STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

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| In the Matter of | |
| HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, HGEA/AFSCME, AFL-CIO, | Case No. CE-02-17 |
| | Decision No. 62 |
| Complainant, | |
| and | |
| FRANK F. FASI, MAYOR, CITY AND COUNTY OF HONOLULU, | |
| JOHN H. FELIX, CHAIRMAN, BOARD OF WATER SUPPLY, and | |
| EDWARD Y. HIRATA, CHIEF ENGINEER, BOARD OF WATER SUPPLY, | |
| Respondents. | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This prohibited practice charge against the above-named respondents (hereafter collectively referred to as the employer) was brought before the Hawaii Public Employment Relations Board (hereafter Board) by the Hawaii Government Employees' Association (hereafter HGEA) on May 7, 1975.

Pursuant to Chapter 89, Hawaii Revised Statutes (hereafter HRS), this Board sitting en banc held a hearing, after due notice, on the subject prohibited practice charge on June 3, 1975. All parties were afforded full rights to call and cross examine witnesses, submit exhibits and present oral arguments and briefs to this Board.

Upon a full review of the transcripts, exhibits and briefs submitted by the parties, this Board hereby makes the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. Complainant HGEA is the exclusive representative of employees in unit 2, supervisory blue collar employees, and was certified as such by this Board on October 22, 1971. HPERB Case R-02-5, Decision 4.

2. Respondents in this case, Mayor Fasi, Board of Water Supply Chairman Felix and Chief Engineer Hirata, collectively constitute a public employer within the meaning of Chapter 89, HRS.

3. HGEA and the employer are parties to the unit 2 contract (effective July 1, 1974 - June 30, 1976) executed on March 22, 1974. Said contract incorporated by reference all the terms and conditions of the initial unit 2 contract (effective December 29, 1972 - June 30, 1975) unless modified thereby.

4. The complaint (Board Ex. 1) alleged that the employer unilaterally, without consultation and negotiation with the union, altered the hours of work of a unit 2 employee, in violation of the contract (Article III on maintenance of rights and benefits) and §89-9(a), HRS, (duty to negotiate in good faith). The relief sought by complainant is an order from the Board requiring the employer to negotiate on the change in hours and to reduce any agreement reached to writing (Tr. 16).

5. The work schedule of the unit 2 employee concerned, supervising building custodian Kenneth M. O. Kam of the Board of Water Supply, had been from 10:15 a.m. - 7:00 p.m. since the time the initial unit 2 contract was signed. Effective May 1, 1975, his work schedule was changed to 12:00 noon - 8:30 p.m.

6. The genesis for the change in Mr. Kam's work schedule was explained by Mr. Kagamida, Head of Field Operations Division (Tr. 55 - 66).

Mr. Kam supervises a crew of building custodians (nonsupervisory blue collar employees in unit 1). A vacancy occurred in his work unit. While the subject of changing work schedules to accommodate the vacancy was being discussed, the matter of later starting and quitting times in order to allow the custodial crew more time to clean after regular office hours also arose.

Mr. Kagamida's original proposal was that the work schedule be changed to 2:00 p.m. - 10:30 p.m. The employees and the United Public Workers (hereafter UPW), the exclusive representative for unit 1, were informed of the proposed change. As a result of consultation with the employees and the UPW, Mr. Kagamida made a recommendation, which was acceptable to the employees, that the work schedule be changed to 12:00 noon - 8:30 p.m. Mr. Hirata approved the change in work schedule and both unions, the UPW and the HGEA, were formally notified of the new work schedule which was to be effective May 1, 1975.

The reason for the change as stated in the letters of notification to the HGEA was:

> "This change is being made as we feel that the custodial crew can do their work more efficiently and effectively after 4:30 p.m. when the work areas to be cleaned would be free of on-going office activity."

