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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of FRANK F. FASI, Mayor, CITY AND COUNTY OF HONOLULU, Petitioner, and HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, Local 152, HGEA/AFSCME, AFL-CIO, and UNITED PUBLIC WORKERS, Local 646, AFL-CIO, and HAWAII STATE TEACHERS ASSOCIATION (HEA-NEA), and STATE OF HAWAII, and COUNTY OF HAWAII, Intervenors.	Case No. DR-01-10 Decision No. 60

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING

On October 10, 1974, Frank F. Fasi, Mayor, City and County of Honolulu, as a public employer, (hereafter petitioner) filed a request for declaratory ruling that a provision in the contract for unit 1 employees respecting promotions was a violation of various portions of Section 89-9(d), Hawaii Revised Statutes, (hereafter HRS). The Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, AFL-CIO (or HGEA), the United Public Workers, Local 646, AFL-CIO (or UPW), and the Hawaii State Teachers Association, HEA-NEA (or HSTA), referred to herein collectively as union-intervenors, along

with the State of Hawaii, the County of Hawaii and the County of Kauai, referred to herein collectively as employer-intervenors, filed petitions to intervene. All of said petitions for intervention were granted. On February 4, 1975, the County of Kauai, at its request, was permitted to withdraw as a party.

At the October 29, 1974, prehearing conference, the union-intervenors challenged the jurisdiction of the Hawaii Public Employment Relations Board (hereafter Board) to consider the petitioner's request for a declaratory ruling. In response, the Board bifurcated the proceeding. Based upon the parties' memoranda and oral arguments on the question of jurisdiction the Board ruled in Frank F. Fasi et al, Case DR-01-10, Decision 58, (December 27, 1974), that it has jurisdiction to entertain the subject petition for declaratory ruling.

On January 10, 1975, the Board ordered the parties to file memoranda on the merits of the case. Based upon a review of the record and oral arguments heard on January 29, 1975, the Board hereby renders the following findings of fact, conclusions of law and ruling.

FINDINGS OF FACT

1. The petitioner is a public employer as defined by §89-2(9), HRS, and is a party to the unit 1 collective bargaining agreement.

2. The HGEA is the exclusive bargaining representative for units 2, 3, 4, 6, 8 and 13.

3. The UPW is the exclusive bargaining representative for units 1 and 10 and is a party to the unit 1 collective bargaining agreement.

4. The HSTA is the exclusive bargaining representative for unit 5.

5. The State of Hawaii and the County of Hawaii are public employers as defined by §89-2(9), HRS, and are parties to the unit 1 collective bargaining agreement.

6. On July 20, 1972, the petitioner, the two employer-intervenors, the County of Kauai and the County of Maui and the UPW executed a collective bargaining agreement for unit 1, effective July 1, 1972. §16.09(d)* of that agreement, dealing with the promotion of unit 1 employees, stated "other factors being relatively equal seniority shall prevail." On March 20, 1974, a new unit 1 collective bargaining agreement was executed. Under the new agreement, §16.09(d) was renumbered §16.06(c) and reworded as follows:

> "Whenever the qualifications between the qualified applicants are relatively equal, the employee with the greatest length of Base-yard, Workplace or Institution Workplace Seniority shall receive the promotion."

7. Prior to July 30, 1973, the petitioner promoted Cosme Rosete, Jr., to the position of Incinerator Plant Furnance Operator in lieu of Arthur Aiu. The UPW subsequently filed a grievance on behalf of Aiu charging that the Rosete promotion violated §16.09(d) of the contract. The grievance process was stalled after the third step and the petitioner then filed a request for a declaratory ruling on the legality of the contract provision in question. Said grievance arose under the earlier version of the contract and it is that version which is the subject of this proceeding.

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*§§16.09(d) and 16.06(c) referred to collectively herein as the seniority clause.

CONCLUSIONS OF LAW

In Frank F. Fasi et al, Decision 58, supra, the Board ruled that it has jurisdiction to entertain the petitioner's request for, and to render or refuse to render, a declaratory ruling. The union-intervenors have argued that the Board should decline to issue a declaratory ruling for good cause under Board's Rule 1.09(f).

