STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>STEPHEN K. YAMASHIRO, Mayor, County of Hawaii,<br><br>Petitioner,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Intervenor. | CASE NO. DR-01-75<br><br>DECISION NO. 399<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY RULING |

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECLARATORY RULING

On May 20, 1999, STEPHEN K. YAMASHIRO (YAMASHIRO), Mayor, County of Hawaii, filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board). Also on May 20, 1999, YAMASHIRO filed a Memorandum in Support of the Petition with the Board. YAMASHIRO contends that the Memorandum of Agreement between the public employers and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) for bargaining unit 01 dated May 3, 1999 (MOA) is a new, superceding collective bargaining agreement covering the period from July 1, 1995 to June 30, 1999. YAMASHIRO contends that the Governor of the State of Hawaii recognized the MOA as a new agreement which must be reduced to writing and that the UPW, like the Hawaii Government Employees Association (HGEA), acquiesced to the Governor's analysis and reduced the agreement to writing. YAMASHIRO further contends that the UPW was also aware that the Union was required by law, and the

Governor's request, to proceed with ratification of the new agreement by their membership. YAMASHIRO raised the following issues in his petition:

> 1. Whether the collective bargaining agreement, dated May 3, 1999 is a new, superceding, agreement between the Employers and UPW, pursuant to Sec. 89-10, HRS?
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> 2. If the May 3, 1999, Memorandum of Agreement is considered a new collective bargaining agreement, is the UPW required to seek and obtain its members' ratification of the May 3, 1999 collective bargaining agreement, and may not rely on the prior March 10, 1998, agreement, pursuant to Sec. 89-10, HRS?

YAMASHIRO requested that the Board rule that the MOA constitutes a new collective bargaining agreement; order the UPW to proceed with membership ratification of the new May 3, 1999 agreement; order the County of Hawaii to comply with all terms and conditions of the March 10, 1998 collective bargaining agreement until such time as the UPW properly and lawfully conducts the statutorily required ratification process and certifies the results to the County of Hawaii; and order the UPW and its State director, to pay the County of Hawaii's attorneys' fees and costs related to the filing of the instant matter; and order such other relief as appropriate.

On May 25, 1999, the Board issued a notice of the receipt of the instant petition for declaratory ruling and set a deadline for the filing of petitions for intervention in these proceedings. Thereafter, on May 27, 1999, the UPW filed a petition for intervention with the Board. On June 8, 1999, the Board granted the UPW's petition for intervention in Order No. 1730 and scheduled a Board conference in this matter on June 23, 1999.

On June 9, 1999, the UPW filed a motion to dismiss the petition with the Board. The UPW contended that the Board should dismiss the petition because (1) the petition is untimely and the Board lacks jurisdiction over the matter, (2) Petitioner lacks "standing," (3) Petitioner failed to establish "good cause" for the issuance of a declaratory ruling, and (4) Petitioner failed to comply with Administrative Rules Section 12-42-9 for an appropriate petition.

On June 22, 1999, the UPW filed a reply brief in support of its motion to dismiss with the Board. On June 23, 1999, YAMASHIRO filed a memorandum in opposition to the UPW's motion to dismiss with the Board.

On June 23, 1999, the Board conducted a hearing on the UPW's motion to dismiss the complaint. After considering the record and the arguments presented, the Board denied the UPW's motion to dismiss the complaint. During the subsequent Board conference scheduled in the matter, YAMASHIRO requested the Board to conduct a hearing on the petition for declaratory ruling. In its reply brief filed on June 22, 1999, the UPW opposed a hearing due to Petitioner's noncompliance with Administrative Rules Section 12-42-9(h).[1] After considering the record and YAMASHIRO's

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[1]Administrative Rules Section 12-42-9(h) provides in part:

> (2) Any petitioner who desires a hearing on a petition for declaratory ruling shall set forth in detail in a written request the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such

arguments, the Board denied YAMASHIRO's request for a hearing because YAMASHIRO did not establish that the petition and other written authorities would not permit a fair disposition of the petition. Thus, the Board indicated that it would issue a ruling in this matter on the record before it.

