

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-13-368
)	
HAWAII GOVERNMENT EMPLOYEES)	DECISION NO. 416
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
Complainant,)	
)	
and)	
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii and JAMES)	
TAKUSHI, Director, Department of)	
Human Resources Development,)	
State of Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 13, 1997, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against BENJAMIN J. CAYETANO, Governor, State of Hawaii, and JAMES TAKUSHI (TAKUSHI), Director, Department of Human Resources Development (DHRD), State of Hawaii (collectively Employer). The HGEA alleges that on or about July 15, 1997, the Respondents implemented a retroactive reduction in shortage differentials of certain Unit 13 employees simultaneously with the implementation of a wage increase established through the decision and award of an Interest Arbitration Panel issued on January 31, 1997. The Union contends that the Employer violated §§ 89-9(a) and 89-13(a)(1), (5), (7), and (8), Hawaii Revised Statutes (HRS).

On January 29, 1999, the Employer filed a motion to dismiss and/or for summary judgment with the Board contending that the instant prohibited practice complaint should be dismissed for lack of jurisdiction and for failure to exhaust contractual remedies. Alternatively, the Employer contends that there are no genuine issues of material fact presented and the Employer is entitled to judgment as a matter of law.

On September 30, 1999, the Board conducted a hearing on Respondents' motion to dismiss the complaint. Thereafter, on December 2, 1999, the Board issued Order No. 1821, Order Denying Respondents' Motion To Dismiss and/or for Summary Judgment. The Board found that the record reflected the existence of genuine issues of material facts presented in this case, and denied the Respondents' motion.

The Board conducted hearings on the instant complaint on February 28, March 10, and March 16, 2000. All parties were afforded full opportunity to present evidence and arguments before the Board. The parties filed post hearing briefs on May 5, 2000.

In Order No. 1869, dated May 22, 2000, the Board directed Complainant's counsel to submit a proposed order to the Board. Complainant's counsel was directed to secure the approval as to form of opposing counsel and if opposing counsel did not approve of the form of the proposed order, Respondents' counsel could submit objections and a proposed order to the Board.

Complainant filed its proposed order with the Board on June 14, 2000 without the approval as to form of opposing counsel. No objections were filed with the Board.

After thorough review of the record in the case, the Board issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The HGEA is the exclusive representative, as defined in § 89-2, HRS, of employees of the State of Hawaii included within bargaining unit 13.

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

JAMES TAKUSHI, Director, DHRD, State of Hawaii, was for all times relevant, a representative of the public employer as defined in § 89-2, HRS.

The State of Hawaii and the HGEA are parties to a collective bargaining agreement covering the employees included in Unit 13.

Article 50, Salaries in the applicable Unit 13 contract provides:

A. Employees who are receiving a shortage differential shall have their compensation adjusted by provisions contained in a separate memorandum of agreement.

On August 31, 1995, the HGEA and the public employers executed a Memorandum of Agreement (MOA) regarding shortage differentials. The MOA provides the method of computing compensation adjustments for individuals receiving a differential attributable to shortage for the period July 1, 1995 to and including June 30, 1997. The Agreement provides, in part:

- A. Employees receiving a differential attributable to shortage on the day prior to a negotiated step movement shall have their compensation adjusted as follows:
 - 1) Adjust basic rate of pay as provided for in the collective bargaining agreement.
 - 2) Adjustment, if any, to the employee's differentials related to shortage shall be provided in a management directive by the respective jurisdictions.
- B. Employees in a shortage or related shortage position who are promoted, demoted, transferred, reallocated or whose class is repriced shall have their compensation adjusted as provided in a management directive by the respective jurisdiction.

On August 31, 1995, TAKUSHI issued a Departmental Circular No. 95-5, regarding compensation adjustments for individuals receiving a differential attributable to shortage for the period July 1, 1995 to and including June 30, 1997. The Circular, as amended on May 13, 1997, provides in part:

- B. Employees Hired On or After the Effective Date of the Across-the-Board Adjustment
 - 1) Adjust the employee's basic rate of pay, as provided in the contract.
 - 2) The employee's shortage differential (SD) shall equal the differential listed on the shortage table for the applicable step.

Prior to January 31, 1997, the public employers and the HGEA were parties to an interest arbitration pursuant to § 89-11, HRS, which resulted in an Arbitration Panel Decision and Award, dated January 31, 1997. The Panel awarded, inter alia, a 2.25% salary increase retroactive to July 1, 1996, to employees included in Unit 13.

On or about July 15, 1997, the Employer implemented the wage and other increases ordered by the Interest Arbitration Panel.

The Employer also removed shortage differentials for certain Unit 13 employees retroactive to July 1, 1996 in an amount equal to the amount of the arbitrated wage increase. The Employer relied on the DHRD circular which does not include a specific retroactive pay increase and/or a retroactive shortage adjustment. The parties did not agree to the simultaneous retroactive shortage adjustment with the retroactive wage increase prior to its implementation.

Subsequently, on or about July 15, 1997, Unit 13 members who were hired after July 1, 1996 complained about the retroactive adjustment to their shortage differentials, which in effect eliminated any arbitrated wage increase.

