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Case No. SF-05-1a

Decision No. 7

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAROLD DAVID NAUD et al., Plaintiffs, vs. SHIRO AMIOKA et al., Defendants, and HAWAII STATE TEACHERS ASSOCIATION, Intervenor.	CIV. NO. 35588 ORDER AFFIRMING SPECIAL HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

ORDER AFFIRMING SPECIAL HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

Pursuant to the Court's order that the Hawaii Public Employment Relations Board hold a public hearing with respect to service fees requested by Hawaii State Teachers Association for teachers and other personnel of the Department of Education under the same salary schedule, Unit 5, the Board secured the services of Ted T. Tsukiyama, esq., as a Special Hearings Officer. On December 19, 1971, the Board published its "Notice of Public Hearing" in the "Honolulu Star-Bulletin" and "The Honolulu Advertiser." On January 3, 1972, the Special Hearings Officer commenced the public hearing on service fees for employees of

Unit 5. On January 18, 1972, the Special Hearings Officer issued his Findings of Fact, Conclusions of Law and Recommended Order in the above-entitled proceeding. The Board has afforded opportunity to all above-named parties to file exceptions and present arguments on the Special Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order. No such exceptions have been filed by any of the parties. The Board having reviewed the record, the arguments of the parties and the Findings of Fact, Conclusions of Law and Recommended Order, now,

IT IS HEREBY ORDERED that pursuant to Section 89-4, Hawaii Revised Statutes, the Hawaii Public Employment Relations Board hereby adopts the Special Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order issued in the above-entitled matter as its Findings of Fact, Conclusions of Law and Order, and, hereby certifies that Seventy-seven Dollars ($77.00) is a reasonable amount of service fee for teachers and other personnel of the Department of Education under the same salary schedule, Unit 5.

DATED: Honolulu, Hawaii, this 24th day of January, 1972.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

Carl J. Guntert, Board Member

John E. Milligan, Board Member

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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
HAWAII STATE TEACHERS ASSOCIATION,	Case No. SF-05-1
Petitioner	Decision No. _____
Re Certification of Reasonableness of Service Fee	

APPEARANCES:

Attorney THOMAS P. GILL for Hawaii State Teachers Association

Attorney VICTOR J. VAN BOURG and JOHN S. EDMUNDS for Hawaii Federation of Teachers, and Harold David Naud

SONIA FAUST, Deputy Attorney General, for Shiro Amioka, State Superintendent of Education, and Kenam Kim, State Comptroller

BRYAN WOO for Hawaii Independent Teachers Association

JENNY E. DOOR for Donald F. Jenson

DECISION
and
RECOMMENDED ORDER

I. Statement of the Case

The above entitled matter came on for hearing before the undersigned Special Hearings Officer for the Hawaii Public Employment Relations Board, called and conducted pursuant to the provisions of Chapter 91-9 through 13, Hawaii Revised Statutes, and Chapters 1 and 6 of the RULES AND REGULATIONS of the Hawaii Public Employment Relations Board, and pursuant

to Order Granting Preliminary Injunction dated December 16, 1971 issued by Circuit Judge Allen R. Hawkins in Civil No. 35588, First Judicial Circuit, State of Hawaii.

On June 29, 1971, the Hawaii State Teachers Association (herein called "Petitioner"), filed a PETITION FOR CERTIFICATE OF REASONABLENESS OF SERVICE FEE under the provisions of Section 89-4, Hawaii Revised Statutes (Hawaii Public Employment Relations Act). On October 27, 1971, the Hawaii Public Employment Relations Board issued its DECISION AND ORDER certifying the sum of $77.00 per year as a reasonable service fee for all persons in the bargaining unit represented by Petitioner.

On November 26, 1971, the Hawaii Federation of Teachers (hereinafter referred to as "HFT" or "Contesting Union"), Harold David Naud and James D. Crane filed a Complaint in the First Circuit Court (Civil No. 35588) against Shiro Amioka, Superintendent of Education, and the Hawaii Public Employment Relations Board to enjoin the proposed deduction of service fee certified by the Board in its DECISION AND ORDER dated October 27, 1971 on ground that the Board's determination of "reasonableness of service fee" was undertaken in violation of administrative due process requirements. The Circuit Court through its Order dated December 16, 1971 granted the preliminary injunction and remanded the matter to the Hawaii Public Employment Relations Board for a determination of the "reasonableness of service fee" as a contested case proceeding pursuant to Section 91-9, Hawaii Revised Statutes and the Rules and Regulations of the Board, requiring published notice of the hearing and permitting all parties in Civil No. 35588 and

other interested persons opportunity to participate therein, the Decision of the Board to be delivered back to the Circuit Court on or before January 24, 1972.