Thereafter, on June 24, 1999, the UPW filed a Supplemental Memorandum with the Board. The UPW advised the Board of proceedings before the Hawaii County Council regarding the approval of the Unit 01 cost items for Unit 01 and requested timely Board action to avoid further delays in proceeding before the Council.

On June 28, 1999, YAMASHIRO, by and through his counsel, filed a Supplemental Memorandum in Opposition to UPW's Supplemental Memorandum with the Board. YAMASHIRO submits that Council action was deferred because the figures in the resolution were wrong. In addition, YAMASHIRO related the substance of Davis Yogi's (Yogi), Chief Negotiator, State Office of Collective Bargaining, testimony to the Council. YAMASHIRO also represented that all Council members, except one, indicated that they would vote in favor of the cost items.

## FINDINGS OF FACT

YAMASHIRO is the Mayor of the County of Hawaii, and an employer as defined in Section 89-2, HRS, of employees of Hawaii County who are included in bargaining unit 01.

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request for hearing is dependent upon factual assertion, shall accompany such request by affidavit establishing such facts.

The UPW is the exclusive representative as defined in Section 89-2, HRS, of bargaining unit 01.

On March 10, 1998, the UPW and a multi-employer group entered into a Unit 01 agreement covering the period from July 1, 1995 - June 30, 1999. The majority of Unit 01 employees ratified the agreement. On August 7, 1998, the Maui County Council approved the cost items. On or about August 18, 1998, the Hawaii County Council deferred action on the cost items indefinitely. On September 9, 1998, the Kauai County Council approved the cost items.

By letter dated August 4, 1998, the Attorney General issued an opinion to the Corporation Counsels of Hawaii and Maui counties and the City and County of Honolulu. The Attorney General concluded that the failure of the State Legislature to approve the funding of the negotiated or arbitrated pay raises prior to adjournment sine die constituted a rejection of the Unit 01 cost items. All cost items were returned to the parties for further bargaining. However, the Attorney General concluded that the non-cost items agreed to remain in effect.

By letter dated August 7, 1998, UPW State Director Gary W. Rodrigues (Rodrigues) advised Al Lardizabal (Lardizabal), Acting Chief Negotiator, State Office of Collective Bargaining, that the UPW disagreed with the Attorney General's opinion but in view of the time involved in challenging the matter, the UPW requested bargaining on the Unit 01 Agreement cost items to begin on August 18, 1998. The Union enclosed the cost item proposals.

Thereafter, by letter dated August 20, 1998, Lardizabal wrote to Rodrigues affirming the State's commitment to the UPW on

the negotiated pay raises. Lardizabal indicated that the Legislature's action was considered a deferral of the State's commitment to the contract. Lardizabal stated therefore that the negotiations requested by Rodrigues' August 7, 1998 letter were not required. Copies of Lardizabal's letter were sent to all personnel directors.

On October 30, 1998, the Board issued Decision No. 395 in Case No. CE-01-390, United Public Workers, 5 HLRB ___ (1999). The Board held that Mayor Harris committed a prohibited practice by repudiating the Unit 01 agreement where the Employers' negotiators had apparent authority to negotiate an agreement.

By letter dated May 3, 1999, Rodrigues notified Yogi that the Unit 01 agreement for the period of July 1, 1995 to June 30, 1999 had been ratified by the employees of Unit 01.

On May 3, 1999, the UPW and the multi-employer group entered into a Memorandum of Agreement[2] which provides as follows:

> This Memorandum of Agreement is entered into this 3rd day of May 1999 by and between the State of Hawaii, the City and County of Honolulu, County of Hawaii, County of Kauai and the County of Maui, hereinafter referred to as the Employer, and the United Public Workers, American Federation of State, County and Municipal Employees, Local 646, AFL-CIO as the exclusive representative of blue collar employees in collective bargaining Unit 01, hereinafter referred to as the Union.
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> The Employer and the Union agree that the non-cost and cost items agreed to on March 10, 1998 and thereafter ratified by the Employees of Unit 01 for the period July 1, 1995 to

[2]The Memorandum of Agreement was apparently entered into at the insistence of Governor Benjamin J. Cayetano in order to support the transmittal of the Unit 01 cost items to the Legislature for funding.

