers will essentially be collecting and disposing of solid waste from Maui County residences.

In this case, LINGLE admits that her decision to initiate and implement privatization of Maui County's uku pau system was motivated by her perception that the UPW would not grant her concessions during uku pau negotiations. LINGLE admits that her actions were undertaken "because there was no movement or there

March 19, 1996. After reviewing LINGLE's letter, the Board notes that LINGLE stated that the Department of Public Works and Waste Management would contact Rodrigues to outline the reorganization of the department caused by the County's out-sourcing of refuse collection. As LINGLE recognized that Rodrigues would have concerns about how the reorganization affected his members, LINGLE suggested that Rodrigues or his representatives meet with representatives of the Departments of Public Works and Waste Management and Personnel Services to "discuss any specific concern(s)" he may have after he received the reorganization plan. Based upon this communication, however, the Board concludes that Respondent's offer to "discuss" the UPW's "concerns" about the effects in no way suggests that the Employer offered to negotiate over the decision or the impact of the privatization of the bargaining unit work. The Board notes that "negotiate" and "consult" are terms of art with legal significance commonly used by the public employers and the unions in their correspondence. Thus, the Board finds that the Employer's use of the words, "discussing your concerns," in its March 19, 1996 letter to the Union does not mean negotiation over the impact of its decision as contended by the County.

The Union contends that the Board should follow the U.S. Supreme Court's decision in Fibreboard Paper Products Corporation v. NLRB, 379 U.S. 208, 13 L.Ed.2d 233 (1964). The Court held that decision to subcontract bargaining unit work was a "term or condition of employment" which employers have a duty to bargain over. The County contends that Fibreboard is inapplicable to the

present case because there the management decision was based upon labor costs which is clearly recognized as subject to negotiation. The County argues that the Employer's decision here turned on the issue of increased services in the form of curbside recycling and bulky item pickups. In addition, the Employer was concerned with the potential savings over the term of the contract. The Employer contends that it made a decision to get out of the trash collection business and thus, all administrative matters will be handled by the contractor. The County would not exercise control or supervision over the contractor's employees.[2] Thus, the County alleges that there is a fundamental change in the direction and scope of the County's operations because it decided to get out of the trash collection business and therefore the matter is non-negotiable under Otis Elevator Co. v. UAW, 115 LRRM 1281 (1984).

The County contends that in a similar case involving the privatization of Hawaii County landfill operations, Dec. No. 347, Case No. CE-01-186, UPW v. Yamashiro, et al., 5 HLRB 239 (1994) (Yamashiro case), the Board previously held that the employer's decision to privatize is a management right and does not require prior negotiation. The Board held, however, that the employer is required to negotiate over the impacts of the decision prior to its implementation of any unilateral action.

In the Yamashiro case, the Board found that Hawaii County had committed a prohibited practice by refusing to negotiate with

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[2]The Board notes, however, that the WMI contract provides for periodic reporting from the contractor to the Employer.

the Union over the impact of its decision to privatize prior to implementing its decision. The Board found that the effects of the County's decision were negotiable because of the impact of the decision on the bargaining unit. However, the Board found that there was a substantial impact on the terms and conditions of employment by the loss of job opportunities, in the form of promotions, transfers and temporary assignments for bargaining unit members and the denial of the opportunity for bargaining unit expansion. In that case, the Board found that the negotiations should have occurred prior to the implementation of the decision, i.e., prior to the contract being negotiated, for the union to be given a meaningful opportunity to participate in the matter. Hawaii County offered to negotiate over the effects of its decision immediately prior to the opening of the landfill thus foreclosing any apparent opportunity for meaningful negotiation.

On appeal, the Third Circuit Court reversed the Board's decision finding that there was no evidence that the County ever refused to participate in effects bargaining. The Court found that in fact the Union had rebuffed the employer's offer to negotiate. The case is currently on appeal to the Hawaii Supreme Court.