7. Upon receipt of notification, the HGEA sought to negotiate on the change in Mr. Kam's work schedule, i.e., requested that the change be reduced to a written memorandum of understanding. The union had no objection to the change in work schedule (Tr. 33), since it recognized that Mr. Kam's classification of a supervising building custodian might be jeopardized if his work schedule did not change along with that of his subordinates (Tr. 51, 54). However, it objects to the employer's unilateral action in modifying existing rights and benefits. The union contends that it retains the right to agree to the change and that any such agreement which modifies existing rights and benefits should be reduced to writing (Tr. 16, 47, 55).

8. In its answer to the subject charge (Board Ex. 5), the employer denied that it was required to negotiate with the union on the change in work schedule of a unit 2 employee. It contends that it rightfully refused to negotiate in view of the following:

(a) Under Article XXXVIII of the contract, it is clearly within its rights as an employer to change work schedules of its employees to serve operational needs.

(b) It cannot agree to any proposal which would interfere with its right to direct employees (§89-9(d)(1), HRS), to maintain efficiency in government operations (§89-9(d)(4), HRS) or determine methods, means and personnel by which its operations are to be conducted (§89-9(d)(5), HRS).

(c) Since nothing in the contract conflicts with the civil service rules, Rule 2.b (Respondents Ex. 1), which plainly allows work schedule changes, prevails according to Article XIV of the contract and §89-9(d), HRS.

Thus, the employer denies that its refusal to negotiate is violative of the terms of the unit 2 contract or §89-9(a), HRS.

The employer does not dispute that work schedule is a condition of employment under §89-9(a), HRS (Tr. 10). Its position is, however, that it was only required to consult on the change in work schedule and that it had met the requirements of consultation (Tr. 11, 48). Letters dated April 10 and 18, 1975, show that it formally notified the union of the change in work schedule prior to its implementation. Additionally, it consulted with Mr. Kam as early as March 4, 1975, with respect to the change and found him agreeable.

Furthermore, the employer contends that under the terms of the unit 2 contract, it is required to negotiate only at specific times (Article XL on duration). Any right the union may have had to negotiate on the change in work schedule is waived in view of Article XXXIX (entirety clause).

9. The record shows that the matter of work schedule changes was not placed on the bargaining table during unit 2 negotiations, primarily because the union recognized that unit 2 employees were supervisors and their schedules depended on the work schedules of unit 1 non-supervisory employees (Tr. 48, 49).

The record also shows that no written agreement was entered into with the UPW concerning the work schedule change of unit 1 nonsupervisory employees (Tr. 69).

## CONCLUSIONS OF LAW

At the outset of the hearing, the employer made an oral motion requesting the Board to exercise its discretion and defer this matter to the unit 2 grievance arbitration procedure (Article XI) for resolution. Before going into the merits of the dispute, the Board shall first deal with the employer's motion for deferral.

In support of its motion, the employer cited the various contractual provisions, which it claims must be interpreted and applied in order to resolve the subject dispute -- Article III (Maintenance of Rights and Benefits), Article VII (Work Schedules), Article XIV (Conflict), Article XXXVIII (Rights of the Employer), Article XXXIX (Entirety) and Article XL (Duration). Since there is no question as to the validity of such provisions, the employer urges deferral to resolve the question as to whether it was required to negotiate on the change in work schedule.

The union's position on deferral is that the dispute solely involves the following legal question: Is the change in hours of work subject to negotiation under §89-9(a), HRS? Since no provision in the contract is in dispute, the union asks the Board to take jurisdiction, rather than to defer.

In determining whether deferral would be appropriate in the instant case, the Board finds significant the following:

(1) The union's primary contention is that it was deprived of its statutory right to negotiate on wages, hours and other terms and conditions of employment under §89-9(a), HRS.

(2) The employer asserts management rights preserved under §89-9(d), HRS, as a defense that it was under no obligation to bargain, but merely to consult, on the change in hours.

It is apparent that the dispute centers on the threshold question: What are the statutory rights and obligations of the employer and the exclusive representative under the Act? This question involves a legal principle central to the public sector collective bargaining law.

