

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
HAWAII GOVERNMENT EMPLOYEES')	Case No. <u>CE-13-14</u>
ASSOCIATION, LOCAL 152,)	
HGEA/AFSCME, AFL-CIO,)	Decision No. <u>63</u>
)	
Complainant,)	
)	
and)	
)	
GEORGE R. ARIYOSHI, Governor,)	
GEORGE A. L. YUEN, Director)	
of the Department of Health,)	
and DONALD BOTELHO, Director)	
of the Department of Personnel)	
Services,)	
)	
Respondents.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERS

This case was initiated by the Complainant (hereafter HGEA) when it filed a prohibited practice charge against the above-named directors of the Department of Health and Department of Personnel Services, State of Hawaii, on March 25, 1975. The name of the Governor was added as a respondent by this Board as part of its policy of naming the appropriate chief executive officer as a respondent so that he will receive notice of all proceedings.

A prehearing conference was held on April 17, 1975, and a full hearing commenced on April 24, 1975.

All parties were represented by counsel, were afforded full opportunity to present evidence through witnesses and the submission of exhibits, and were permitted to cross examine witnesses and present briefs and oral argument to the Board. The proceedings were transcribed by a court reporter.

The brief of the respondents (hereafter referred to as the employer or the State) was received by this Board on June 10, 1975. The HGEA's brief was received on June 12, 1975.

Upon a full review of the transcript, exhibits, the employer's written opening statement and the briefs submitted by the parties, this Board makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

1. Complainant HGEA is and was at all relevant times the exclusive representative of employees in unit 13, including psychiatrists employed by the Department of Health (hereafter DOH) who are not excluded from unit 13 by virtue of Section 89-6(c), Hawaii Revised Statutes (hereafter HRS). There are approximately fifty (50) psychiatrists employed by said respondent who are members of unit 13.

2. Respondents herein collectively constitute a public employer of the subject employees within the terms of Chapter 89, HRS.

3. There is in effect a collective bargaining agreement between the HGEA and the State for employees in unit 13.

4. Said contract entered into on March 19, 1973, was made effective as of February 1, 1973. The agreement will terminate on June 30, 1976.

5. It is the position of both the HGEA and the employer that the term "regular employee" in said contract refers to employees who are in civil service.

6. The subject psychiatrists are not in civil service, but are hired pursuant to Section 334-4, HRS, which provides:

"§334-4 Personnel for mental health program. The director of health shall appoint such professional and nonprofessional staff as he deems necessary to carry out the state mental health program and for which appropriations are available. Positions for psychiatrists are exempted from chapters 76 and 77. The director may employ such psychiatrists as may be needed by the department of health on a contractual basis, the contract being subject to the approval of the governor."

7. The subject psychiatrists are hired under individual personal services contracts of a one year duration.

8. Thus, wherever the term "regular employee" is used in the unit 13 collective bargaining agreement, it does not include psychiatrists.

9. When the State Legislature enacted Section 334-4, HRS, exempting the psychiatrists' positions from the civil service laws, the DOH was experiencing difficulty recruiting psychiatrists. One of the reasons for this difficulty was that the starting salary for psychiatrists then provided by law for civil service employees was insufficient to attract psychiatrists. The purpose of exempting psychiatrists from the State civil service laws was to enable the DOH to recruit psychiatrists at starting salaries higher than those provided in the civil service laws.

10. During the negotiations leading to the unit 13 collective bargaining agreement the State expressed concern over the impact of the terms agreed to for unit 13 employees on the personal services contracts such as the personal services contracts of psychiatrists in the DOH. Of concern was the effect the new wage scale agreed to for unit 13

employees generally would have on the wages being paid to the psychiatrists. This concern arose from the fact that the new wage scale agreed to by the parties was based on the wage scale contained in the State civil service laws. Since the psychiatrists were not being paid under the civil service salary schedule, it was feared that the new wage scale agreed to for unit 13 employees might adversely affect the wages then being paid to the psychiatrists. It was stated, in essence, by Carl Nakamura, a witness for HGEA, that the State and HGEA did not appear to know enough about the personal services contracts at the time of negotiations to resolve the problems that might arise from the terms agreed to for unit 13 employees generally. Thus, at the suggestion of management, a proviso was added to Article III, "Conflict," in the collective bargaining agreement. Article III, with the proviso, reads as follows:

"If there is any conflict between the provisions of this agreement and any of the rules and regulations of any civil service or other personnel regulations applicable to employees or any contracts between the employer and the employees, the terms of this agreement shall prevail, provided that this Article shall not apply to personal services (individual) contracts." (Emphasis added).