Upon consideration of the Board's previous decision and the arguments presented in this case, the Board finds that the decision to privatize and its impact are so intertwined that the negotiation over the impact of the decision necessarily involves the decision to privatize. The Employer fails to appreciate that negotiation of the effects of its decision immediately prior to implementation is so far removed in time from the actual decision

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to privatize that the union is effectively shut out of any meaningful input. By the time the employer is prepared to negotiate with the union over the effects of its decision, if at all, the parameters of the scope of services have already been determined and negotiated in a contract or subcontract with the private enterprise and there is no room to fully accommodate the concerns of the employees affected by the decision. In this regard, the Board does not consider the impact to be limited to the effects on specified employees but the impact of the decision upon the bargaining unit as a whole.

In Niagara Frontier Transportation Authority, 18 NYPERB 18-3083 (1985), the New York Public Employment Relations Board considered whether the employer violated the statute by unilaterally assigning unit work to nonunit employees. The Board stated:

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of § 209-a.1(d), unless the qualifications of the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.

The New York PERB thus examines the factual context of each subcontracting case and determines on a case-by-case basis whether the facts give rise to a bargaining obligation. Here, too,

the Board refrains from declaring a hard and fast per se rule whether contracting out is or is not a mandatory subject of negotiations. The determination of negotiability will depend on the factual context of the case and upon the degree of adverse impact, if at all, upon the bargaining unit. Based upon the facts of each case, the Board will determine whether the employer complied with its bargaining obligations. If the charging party establishes that the work performed was previously exclusively performed by the bargaining unit and that the transferred job duties are similar to the bargaining unit work so that there is a continuity of function, the matter will be subject to negotiation unless the employer can show that there is a significant change in the qualifications for the work. The Board will consider the extent of adverse impact to the bargaining unit and will apply a balancing test to determine whether the Employer's interests in contracting out the work outweighs the interests in maintaining the bargaining unit work.

Utilizing this approach, the Board finds that the record clearly establishes that the Unit 01 uku pau workers have exclusively performed the work of collecting solid waste from the Maui County residences. This function will not cease under the contract; employees of the contractor will continue to collect and dispose of solid waste from the residences. The County has not altered the nature and extent of the services afforded to its constituency; the County recognizes that it has been and will continue to be responsible for the disposal of solid waste. Here, the detriment to the workers is also clear; under LINGLE's scenario

all refuse worker positions would cease to exist and if the employees are unable to be transferred to vacant positions, they will be placed into laborer positions in a different division. In addition, the Board recognizes that there is a detriment to the bargaining unit as a whole if the scope of the bargaining unit is reduced.

With respect then to the balancing test, the Board will apply the balancing test it traditionally applies as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether it has a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 63 (1977). The Board has relied upon the analysis used in Dec. No. 26, Department of Education, 1 HPERB 311 (1973) and Dec. No. 102, Hawaii Fire Fighters Association, 2 HPERB 207 (1979) to determine whether an issue is negotiable where the employer claims an interference with management's rights.

Under this analysis, the Board finds that the impact of privatization on the Unit 01 refuse workers and the bargaining unit is clear. The uku pau positions will be eliminated on July 1, 1996 and the Uku Pau Agreement will be a nullity. Unless the uku pau workers qualify for other County vacancies, they will be transferred to laborer positions in the highways division. While LINGLE indicated to the uku pau employees that the biggest difference in their working conditions would be that they would be working an eight-hour day, the fact is that the employees will be

doing different work under different working conditions. Some employees will lose their second jobs because of the increased hours of work. Employees who are not placed in other County jobs will suffer demotions to laborer positions if they currently occupy crew leader (driver) positions under the Uku Pau Agreement. Competing claims to seniority by other County employees will place the refuse collectors and drivers in a relative position of disadvantage for promotions, work opportunity, and other terms of employment.

On the other hand, LINGLE claims that she was ultimately concerned with the issue of recycling and the filling up of the landfills which prompted a major change in the County's direction with regard to refuse collection. She contends that negotiations with the Union, if required, would interfere with her right to establish such policy and determine the methods and means to operate an efficient refuse collection system for the County of Maui. LINGLE also stated that economic savings were considered in her decision.