> June 30, 1999 are included without change into this Memorandum of Agreement.
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> This Agreement is for the contract period July 1, 1995 to June 30, 1999.
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> The Union informs the Employer that the agreement has been ratified and it is agreed that this Memorandum of Agreement meets the requirements of Section 89-10(a) and (b) HRS.

Also, by letter dated May 3, 1999, Governor Cayetano informed Senators Carol Fukunaga and Andrew Levin of the Senate Committee on Ways and Means that:

> In further response to your letter of April 27, 1999 (copy enclosed), concerning the administration's position on the "retroactive pay raises" and since my letter to you dated April 29, 1999 (copy enclosed), the Employer, HGEA and UPW have in fact reduced to writing the agreements (copies enclosed), concerning bargaining units 1, 2, 3, 4, 6, 8, 9, and 13, to submit to the legislature the same cost items which were submitted to the legislature in 1998. In addition, the Unions have communicated that these cost items have been ratified by their memberships. This is in compliance with the requirements of § 89-10, Hawaii Revised Statutes, and is consistent with the discussion in the August 4, 1998 attorney general opinion (copy enclosed).

The State Legislature approved the cost items during the 1999 legislative session. On May 14, 1999, Mayor Jeremy Harris, City and County of Honolulu, recommended approval of the cost items to the City Council and approval was anticipated during early June.

By letter dated May 4, 1999, Hawaii County Corporation Counsel Richard D. Wurdeman (Wurdeman) wrote to Gary Yoshiyama, HGEA Hawaii Division Chief, thanking him for transmitting copies of the May 3, 1999 Memoranda of Agreement between the HGEA, the Governor and the City and County of Honolulu. Wurdeman indicated that Hawaii County was not privy to the Agreement and was not aware

of the understanding under which it was signed. Upon receipt of the full text of the Agreement and the HGEA's certification that the ratification required by § 89-10, HRS, occurred, Wurdeman indicated the Mayor would submit the requisite information to the County Council.

Similarly, by letter dated May 5, 1999, Wurdeman wrote to Rodrigues, indicating that Hawaii County was not privy to the collective bargaining agreement between the UPW, the State, and Maui County. Wurdeman requested a copy of the new agreement and UPW's certification that the contract was properly ratified by the membership.

By letter dated May 10, 1999, Rodrigues enclosed a copy of the MOA which had been signed by Governor Cayetano and Mayors Apana and Harris. Rodrigues also indicated that YAMASHIRO had already transmitted the cost items for the March 10, 1998 Unit 01 agreement to the County Council in 1998.

By letter dated May 11, 1999, Russell K. Okata, HGEA Executive Director, informed YAMASHIRO that the employees of Units 02, 03, 04, 09, and 13 had ratified the terms of the contract settlements for the period July 1, 1997 through June 30, 1999. Okata also transmitted the tentative agreements to YAMASHIRO.

By letter dated May 13, 1999, Yogi wrote to Rodrigues confirming his understanding of the Lump Sum Salary Supplement for the contract period July 1, 1995 to June 30, 1999. In addition, on May 14, 1999, the UPW and the public employers entered into a Memorandum of Agreement regarding the Retirees Lump Sum and another Memorandum of Agreement amending various provisions of the Unit 01 contract.

By letter dated June 24, 1999, Yogi wrote to YAMASHIRO indicating his belief that the MOA signed by the Chief Executives of the State, Maui, and the City and County of Honolulu included sufficient notification of the UPW's ratification of the July 1, 1995 - June 30, 1999 agreement. At the request of the Hawaii County Council, Yogi forwarded Rodrigues' letter dated May 3, 1999 confirming the ratification of the July 1, 1995 - June 30, 1999 agreement to YAMASHIRO.

Based upon the foregoing facts, the Board finds that the parties entered into an agreement for bargaining unit 01 members on March 10, 1998. The effective date is consistent with Decision No. 395 where the Board found that the tentative agreements signed on March 10, 1998 by the State's Chief Negotiator were binding on the parties. The Board's decision was not issued until October 30, 1998. Nevertheless, the Attorney General opined in August 1998 that the cost items submitted by the Governor on May 1, 1998 for the Unit 01 agreement were rejected by the Legislature's failure to approve them. The Attorney General also stated that pursuant to Section 89-10, HRS, the cost items are returned to the parties for further negotiations. The Attorney General also concluded that the agreement on the non-cost items was still valid.