The parties hereto have stipulated on record that this matter shall be heard commencing January 3, 1972 and that the transcription of the record, filing of written briefs, filing of the Decision and Recommended Order of the Special Hearings Officer, and any Exceptions thereto, as well as the Board's Decision and Order shall be performed and completed at specified dates within the January 24, 1972 deadline established by said Circuit Court Order. Commencing January 3, 1972, the matter required 3 1/2 days of hearing at which a recorded transcript was preserved, and the matter was submitted to the Special Hearings Officer on oral and written briefs.

II. Issues to be Determined

The basic issue to be determined by the Board is the reasonableness of the service fee proposed by Petitioner, together with the amount and commencement date thereof, as well as clarification of the procedural mechanics required in the deduction of such approved service fees and any other matter requiring clarification and interpretation under the provisions of Section 89-4 of the Hawaii Public Employment Relations Act.

The applicable statutory provisions read as follows:

> "Sec. 89-4. Payroll deductions. (a) The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all

employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative. A deduction permitted by this section, as determined by the board to be reasonable, shall extend to any employee organization chosen as the exclusive representative of an appropriate bargaining unit. If an employee organization is no longer the exclusive representative of the appropriate bargaining unit, the deduction shall terminate.

"(b) In addition to any deduction made to the exclusive representative under subsection (a), the employer shall, upon written authorization by an employee, deduct from the payroll of the employee the amount of membership dues, initiation fees, group insurance premiums, and other association benefits and shall remit the amount to the employee organization designated by the employee.

"(c) The employer shall continue all payroll assignments authorized by an employee prior to the effective date of this chapter and all assignments authorized under subsection (b) until notification is submitted by an employee to discontinue his assignments."

"Sec. 89-2. . . .

"(16) 'Service fee' means an assessment of all employees in an appropriate bargaining unit to defray the cost for services rendered by the exclusive representative in negotiations and contract administration."

III. Contentions of the Parties

It is the basic contention of the Petitioner HSTA that the Legislature, through the language adopted in Section 89-4, attempted to deal with the "free rider" problem by assessing a reasonable pro rata service fee from all members of the bargaining unit who receive the benefits of representation efforts of their bargaining agent which it is obligated to supply to its entire constituency. The Legislature also provided for a long, complex bargaining procedure culminating with legislative (and possible gubernatorial)

ratification of cost items for the negotiation of a contract, the cost and expense of such negotiation efforts of which should be assumed and shared equally by all bargaining unit personnel in the form of the pro rata service fee. The proposed service fee should be determined on the basis of including not only costs of negotiating and administering an agreement but also the cost for representing the interests of all persons within the bargaining unit in their entire working relationships with the employer. Section 89-4 may be construed to authorize and permit a service fee which is equivalent to the unified dues structure of the bargaining representative and its affiliated organizations, otherwise discrimination between member and non-members of the bargaining unit result. The obligation to pay such service fee should commence from the date of commencement of collective bargaining efforts by the bargaining agent, which is from the date of certification. In any event, the evidence produced by the Petitioner supports a proposed service fee of $77.00 per year per person to be "reasonable" within the meaning and purpose of the law.

The major thrust of HFT's position in the matter is that the statute does not permit the assessment of a service fee until a contract is negotiated and executed, thus all of Petitioner's proof as to costs incurred prior to the consummation of contract negotiations are incompetent. In any event, HFT insists that a request for certification of service fee cannot be based upon mere estimated costs, but upon actual expenditure of funds paid pursuant to billings or other legal obligations therefor. If no service benefits are received until a contract is negotiated, in no event can the service

fee be made retroactively effective prior to such contract consummation. A negotiated contract is the true measure of services performed and the only basis for an obligation to pay for such services in the form of a service fee. A certified bargaining representative must finance itself until it produces a negotiated contract for its constituents. The Petition filed by HSTA is therefore premature. It follows that any costs of administering grievances in the absence of a contract grievance clause is likewise barred by the statutory language.

The service fee is chargeable against all persons in the bargaining unit without discrimination as to membership or non-membership in unions.