The Board has taken cognizance of the contentions of the union-intervenors. However, the Board is of the opinion that a ruling on the issue before it would be in the best interest of all parties. Paramount among the reasons for a Board determination is the clear and far-reaching importance of the issue presented by the petitioner. The UPW, the HGEA and the HSTA, who intervened in the proceedings, represent 9 of the 13 collective bargaining units. Most of these units have contractual provisions similar to the seniority clause in question. Additionally, the State of Hawaii and the County of Hawaii, which with the petitioner constitute a majority of the public employers of unit 1 employees, have intervened. A ruling as to the validity of the unit 1 seniority clause would not only resolve the present controversy, as raised in the pleadings before this Board, but would serve as a guide to those who are not parties to the unit 1 contract, but whose contracts or proposed contracts have a similar employee promotion provision. The Board, therefore, concludes that the issuance of a declaratory ruling would be consonant with its duties under Chapter 89, HRS.

The Board's ruling in Frank F. Fasi et al, Decision 58, supra, was predicated upon the representations of the petitioner that he was not asking this Board to resolve a dis-

pute concerning the interpretation or application of the contractual provision, but rather, was asking this Board to determine the legality of the contractual provision.

In view of the petitioner's initial request and representations, this ruling will be restricted to whether or not the contract seniority clause, on its face, is inconsistent with §89-9(d), HRS.

§89-9(d), HRS, in relevant part, states:

> "The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles . . . pursuant to sections 76-1, 76-2, 77-31 and 77-33 . . . or which would interfere with the rights of a public employer to . . . (2) . . . promote . . . employees . . . (5) determine . . . personnel by which the employer's operations are to be conducted; . . . ." (Emphasis added.)

The petitioner and employer-intervenors maintain that §89-9(d), HRS, and the merit principles referred to by said subsection render illegal a contract provision that requires the consideration of seniority in determining employee promotions. Accordingly, the petitioner and employer-intervenors contend that the seniority clause of the Unit 1 contract violates §89-9(d), HRS, and is therefore null and void.

A. IS THE SENIORITY CLAUSE OF THE UNIT 1 CONTRACT REPUGNANT TO THE MERIT PRINCIPLES PRESERVED BY §89-9(d), HRS?

The petitioner and employer-intervenors contend that any reference to seniority is repugnant to the merit principles and that promotions must be based solely upon merit. This contention is in error. A close review of all of the points and authorities cited by the petitioner and employer-intervenors fails to uncover any prohibition against the utilization of

seniority as a criterion for promotion. The petitioner and employer-intervenor are, however, correct in contending that merit is and must be the primary measure by which an employee is considered for promotion. The seniority clause of the contract does not abandon the principles of merit, but merely states that seniority be utilized as a criterion only after it has been determined that the subject employees are relatively equal in qualification. Seniority is merely the deciding factor when other factors are relatively equal. Such a promotion scheme is not repugnant to, nor inconsistent with, the merit principles as preserved by §89-9(d), HRS.

§76-1, HRS, applicable to Chapter 89, HRS, by §89-9(d), HRS, articulates the general provisions of Chapter 76, HRS, the Civil service law. §76-1, HRS, more specifically sets forth the merit principles and expresses the State's policy of adherence thereto. Nowhere in this section or in other sections of Chapter 76, HRS, is there any prohibition, expressed or implied, against consideration of seniority with regard to employee promotions or any indication that seniority is inconsistent with the merit principles. To the contrary Chapter 76, HRS, articulates a manner in which departmental vacancies are to be filled by seniority promotions. §76-26, HRS, in relevant, part states:

> ". . . when there is not material difference between the qualification of the employees concerned, the employee with the longest government service shall receive first consideration for the promotion. . . ."

Although the language of §76-26, HRS, and the seniority clause of the Unit 1 contract are not exactly identical, it is exceedingly instructive to find that the civil service laws of Chapter 76, HRS, which enunciate merit principles, contain

a provision which requires that with respect to promotions, seniority be considered when the qualifications of employees concerned are of no material difference.

