

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-01-356a
)	CE-03-356b
UNITED PUBLIC WORKERS, AFSCME,)	CE-09-356c
LOCAL 646, AFL-CIO and HAWAII)	CE-10-356d
GOVERNMENT EMPLOYEES ASSOCIA-)	CE-13-356e
TION, AFSCME, LOCAL 152,)	
AFL-CIO,)	DECISION NO. 393
)	
Complainants,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
and)	
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii; LAWRENCE)	
MIIKE, M.D., Director, Depart-)	
ment of Health, State of Hawaii;)	
and JOHN H. WESTERMAN, Acting)	
CEO, Hawaii Health Systems)	
Corporation,)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 14, 1997, Complainants UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) and the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), filed a prohibited practice complaint against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainants allege that Respondents unilaterally contracted out bargaining unit work at the Hana Medical Center (HMC) to the Hana Community Health Center (HCHC), a privately incorporated entity. Complainants also allege that Respondents authorized HCHC to subcontract out Units 01 and 13 work. Complainants contend that the Respondents breached their duty to bargain in good faith over a mandatory subject of bargaining in violation of Section 89-9(a), Hawaii Revised Statutes

(HRS) and wilfully violated Sections 89-13(a)(1), (5), and (7), HRS.

On July 15, 1997, Complainants filed a motion for interlocutory relief with the Board. The UPW and the HGEA moved to enjoin and restrain Respondents from continuing to unilaterally implement their decision to privatize bargaining unit work at HMC; from continuing to fund the privatization of bargaining unit work at the HMC; from refusing to negotiate over the decision to privatize and its impact; and authorizing the subcontracting of bargaining unit work for building and grounds maintenance work.

On August 22, 1997, Respondents filed a motion to dismiss and/or for summary judgment with the Board. Respondents do not dispute the facts that on or about July 1, 1997, Respondents transferred the functions of the HMC to HCHC and that 12 employees, members of Complainants, were relieved from their duties at HMC as a result of the privatization. Respondents contend that Act 263 requires privatization of the HMC; that the Konno decision created no duty to bargain; and that the layoff procedures in the applicable collective bargaining agreements were properly applied.

On August 27, 1997, Complainants filed a memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment with the Board. Complainants contend, inter alia, that they should be given the opportunity to present evidence and have their claims heard; contracting out is a mandatory subject of bargaining; there are genuine issues of material fact which must be resolved by the Board before it can be determined whether bargaining is required under Section 89-9(a), HRS; and the

Legislature did not preempt or nullify the requirements for bargaining under Section 89-9(a), HRS.

On August 28, 1997, the Board conducted a hearing on Respondents' motion to dismiss and/or for summary judgment. The Board found that there were material issues of fact in the record and therefore denied Respondents' motion to dismiss and/or for summary judgment. The Board indicated that there was a genuine issue of material fact in the record as to how the Respondents resolved the status of the HMC employees in implementing the transfer to a nonprofit corporation.

The Board commenced the hearings in this matter on the foregoing issue on September 5, 1997. After the close of the hearing on September 12, 1997, the parties presented argument on Complainant's motion for interlocutory relief.¹ The parties filed supplemental arguments with the Board on September 19, 1997.

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 units 01 and 10.

Complainant HGEA is the exclusive representative of employees in bargaining units 03, 09, and 13.

¹In view of the issuance of this decision, the Board need not address Complainant's motion for interlocutory relief.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer within the meaning of Section 89-2, HRS.

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

Respondent JOHN H. WESTERMAN was for all times relevant, the chief executive officer of the Hawaii Health Systems Corporation (HHSC).

The UPW, the HGEA, and the State of Hawaii are parties to collective bargaining agreements, covering the employees at HMC in bargaining units 01, 03, 09, 10, and 13.

The HMC was transferred from the County of Maui to the State of Hawaii in the early 1970's. The HMC operated as a satellite under the license issued to the Maui Memorial Hospital until 1985 and functioned as part of the DOH's Division of Community Hospitals. It received supplies and support services from Maui Memorial Hospital. HMC served the Hana community consisting of approximately 2,000 residents in a remote area of Maui.