No service fee can be certified in an amount exceeding $30.00, the dues of the petitioning organization (HSTA), since any service fee in excess thereof would be paid to organizations that were not certified as exclusive bargaining agents (viz. the H.E.A. and the N.E.A.), nor have the latter two organizations filed or joined in a petition for certification of service fees. The costs of "negotiating" an agreement under the statutory language must be limited to the scope of negotiations defined in Section 89-9, meaning face-to-face dealings with the employer on terms and conditions on employment. The Petitioner has not fulfilled its burden of proof in the matter and the evidence does not support the service fee requested in the Petition.

In view of the conflicting interpretations of the statute contended for by the parties, the Board will first render its interpretation of the statutory language in its

discussion under Conclusions of Law, then followed by its factual determinations under the Findings of Fact.

IV. Conclusions of Law

1. Legislative purpose and policy. Even considering the laws of the few states that have legislated on the subject of union security, Section 89-4 of the Hawaii Public Employment Relations Act (HPERA) is unprecedented. In substance, this law provides for a mandatory check off from every employee in the bargaining unit of a service fee payable to the exclusive representative computed and based upon pro rata "costs for its services rendered in negotiating and administering an agreement". The form and language used manifests an unmistakable legislative intent and policy to provide for a form of agency shop, but with numerous variations. Preliminarily, it may be classified as a "modified agency shop" characterized by the following significant variations, viz.: (1) the issue of union security has been removed as a negotiable item and is legislatively imposed, (2) the proposed service fee is not equated to the union dues structure but to the general costs of contract negotiation and administration, (3) the service fee is uniformly imposed against all employees in the bargaining unit, and not limited to the non-union members therein, (4) the service fee must be reviewed and determined by the Board to be reasonable, and (5) the employer is required to undertake and establish an automatic service fee check off system at employer's cost. All of these features distinguish it from a pure agency shop under which the service fee is a negotiable issue but fixed in an amount equal to the union dues structure and assessed only against the non-members

in the bargaining unit. Had the Legislature intended to create a statutory agency shop, it could have easily done so. Its final work product clearly indicates that it did not.

A review of the legislative labor pains and travail in the parturition of this law is instructive and revealing. Section 4 of the first Bill (S.B. 1696-70) reported out from committee on April 4, 1970 merely provided for authorization and deduction of union dues. On April 14, 1970, twelve scant days later, Senate Draft 1 of this Bill emerged providing for a section for which generally read in its present form, minus the "reasonableness" and the determination thereof by the Board, but including a provision permitting the parties to negotiate for a union shop clause in the agreement. Senate Standing Committee Report 745-70 commenting on this Senate Draft 1 version stated:

> "Your Committee is aware of the major issues essential to collective bargaining and deems that a declaration of findings to clarify the following is necessary.
>
> (1) Agency shop and union shop. The Committee feels that since every individual shall have an opportunity to vote by secret ballot whether and by which employee organization he desires to be represented, it is just and reasonable to permit payroll deductions for service fees to defray costs incurred by the exclusive representative in negotiating and administering an agreement for all employees in an appropriate bargaining unit. All employees in the unit will accrue the benefits of such services and each employee should assume a portion of the costs. The Committee further feels that a union shop provision may be a negotiable item. Since any agreement reached between a public employer and an exclusive representative is subject to ratification by the employees concerned, any employee involved shall have an opportunity to approve or reject any items included in the agreement. The following parallel may be drawn to illustrate the thoughts of your Committee on service fees and union shop provisions. A consumer who desires particular

services, indicates his willingness to obtain such services by the payment of money. If he has purchased services at a particular cost, it is only fair and equitable to him that other consumers obtain the same services at an equal cost. An employee indicates his desire to obtain the services of an exclusive representative, not by the payment of money initially, but by casting a vote. If an employee organization is selected by a majority of the employees to render services in negotiating and administering an agreement, then all employees benefiting thereby should be assessed an equal amount to pay for such services."

House Draft 1 of the same Bill merely added the word "reasonable" to describe the service fees. House Draft 2 of the Bill modified the language in Section 4 to add the words "determined by the Board to be reasonable" after the word service fee, provided that the deduction thereof would be against "every employee not a member of the employee organization which the exclusive representative represents", and also threw out the statutory authorization for a negotiated union shop. In commenting on these changes, House Standing Committee Report 752-70 stated:

"3. Rights of Public Employees. Your Committee believes that in the public service the right to join an employee organization must be accompanied by the right not to join. When the right to join becomes a duty, freedom of choice becomes merely a catchword. The union shop or closed shop may or may not be appropriate for various craft and trade portions of private industry. But given the size of the governmental jurisdictions and agencies involved, the diversity of employee skills and the intense competition between and among public employee organizations, your Committee feels this arrangement is wholly unsuitable in the public service.

