STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii; BARBARA D. PETERSON, Administrator, Hawaii State Hospital, Department of Health, State of Hawaii and DEPARTMENT OF HEALTH, State of Hawaii, Respondents.	CASE NOS.: CE-02-468a CE-03-468b CE-04-468c CE-09-468d CE-13-468e DECISION NO. 427 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 13, 2001, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed a prohibited practice complaint against Respondents BENJAMIN J. CAYETANO (CAYETANO), Governor, State of Hawaii (SOH); BARBARA D. PETERSON (PETERSON), Administrator, Hawaii State Hospital (HSH), Department of Health (DOH), SOH; and the DOH, SOH (collectively State) with the Hawaii Labor Relations Board (Board). Complainant alleges Respondents failed to consult and/or negotiate with the HGEA regarding the closure of the Guensberg Building at the HSH thereby violating Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), (7), and (8).

On May 16, 2001, the Board conducted a hearing on the complaint. The parties had full opportunity to present evidence and argue their cases. After a complete review of the record and arguments the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The HGEA is the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining units 02, 03, 04, 09 and 13.

2. Respondents CAYETANO, PETERSON, and DOH are public employers or the representative of a public employer as defined in HRS § 89-2.

3. PETERSON was for all times relevant, the administrator at the HSH. She was preceded by Wayne P. Law (Law).

4. The HSH is the State of Hawaii's State Mental Hospital. Among its facilities is the 60-year old Guensberg Building which housed three patient units, including the Psychiatric Intensive Care Unit (PICU), a transition and evaluation unit (STEP unit), and a high security patient unit (R-unit).

5. Act 119, SLH 1999, required HSH to transition into a secured psychiatric rehabilitation facility for individuals who require intensive therapeutic treatment and rehabilitation. This required transition was in response to a federal court consent decree addressing, inter alia, inadequate staffing levels at HSH. Pursuant to Act 119, HSH would appropriately divert patients to in-community treatment programs thereby reducing the census at HSH and permitting reallocation of personnel and services in accordance with the consent decree.

6. By letter dated August 16, 1999, Law wrote to Russell K. Okata (Okata), Executive Director of the HGEA. The letter was to consult with the Union regarding a proposal to combine the staffs of the PICU and the STEP unit and relocate Units I, F, PICU and the STEP unit in connection with HSH's transition to a secured psychiatric rehabilitation facility. The transition was anticipated to result in a census reduction from 168 beds to 108. The letter also addressed the closing of the Guensberg Building due to its deteriorating infrastructure and identified the closure date as June 30, 2000.

7. By letter dated December 8, 1999, Law wrote Okata to continue consultation on a proposal to combine the staffs of the PICU and STEP units and relocate various units. Attached to the letter was a proposed draft of a model to transition the HSH to a secured psychiatric rehabilitation facility in accordance with Act 119. In the draft document, the date of closure of the Guensberg Building was August 2000.

8. By letter dated December 17, 1999, William T. Elliot (Elliot), Associate Administrator, Administrative and Support Services, HSH wrote to Ms. Nora Nomura (Nomura), HGEA Field Services Officer, to invite the HGEA to participate as a member of the HSH Performance Improvement Team (PIT) for transitioning the HSH to a secure psychosocial rehabilitation facility in accordance with Act 119.

9. Elliot testified that the PITs were employee committees that made recommendations for service improvement to the Performance Improvement Council, a decision-making body composed of clinical and administrative directors, including Law.

10. The HGEA elected not to participate in the PIT meetings because, according to the testimony of Nomura, the Union did not feel the meetings were worth attending.

11. By letter dated August 1, 2000, Law wrote to Nomura to continue to consult regarding the transition of the HSH. Attached to this letter was a "Gantt chart" which set the time lines for the closure of the Guensberg Building as the end of October 2001.

12. By letter dated September 5, 2000, Law wrote to Nomura to continue consulting with the HGEA on the assignment of Unit 09 staff at the facility in the transition of the HSH to a psychiatric rehabilitation facility.