11. Mr. Nakamura said that the discussion on the subject of personal services contracts, as best he could recall, took about 15 or 20 minutes and he believed "both sides" were not sure how the individual contracts would work within the collective bargaining agreement.

12. After the signing of the collective bargaining agreement on March 19, 1973, the HGEA approached the State in an effort to secure an understanding regarding the wages, hours, and other terms and conditions of employment of all psychiatrists employed in the DOH. On April 23, 1974, the

HGEA sent the State a formal written request to negotiate about the terms and conditions of employment of the psychiatrists.

13. The State responded to the HGEA's request on November 21, 1974, when Mr. James Takushi, then the State director of the Department of Personnel Services (hereafter DPS) wrote to David K. Trask, Jr., the executive director of HGEA, stating that the State did not believe that it was appropriate or possible to reopen the unit 13 agreement for the purpose of addressing the special problems noted in the HGEA's request of April 23, 1974. He said that the State recognized that HGEA had a right to represent psychiatrists employed by the DOH "in negotiating the renewal of personal services contracts which the Director of Health plan to continue," and added that the State was "amenable to working with you in modifying the personal services contracts when they are renewed." He suggested a meeting to review the unit 13 agreement with the psychiatrists and the HGEA.

14. Following the receipt of this letter, informal meetings between the representatives of HGEA, DOH, and DPS were held in October and November, 1974. As a result of these meetings the State agreed to give the HGEA a list of the psychiatrists whose contracts were due for renewal during the period from January, 1975, to April, 1975.

On December 17, 1974, the HGEA submitted to the State a proposed form of employment agreements for seven DOH psychiatrists whose contracts were terminating in January and February, 1975, and requested a meeting to negotiate and discuss the proposed agreements. Many of the proposals contained benefits which exceeded those provided for in the unit 13 contract for all employees covered by said contract. The director of DOH responded by letter dated December 26, 1974, as follows:

"We intend to renew the personal service contracts of all the psychiatrists whom you have listed. We also intend, in the very near future, to meet individually with each psychiatrist to discuss the terms and conditions of continued employment and to notify H.G.E.A. of the schedule of such meetings so it may participate as an agent for each of the psychiatrists listed." (C. Exh. No. 4)

15. On January 21, 1975, the State and the HGEA met for the purpose of setting a specific time and place for a formal meeting between the State and the HGEA regarding the personal services contracts expiring in January and February, 1975. Pending such formal meetings, the contracts expiring in January and February, 1975, were extended by the DOH for thirty days. Subsequently on January 27, February 5, and February 10, 1975, formal meetings were held by the State and HGEA.

16. During the informal discussions held in late 1974 and during the formal meetings held in January and February, 1975, HGEA sought to secure a single memorandum of agreement covering wages, hours, and other terms and conditions of employment of all psychiatrists employed in the DOH. This request was rejected by the State. It insisted on handling each contract individually as its renewal date approached.

17. Unable to secure a single memorandum of agreement, the HGEA insisted on its right to negotiate in behalf of each psychiatrist individually with respect to wages, hours, and other terms and conditions of employment of the psychiatrist. This, too, was denied by the State. While acknowledging that HGEA was the exclusive representative of the psychiatrists, the State insisted: (1) that the personal services contracts were between the State and the individual psychiatrists, not between the State and the HGEA, and thus

each psychiatrist could represent himself or be represented by HGEA, or by any other party of his choosing; (2) that since the contracts were between the State and the individual psychiatrists, the State could not be compelled to negotiate with HGEA on the terms and conditions of employment of the psychiatrists; and (3) that since the personal services contracts were contracts of hire, the State could unilaterally set the wages, hours, and other terms and conditions of employment of each psychiatrist.