Based on these facts, the Board finds that on July 1, 1997, Respondents implemented an across-the-board pay increase for certain members of Unit 13 pursuant to an arbitration award retroactive to July 1, 1996 and simultaneously retroactively removed shortage differentials from employees hired after the negotiated increase date. Thus, the employees' total compensation remained the same. The Respondents' actions effectively negated the arbitrated wage increase and significantly and negatively impacted the wages of certain Unit 13 employees.

DISCUSSION

The Union alleges that pursuant to § 89-9(a) HRS, the Employer and the Union shall meet at reasonable times, ... and shall negotiate in good faith with respect to wages ... The Union further alleges that, notwithstanding Chapter 77, HRS, § 89-9(d), HRS, and management rights generally, the matter of shortage

differentials made as a result of negotiated wages increases are subject to Article 50(A) of the Unit 13 Agreement. Finally, the Union alleges that the implementation of a retroactive shortage differential adjustment, simultaneously with a retroactive pay increase, which effectively eliminated any arbitrated wage increase, constitutes a violation of § 89-9(a), HRS, and §§ 89-13(a)(5), (7), and (8) HRS.

The Employer contends that there was no disagreement about the Employers' retroactive adjustment to shortage differentials, prior to July 15, 1997 by the HGEA. The Employer further asserts that it applied both the MOA of 1995 and the subsequently developed Departmental Circular No. 95-5, revised in May 1997, properly with the understanding of the parties. Further, the Employer contends that the Board lacks jurisdiction to decide shortage pay issues, because shortage differentials is not a mandatory subject of collective bargaining, and not subject to Chapter 89, HRS.

Section 89-13, HRS, provides in relevant part:

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

* * *

- (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;
- (8) Violate the terms of a collective bargaining agreement; . . .

Section 89-9(a), HRS, refers to the scope of negotiations and provides as follows:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental and longevity steps and movements between steps within the salary range, the amounts of contributions by the State and respective counties to the Hawaii public employees health fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

Section 77-9, HRS, refers to initial appointments and shortage categories, and provides in part:

(a) All initial appointments shall be made at the first step of the appropriate salary range.

* * *

(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 a 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 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 of related shortage positions,

the director shall adjust their pay appropriately.

In Decision No. 389, United Public Workers, V HLRB 719 (1997), the Board recognized that pursuant to § 77-9, HRS, the DHRD director may declare a class of positions or group of positions in a class to be a shortage category when there is a labor shortage and shall set the new entry salary at which the employees can be recruited from the labor market. In addition, the statute provides for a periodic review to adjust salaries if necessary and to reestablish the first step of the salary range as the entry level when the shortage ceases to exist. The Board there found that the implementation of the shortage differentials pursuant to the federal court order are not subject to negotiations.

The record in this case indicates that the employees were hired in a shortage class and paid a shortage differential. After the employees had already performed the work for the Employer and received the differentials, Respondents retroactively reduced the employees' shortage differentials simultaneously with the implementation of the retroactive pay increase, effectively offsetting the arbitrated wage increase. Thus, while the Board recognizes the DHRD Director has the authority to declare and remove shortage categories and set shortage differential rates under Chapter 77, HRS, the Board finds that the Respondents' actions significantly impacted upon the wages of the affected employees and was therefore subject to negotiations prior to implementation. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 1 HPERB 763 (1977). Notwithstanding § 77-9, HRS, the parties have negotiated a contract provision regarding

shortage differentials which referred to an MOA and which in turn, referred to a Departmental Circular. There is no provision in the circular which provides for the retroactive adjustment to the shortage differential rate and no evidence of a wage study performed to justify the adjustment in the shortage rate. Thus, the Board concludes that the retroactive removal of the shortage differentials in this case should have been subject to negotiations with the Union prior to implementation and that the Respondents violated §§ 89-13(a) (5), (7), and (8), HRS.

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. Based upon the evidence in the record, the Board finds that the natural consequence of retroactively removing shortage differentials from affected Unit 13 employees which effectively eliminated any arbitrated wage increase violated their rights. Thus, the Board concludes that the Employer's actions were wilful.

CONCLUSIONS OF LAW

The Board has jurisdiction over the subject complaint pursuant to §§ 89-5 and 89-14, HRS.

An Employer commits a prohibited practice in violation of § 89-13(a) (5), HRS, and § 89-13(a) (7), HRS, when it fails to bargain collectively in good faith with the exclusive representative as required in § 89-9, HRS.

An Employer commits a prohibited practice in violation of § 89-13(a)(8), HRS, when it failed to adhere to Article 50 of the Unit 13 collective bargaining agreement.

ORDER

The Employer is ordered to cease and desist from committing the instant prohibited practices and is ordered to comply with the requirements of Chapter 89, HRS.


The Employer shall make the affected employees whole.

The Employer shall immediately post copies of this decision in conspicuous places at its work sites where employees of bargaining Unit 13 assemble and congregate, and leave such copies posted for a period of 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 30 days of receipt of this order.

DATED: Honolulu, Hawaii, June 29, 2000.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

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and BENJAMIN J. CAYETANO, Governor, State of Hawaii, et al.
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