The employees of the HMC have been civil servants since at least the early 1970's and have been represented by the UPW and the HGEA for collective bargaining purposes. Previously, there were 15 positions, including two physicians, one emergency medical technician, five registered nurses, one x-ray technician, two clerk typists, a building maintenance worker, a janitor and a groundskeeper. All employees were State employees until

June 30, 1997. The personnel were in the merit system established by Chapters 76 and 77, HRS and represented by the HGEA and UPW, respectively.

During 1996, Senate Bill No. 3198 was introduced to transfer the operation and management of the HMC from the DOH to a nonprofit organization. The bill was enacted as Act 263. The bill provides for the DOH to release the HMC from the Division of Community Hospitals, effective July 1, 1997, upon the successful completion of the terms of the memorandum of agreement with the Hana Health Committee and the resolution of, inter alia, "the status of the current state employees working at the HMC after the transition to the nonprofit organization."

In addition, Act 262, 1996 SLH, provides for the transfer of the Community Hospitals Division of the Department of Health to the HHSC. Section 7 of Act 262 specifically requires the HHSC to develop a corporate-wide hospital personnel system that is subject to Chapters 76, 77, and 89, HRS. The transfer occurred on November 30, 1996. The HHSC Board of Directors began assuming responsibility of the employees under Act 262, commencing in August 1996. The HHSC Board of Directors did not authorize any action to resolve the question of the employees' status.

Following the close of the 1996 legislative session, the DOH published a request for proposals for the transfer of the HMC to a nonprofit entity. In a report, dated December 26, 1996, Director MIIKE reported to the Legislature that the HCHC, Inc., responded to the request for proposals to assume operations from the DOH. At that time, MIIKE indicated that the issue of the status of the current State employees at the HMC remained

unresolved. In fact, MIIKE or other State officials did not seek to resolve the issue affecting personnel at the HMC with the HGEA or the UPW.

Allen Lee, then administrator of Maui Memorial Hospital and DOH Deputy Director Bertram Kobayashi met with representatives of HCHC to resolve a number of issues identified in Act 263. Lee asked HCHC officials at the initial meeting whether they would be open to continuing HMC employees as civil service employees with payment for costs by the State. HCHC officials declined the suggestion and stated a preference that the positions be filed with private employees of HCHC. In later discussions, Lee again raised the option of retaining HMC employees as civil servants and HCHC officials again declined. On January 21, 1997, Lee informed both the UPW and the HGEA that HCHC would assume operations at Hana and that existing employees would be subject to a reduction-in-force (RIF). Discussions between the State and Unions on the status of employees did not occur until after the announcement on January 21, 1997. Kobayashi met with Hana employees on January 22, 1997 to tell them of the job layoffs.

Thus, on or before January 21, 1997, the DOH decided to replace the State employees with the private employees of the HCHC. The HCHC provides the same types of services and functions formerly provided by the HMC.

On March 4, 1997, Gary Rodrigues, UPW State Director, wrote to MIIKE and requested that he cease and desist from all forms of privatization in violation of the civil service laws. On March 27, 1997, the HHSC entered into a memorandum of agreement with the HCHC to fund the privatized operations.

On April 1, 1997, MIIKE sent letters to the employees of the HMC that their positions would be abolished effective the close of business on June 30, 1997.

On June 30, 1997, the First Circuit Court denied the Complainants' motion for temporary restraining order agreeing with Respondents that this is not a case governed by Konno because there has been authorization to privatize by the Legislature. On June 30, 1997, Complainants requested bargaining and Respondents refused to cease from their unilateral conduct.

According to the Employer, one regular full-time employee, two regular part-time employees and two non-regular temporary employees were terminated. All other employees were placed in other positions, including one employee who was demoted. All positions are being eliminated and replaced by employees of a private entity to perform the work previously performed by the State employees.

DISCUSSION

The Unions contend that the Employer breached its duty to negotiate over the decision and impacts of the privatization of the HMC in violation of Sections 89-13(a)(1), (5), and (7), HRS.

