STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii; JAMES TAKUSHI, Director, Department of Human Resources Development and DR. LAWRENCE MIIKE, Director, Department of Health, Respondents.	CASE NO. CE-10-250 DECISION NO. 389 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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CONCLUSIONS OF LAW, AND ORDER

On May 3, 1995, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against BENJAMIN J. CAYETANO, Governor, State of Hawaii; JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii, and DR. LAWRENCE MIIKE, Director, Department of Health, State of Hawaii (collectively Employer or State of Hawaii). The UPW alleges that the State of Hawaii entered into a Stipulation and Order in a federal court proceeding which provides for the employment and deployment of additional staff at the Hawaii State Hospital (HSH). The UPW contends that the order requires changes in the wages, hours, and conditions of employment for bargaining

unit 10 members. The UPW alleges that it requested negotiations over the impact of the court order and its implementation and Respondents failed to negotiate over the effects of the federal court order. The UPW also alleges that the Employer failed to provide information requested by the UPW. The UPW thus alleges that Respondents violated Sections 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On June 15, 1995, June 22, 1995 and July 28, 1995, the Board conducted hearings on the merits of the case. The parties were afforded full opportunity to present witnesses, exhibits, and arguments to the Board. The parties submitted post-hearing memoranda to the Board on September 8, 1995.

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

FINDINGS OF FACT

The UPW is the exclusive representative, as defined in Section 89-2, HRS, of employees of the HSH included in bargaining unit 10.

BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer as defined in Section 89-2, HRS.

JAMES TAKUSHI (TAKUSHI) is the Director of the Department of Human Resources Development (DHRD), State of Hawaii, and a representative of a public employer as defined in Section 89-2, HRS.

DR. LAWRENCE MIIKE (MIIKE) is the Director of the Department of Health, State of Hawaii, and a representative of a public employer as defined in Section 89-2, HRS.

In March 1991, the United States Department of Justice (DOJ) filed an action in federal district court against the State of Hawaii and various State officials alleging that the State was subjecting patients at the HSH to confinement which violated their constitutional rights. On September 19, 1991, the State entered into a stipulated federal court order (Settlement Agreement) which outlined certain steps which the State was required to take to provide constitutional conditions of patient care and treatment at HSH. The DOJ conducted annual compliance reviews and was dissatisfied with the prevailing conditions at HSH. On December 1, 1994, the DOJ filed a petition to hold the State in civil contempt of the Settlement Agreement. The DOJ alleged that the State continued to subject HSH patients to unconstitutional conditions of confinement. After a hearing on January 10, 1995, the federal District Court granted the DOJ's petition and found the State to be in contempt of its September 19, 1991 order. The Court ordered the parties to confer and develop a remedial plan to address the deficiencies at the hospital. On January 19, 1995, the parties entered into a Stipulation and Order to Remedy Defendants' Contempt of Settlement Agreement, which included a Remedial Plan which set forth specific actions to be taken by November 1995, including provisions relating to the employment and deployment of additional staff.

The Stipulation required the State to increase the total compensation package of registered nurses (RNs), licensed practical nurses (LPNs), and paramedical assistants (PMAs) employed at the HSH. The order states in pertinent part:

> C. In order to fill existing vacancies, by no later than March 15, 1995, Defendants shall increase the salary of state employed pharmacists, registered nurses, licensed practical nurses, occupational therapists, social workers, and paramedical assistants at HSH to make them competitive with salaries of such personnel in other comparable positions in the State of Hawaii. Thereafter, Defendants shall make annual adjustments to ensure that their salaries remain competitive.

The intent of the foregoing provision was to bolster the recruitment and retention of existing RNs, LPNs, and PMAs at the HSH to ensure a safe environment for patients and staff.

By letter dated January 25, 1995, TAKUSHI recommended to CAYETANO that the PMA I-IIIs at HSH be declared shortage classes and PMA IV-VIs be related shortage classes. TAKUSHI's recommendation states in pertinent part:

> Competitive Salaries: Currently the state hiring rate for Para Medical Assistants I and II are $1506 and $1601 respectively. The current market rate for both positions is $1690. The state rate is behind that of the market by 12% for PMA I's and 6% for PMA II's. The rates that are being proposed would enable the state to attract and retain qualified applicants and would avoid increases in turnover.