13. On December 22, 2000, the HSH and HGEA agreed to conduct monthly meetings on the transition. The first such meeting was held on January 8, 2001. At the meeting the HSH made no mention of the closing of Guensberg. The February meeting was cancelled at the Union's request.

14. By certified mail dated February 14, 2001, PETERSON wrote to Okata to consult on the planned closure of the Guensberg Building. The projected date of closure was identified as May 1, 2001.

15. Nomura testified that the February 14th letter was the first consultation on the closing of the Guensberg Building. Previously, all references to the possible closing of the building had been within the context of consultation regarding the transition of HSH to a secured psychiatric rehabilitation facility as required by Act 119. As Nomura had been led to believe by HSH administrators that the transition was contingent upon a reduction in population and because no population reduction had occurred, the HGEA had concluded that neither the transition nor closure was imminent.

16. The HSH newsletter, the "Daily Wave," for February 27, 2001 contained an article entitled "Target Dates Postponed for One Week; Guensberg MDs New Units" which stated in part:

> The Performance Improvement Committee (PIC) made and announced several decisions this morning relating to the impending move out of the Guensberg Building.

> Based on the most current information, PIC decided to move the target dates back by one week. Staff and patients will move out of PICU by March 19th, out of STEP by March 26th and out of Unit R by April 2nd, plus or minus seven days either way. (emphasis added.)

17. By letter dated March 2, 2001, HGEA union agent Kevin Mulligan (Mulligan), on behalf of Nomura, wrote to PETERSON identifying health and safety concerns of the HGEA arising out of the impending closure of Guensberg and requesting negotiations on the concerns.

18. On March 12, 2001, the "Daily Wave" contained an article entitled "PICU to Close Down Next Monday—Plan Delivered to Licensing Branch." The article stated that the PICU would close on Monday, March 19th, and that a plan for phased movement of beds from Guensberg had been delivered to the hospital licensing agency "last week."

19. Nomura testified that HGEA obtained a copy of the March 12th "Wave" and that the referenced article was the first time that it learned of a scheduled March closing of the Guensberg Building. By certified mail dated March 15, 2001, PETERSON wrote to Okata to respond to Nomura's letter on the closing of the Guensberg Building. This letter states in part:

> In conclusion, management at the Hawaii State Hospital (HSH) acknowledges that consultation with the Unions on the move out of the Guensberg Building is required. Staffing ratios and assignment of staff, however, are considered a management right and does not require negotiation. Health and safety issues are legitimate concerns for both labor and management and will be address as deemed appropriate in consultation with the all (sic) parties involved.
>
> The Union has a standing invitation to attend meetings at the HSH. It has been communicated through different forums that all our meetings are open to whomever wishes to attend. This was also communicated through telephone discussions with the Bargaining Unit 9 Union Agent and in our monthly HGEA/AMHD/HSH meetings. I again extend my standing invitation to the union to attend any of the meetings relating to this issue, whenever you desire or have concerns. We will continue to discuss and address your specific concerns based on their relevance, and remain open for consultation on any issue other than those that are exclusively reserved for management.

20. By letter dated March 16, 2001, Nomura wrote to PETERSON objecting to the way that consultation on the closing of the Guensberg Building was occurring. The letter stated that the HGEA learned indirectly from the March 12, 2001 newsletter that the move would actually begin on March 19th. The letter further stated that a complaint had been filed with the Board.

21. Elliot testified that the decision to move out of the Guensberg Building was a clinical decision. He further testified that he could not speak for the clinical side of the HSH and did not know when, how or why the decision was made. He also testified that when he found out when the move was about to occur, which he believes was the Monday before the actual move (March 12), he attempted to contact the two affected unions. He testified that he was able to advise Merlene Akau at the United Public Workers (UPW), and that it might have been the next day that he was able to contact Mulligan to advise him of the impending move.

22. The closure of the Guensberg building commenced on or around March 19, 2001 and proceeded to conclusion.

23. On April 23, 2001, PETERSON wrote to Nomura in response to the expressed health and safety concerns. Accommodations identified included steps taken to prevent electrical wire and crawlspace access and installation of protective surfaces on glass windows. The Union was also urged to take advantage of the previously extended invitation to attend safety committee meetings.