Section 89-13(a), HRS, sets forth prohibited practices committed by employers, and provides in part:

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

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

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

* * *

- (7) Refuse or fail to comply with any provision of this chapter;

The Employer contends that Act 263 mandates the privatization of the HMC and that therefore the matter is nonnegotiable. The Employer also contends that the Konno decision created no duty to bargain and that there is clear legislative intent to privatize HMC. Moreover, the Employer asserts that the HMC shut down its operations on June 30, 1997 and HCHC began providing medical services to the people of the Hana community effective July 1, 1997. The Employer further argues that the status of the State employees was resolved, and that due to the lack of work and lack of funds and pursuant to the applicable reduction-in-force provisions in the relevant collective bargaining agreements, the employees were laid off.

The Unions contend that under Act 263, if the DOH was unsuccessful in completing the terms of the agreement or unable to resolve the various issues, the DOH was obligated under Section 3 of the Act to report any barriers to the completion of the transition to the Legislature. However, MIIKE reported to the Legislature that the issue of the employees' status was unresolved. Thus, the Unions contend that the State failed to report on the barriers to implementation and did not provide the Legislature with written recommendations on how to resolve the question on the status of employees.

Complainants contend that the Respondents were obligated to bargain over the status of employees at the HMC. Act 263, provides, in part, as follows:

The purpose of this Act is to:

- (1) Establish an affiliation between the State through the department of health and the community of Hana through a Hana nonprofit health care organization to support the development of a community-based health care program which will result in the transfer of the Hana Medical Center to a Hana nonprofit health care organization within the next two years;
- (2) Guarantee continuing state financial support to sustain this transition and the development of a community-based health care program; and
- (3) Assure that necessary financial and medical statistical data be made available by the department of health to enable the nonprofit organization and the department to reach a sensible agreement relating to subsidies necessary to keep the nonprofit financially stable.

In addition, Act 263, provides, in part:

- (2) The department of health shall release the Hana Medical Center from the division of community hospitals, effective July 1, 1997, upon the successful completion of the terms of the agreement and resolution of the following issues:
 - (A) The status of the current state employees working at the Hana Medical Center after the transition to the nonprofit organization;
. . . .

In Standing Committee Report No. 1103-96, the House Committee on Health stated:

Your committee finds that Hana's relatively small size and physical isolation contribute to the difficulty in accessing

medical services. Many Hana residents are frustrated at the way in which the Center is operated because they perceive that authorities outside the community are not responsive to local conditions. A change in the status of the Center to a nonprofit organization will facilitate community-based services and may also qualify it for federal funds, thereby providing additional resources for the Center.

Efforts to improve the quality of available health care by the Hana community, and in particular the Hana Health committee, should be recommended. Your Committee supports the conclusion of the Hana Health committee that the Center should be transformed from a state agency to a community bases (sic) nonprofit organization, and declares this to be a public policy.

Nonetheless, a successful transition depends upon the resolution of two sensitive issues that were raised at the hearing. Concerns were expressed about the status of employees after the transition and about the existing ambulance service. The discussion clearly established that committee members want existing benefits of current employees to be preserved. Your Committee urges all interested parties to develop solutions to resolve these issues. Your Committee notes that page 3 of the bill requires both of these issues to be resolved prior to the release of the Center from the Division of Community Hospitals.

After full and free discussion, your Committee has amended the bill by:

- (1) Requiring DOH to submit a report to the Legislature whether or not certain specified issues are resolved;

[Emphasis added.]

After reviewing the provisions of Act 263, the Board majority finds that the bill expressly requires the transition of the state agency to a nonprofit organization. Thus, the Legislature specifically authorized the privatization of the HMC

and under SHOPO v. Society of Professional Journalists, 83 Hawaii 378 (1996), the Board majority concludes that the decision to privatize is nonnegotiable. However, Act 263 specifically conditioned the transition upon the "resolution" of the status of the existing employees. With respect to the meaning of "resolution," the legislative history of the Act indicates that the House Health Committee specifically intended that the "existing benefits of current employees to be preserved." This was confirmed by Representative Lennard Pepper who testified that the legislators wanted the status of employees resolved before the privatization could proceed. Thus, the clear legislative intent was to privatize HMC but to preserve the existing benefits of current employees.