CAYETANO approved the shortage class declaration for PMAs on February 3, 1995. The DOJ Remedial Plan attached to the Stipulation indicates that the PMAs should realize compensation by March 15, 1995.

By letter dated January 26, 1995, TAKUSHI confirmed the shortage rates for LPN I-III positions at HSH which were declared shortage classes. Other classes also declared as shortage classes at HSH included Registered Professional Nurses, Occupational Therapists, and Social Workers. A copy of the letter was sent to the Hawaii Government Employees Association (HGEA) but not to the UPW. TAKUSHI testified that the omission was inadvertent. Thus, the UPW was neither notified of nor provided copies of the shortage declarations for the LPNs. According to the Remedial Plan, the LPNs would realize their increased compensation by February 28, 1995.

The Remedial Plan also provided for a complete compensation review by December 31, 1995, which would be conducted yearly thereafter, to determine the competitiveness of staffing shortage differential categories.

On March 31, 1995, a copy of the Stipulation was provided to the UPW.

By letter dated March 31, 1995, Gary Rodrigues, UPW State Director, wrote to MIIKE requesting negotiations over the impacts of the court order on wages, hours, and terms and conditions of employment for Unit 10 employees. Rodrigues requested a response within ten days. Rodrigues also requested specific information and documents in connection with its request for bargaining within seven days.

MIIKE referred the UPW's letter to Special Assistant Sherry Harrison who in turn referred the letter to HSH. William Elliott (Elliott), Associate Administrator for Administrative and

Support Services at HSH, received the UPW's letter after April 6, 1995 and faxed a copy to the Attorney General's office. A copy was also sent to and received by TAKUSHI.

During the hearings before the Board, Elliott testified that he was advised by the Attorney General's Office not to respond to the UPW's requests. MIIKE testified at the hearing that he had not yet made a decision whether to negotiate with the Union.

DISCUSSION

The UPW alleges that the January 19, 1995 federal court order requires the State to make significant changes in wages, hours, and other conditions of work for bargaining unit 10 employees. While the UPW admits that the State was not obligated to negotiate over the terms of the decree, the Union contends that the State should have negotiated over the implementation of the requirements under federal law. The UPW also contends that the Department of Health officials agreed in their testimony that the wage and salary adjustments require negotiations and bargaining obligations extend to how, when, and who will receive shortage differentials. In addition, the UPW contends that the Employer's bargaining obligations apply to the annual salary adjustments which are due at the end of each year. Further, the Union contends that the decree has a significant impact on other working conditions, such as safety, reduction of overtime, transfer and promotional opportunities, and recruitment and retention of employees. The Union thus requests rescission of the Respondents' unlawful unilateral actions and restoration of the status quo ante preceding March 31, 1995.

Lastly, the UPW contends that the Respondents admit that they failed to provide information requested by the UPW on March 31, 1995 in connection with the changes made at the HSH. The record indicates that the information was prepared but not turned over to the UPW on advice of counsel. Thus, the UPW contends that the Employer committed a prohibited practice by failing to comply with its information request.

In response, the Employer concedes that wages are a proper subject for negotiation but in compliance with the court order, the Employer established a shortage pay differential as opposed to a permanent salary increase. The Employer contends that the shortage differentials are temporary pay increases and recruitment incentives to address shortages in the labor market and are not permanent changes in salary. Thus, the Employer contends that the implementation of shortage pay falls within the ambit of its management rights to hire and retain employees which is nonnegotiable.

With respect to the Union's allegations that the Stipulation significantly impacts the safety of Unit 10 employees, the Respondents contend that the Stipulation refers to patient safety rather than changes in staff work. Respondents maintain that the staffing ratios were established in 1991 and the UPW did not challenge the staffing requirements at that time.

With respect to the Union's allegations that Respondents deliberately ignored the UPW on the implementation of the shortage pay differential, Respondents contend that the evidence adduced at the hearing indicates that TAKUSHI did not deliberately exclude the

UPW from receipt of the information. The evidence indicates that HGEA was notified regarding the staff shortages, but that the failure to notify UPW of the shortage pay was inadvertent and thus not deliberate. The Employer contends that its failure to provide the UPW with information regarding the implementation of the court order was not wilful. In sum, the Respondents contend that its establishment of the shortage pay differential was not a proper subject of negotiations. Moreover, by the time the Employer received the Union's request after March 31, 1995, the mechanism for the payment of the differential was already in place.