24. The Board finds that the State's notice to the Union inviting consultation lacked reasonable completeness and detail as the State failed to provide an accurate schedule of the Guensberg closing. Subsequent to PETERSON's February 14th letter to Okata inviting consultation and projecting May 1st as the date for closure, the Union was notified by Elliot on or about March 13th that the building would be closed on March 19th. The Board finds the State's notice inadequate because it failed to provide the Union with reasonably accurate information prior to the change in order to provide a meaningful opportunity for dialog.

DISCUSSION

In its complaint, the HGEA alleges that the State's conduct violated HRS §§ 89-13(a)(5),(7), and (8).[1] In essence, the HGEA contends that Respondents failed to

[1]HRS § 89-13(a) provides in part:

§89-13 Prohibited practices; evidence of bad faith. (a) It

consult and/or negotiate on the closure of the Guensberg Building.[2] It claims that the State failed to satisfy the statutory duty to consult identified in HRS § 89-9(c)[3] and identical contractual provisions.[4]

The Respondents claim that the HGEA failed to exhaust its contractual remedies, that their conduct comported with all applicable statutory and contractual obligations regarding consultation, and that any violation was not wilful.

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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; . . . .

[2]In the presentation of its case, however, the HGEA has not provided evidence or argument on the alleged failure to negotiate and have instead concentrated its case on the HSH's failure to meet the consultation provisions of law and contract. Therefore the Board will limit its discussion and analysis to the consultation issue.

[3]HRS § 89-9(c) provides:

(c) 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.

[4]Applicable contract provisions providing for consultation over personnel policy changes are identical for Units 02, 03, 04, 09 and 13 and state:

ARTICLE 4 - PERSONNEL POLICY CHANGES

A. 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 Union. The Employer shall consult with the Union prior to affecting changes in any major policy affecting Employee relations.

Exhaustion

The Hawaii Supreme Court in Santos v. State of Hawaii, Dept. of Transportation, Kauai Division, 64 Haw. 648, 655, 646 P.2d 962 (1982) stated:

> It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (citation omitted.) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. (citations omitted.)

Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See e.g., Hawaii State Teachers Association, 1 HLRB 253 (1972).

In this case, the Board concludes that the application of the doctrine is not appropriate. Here, Complainant raises allegations of both contractual and statutory violations. While the grievance procedure is indeed available to address the alleged contractual violations,[5] the Board has exclusive jurisdiction over the alleged statutory violation. Accordingly, if the HGEA were required to exhaust the grievance process prior to pursuing this action before the Board, the results of that process would have no jurisdictional, precedential or preclusive effect and the Union would still be free to subsequently file this complaint with the Board. The results of successive identical actions would be either redundant or conflicting. Time and money would have been wasted. The Board therefore cannot identify how the interests of the parties, or principles of collective bargaining would be forwarded by a declination of jurisdiction based on exhaustion.

Consultation

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

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[5]The Union in fact filed a grievance in 2000 regarding an alleged failure to consult over the transition. It was resolved at Step 3 with instructions that the State continue consulting with the HGEA. Grievances regarding alleged health and safety issues related to transition were similarly filed in 2000.

> 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." (Decision 54 Hearings Officer's Report at page 11). [1 HPERB No. 54 at 512]

Id. at p. 226.

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 1463, IAFF, AFL-CIO, 1 HPERB 650 (1977). Here, it is uncontested that the closure of the Guensberg Building was a matter requiring consultation with the affected unions.

The standard of review by the Board on questions of consultation was recently expanded in Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 6 HLRB 1 (1998). In that decision the Board adopted as applicable to HRS § 89-9(c) the test crafted by Arbitrator Ted T. Tsukiyama in the arbitration between Department of Water, County of Kauai and United Public Workers, Local 646, AFL-CIO, AFSCME (9/11/87):

> From the foregoing, the Arbitrator infers the requirement upon management "to consult" includes: (1) notice to the union, (2) of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advice or input of the Union thereto, (5) listening to, comparing views and deliberating together thereon (i.e., "meaningful dialog"), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

In applying this test to the instant case, the Board must conclude that the HSH did not satisfy its duty to consult with the HGEA regarding the closure of the Guensberg Building:

1. Notice to the Union: The Board concludes that notice to the Union of State's plans to close the Guensberg Building occurred on February 14, 2001 by PETERSON's letter to Okata. Prior to that time, all discussion

of the building closure had taken place within the context of the transition plan and population reduction.[6]

2. of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations: As noted above, it is uncontested that the Guensberg closing was a mandatory subject of consultation.