The Board is cognizant of the employer's various contractual defenses, but deems that such defenses would be relevant only after the issue of statutory rights is resolved and if it is resolved in the union's favor. This is particularly true of the employer's defense of contractual waiver by the union, which was discussed at length by both the employer and the union in their briefs. In the absence of a resolution favorable to the union on the threshold issue, the waiver defense is nugatory since the union could not waive a right (to bargain on the subject change in work schedule) it did not have.

Thus, the Board shall take jurisdiction to resolve the issue of statutory rights and denies the employer's motion for deferral. The reasons following support our decision for declining deferal.

Initially, we note that the Board's deferral policy is discretionary and our inclination to defer involves matters concerning contractual interpretation.

> "We are of the opinion that under our statute this Board has jurisdiction over prohibited practice charges, including those involving alleged breaches of contracts, and that in the exercise of such jurisdiction the Board has <u>discretion</u> to require the parties to utilize their contractual arbitration procedure. It shall be the policy of this Board to attempt to foster the peaceful settlement of

> disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." (Emphasis added.) HPERB Case CE-05-4, Decision 22 (October 24, 1972).

Similarly, the leading cases cited by the employer and the union on the NLRB's policy of deferral show that cases favoring deference are those which involve contractual rights and privileges. Among the reasons for deferral, as stated by the NLRB in the Schlitz case, was that the employer's claim was not patently erroneous, but rather based on a substantial claim of contractual privilege. Joseph Schlitz Brewing Co., 175 NLRB 23, 70 LRRM 1472 (1969). Subsequently, the NLRB applied its Schlitz formula and reaffirmed its deferral policy in Collyer, a case in which the employer's defense for its unileteral actions was that it was acting within what he believed to be his contractual rights. Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 1931 (1971).

Though the employer defends its unilateral act in changing the work schedule, to a large extent on contractual rights, we noted above that the threshold issue involves statutory rights.

In cases where the NLRB has declined deference over disputes involving unilateral acts, the major reason seems to be that the issue raised involves a matter central to the system of collective bargaining or that any need to interpret the contract is tangential. The leading case is C & C Plywood where the NLRB's jurisdiction was subsequently challenged. In affirming the NLRB's jurisdiction, the Supreme Court stated, in relevant part:

> "It [the NLRB] has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment . . . . The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards . . . ." (Emphasis added.) NLRB v. C & C Plywood, 385 US 421, 64 LRRM 2065).

We are similarly faced here with a request from the union that this board enforce its statutory right to bargain on the change in work schedule. The union's claim stems from §89-9(a), HRS, which provides, in relevant part:

> "The employer and the exclusive representative . . . shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under the Act . . . ."

It is significant to note that §89-9(a), HRS, not only grants the union a right but also imposes on the employer the duty and obligation to bargain as required thereunder.

The duty to bargain, however, presupposes that the matter can lawfully be negotiated. With respect to provisions which are unlawful and their relationship to the duty to bargain, the NLRB held that neither party may require that the other agree to contract provisions which are unlawful under the Act. In National Maritime Union (Texas Co.), 78 NLRB 971, 22 LRRM 1289 (1948), the NLRB stated:

> "[W]hat the Act does not permit is the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining

> cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy."

Thus, under the National Labor Relations Act (NLRA) there can be no duty to bargain pursuant to §8(d) on unlawful provisions, such as those establishing closed shops and hiring halls.

Our law differs significantly from the NLRA on the duty to bargain. §8(d) of the NLRA is not circumscribed; however, the duty to bargain under §89-9(d), HRS, is circumscribed by §89-9(d), HRS. §89-9(a), HRS, requires bargaining on those matters "which are subject to negotiations under the Act" and cannot be construed to require negotiations on matters excluded from the scope of the Act or contrary to the policies of the Act. Thus, §89-9(a), HRS, must be evaluated in light of §89-9(d), HRS, wherein restrictions and limitations on the scope of bargaining are set forth.