Prior to the passage of Acts 262 and 263, employees at the HMC were in positions which were included in bargaining units established under Chapter 89, HRS, and enjoyed all rights, benefits, and protection afforded pursuant to the statute. In Act 262, the Legislature mandated that the State DOH transfer management of the Community Hospitals Division to the newly created HHSC. Employees covered under Chapter 89 continued to enjoy all rights, benefits, and protection afforded pursuant to the statute.

With the passage of Act 263, the Legislature mandated that the HHSC transfer management of the HMC to a private nonprofit entity, created by the members of the Hana community. The purpose of the act was to ensure that the center would be responsive to the needs and concerns of the community through community management. Act 263 did not expressly preempt or nullify the rights, benefits, and protection afforded pursuant to Chapter 89. Act 263 provided for "resolution" of the issue of state employees prior to the

transfer. The State DOH and HHSC interpret the term "resolution" to mean that application of the provisions as contained in the various collective bargaining agreements fulfills all obligations and responsibilities on the part of the State with respect to the affected State employees.

The Union, on the other hand interprets "resolution" to mean that the parties were required to negotiate the impact on the employees prior to the transfer from HHSC to the HCHC. At no time did the HHSC negotiate with the exclusive representatives over the impact of the privatization on the State employees. HHSC merely consulted with the exclusive representatives. Alan Lee, acting director of Maui Memorial Hospital, mentioned the possibility to HCHC that the State employees remain State employees under the HCHC, but this suggestion was rebuffed.

In interpreting the term "resolution," the Board majority finds the legislative history of Act 263 to be particularly instructive. In the Standing Committee Report, it appears that the Legislature intended that employee benefits be maintained. Employee benefits include coverage under collective bargaining agreements, the State Health Fund, Deferred Compensation Plan, State Employee Retirement System, and other programs geared exclusively to State and county government employees, including coverage under Chapter 89, HRS. The only manner in which these employee benefits could be maintained is if they continued employment at the privately managed HCHC as State employees.

The HHSC had a pre-existing duty to bargain with the exclusive representatives over the fate of these State employees which was not preempted by Act 263. The HHSC's failure to bargain,

and rather simplistic approach to "resolve" their fate by applying procedures contained in the collective bargaining agreements, constitutes a prohibited practice.

At a minimum, in keeping with the legislative intent to "maintain employee benefits," the HHSC should have imposed a requirement in its request for proposals that the private entity retain State employees as State employees. If this was neither practical or feasible, the HHSC should have taken steps to ensure that these employees maintained their status as State employees in order to maintain employee benefits. The Employer argues that Respondents sought input from the Unions on the issue of the resolution of the status of employees and "even went so far" as to propose to the private corporation that they should consider hiring the former employees. The Board majority finds that the Respondents' efforts fell short of its obligations under the Act and Chapter 89, HRS. The Board majority also concludes that any existing bargaining obligations with respect to the impact of the privatization was neither specifically preempted nor nullified by the Legislature in Act 263.

Turning then to the question as to whether the impacts of the privatization of HMC is a negotiable subject, the Board traditionally applies a balancing test to determine the nature of the impact of the subject 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.

Under this analysis, the Board majority finds that the impact of the privatization on the employees and the respective bargaining units are clear. Here, employees were subject to the layoff provisions of their respective contracts or were otherwise displaced, terminated, or demoted. In addition, the bargaining unit as a whole was affected by the loss of bargaining unit work.

The Employer contends that the privatization of HMC was mandated by the Legislature and therefore there was no obligation to negotiate over the matter. The Board majority however, finds that Act 263 did not specifically foreclose negotiations and that the magnitude of the impact of the privatization on the employees and the bargaining unit warrants negotiations. The evidence in the record indicates that the Respondents did not respond to the Union's request to bargain over the decision and its impacts. The evidence rather indicates that the Employer representative met with the employees and announced what the Employer unilaterally determined to be the ramification of the decision to privatize, including the changes in the employees' working conditions.