3. in reasonable completeness and detail: PETERSON's letter of February 14th identifies a number of details associated with the move and invites the HGEA to contact Elliot if there are questions. The HGEA does not challenge the adequacy of the substantive content of this communication. However, the Union argues that the letter was both inadequate and misleading in a critical detail. The letter identifies the planned closing date as May 1, 2001.[7] On March 12th, by way of the HSH newsletter, the Union learned that the Guensberg Building closing was scheduled to commence one week later on March 19th. And it was only on March 12th or 13th that Elliot claims to have telephonically advised the Union of the change in schedule. At the very least, reasonable completeness and detail requires a meaningful proximate schedule. This was not provided, if at all, until one week before the activity began. Both statute and contract requires consultation "prior" to affecting changes in any major policy affecting employee relations. "Prior" consultation requires an effective temporal opportunity for exchange. This was not provided. Accordingly, the Board concludes that the notice did not satisfy the "reasonable completeness and detail" test and failed to satisfy the consultation requirements of law and contract.

Having concluded that adequate notice was never provided, the Board need not address the remaining elements of the test at this point.

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[6]PETERSON's letter admits as much:

> Based on our continuing consults, transition out of the Guensberg Building was to occur as patient census was reduced. Since our census has not decreased to a level that allows our transition as outlined in our transition plan, we find ourselves with an ever increasing sense of urgency to close the building as soon as possible.

[7]Dates for the closing of the building had been previously identified by the State as June 30, 2000 (transition consult letter of 8/16/99), August 2000 (transition consult letter of 12/8/99), and October 2001 (transition Gantt chart of 8/1/00).

HSH argues that even if adequate consultation did not occur, it cannot be held culpable because 1) any violation was not "wilful" as required by HRS § 89-13(a), supra, and 2) the Union bears at least some of the blame because it failed to attend or participate in PIT meetings at which all relevant information could have been obtained, subsequently cancelled the monthly meeting scheduled for February at which further exchange was possible, failed to take advantage of offers, contained in each consult letter, to call Elliot if it had questions or concerns, and its stewards and members participated in, and were aware of, planned activities.

With respect to wilfulness, the Board has ruled that "wilfulness can presumed where a violation occurs as a natural consequence of a party's actions." United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HLRB 507, 514 (1984). In the instant case, we have concluded that the action which precipitated the violation was claimed[8] notice of the date of the move only one week before the move was to begin. Inasmuch as it is unlikely that adequate consultation can occur pursuant to such notice, the violation was a natural consequence of Respondents' actions and wilfulness will be presumed.

The Union's decision not to participate in the PIT hardly facilitated the statute's goal of promoting employee participation in joint decision-making on substantial and critical matters effecting employee relations. And had adequate notice been provided prior to the Union's declination, its decision might well have been found to constitute a waiver of its rights. But any notice was served well after the Union's declination, and the Board has concluded that notice was not provided in "reasonable completeness and detail." Accordingly, inasmuch as adequate notice is a precondition for consultation, the Union's failure to participate in committees or meetings prior to such notice cannot excuse the State's failure to consult.

Similarly, the duty to consult requires the employer to notify "the exclusive representative." (emphasis added). Hawaii Nurses Association, supra. Unless a member of the Union is specifically designated as an agent of the exclusive representative, information provided those members will not be attributed to the Union absent a specific showing. No such showing having been made here, the knowledge or participation of stewards or Union members cannot relieve the State of its obligation to consult with the HGEA.