A. Shortage Differential and Compensation Review

In the instant case, the Employer implemented the provisions of the Stipulation and Remedial Plan in accordance with Section 77-9, HRS, relating to shortage categories. This statute provides in pertinent part:

> (a) All initial appointments shall be made at the first step of the appropriate salary range.
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> * * *
>
> (c) Whenever a labor shortage exists in a class or group of positions in a class, the director, with the prior approval of the chief executive, may declare the class or group of positions to be a shortage category. The director may review the impact of making such a declaration on other classes or groups of positions in classes within the same series. If the director finds that it is necessary to preserve internal relationships within the series, the director may declare those other classes or groups of positions as related shortage categories. The director shall review each shortage category periodically, but at least once each

year, to determine whether the shortage category should be continued.

In making this determination, the following procedure shall be followed:

(1) The director shall set the new entry salary of a shortage category at an amount that is fair and reasonable and at which employees can be recruited from the labor market;

(2) The director shall set the new entry salary of a related shortage category in consideration of appropriate internal pay relationships;

(3) Whenever a new entry salary is determined for a class or group of positions in a class under paragraphs (1) and (2), incumbents thereof who are being paid less than the new entry salary shall have their pay adjusted to an amount that is not less than the new entry salary in a manner determined by the director;

(4) In addition to establishing a new entry rate, the director, if necessary to promote retention of existing incumbents, may provide alternative adjustments to the salaries of incumbents in a shortage category and related shortage category. No adjustment under this paragraph shall result in a salary that exceeds the maximum step of the pay range;

* * *

(6) As a result of the periodic review of each shortage category, the director may adjust salaries established under this subsection. If the director determines that a shortage no longer exists, the director shall reestablish the first step of the appropriate salary range as the entry salary rate for the class or group of positions;

(7) In the event that the new entry salary for a shortage category or related shortage category is subsequently lowered, incumbents shall not have their pay reduced so long as they remain in the shortage class or group of positions; and

(8) If employees move from their respective shortage or related shortage positions, the director shall adjust their pay appropriately. [Emphasis added.]

Section 77-9, HRS, provides that the DHRD director may declare a class of positions or group of positions in a class, such as those at the HSH, to be a shortage category when there is a labor shortage. The statute further provides that the director shall set a new entry salary at an amount at which the employees can be recruited from the labor market. Incumbents in a shortage class who are being paid less than the new entry level salary receive pay adjustments to an amount not less than the new entry salary. In order to preserve internal relationships, the director may also set a new entry salary for related classes. In the event that the new entry salary is lowered, the incumbents will not have their pay reduced so long as they remain in the same shortage class or group of positions. The statute also further provides for a periodic review to adjust salaries if necessary and the reestablishment of the first step of the salary range as the entry level when the shortage ceases to exist.

The UPW seeks bargaining over the implementation of the court decree and specifically the shortage declarations, including who, how much, and when the shortage differentials are applied.

The Employer contends that the subject is a proper subject of management's rights and therefore nonnegotiable.

Section 89-9(d), HRS, sets forth those matters which are excluded from the subjects of negotiations. That section provides in part:

> The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to . . . (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper legitimate cause; . . . .

The Board has traditionally applied a balancing test to determine whether a subject is a condition of employment and a mandatory subject of bargaining. Hawaii Government Employees Association, 1 HPERB 63 (1977). The Board has relied upon the analysis used in Decision No. 26, Department of Education, 1 HPERB 311 (1973) and Decision 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.

Here, while shortage declarations and differentials clearly affect wages, a traditionally negotiable subject, the Board agrees with TAKUSHI that the declaration of shortage categories and the corresponding increases in salaries are recruitment tools to attract and retain qualified applicants where there is a shortage in the labor market. Section 77-9, HRS, provides the DHRD director

with the authority to implement the shortage declarations in the affected classes. The statute provides the DHRD director with the discretion to set the new entry level salary for the shortage category and adjust the salary if the shortage continues. In addition, the statute permits the director to determine when the shortage ends.