18. In light of the State's position, the formal meetings held in January and February, 1975, centered on Dr. Robert Eisler's personal services contract, Dr. Eisler apparently having indicated to the State that HGEA was representing him in his individual contract. In the view of HGEA, however, Dr. Eisler's contract was intended as a model to be followed in all other psychiatrists' contracts, and the discussion and results that ensued seemed to indicate that this was also the view of the State.

19. Meetings were held in January and February between the HGEA and the State. The State did not change its position as set forth in Findings of Fact 17, supra. While at these meetings, oral agreements appear to have been reached on some subjects, no bilateral written agreement was reached as a result of these meetings, and disagreement remained over the issues of application of the unit 13 grievance procedure in cases of discipline of the psychiatrists, the length of the contract, and whether the HGEA could sign the individual contracts.

20. In late February, 1974, the State prepared and issued personal services contracts of employment to individual psychiatrists for execution. Each of these contracts contained

provisions, unilaterally determined by the State, relating to salary, discharge, use of the unit 13 grievance procedure in case of discharge, work rules, sabbaticals, vacations and other terms and conditions of employment. In its letter transmitting the contracts to the psychiatrists, the State said that failure to sign and return the contract by the date specified in the letter "will compel us to assume that you are no longer interested in employment with the Department of Health." The significant terms of said contract are as follows:

"2. The EMPLOYEE further agrees to perform such services in the above-named position in a manner satisfactory to the STATE.

"The STATE further agrees that during the life of this Agreement whatever salary increase negotiated in the Unit 13 Agreement will also be granted to the EMPLOYEE in the manner and method provided for in the Unit 13 Agreement.

"3. During the period of this Agreement, the STATE shall not terminate this Agreement without proper cause. If the EMPLOYEE disputes the State's right to terminate this Agreement, he has the right to utilize the terms and conditions of Article XII, Grievance Procedure of the Unit 13 Agreement, except that the Employer's decision at Step 3 for the purpose of the Agreement shall be final and binding.

"The STATE agrees to provide the EMPLOYEE with a 30-day advance written notice if it determines not to renew the Employment Agreement. Non-renewal of Employment Agreement is not grievable.

"4. The EMPLOYEE may terminate this agreement at any time, by giving thirty (30) days prior written notice to the STATE; and the EMPLOYEE upon such termination shall be entitled to only such salary and vacation credit as shall have accrued at the time of such termination.

"5. The STATE further agrees to grant said EMPLOYEE vacation, sick leave and other rights and benefits to the extent provided by law and the Unit 13 Agreement.

"6. The EMPLOYEE shall comply with the provisions of Chapter 78, General Provisions on Public Service and Chapter 84, Standards of Conduct, Hawaii Revised Statutes.

"7. This Agreement is subject to the EMPLOYEE obtaining a license to practice medicine in the State of Hawaii under the provisions of Chapter 453, Hawaii Revised Statutes.

"8. It is further understood and agreed that in consideration of the promises, covenants and undertakings herein set forth, the STATE is entitled to and demands exclusive right to the professional services of the EMPLOYEE without conflict with any outside employment while on paid duty status for the EMPLOYER during the life of the Employment Agreement.

"9. The STATE agrees to grant the EMPLOYEE Sabbatical Leave under the terms and conditions set forth in the Unit 13 Agreement, except that the EMPLOYEE shall not be entitled to any salary increment or receive any credit for a salary increment as would otherwise be provided under Article XXX G-3.

"Continuous service for purpose of Sabbatical Leave shall mean continuous creditable service without any break in service for seven (7) continuous years, due to the continuous renewal of the Employment Agreement.

"IN WITNESS WHEREOF, the STATE and the EMPLOYEE have signed this agreement of employment on the day and year first above written.

"STATE OF HAWAII

"By _____
GEORGE A. L. YUEN
Director of Health

EMPLOYEE"

21. Upon the advice of HGEA, one of the psychiatrists involved, Dr. Kerry J. Monick, sought to sign her individual contract "with reservations." The State, however, required execution by the psychiatrist without reservation. All psychiatrists whose contracts of employment

were up for renewal since January of 1975 to this date have signed their contracts without any words of reservation on the contracts. Several of the psychiatrists wrote to the DOH expressing their dissatisfaction with the method in which they were each required to execute the renewal contracts.