When a public employer unilaterally implements changes in wages, hours, and other terms and conditions of employment, such conduct is tantamount to a refusal to bargain. As the Hawaii Supreme Court 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 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 (1982). 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 in this case indicates that Respondents rebuffed the Unions' attempts to negotiate over the status of employees. Lee Matsui from HGEA wrote to Alan Lee on December 27, 1996 to propose a resolution and Lee did not respond. Thereafter, by letter, dated January 21, 1997, the DOH officials simply notified the UPW and the HGEA that it was implementing a RIF. Deputy Director Kobayashi then met with employees to inform them of the layoff on January 22, 1997. By letter dated March 4, 1997, the UPW requested Respondents CAYETANO and MIIKE to cease and desist from any form of privatization, MIIKE refused to address the situation at Hana. Based upon the foregoing, the Board majority concludes that the Respondents failed to negotiate with the Unions

over the impacts of the privatization, i.e., to resolve the status of employees.

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

With respect to an appropriate remedy in this case, there are significant problems in imposing a remedy to cure what has already transpired. HCHC is an operating entity with its own workforce and is not subject to the Board's jurisdiction under Chapter 89, HRS. Therefore, the Board cannot order HCHC to terminate its workforce and hire the affected State employees.

Therefore, the Board orders the HHSC to negotiate with the exclusive representatives over the impact on the affected State employees and develop a plan to ensure that they retain their benefits as State employees. The affected State employees shall receive all benefits to which they were entitled, retroactive to the date of their displacement, until such time as their status is resolved.

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).

CONCLUSIONS OF LAW

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

The Employer violated its duty to bargain in good faith over the impacts of its privatization decision on the status of the existing employees. Thus, the Employer violated Sections 89-13(a)(1), (5), and (7), HRS.

ORDER

Based on the foregoing, the Board orders the following:

(1) The Employer shall cease and desist from refusing to bargain in good faith the Unions over the status of the employees who were employed at the HMC;

(2) 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;

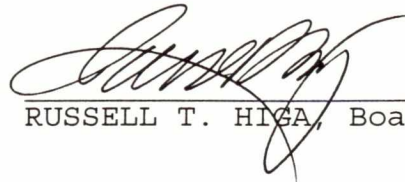
(3) Any employees adversely affected by the Employer's unilateral decision to privatize shall receive retroactively all benefits to which they were entitled from the date of their displacement, until such time as the parties negotiate in good faith to resolve the status of employees;

(4) The Employer shall, within 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 60 days from the initial date of posting; and

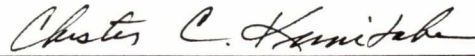
(5) The Employer shall notify the Board within 30 days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, November 10, 1997.

HAWAII LABOR RELATIONS BOARD



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member


DISSENTING OPINION

I would dismiss this complaint because I believe that the Board is not the proper forum to decide this matter. The Board's jurisdiction is limited to the administration of Chapter 89, HRS, and this dispute involves the interpretation of Act 263, SLH 1996, a legislative enactment which does not deal directly with Chapter 89, HRS.

In general terms, Act 263 mandates the Employer to privatize the Hana Medical Center effective July 1, 1997, upon resolution, among other things, of the "status of the current state employees working at the Hana Medical Center after the transition to the nonprofit organization." The Board majority concludes that Act 263 does not specifically preempt or nullify any bargaining obligations under Chapter 89 with respect to the impact of the privatization and that the Employer failed to meet its obligations under the Act and Chapter 89. The failure of the Employer under Act 263 is found to be a failure to maintain employee benefits for

the displaced employees in keeping with the perceived legislative intent of the Act.

I do not disagree with the conclusion of the Board majority that the Employer did not meet its obligations under Act 263. Indeed, the fact that such a conclusion can be reached by a review of the Act and its legislative history without reference to Chapter 89 is what leads me to the opinion that the Board should not decide this case. Simply stated, Act 263 deals with both the question of privatization and the status of the employees. Whether or not the Employer complied with the requirements of the Act is a question to be decided by an appropriate court and not this Board. The record reflects that a court action has been filed contesting the actions of the Employer in effecting the privatization and that it is still pending final decision. That is where this dispute should be decided.


BERT M. TOMASU, Chairperson

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