"While an employee may refrain from joining an employee organization, he cannot refuse to be represented by the exclusive representative. S.B. No. 1696-70, S.D. 1, H.D. 1, permits the employee organization to assess a reasonable service fee on all employees to defray its costs for negotiating and administering an agreement.

> Your Committee has amended this section to require the Hawaii Public Employment Relations Board to determine and assess reasonable service fees for employees who have not joined an employee organization."

House Draft 3 of the Bill remained the same. However, the joint House-Senate version as reflected by Conference Draft 1 of S.B. 1696-70 restored the language of Section 4 to read as finally adopted in the form and language now set forth in Section 89-4.

Since the legislative history clearly indicates that the proposed union shop authorization was aborted in committee, essentially what remained was a mandatory agency shop provision as described in the first paragraph of Standing Committee Report 745-70 (above-cited), together with certain modifications therefrom. Whether this service fee may be labeled and characterized as a "modified agency shop", "legislative service fee", the "bargaining fee" described by John B. Spielmans (Industrial and Labor Relations Review, July 1957, p. 614), or some other bastardized version of union security, it nevertheless essentially and basically remains a form of agency shop which attempts to strike a balance between avoidance of compulsory unionism as against the elimination of a "free rider". Perhaps our Legislature sought to adopt a form of agency shop which would accommodate between those two competing interests and may be just that kind of "compromise legislation" predicted by Charles E. Hopfl in his comment:

> "No doubt the unions consider section 14(b) the cause of their problems with the agency shop arrangement. Congress can certainly expect the unions to seek its repeal. Whether the union's efforts will be successful or will lead to compromise legislation, only time will tell. It is this author's opinion that compromise legislation

will result. Legislation which would limit payments, by a nonmember, to the union for services rendered as bargaining agent would be just. The nonmember has, and always will, accept the gains obtained by the bargaining agent for him and he cannot complaint if he is called upon to bear his share of the expense. Auditing procedures could be set up to ensure that the expense was properly allocated." ("The Agency Shop Question", 49 Cornell Law Quarterly (1964), p. 478-501 at 501)

Or perhaps it is an attempt to avoid the judicial proscription of Schermerhorn which found that service fees equal to union membership dues are not devoted entirely to collective bargaining costs, making the non-member pay more than his pro rata share of such bargaining expenses. (See Retail Clerks v. Schermerhorn (1963) 373 U.S. 746). Whatever the explanation, reason or motivation behind Section 89-4, there is manifest undisputable intent to legislatively guarantee and grant union security to the public employees of the State of Hawaii in the basic form of an agency shop.

The agency shop is based on the following rationale:

"Where, either by statute or contract, it is the 'exclusive representative' of all members in the negotiating unit, the recognized organization is obligated to represent fairly and without hostile discrimination everyone in the unit, whether he belongs to the organization or not. The 'free rider' is the man who accepts the fruits of collective negotiations but is unwilling to support the negotiating apparatus. The agency shop does not require membership in the organization or any commitment to its practices and objectives. It does, however, require the nonmember to contribute his share of the cost and expense of the process from which he benefits." (Wollett and Chanin, "The Law and Practice of Teacher Negotiations", BNA, Inc. (1970), p. 375)

"The rationale behind the agency shop was obvious. Although the employee could refrain from any and all union activities, the bargaining agent was required to represent him without charge and 'without hostile discrimination, fairly, impartially, and in good faith.' Achieving and maintaining benefits for its members cost money, and

the unions felt that if these same benefits were to be enjoyed by nonmembers, the members were being penalized. The unions considered these nonmembers to be free-riders and felt they should be forced to pay for the union's representation. Although the nonmembers did not seek to have the union represent them, and may be personally strongly opposed to the union, the fact remains that they are benefited by the union's activities along with the members." (Charles E. Hopfl, "The Agency Shop Question", 49 Cornell Law Quarterly (1964), p. 479-480)

"The union representing the employees in that process is obligated to speak, not merely for the majority that may have elected it, but for all in the unit. It has the right, in the public sector no less than in the private sector, to insist that the resources with which to meet that obligation come from all who share in what the exercise of that obligation produces. In imposing that requirement through a union security clause, the union ultimately develops an organization in which decisions on policy and strategy can be made in a responsible manner. That is the kind of union we must have if we are to have stable collective bargaining in the public sector." (I. J. Gromfine "Union Security Clauses in Public Employment" (1970), New York University Conference on Labor, p. 314)

By its adoption of Section 89-4, the Hawaii Legislature must be deemed to have sought and promoted the foregoing objectives and purposes of the agency shop arrangement. This law must therefore be interpreted against that context and background.

