

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter Of Petition
For Declaratory Ruling

Case No. DR-07-7

BOARD OF REGENTS,
UNIVERSITY OF HAWAII,

Decision No. 41

Petitioner,

and

HAWAII FEDERATION OF COLLEGE
TEACHERS, Local 2003,
AMERICAN FEDERATION OF
TEACHERS,

Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RULING

This petition for declaratory ruling was filed by the Board of Regents, University of Hawaii (hereafter Petitioner) on January 29, 1974.

Briefs and reply briefs were filed by the Petitioner and the Hawaii Federation of College Teachers, Local 2003, American Federation of Teachers (hereafter HFCT). The Board has completed a review of the briefs submitted by the parties and hereby makes the following findings of relevant facts, conclusions of law and declaratory ruling.

FINDINGS OF FACT

The Petitioner is a public employer as defined by Section 89-2(9), Hawaii Revised Statutes (hereafter HRS).

The HFCT is an employee organization certified by this Board as the exclusive bargaining representative of Unit 7 (faculty of the University of Hawaii and the community college system).

The University of Hawaii Professional Assembly (hereafter UHPA) is an employee organization within the meaning of Chapter 89, HRS.

The relevant facts as determined by the Board are as follows:

On November 30, 1972, the HFCT was certified by the Board as the exclusive bargaining representative of Unit 7. During the first year of its representation, the HFCT and the Petitioner engaged in protracted contract negotiations.

On November 12, 1973, just eighteen days prior to the anniversary of the certification, a tentative contract was reached by the negotiating parties. On November 25, 1973, the employees of Unit 7 rejected the proposed agreement by a vote of 1310 to 279.

In December of 1973 the College and University Professional Association, (CUPA), and the American Association of University Professors, (AAUP), formed an alliance, the UHPA. On January 4, 1974, the UHPA filed both certification and decertification petitions. An investigation of the petitions was conducted by the Board. On January 21, 1974, the Board held a hearing and ordered a certification election to be held on March 13 (Oahu) and 15 (neighbor islands), 1974. At the January hearing, both the HFCT and the UHPA went on record as consenting to this election.

On November 28, 1973, the HFCT had sent a request for resumption of contract negotiations to the Petitioner.

Confronted by the HFCT request to resume bargaining, the Petitioner on January 16, 1974, sent a letter to the HFCT stating that it had a good faith doubt as to HFCT's claim of majority representation and questioned the legality of resumption of contract negotiations. The Petitioner then filed this petition on January 29, 1974, requesting a declaratory ruling to determine whether it would be a prohibited practice within the meaning of Subsections 89-13(a)(1) and (2), HRS, and Section 89-3, HRS, for the Petitioner to continue to bargain with the HFCT in the face of a Board ordered election.

CONCLUSIONS OF LAW

The Board has considered the Petitioner's request for a declaratory ruling and concludes that the petition is proper and that a ruling should be issued.

The Petitioner submits that it need not bargain with the HFCT since a real question of representation exists which requires it to assume strict neutrality in its dealings with the rival unions. It further maintains that bargaining at this time would be a prohibited practice under Section 89-3 and Subsections 89-13(a)(1) and (2), HRS.

Section 89-3, HRS, provides in relevant part:

"Employees shall have the right of 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. . . free from interference, restraint, or coercion. . ."

Subsections 89-13(a)(1) and (2), HRS, provide:

"(a) 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;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization; . . ."

The Board finds that since an election has been directed and that the HFCT has not submitted substantial evidence of a clear showing of majority support, a real question of representation exists and that the Petitioner must remain neutral and should not negotiate with the HFCT or any other employee organization until the results of a conclusive election have been certified.

The doctrine of employer neutrality was first enunciated in Midwest Piping & Supply Co., Inc., 63 NLRB 1060, 17 LRRM 40 (1945). In that case, both the steelworkers' and steamfitters' unions had petitioned the NLRB for an election. While the petitions were pending, the employer recognized and entered into a union shop agreement with the steamfitters' union. The NLRB held that the employer had violated Section 7 of the National Labor Relations Act (hereafter NLRA) since its dealings with the steamfitters indicated its approval of that union, and accorded it unwarranted prestige, encouraged membership in said union, and discouraged membership in the rival union. The NLRB held that these employer actions and their resultant effects constituted interference with, restraint, and coercion of its employees in their exercise of rights guaranteed by Section 7 of the NLRA. Subsequent cases which clarified the Midwest Piping doctrine include: William D. Gibson Co., 110 NLRB 660, 35 LRRM 1092 (1954); Shea Chemical Corp., 121 NLRB 1027, 42 LRRM 1486 (1958). The NLRB thus established what is sometimes known as the Midwest Piping doctrine which states that it is a prohibited practice

for an employer to negotiate with one union when faced with conflicting union claims which raise a real question of representation.