Since Chapter 76, HRS, is based upon merit principles and allows as part of the promotion system the utilization of seniority as a criterion, it appears that the seniority clause of the unit 1 contract, on its face, is also consistent with the merit principles preserved by §89-9(d), HRS.

In view of the foregoing, this Board is of the opinion that the unit 1 contract's seniority clause is not repugnant to the merit principles referred to by §89-9(d), HRS.

B. DOES THE SENIORITY CLAUSE OF THE UNIT 1 CONTRACT INTERFERE WITH THE RIGHT OF THE PUBLIC EMPLOYER TO PROMOTE EMPLOYEES AND TO DETERMINE PERSONNEL BY WHICH THE EMPLOYER'S OPERATIONS ARE TO BE CONDUCTED AS PRESERVED BY §89-9(d)(2) AND (5), HRS?

The answer appears to be no. Subsection 89-9(d)(2) and (5), HRS, prohibit the employers and employee organizations from agreeing to a proposal which would interfere with the right of the public employers to promote employees and to determine personnel by which the employers' operations are to be conducted.

However the rights of the petitioner and employer-intervenors to promote employees and to determine personnel by which its operations are to be conducted are not absolute as a review of all extant statutory provisions or rules and regulations on the subject reveals.

The petitioner and employer-intervenors, however, appear to maintain that §89-9(d), HRS, grants an absolute management right, totally free of any union involvement, to promote or determine employees for its operations.

The Board has ruled that a broad construction of the management rights provision of §89-9(d), HRS, would divest the union of its right to bargain collectively under §89-9(a), HRS, and abrogate the intent of Chapter 89, HRS, to encourage joint decision making between the employer and employee organization. Conversely, a narrow construction of §89-9(d), HRS, would divest the employer of its inherent management's rights. A difficult but necessary balance must be achieved. HSTA et al, Decision 22, Case No. CE-05-4 (October 24, 1972).

In establishing a reasonable and workable balance between a narrow or broad construction of §89-9(a) and §89-9(d), HRS, the Board has ruled that §89-9, HRS, must be considered in its entirety and not disjunctively. The HSTA et al, Decision 22, Supra, the Board stated that:

> "As joint decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours and conditions of employment, even those which may overlap with employer rights as enumerated in Sec. 89-9(d) are now shared rights up to the point where mutual determinations respecting such matters interfere with employer rights, which, of necessity, cannot be relinquished because they are fundamental to the existence, direction and operation of the enterprise."

The seniority clause of the unit 1 contract does not appear on its face to infringe upon an absolutely unrelinquishable employer right which is so "fundamental to the existence, direction and operation" of the government. All that §16.09(d) and §16.06(c) provide for is that seniority be a criterion in the event candidates for promotion are in a catergory in which all other factors are equal.

Any interference with the petitioner's and employer-intervenors' right to promote or to determine employees for the operation of the governmental function, on balance, is remote and minimal at best and outside intent of §89-9(d), HRS.

The petitioner and employer-intervenors additionally maintain that the promotion scheme set forth in the seniority clause is contrary to the various existing State and County personnel and civil service rules and, therefore, is null and void. §89-10(d), HRS, states:

> "All existing rules and regulations adopted by the employer, including civil service or other personnel regulations, which are not contrary to this chapter, shall remain applicable. If there is a conflict between the collective bargaining agreement and any of the rules and regulations, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d)." (Emphasis added.)

Additionally §89-19, HRS, states:

> "This chapter shall take precedence over all conflicting statues concerning this subject matter and preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission."

In view of these two statutory provisions, it is clear that any conflict between the unit 1 seniority clause and the personnel and civil service rules, is resolved in favor of the contract provision in the absence of any inconsistency with §89-9(d), HRS.

RULING

In conclusion, the Board rules that the seniority clause of the unit 1 contract is not, on its face, in conflict with §89-9(d), HRS, and therefore is valid and enforceable.

In so ruling this Board does not base its determination on, nor consider, any dispute over the interpretation of the language of the seniority clause or application thereof which may exist among the parties. Such dispute can best be resolved through use of the parties' contractual grievance procedure.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

John E. Milligan, Board Member

James K. Clark, Board Member

DATED: February 12, 1975

Honolulu, Hawaii