Subsection 89-9(d), HRS, in relevant part, declares:

> "The employer and the exclusive representative shall not agree to any proposal . . . which would interfere with the rights of a public employer. . . ."

Here again we note that §89-9(d), HRS, not only retains certain rights of the employer, but also imposes a mutual obligation on both parties not to agree on matters which would interfere with those rights.

Section 89-10(d), HRS, reinforces the preservation of management rights by stating:

> "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.)

The language of §89-10(d), HRS, clearly provides that the terms of a contract shall prevail, but that such terms must be consistent with §89-9(d), HRS.

Under our law, there is a duty to bargain pursuant to §89-9(a), HRS, but at the same time, there is an obligation not to bargain on certain matters under §89-9(d), HRS. Even in the absence of a contractual management rights clause, §89-9(d) and §89-10(d), HRS, remain operative. Even if there are provisions in a contract which conflict with §89-9(d), HRS, such provisions cannot be enforced in light of §89-10(d), HRS, and the employer is not estopped from questioning their validity. HSTA v. HPERB, Civil No. 38086 and DOE v. HPERB, Civil No. 38097 (March 30, 1973).

Similarly, under the facts of this case, the Board is of the opinion that an interpretation of the unit 2 contract is not necessary to resolve the issue of statutory rights. The fact that there is present a broad maintenance of benefits clause (Article III) is immaterial, since such a clause cannot be used as the basis to claim any bargaining rights beyond what the Act permits. The presence of a broad management rights clause (Article XXXVIII) is also immaterial, since such a clause cannot be used as the basis for refusing to negotiate on matters which the employer is obligated to bargain about under the Act.

We turn now to the merits of the dispute to determine the issue which is before this Board as to whether the employer's unilateral action in changing Mr. Kam's work schedule constitutes a refusal to bargain. §89-13(a)(5), HRS, makes it a prohibited practice for an employer to "refuse to bargain collectively in good faith with the

exclusive representative as required in section 89-9." §89-9, HRS, defines the scope of bargaining. We must, therefore, determine whether the employer was under a statutory duty to negotiate the change in Mr. Kam's work schedule pursuant to §89-9(a), HRS, or whether the employer was under a statutory obligation pursuant to §89-9(d), HRS, not to agree on a proposal which would interfere with its rights under the facts of this case.

In the Board's initial decision regarding the scope of bargaining, it held that §89-9(a), (c) and (d), HRS, must be considered in relationship to each other. It was of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in §89-9(d), HRS. HPERB Case CE-05-4, Decision 22 (October 24, 1972). Thus, a reduction in overall class size ratio was found to be negotiable, but provisions dictating the number of teachers the employer was to hire in order to implement the reduction in class size and the assignment of teachers to specific roles were found to be violative of §89-9(d)(2), (4) and (5), HRS. Said rulings were affirmed by Judge Norito Kawakami in HSTA v. HPERB, Civil No. 38086 and DOE v. HPERB, Civil No. 38097 (March 30, 1973).

In a subsequent decision on the scope of bargaining, the Board held that the specific reopening proposals on work load and scheduling of preparation periods, though admittedly conditions of employment, so interfered with the employer's rights as to render them non-negotiable under §89-9(d), HRS. HPERB Case DR-05-5, Decision 26 (January 12, 1973).

The issues raised in these decisions were hybrid in that they involved both management rights and terms and conditions of employment. This Board, appreciating that it was necessary to achieve a balance between the employer's and the employees' interests to effectuate the purposes of the Act, expressed the view that while §89-9(d), HRS, should not be narrowly construed so as to negate the purposes of bargaining, concomittantly, said section should not be too liberally construed so as to divest the employer of its rights protected thereunder.

These cases lend guidance insofar as the rationale employed. While it would be ideal if a clear-cut demarcation could be drawn between the employer's rights and the employees' rights, the ideal cannot be transformed into reality since such rights are not mutually exclusive, but overlap. We must here again, as in prior cases involving the scope of bargaining, turn to the facts of the instant controversy and examine them in light of what the Legislature intended when it accorded public employees collective bargaining rights, while at the same time imposing certain limitations on the scope of bargaining under §89-9(d), HRS.