22. No significant discussion took place during negotiations for the unit 13 contract on the Entirety Clause (Article XXXIX) contained therein.

CONCLUSIONS OF LAW

On March 25, 1975, HGEA filed this prohibited practice action against the State. In its petition, the HGEA alleges that the employer violated Sections 89-13(a)(1), (5) and (7), HRS. Specifically, the petition states, in relevant part:

"Respondents have and are (a) interfering, restraining, and coercing employees in Unit 13 in the exercise of their rights to be represented by Complainant who is the exclusive representative of all employees in Unit 13, (b) refusing to bargain in good faith with Complainant as the exclusive representative of Unit 13 as required by Section 8[9]-9, HRS, and (c) refusing and failing to comply with the provisions of Section 89-10, HRS."

In its answer, the State admits that the HGEA is the exclusive representative of all employees in unit 13 but denies that the State committed any prohibited practices. The State further asserts as defenses the Entirety Clause of the unit 13 contract (Article XXXIX) which reads, in relevant part, as follows:

"A. Except as modified below, the Employer and the Union agree that the terms and provisions herein contained constitute the entire Agreement between the parties and supersede all previous communications,

representations or agreements, either verbal or written, between the parties hereto with respect to the subject matter herein. The Employer and the Union agree that all negotiable items have been discussed during the negotiations leading to this Agreement and, therefore, agree that negotiations will not be reopened on any item during the life of this Agreement except as provided in Article XL, Duration, or by mutual consent."

The State further takes the position that the individual contracts of the psychiatrists are outside of the scope of Chapter 89, HRS. It also takes the position that it is not required to negotiate with the HGEA as to the individual personal services contracts and that it is in fact, precluded under the law, from doing so in view of (1) the existence of the unit 13 agreement; (2) the recognition in the Conflicts article of that agreement of the possible existence of individual contracts; and (3) the fact that there was no reopening under the unit 13 contract on the subject of the individual contracts.

In its written opening statement, the employer asserts that the individual contracts are contracts of hire, the terms of which need not be negotiated with the HGEA.

As a threshold question the Board must determine whether the HGEA by contract or conduct waived any statutory right it might have to negotiate terms and conditions of employment of the subject employees.

The Board is of the opinion that the conflicts clause of the unit 13 collective bargaining agreement (Article III) does no more than provide that if personal services contracts exist, they will take precedence over the unit 13 agreement to the extent the terms of the former are in conflict with the terms of the latter. Nothing contained in said Article can fairly be construed to permit unilateral

determinations by the employer of matters which, under Chapter 89, HRS, are subject to bilateral negotiation.

The failure of the HGEA to select the subject of the personal services contracts as a subject of reopening negotiations under Article XL of the unit 13 contract does not constitute a waiver on the part of the HGEA to negotiate on the facts of this case. cf., Jacobs Mfg. Co., 94 NLRB No. 175, 28 LRRM 1162 (1951).

The Entirety Clause (Article XXXIX) of the unit 13 contract, a standard "zipper clause," also does not constitute a waiver by the HGEA of any statutory right it may possess to negotiate the terms and conditions of the employment of psychiatrists employed by the DOH who are members of unit 13. It was evident throughout the hearing in this case that all parties to the unit 13 agreement failed to explore or fully discuss the issue of the personal services contracts. The discussion was brief and was limited chiefly to the subject of pay. It is possible, though not entirely clear, that during the negotiations on the subject, the State may have misled the HGEA into believing that it could negotiate the personal services contracts as they came up for renewal. At any rate, nothing presented in the record shows the kind of clear and unmistakable waiver required to foreclose negotiations on the issues at hand. New York Mirror, 151 NLRB No. 110, 58 LRRM 1465 (1965).

In sum, the Board, on the record presented, is unable to find any waiver by the HGEA of any statutory right it may possess to negotiate the terms and conditions of employment of the subject psychiatrists.

The question which next arises is whether the HGEA possesses a statutory right to negotiate the terms and conditions of employment of the DOH psychiatrists in unit 13.