In reviewing the impact of the shortage declaration on employees, the Board finds no evidence of any adverse effect or disadvantage to the applicants or incumbents in the shortage classes. The shortage declaration results in a temporary increase in hiring rates so long as the shortage exists and so long as the incumbents remain in the shortage class. On the other hand, requiring management to negotiate would seriously impair the Employer's flexibility to declare, implement, and remove the shortage categories. Thus, in balancing the impact of the shortage differentials on the employees on the one hand, and the significant interference which negotiations would have on the Employer's right to fill critical vacancies during labor shortages by offering recruitment incentives, the Board finds that the balance in this case tips in favor of management's rights. Therefore, the Board concludes that the implementation of the shortage differentials pursuant to the federal court order are not subject to negotiations.

The Union further argues that the provision for the annual review and adjustment of salaries entails negotiations as admitted by Respondents in their testimony. The Board notes that Elliott testified that the annual review would be linked to

negotiated pay increases. However, in reviewing the terms of the Remedial Plan, the Board finds that the purpose of the annual compensation review is to determine the competitiveness of staffing shortage differential categories. This is in effect what Section 77-9(6), HRS, already provides, i.e., periodic review of the shortage declaration and further adjustment, if necessary. The Plan thus only specifies the timing of the annual compensation review. Hence, the Board views the provision for annual review of compensation to be the periodic review of the shortage category referenced in the applicable statute and not a separate opportunity to reopen salary negotiations which would trigger the duty to bargain with the Union. Accordingly, the Board concludes that there is no duty to negotiate over the annual review of the shortage categories.

B. Other Working Conditions

With respect to the UPW's contention that the court order impacts on other working conditions, i.e., safety requirements, reduction of overtime, transfer and promotional opportunities, the Board is not convinced on this record that there is any evidence of significant impact on these working conditions. Employee safety is not addressed in the Stipulation and Remedial Plan. However, the Board notes that the Stipulation provides as follows:

> B. Defendants shall ensure that sufficient numbers of permanent nursing staff are deployed at HSH such that the use of temporary staff and staff overtime are kept to an absolute minimum. In order to accomplish this and to meet the staffing requirements of the Settlement Agreement, Defendants shall take the following actions within the timeframes set forth below: . . . .

Thus, while the Stipulation refers to minimizing overtime, the thrust of the provision is to require permanent nursing staff to be deployed at HSH to meet the staffing requirements of the 1991 Settlement Agreement. The Employer argues that the staffing levels were previously set in 1991 and were not objected to by the Union. Hence, the Board finds that the Employer did not violate Section 89-13(a)(5), HRS, in this case by failing to negotiate the effects of the implementation of the court order.

C. Failure to Consult

Although the Board found, supra, that the Employer was not required to negotiate over the instant shortage declarations, the Board nevertheless finds that the Employer failed to notify the UPW about the shortage declarations and to consult with the UPW over the declarations and the effect that the declarations would have on Unit 10 employees.

Section 1.05 of the Agreement states:

> The Employer agrees that it shall consult with the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

Section 89-9(c), HRS, states:

> Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

In Hawaii Nurses Association, 2 HPERB 218 (1979), the Board discussed the duty to consult in § 89-9(c), HRS. The Board stated:

> The primary reason for a consultation provision is to facilitate employee participation in joint decision making on substantial and critical matters affecting employee relations which are normally determined by management alone. Matters of consultation do not require a resolution of differences. "All that is required is that the employer inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or policy change take place." (cite omitted.)

Consultation is not required for each and every employer action. However, consultation is required for major or "substantial and critical" matters affecting employee relations. Hawaii Firefighters Association, Local 1263, IAFF, AFL-CIO, 1 HPERB 650 (1977) (Firefighters case). In the Firefighters case, the Board considered whether the creation of a Fire Fighter Trainee class was a proper subject of consultation. The Board held that it was not a major policy change affecting employee relations insofar as present employees in the class were not directly affected. However, the Board found that it was a substantial matter affecting employee relations because it introduced a separate entry-level class into the firefighting series and modified existing job requirements for the Fire Fighter class.

In this case, the declarations of shortage categories affect the entry level wages for applicants and the wages of incumbents in the shortage class as well as those in related

shortage classes. Hence, the Board finds that the duty to consult attached to the declarations of shortage.

In Jahne Hupy, 1 HPERB 689 (1977), the Board discussed the consultation process and stated:

> Consultation ordinarily requires more than mere notice. Consultation contemplates asking for (and listening to) the advice or opinion of the union, it contemplates, short of requiring negotiation, deliberating together and comparing views. The purpose of consultation obviously is to require management to hear union input even on matters about which unions are not able to negotiate.