There is no dispute that hours of work is a negotiable term and condition of employment. The dispute focuses on the duty to bargain as required under the Act. The union contends that the employer was required to negotiate on the work schedule change pursuant to §89-9(a), HRS. The employer contends that since the matter falls within its rights under §89-9(d), HRS, it was not required to negotiate, but only to consult. There is no dispute that the employer fulfilled its obligations to notify and consult the union as required under §89-9(c), HRS.

The purpose for changing Mr. Kam's work schedule is also undisputed. Mr. Kam is a supervising building custodian who directs a crew of custodial workers. The work schedule of his custodial crew was changed to allow them more time to clean after office hours so that they could do their work more efficiently. The custodial crew and their union, the UPW, were agreeable to the new work schedule, which resulted after the employer consulted with them. Mr. Kam's work schedule was changed so that his hours would coincide with that of the custodial crew which he supervised.

The union recognizes the necessity for changing Mr. Kam's work schedule. If his hours did not change along with his subordinates, his position classification might be jeopardized since it is essentially supervisory in nature. The union had also anticipated that work schedule changes such as Mr. Kam's might become necessary because of work schedule changes of subordinates and did not place the matter on the bargaining table during negotiations on the unit 2 contract.

Based on the unique facts above, the Board finds that the change in the work schedule of Mr. Kam was made for a valid management reason to promote efficiency in government operations and was an exercise of management's right to determine the methods, means and personnel by which its operations are to be conducted, rights protected under §89-9(d)(5), HRS. The above conclusion is stated in the general terms of the statute. The specific holding of this Board in this case is that when employees who are supervised by an individual have their work schedule changed properly and lawfully, management has an inherent right to change the work schedule of their supervisor to coincide with their new work schedule.

Sometime in the past, a management decision was made that supervisory personnel were necessary to direct the work of crews of custodial workers. Thus, the supervising building custodian position was established in the civil service classification scheme for the specific purpose of directing a crew of custodial workers. The employer's unilateral action in changing Mr. Kam's work schedule does no more than continue implementation of a management decision that a supervising building custodian should direct the work of a custodial crew.

Thus, the Board finds that in this case, the employer's action was clearly within its rights protected under §89-9(d), HRS.

§89-9(a), HRS, imposes a duty to bargain on matters which are subject to negotiations under the Act. The Act does not require bargaining on matters protected under §89-9(d), HRS, but does require consultation on matters affecting employer-employee relations. The employer has complied with this requirement and has, therefore, fulfilled its obligations under the Act.

Since the employer was not under a duty to bargain on the change in Mr. Kam's work schedule and did not violate §89-9(a), HRS, requirements, there can be no finding of a refusal to bargain. Thus, an order to negotiate and reduce any agreement reached on the change to writing is inappropriate in this case.

ORDER

The Board, in view of the foregoing, hereby dismisses the refusal to bargain charge alleged by complainant HGEA against the respondent employers.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

John E. Milligan, Board Member

James K. Clark, Board Member

Dated: July 14, 1975

Honolulu, Hawaii

CONCURRING OPINION

I fully concur with the findings of fact, conclusions of law and order reached herein. However, although I recognize that the employer was under no duty to negotiate with the HGEA respecting the change of hours for Mr. Kam, I feel that its adamant refusal to execute a written understanding with the HGEA respecting the change in Mr. Kam's hours of work was counterproductive to the achievement of harmonious employer-employee relations. I make these observations in view of the fact that the HGEA was consulted on the change of hours and was agreeable to said change. I cannot understand why the employer, given these facts, refused to permit the HGEA to signify this agreement in writing.

Mack H. Hamada

Mack H. Hamada, Chairman

Dated: July 14, 1975

Honolulu, Hawaii