It is axiomatic, in a general sense, that the HGEA does possess such a right under Section 89-9, HRS. The employees are members of unit 13 and the HGEA is the exclusive representative of all employees in said unit. In large measure, it has negotiated for them in the unit 13 contract. The unique factual situation presented here, of course, raises the question of whether the HGEA has a right to negotiate any of the terms and conditions which found their way into the individual personal services contracts.

The employer takes the position that the HGEA does not possess such a right, chiefly on the grounds that said contracts are contracts of hire. With this contention, the Board, after a review of the terms of the contracts, cannot agree. The individual contract contains many provisions intended to mirror provisions in the unit 13 contract. However, these provisions, are not identical to the unit 13 contract. The Board is of the opinion that said provisions are more than a clarification of the unit 13 contract and constitute a unilateral imposition of terms and conditions of employment which are negotiable under Section 89-9(a), HRS.* Additionally, the Board points out that such unilateral clarifications of how the unit 13 contract applies

*Section 89-9(a), HRS, provides:

"Scope of negotiations. (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, and other terms and conditions of employment which are subject to negotiations under this Act 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."

to the subject individual contracts are not allowed under the law. Section 89-9(a), HRS, requires negotiations on any questions arising under collective bargaining agreements.

The Board is of the opinion that the unilateral establishment of terms and conditions of the individual contracts with respect to mandatory subjects of negotiation does constitute a prohibited practice. In so holding, the Board is not unmindful of the intent and purpose of the law in making such individual contracts, outside of civil service, possible. Thus, the Board would have been inclined to agree with the employer's position in this case if the individual contracts had contained no more than an undertaking by the employer to hire a named psychiatrist and the undertaking of the psychiatrist to work for the employer. The Board also believes that if a starting salary and a commencement and termination date had been in the contract, it still, in view of the provisions of Sections 334-4 and 78-1, HRS, would not have regarded the subject individual contracts as anything but contracts of hire and would not have found the employer guilty of a prohibited practice. J. I. Case Company v. NLRB, 321 U.S. 332, 14 LRRM 501 (1944). However, the employer, in its effort to "clarify" the applicability of the unit 13 contract to the psychiatrists through unilaterally drawn up individual contracts went too far and did commit the prohibited practices complained of.

ORDERS

The issue of remedies poses difficult problems on the facts of this case. This is not the classic case involving complaints of unilateral changes of working conditions in the face of a union's attempt to secure a master agreement for the entire unit or to be recognized as the exclusive representative.

The union has been recognized. A unit 13 agreement is in effect. The psychiatrists are employed under individual contracts.

The Board is loathe to void the subject individual contracts in their entirety. However, it is of the opinion that the employer should be and hereby is ordered to (1) cease and desist from refusing to negotiate terms and conditions of employment for the subject psychiatrists; (2) not use the individual contracts, or any terms thereof, to defeat the purposes of Chapter 89, HRS.

The employer is further specifically ordered to remedy its prohibited practice by negotiating with the HGEA concerning the terms and conditions of employment of the subject psychiatrists and to reduce any agreement which may be reached to written form to be executed by both the employer and the HGEA. In doing so, however, neither the employer nor the HGEA shall agree to any term or condition of employment that gives a greater benefit than that received by regular employees covered by the unit 13 agreement. This order does not preclude the higher base salary contemplated in the discussions of the provisions of Article III of the unit 13 contract and under Section 334-4, HRS, but it does preclude negotiating for any other benefits greater than those obtained

for other employees covered by the unit 13 agreement. The Board regards the unit 13 agreement as setting the permissible boundaries for such negotiations and intends that the no-strike provisions of said contract will apply throughout the subject negotiations.

This Board is not unmindful of the employer's concern about the HGEA being a signatory to the individual contracts. While it is not for this Board to write the parties' contract, the Board can suggest what common sense dictates to be a way around this problem for the employer. It should look, during negotiations, toward a master memorandum of agreement applicable to all psychiatrists employed by the DOH who are members of unit 13.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


John E. Milligan, Board Member


James K. Clark, Board Member

Dated: August 28, 1975

Honolulu, Hawaii