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[8]Elliot testified that he learned of the date of the move only one week before the move was scheduled to begin and immediately thereafter tried to telephone affected unions. This testimony strains credulity. Elliot, as Associate Administrator was responsible for HSH's plant. That any necessary preparations took place in only one week or without his knowledge is unlikely. Further, the schedule for the move was published in the "Daily Wave" on February 27, 2001, two weeks before Elliot ostensibly learned of the schedule. Thus, to accept Elliot's testimony the Board must find that the schedule was public knowledge before the Associate Administrator of HSH, the person responsible for implementation, learned of the schedule. Standing alone, this tends to support the Union's suggestion that the information was intentionally withheld, thereby making the violation wilful.

Finally, it was appropriate for the State to invite further dialog in its "consult" letters regarding the transition of the facility. The Board concludes, however, that the Union appropriately deferred detailed discussions since the transition was admittedly,[9] based upon population reductions which had yet to occur. The Union responded on a timely basis to the February 14th, albeit inadequate, notice of the closing of Guensberg. That PETERSON's reply, the first and only round of the required "meaningful dialog," was dated April 23rd, after the building was closed, reflects the Board's conclusion that notice was in fact inadequate and that the required consultation did not occur prior to the proposed activity.

Remedy

The Board takes notice of the fact that this is the second occasion in recent memory that the HSH has been found to have committed a prohibited practice for failure to consult with an exclusive representative. In Decision No. 389, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 719 (1997) (UPW case), the Board found that the HSH failed to consult with the UPW over the declaration of a shortage differential. In that case the UPW claimed that the matter of shortage differential was negotiable. As a result of this claim, the HSH, on advice of counsel, chose not to inform the UPW about the shortage differential. The Board found that while the matter of shortage differential was not negotiable, the matter was one requiring consultation. The Board therefore directed that the HSH consult with the UPW over the declarations and the effect that the declarations would have on Unit 10 employees.

In both the UPW case, supra, and the instant case, a union requesting negotiations was subsequently shut out from receiving information that would have permitted meaningful consultation. We do not know of any HSH policies or procedures which dictate such outcomes. But the Board is also unaware of any policies or procedures which would prevent their recurrence. Consequently in order to avoid recurrence and facilitate required consultation, the Board orders that the HSH develop a formal standard operating procedure to be utilized on matters requiring consultation.[10] The Board further orders that such procedure be developed in consultation with the exclusive representatives of the employees at the HSH. Finally, the Board orders that HSH file with the Board the standard operating procedure required above within 120 days of the receipt of this decision and order. The Board retains jurisdiction over this complaint for the purposes of receiving the standard operating procedure or ordering additional remedies if the procedure is not timely filed.

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[9]See, fn. 6, supra.

[10]A cease and desist order alone would have little effect in this case since the move has been completed. Further the Union does not request that Guensberg be reopened and the Board concurs that it would serve no meaningful purpose. Such orders would, in effect, require nothing from the HSH and consequently do little to deter noncompliance in the future. The Board concludes that the development of the required consultation procedure will more appropriately effectuate the purposes of Chapter 89.

CONCLUSIONS OF LAW

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

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

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

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

5. The State violated Article 4, Personnel Policy Changes, of the Unit 02, 03, 04, 09, and 13 agreements and HRS § 89-9(c) when it failed to consult with the HGEA over the closure of the Guensberg Building at the HSH.

6. The State's failure to consult with the HGEA over the closure of the Guensberg Building at the HSH thereby violated HRS §§ 89-13(a)(5), (7), and (8).

ORDER

The State is ordered to cease and desist from committing the instant prohibited practices and shall comply with the requirements prescribed in Article 4 of the applicable agreements and HRS § 89-9(c).

The HSH is further ordered to develop a standard operating procedure in consultation with exclusive bargaining representatives of the HSH employees. Such procedures to be developed as prescribed in the Discussion above. Further, the HSH shall submit the completed procedures to the Board within 120 days receipt of this decision.

The DOH shall immediately post copies of this decision on its website and in conspicuous places at its work sites where employees of the bargaining units assemble, and leave such copies posted for a period of 60 days from the initial date of posting.

The HSH shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Union.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO and BENJAMIN J. CAYETANO, et al.
CASE NOS.: CE-02-468a, CE-03-468b, CE-04-468c, CE-09-468d, CE-13-468e
DECISION NO. 427
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, September 7, 2001.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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