Since the cost items were returned to the parties for further bargaining, either party could have reopened the negotiations. In fact, in August 1998, the UPW requested negotiations on the Unit 01 cost items based upon the Attorney General's Opinion, but the State's Acting Chief Negotiator assured the UPW that further negotiations were not needed because the State was committed to the negotiated agreement. This letter was

circulated to the employing jurisdictions and there is nothing in the record to indicate dissent by any employer, including YAMASHIRO. Thus, while the cost items may have been subject to renegotiation, none of the cost item provisions was reopened by any party.

On or about May 3, 1999, the public employers and the UPW entered into an MOA which plainly and clearly states that the agreement entered into is the same agreement of March 10, 1998; no items were reopened or changed and the operative dates of the contract remain the same. Thus, based upon a plain reading of the MOA, the Board finds that it consists of the same terms which were previously presented to and ratified by the Unit 01 members.

Further, the MOA plainly provides that the Union represented that the agreement was ratified and the parties thereto agreed that the MOA met the requirements of Section 89-10, HRS, including the ratification requirements. Based on these facts, the Board finds that the ratification of the Unit 01 contract was sufficient as to the majority of the multi-employer group.

Rodrigues in fact communicated to Yogi that the terms of the July 1, 1995 - June 30, 1999 agreement were ratified by the membership by letter dated May 3, 1999. Rodrigues' letter was apparently not shared by Yogi with YAMASHIRO until on or about June 24, 1999. In addition, the MOA expressly provides that the Union represented that the terms of the contract had been ratified. Rodrigues provided a copy of the MOA to YAMASHIRO by letter dated May 10, 1999 in response to Wurdeman's request. It appears from these facts that while YAMASHIRO is a member of the employer group, he was not given a copy of the MOA previously because he was not

"privy" to the agreement. While it would appear prudent and the normal course of business that all employers be given the opportunity to review and sign the collective bargaining agreements between the multi-employer group and the exclusive representatives, YAMASHIRO leaves the Board with the impression that this was not done in this case and prompted him to request and obtain the contract and ratification certification directly from the Union.

Although the multi-employer group and the UPW thereafter entered into other Memorandums of Agreement which modified the Unit 01 contract with regard to the Retirees Lump Sum and other provisions of the contract, there is nothing in the language of the Memorandums of Agreement to indicate that they are part of the MOA. Mindful that the MOA is retroactive to July 1, 1995, the Board finds that the Memorandums of Agreement entered into on May 14, 1999 regarding the Retirees Lump Sum and other modifications to the Unit 01 contract are mid-term modifications to the contract.

## DISCUSSION

The issue before the Board is whether the May 3, 1999 MOA is a new, superceding agreement and whether such new agreement requires another employee ratification pursuant to Section 89-10, HRS. Petitioner contends that the May 3, 1999 MOA is a new, superceding agreement which requires another employee ratification.

Sections 89-10(a) and (b), HRS, provide as follows:

> (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding

> arbitration and shall be valid and enforceable when entered into in accordance with provision of this chapter.
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> (b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

Petitioner contends that the prior March 10, 1998 Unit 01 contract is not valid because the Legislature rejected the cost items by its failure to approve them during the 1998 legislative session. Pursuant to Section 89-10, HRS, the cost items were returned to the parties for further bargaining.

However, under the facts before the Board, the UPW immediately requested reopening negotiations over the cost items in accordance with the August 4, 1998 Attorney General's Opinion and the Acting Chief Negotiator reaffirmed the commitment to the negotiated Unit 01 contract indicating that further negotiation was unnecessary. Thus, none of the provisions of the March 10, 1998 agreement was reopened or renegotiated. The May 3, 1999 MOA merely incorporated the terms of the March 10, 1998 Unit 01 agreement. A plain reading of the terms of the MOA indicates that it is the same

contract as the March 10, 1998 Unit 01 contract which was previously ratified by the membership.

The parties to the MOA, consisting of a simple majority of the public employer group, expressly confirmed that the terms of the Unit 01 agreement were ratified by the membership and agreed that the MOA complied with Section 89-10, HRS. Based upon the record before the Board, the Board concludes that the terms of the MOA are the same as provided in the agreement of March 10, 1998.