In considering LINGLE's reasons for entering into the contract with WMI, the Board notes that LINGLE's stated primary concern, recycling, was never an issue in the ongoing negotiations with the UPW. In addition, LINGLE admitted that she would have not have entered into the agreement with WMI if she had been able to come to an agreement with the UPW. This suggests that recycling was not the Employer's primary concern since the Employer's only proposal in the uku pau negotiations at the time involved workload, a condition of employment which is a mandatory subject of

bargaining and which was previously negotiated in the Uku Pau Agreement.

Moreover, LINGLE stated that she sought the issuance of the RFPs because the negotiations with the UPW were not progressing and the County would have to provide for alternative means of disposal if no agreement was reached. The Board notes that the Employer, however, first set a deadline in its correspondence to the Union of June 21, 1995 that if an agreement were not reached by January 31, 1996, the County would not extend the Uku Pau Agreement and the County would be free to seek other means of refuse collection. The parties, however, thereafter agreed to extend the Uku Pau Agreement until June 30, 1996. LINGLE, thus appeared to have established the time frame within which agreement on the Uku Pau Agreement would have to be achieved and therefore, issued the RFPs in early January. While the County contends that it could not predict whether the responses to the RFPs would be favorable, the RFPs indicated that an award of the contract was projected for February 20, 1996 with a commencement date of April 1, 1996 for seven years. The contract was signed with WMI in mid-March to take effect on July 1, 1996.

Under these facts, in striking a balance between the conflicting requirements in Section 89-9, HRS, that working conditions be negotiated and which prohibit agreements which interfere with management's rights, the Board finds that the balance tips heavily in favor of negotiations. Again, the impact on the forty-one (41) refuse workers is so significant and

immediate as to require negotiations prior to implementing the Employer's decision to privatize.

It is undisputed that Respondent LINGLE did not respond to the Union's request to negotiate over the decision to privatize nor the effects of that decision. The evidence indicates that the Employer met with the employees and announced what the Employer unilaterally determined to be the ramifications of her decision to privatize, including the changes in the employees' working conditions. These matters were not negotiated nor even submitted for consultation with the Union. Although the Employer contends that the biggest difference between the uku pau refuse worker jobs and the laborer jobs in the highways division is the required hours of work, it seems clear that the job duties and responsibilities are significantly different. Based upon this record, the Board finds that the Employer refused to bargain in good faith with the UPW over the privatization of the refuse collection system. The Board finds that the result of the Employer's unilateral decision was the elimination of the uku pau system and the employees' jobs as refuse collectors.

Even under the County's narrow reading of the Yamashiro case, the Employer was required to negotiate with the Union over the impacts of her decision to privatize on terms and conditions of employment before implementing her decision. Here, LINGLE entered into the WMI contract and unilaterally determined the fate of the uku pau workers without negotiating their working conditions. Based on the record before the Board, we find that the evidence strongly supports the UPW's claim that Respondent LINGLE never

responded to the Union's request to negotiate prior to implementation of her decision and therefore violated Section 89-13(a)(5), HRS.

By unilaterally implementing privatization without bargaining, Respondent LINGLE has undercut the integrity of the bargaining process. LINGLE's unilateral course of conduct not only violated her duty to negotiate, it also undermined the proper authority and role of the exclusive bargaining agent. Allied Signal Inc., 307 NLRB No. 118, 140 LRRM 1121, 1122 (1992).

The Board finds that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government, is furthered by the issuance of the subject order. Restoring the integrity of the bargaining process is in the public's interest. Board of Educ. v. Hawaii Pub. Emp. Relations Bd., 56 Haw. 85, 528 P.2d 809 (1974).

As the natural consequence of the Employer's actions was the deprivation of the Union's and employees' rights, the Board hereby concludes that the Employer wilfully refused to bargain in good faith by unilaterally implementing its decision to privatize without negotiating with the Union.

CONCLUSIONS OF LAW

The Board has jurisdiction over this case pursuant to Sections 89-5 and 89-13, HRS.