This Board finds the rationale and doctrine of Midwest Piping sound and persuasive. The rights of public employees which are guaranteed by Section 89-3 and Subsection 89-13(a)(1), HRS, to choose their exclusive bargaining representative free from interference, restraint, or coercion, and the obligation imposed upon the employer by Subsections 89-13(a)(2), HRS, not to dominate, interfere, or assist any employee organization make the adaptation of the Midwest Piping doctrine necessary to insure the laboratory conditions essential for a proper and fair representation election.

The requirement of employer neutrality established by the Midwest Piping doctrine becomes operative when a real question of representation exists.

NLRB and courts have fashioned guidelines to determine the existence or nonexistence of a real question of representation. A majority of these cases, many of which are cited in the briefs of the Petitioner and HFCT, do not, however, deal with the situation in which a representation election has been directed. Rather, they are concerned with situations arising prior to the direction of an election. Their relevance in the context of the instant case is, at best, dubious.

The specific issue faced by this Board in this case is whether the ordering of an election by the Board gives rise to a real question of representation, thus, relieving the employer of its duty to bargain with the incumbent union.

In NLRB v. Swift & Co., 294 F2d 2699, 48 LRRM 2699 (3rd Cir. 1961), the Circuit Court of Appeals held that the filing of an election petition by a rival union, an administrative

hearing being held thereon, but an election not being ordered, was insufficient to raise a real question of representation.

In NLRB v. North Electric Co., 269 F2d 137, 49 LRRM 2128 (6th Cir. 1961), the court held that the filing of a petition and a hearing being held thereon did not alone raise a real question of representation, when the Board did not order an election. Both Swift, supra, and North Electric, supra, state that a real question of representation exists when proven by substantial evidence. The mere fact of the filing of petitions coupled with hearings thereon were insufficient in and of themselves to raise a real question of representation. However, the language of both cases clearly implies that upon the direction of election a real question of representation comes into existence.

In St. Louis Independent Packing Co. v. NLRB, 291 F2d 700, 48 LRRM 2469 (7th Cir. 1961), the court specifically held that once the Board has ordered an election, a real question of representation exists, absent a clear showing of majority representation by substantial evidence. In St. Louis Independent Packing Co., supra, a rival union filed an election petition four months prior to the expiration of the contract between the employer and the incumbent union. An election was ordered by the NLRB. Despite the ordered election, the employer and incumbent union continued to negotiate. A new agreement was executed five days prior to the election date. The election was held and the incumbent obtained a majority. The rival union then charged the employer with unfair labor practices consisting of bargaining activities that constituted support or assistance to the incumbent and interfered with the right of the employees to freely choose their exclusive bargaining representative.

The NLRB sustained the rival union's charges, set aside the election, and ordered a new election. The employer appealed. The court affirmed the NLRB stating:

" . . . [W]here a real question of representation exists an employer's duty to observe strict neutrality in matters relating to the employee's choice of bargaining representative precludes his bargaining with one of the rival labor organizations."

" . . . [W]here the Board after its investigation orders a representation election we are of the opinion that absent a clear showing of majority representation by evidence of a substantial nature a real question of representation must be said to exist." (Emphasis added)

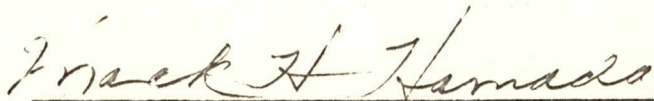
In the case at hand, the Board has conducted an investigation, a hearing, and has ordered an election. The HFCT has not submitted substantial evidence of a clear showing of majority support. A real question of representation must then be said to exist. The Petitioner's duty to bargain with the HFCT is therefore obviated in the face of the Board's ordered election which is set to take place on March 13 and 15, 1974.

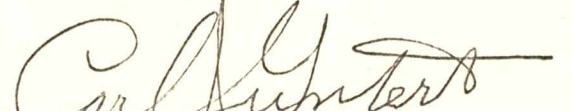
Additionally, it is well to note that the HFCT through its attorney consented to an election at the January 21, 1974, hearing. Since the complex procedure required for a representation election has been put into effect, the Board finds untenable the HFCT demand for negotiations with the Petitioner, negotiations which would contaminate the very election it consented to.

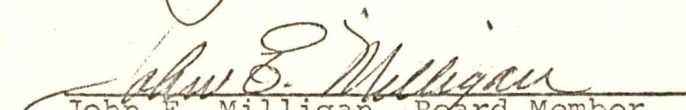
RULING

The Board, for the reasons set forth above, concludes that a resumption of contract negotiations by the Petitioner with the HFCT, in face of a Board ordered election, would be a prohibited practice within the meaning of Section 89-3, and Subsections 89-13(a)(1) and (2), HRS.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


Carl J. Guntert, Board Member


John E. Milligan, Board Member

Dated: February 12, 1974

Honolulu, Hawaii