Id., at 696.

The evidence in the record indicates that the Employer notified the HGEA of the impending shortage declarations but failed to likewise notify the UPW. Respondent TAKUSHI testified that the failure to notify the UPW of the shortage declarations was not deliberate. However, the Board finds that the Employer's failure to notify the Union of the shortage declarations foreclosed any notice to the UPW and the opportunity for meaningful consultation as to the Employer's actions to comply with the court order. Further, the record does not indicate that the Employer subsequently attempted to consult with the UPW.

Respondents argue that the failure to notify the UPW was not deliberate and therefore not wilful. In United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984), the Board held that wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's actions. Thus, based on the evidence in the record, the Board finds that the natural consequence of the

Employer's actions in failing to notify the UPW of the shortage declarations was the deprivation of the Union's right to meaningfully consult with the Employer on the declarations. Hence, the Board finds Respondents wilfully violated the provisions of Sections 89-13(a)(5), (7), and (8), HRS, when they failed to consult with the UPW on the shortage declarations.

D. Failure to Provide Information

Based upon the record in this case, the Board finds that the Union requested information in conjunction with its request to bargain. The Employer never responded to the Union. MIIKE transmitted the request through Harrison to Elliott who consulted with Deputy Attorney General Lester Goo and advised Elliott not to respond to the Union. No reason was given for the Employer's refusal to provide the information to the UPW. However, at the hearing in this matter, the Employer did not object to or claim a privilege for the production of information which had been requested by the Union.

Thus, based upon the evidence provided, the Board finds that the Employer failed to respond to the Union's request for information without justification. The Board has previously recognized that the duty to bargain in good faith encompasses the Employer's duty to provide information upon request from the Union. State of Hawaii Organization of Police Officers, 3 HPERB 25 (1982). Here, the Board finds the Employer's refusal or failure to respond to the Union's request for information to be a prohibited practice. The Board has found that the Employer was required to consult over the shortage declarations and the Employer failed to comply with

the Union's request for information. Thus, the Board finds that the Employer violated Section 89-13(a)(5), HRS, by its failure to respond to the Union's request for information.

CONCLUSIONS OF LAW

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

An employer commits a prohibited practice in violation of Section 89-13(a)(1), HRS, when it interferes, restrains, or coerces an employee in the exercise of any right guaranteed under this chapter.

An employer commits a prohibited practice in violation of Section 89-13(a)(5), HRS, when it refuses to bargain in good faith with the union.

An employer commits a prohibited practice in violation of Section 89-13(a)(7), HRS, when it fails to comply with any provision of Chapter 89.

An employer commits a prohibited practice in violation of Section 89-13(a)(8), HRS, when it violates the terms of a collective bargaining agreement.

The declaration and implementation of a labor shortage differential by the Employer to recruit and retain employees in order to comply with a federal court order is a valid exercise of management's right to hire and retain employees under Section 89-9(d), HRS, and is not a mandatory subject of negotiations.

The Employer wilfully violated Section 1.05 of the Unit 10 contract and Section 89-9(c), HRS, when it failed to

consult with the UPW over the declaration of a shortage category for bargaining unit 10 positions at the HSH.

The Employer's failure to consult with the UPW over the declaration of the shortage category for bargaining unit 10 employees at HSH, thereby violated Sections 89-13(a)(5), (7), and (8), HRS.

The Employer violated Section 89-13(a)(5), HRS, by failing to respond to the Union's request for information.

ORDER

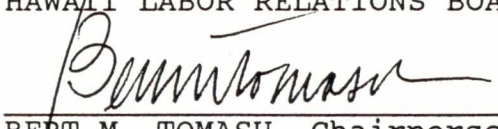
The Employer is ordered to cease and desist from committing the instant prohibited practices and shall comply with the requirements prescribed under Section 1.05 of the Agreement and Section 89-9(c), HRS. The Employer shall consult with the Union over the results of its annual reviews and further shortage declarations or changes thereto, as applicable.

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

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

DATED: Honolulu, Hawaii, August 25, 1997.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member[1]

Copies sent to:

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State Archives
Publications Distribution Center
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Richardson School of Law Library
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[1]Although Board Member Kunitake was not present for the hearing in this matter, he has thoroughly reviewed the record and transcripts in this case in order to participate in this decision.