The Employer and the Union, respectively, failed to prove that the other party violated the ground rules in negotiations which prohibited the public release of the substance of collective bargaining negotiations.

The Employer violated its duty to bargain in good faith by failing to negotiate over the privatization of the solid waste disposal work performed by the Unit 01 Uku Pau workers.

The Employer's actions evidence conduct which is inherently destructive of the rights guaranteed by Chapter 89, HRS.

ORDER

Based on the foregoing, the Board orders the following:

(1) The Board's Order No. 1333, dated May 17, 1996, is rescinded;

(2) The Employer shall cease and desist from refusing to bargain in good faith with the Union over the privatization of the refuse collection system;

(3) The Employer shall cease and desist from making unilateral changes in wages, hours of work, and terms and conditions of employment during the bargaining process;

(4) Any employees adversely affected by the Employer's unilateral decision to contract out the Uku Pau work shall be made whole;

(5) The Employer shall, within thirty (30) days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where Unit 01 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting; and

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

LINDA CROCKETT LINGLE, Mayor, County of Maui and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and LINDA CROCKETT LINGLE, Mayor, County of Maui and COUNTY OF MAUI; CASE NOS.: CU-01-121, CE-01-297
DECISION NO. 382
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, August 30, 1996.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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appeared to be no movement on the part of the union with respect to amendments to the Uku Pau Agreement." Clearly, in light of Respondent's stated reasons for privatization, reliance on a belated assertion of "management rights" pursuant to Section 89-9(d), HRS, to avoid the obligations set forth in Section 89-9(a), HRS, is misplaced. LINGLE further admits that cost savings through privatization was not the primary reason for her actions at the time she made her decision. While LINGLE also now contends that recycling was a significant concern, the Board notes that the record does not indicate that the subject of recycling was raised in the ongoing negotiations with the UPW.

When a public employer unilaterally implements changes in wages, hours, and others terms and conditions of employment, such conduct is tantamount to a refusal to bargain. As the Hawaii Supreme Court recently held in UHPA v. Tomasu, 79 Haw. 154, 159 (1995):

> The duty to bargain arises in two circumstances potentially applicable to this decision: First, the obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. See, e.g., NLRB v. Katz, 369 U.S. 736, 737, 82 S.Ct. 1107, 1108, 8 L.Ed.2d 230 (1962) (unilateral implementation of automatic wage increases, changes in sick-leave benefits and numerous merit increases violated the statutorily imposed duty to bargain collectively); Burlington Fire Fighters Ass'n v. City of Burlington, 142 Vt. 434, 457 A.2d 642 (1983)

> (principle that unilateral imposition of terms of employment is a violation of duty to bargain is equally applicable to public sector bargaining); First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). Therefore, when the employer attempts to promulgate a policy that will affect bargainable topics, the employer cannot do so without first initiating bargaining on such topics.
>
> Second, the duty to bargain also arises if a union unilaterally demands "mid-term" bargaining, that is, bargaining mid-way through an active applicable collective bargaining agreement on bargainable subjects such as wages, hours, or terms of employment.

The record also establishes that Respondent LINGLE engaged in a pattern of unilateral changes in working conditions commencing in June 1995. Before even reaching impasse in the uku pau negotiations, LINGLE allegedly implemented a change in refuse pickup on the island of Molokai, changed temporary assignment practices within the highways division and reduced the crew size from three (3) to two (2) in 1995. She issued a request for proposals to privatize the refuse pickup on January 5, 1996 and made a decision to privatize on February 23, 1996. All of these changes were accomplished without bargaining with the Union.

Further, LINGLE did not notify nor negotiate with the UPW before announcing multiple changes in the employees' hours of work and other conditions of employment at the employees' meeting on March 19, 1996. More importantly, however, LINGLE failed to respond to a request to bargain sent by the UPW on March 20, 1996 before consummating an agreement with the private contractor (WMI) on April 12, 1996. The Employer nevertheless contends that she offered to bargain with the UPW over the impact of the privatization decision in her letter to Rodrigues, dated