Assuming arguendo, that the Board found that the terms of the MOA were different from the March 10, 1998 agreement, the Board would be reluctant to order a re-ratification[3] in view of the Intermediate Court of Appeals holding in Ariyoshi v. HPERB, 5 Haw. App. 533 (1985) (Ariyoshi case). In that case, the Board found that the union had violated the employees' rights in the conduct of the ratification vote and since the validity of the vote was in question, the Board ordered a re-ratification of the contract. The Court found, however, that the Board's re-ratification order constituted an abuse of discretion and exceeded the bounds of reason in part, because the contract would have expired within four months of the Board's order. The Court found that a cease and desist order to the union would have been sufficient as a remedy.

In the instant case, the MOA which YAMASHIRO challenges extends from July 1, 1995 to June 30, 1999. Thus, the contract

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[3]Declaratory ruling petitions request agency interpretations on the applicability of statutes, rules, or orders to specific fact situations. Thus, a request for affirmative remedial relief in a declaratory ruling petition is highly unusual. YAMASHIRO, however, requested, inter alia, in this petition that the Board order the UPW to conduct ratification vote on the MOA by the Union membership.

will expire on the date of this decision. We believe an order to the Union to re-ratify the terms of a contract which have already been accepted by the membership would create a situation like the Ariyoshi case which would be disruptive of public employer-employee relations under the contract and would not be in concert with the policy and goals of collective bargaining in public employment as proclaimed in Section 89-1, HRS. In the Board's view, this would be the absurd result of an overly technical reading of the collective bargaining law which offends common sense.

## CONCLUSIONS OF LAW AND DECLARATORY RULING

The Board has jurisdiction over this petition pursuant to Sections 89-5 and 91-8, HRS.

The MOA dated May 3, 1999 between the public employers and the UPW for bargaining unit 01 contains the same terms as the March 10, 1998 agreement which was previously ratified by the membership. The MOA states that the parties thereto have agreed that the provisions of Section 89-10, HRS, have been complied with. Under the circumstances of this case, the Petitioner has failed to establish that ratification of the MOA is required.

DATED: Honolulu, Hawaii, June 30, 1999.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

CONCURRING OPINION

I am in agreement with the conclusion reached by my fellow Board members but feel compelled to further explain my reasons for reaching that result.

The Attorney General's well-researched and reasoned opinion dated August 4, 1998 concluded that the failure of the Legislature to fund the Unit 01 cost items constituted a rejection of the cost items and that all cost items are returned to the parties for further bargaining. I agree with the opinion of the Attorney General. It follows that there is no contract with respect to the cost items and that any subsequent agreement reached between the parties is a "new" agreement. There can be no serious question that if the parties had negotiated cost items different from that presented to the Legislature, ratification by the Union membership would be required under Section 89-10(a), HRS.

However, the facts of this case are that the parties, on May 3, 1999, agreed to the identical cost items that had been presented to the Legislature. On a technical legal basis, it can be persuasively argued that because rejection of the cost items by the Legislature effectively extinguished the March 10, 1998 agreement between the parties, any agreement between the parties is a "new" agreement requiring ratification under Section 89-10(a), HRS. In my view, such an argument would run counter to the decision in the Ariyoshi case cited in the main opinion. In that case the Intermediate Court of Appeals found that the Board erred in ordering re-ratification of a collective bargaining agreement where there had been an admittedly flawed ratification process. The Court looked to the circumstances under which re-ratification

had been ordered and found that requiring re-ratification exceeded the bounds of reason.

The circumstances surrounding this case are that: (1) the MOA entered into on May 3, 1999 contains the identical terms as the agreement of March 10, 1998; (2) the March 10, 1998 agreement had been ratified; (3) all other legislative bodies involved have funded or are expected to fund the agreement; (4) the agreement will expire on the date of this decision; (5) requiring ratification of the May 3, 1999 MOA may result in Unit 01 employees having to wait another year to receive agreed upon wage increases. Under such circumstances, requiring ratification of the May 3, 1999 MOA would not be in keeping with the statement of policy contained in Section 89-1, HRS, and would be disruptive of the employee-employer relationship. Requiring ratification, therefore, would exceed the bounds of reason.

BERT M. TOMASU, Chairperson

Copies sent to:

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