2. Validity of the law. At this proceeding, the parties did not question or attack the legality of these statutory provisions. If its unique provisions are to be tested or challenged, this should be undertaken in a court of law. This Board must interpret and apply this law on the assumption that it is valid.

As of this reading, such assumption appears to be warranted. Aside from the fact that it is a legislatively mandated, rather than negotiated, form of agency shop, it should not be invalidated by Section 8(a)(3) of the National

Labor Relations Act under the General Motors rationale (National Labor Relations Board v. General Motors Corp. (1963) 373 U.S. 734). Since Hawaii does not have a "right-to-work" law, this statutory validation of the "agency shop" in Hawaii should not run afoul of Section 14(b) of the National Labor Relations Act under the Schermerhorn ruling (supra). Even in states which make no statutory provision for agency shop, the agency shop has been upheld as a proper issue for bargaining in New Hampshire (Tremblay v. Berlin Police Union (1968) 68 LRRM 2070) and has been validated against all attacks in Michigan administrative and judicial tribunals. (Oakland County Sheriff's Dept. v. AFSCME (1968) GERR No. 227, January 15, 1968, F-1; Warren v. International Association of Fire Fighters (1968) 68 LRRM 2977; Clampitt v. Board of Education (1968) 68 LRRM 2996; Smigel v. Southgate Community School District (1968) 70 LRRM 2042; Nagy v. City of Detroit (1969) 71 LRRM 2362; City of Grand Rapids v. Local 1061 (1969) 72 LRRM 2257; Warczak v. Board of Education (1970) 73 LRRM 2237; Southgate Community School District and Linda Morrison (1970) GERR No. 341, March 23, 1970, B-9). However, these Michigan precedents have had clouds of doubt cast over them by the second Smigel decision (Smigel v. Southgate Community School District (1970) 24 Mich. App. 179, 74 LRRM 3080), which is now on appeal to the Michigan Supreme Court.

Three other states, Massachusetts, Wisconsin and Vermont, have joined Hawaii in legislatively authorizing agency shop authority but none of these laws appear to have been tested in court. The question is still open. A more optimistic prediction of the validity of Hawaii's union security law is expressed by John A. Thompson:

> "What is the significance of the rulings on the legality of agency shop for teachers in Hawaii? Court cases and public employee relations boards tend to follow one of two tracks in their decision on this issue. In states where public employee bargaining statutes have been enacted, the union security rule seems predominant and the agency shop upheld. In other jurisdictions, the question turns on an exercise of personal freedom and police power. In those states, the right to discharge an employee for failure to support an agency contribution has not been sustained. Since the Hawaii Collective Bargaining Act is specific on the issue, it would seem that the courts would give the greater weight to arguments supporting union security, in absence of any obvious attack on constitutional guarantees. Thus it appears that agency shop is legal and employees must pay the service fee, regardless of their own personal attitudes." ("Teachers and the Agency Shop Agreement", EDUCATIONAL PERSPECTIVES, Journal of the College of Education/University of Hawaii, Vol. 10, No. 3, October 1971)

Section 89-4 on its face poses troublesome technical and legal complications to come and imposes burdensome administrative problems upon the Board (as well as upon the bargaining representative), but this Board does not question the wisdom nor validity of this provision. Despite the obvious imperfections and ambiguities of this law, this Board's function and responsibility is to interpret and administer the same to the best of its ability. "Ours is not to question but to serve".

3. "Service Fee". This term is separately defined in Section 89-2(16) as "an assessment of all employees in an appropriate bargaining unit to defray the cost for services rendered by the exclusive representative in negotiations and contract administration". The most unique feature about this definition of "service fee" is that it is assessable against all employees within the bargaining unit, member and non-member alike. This is a clear departure from the traditional definition of "service fee" which is made assessable against non-members only:

> "Under the agency shop arrangement, a fixed amount, usually the equivalent of union dues which is agreed upon in negotiation between union and employer, paid by nonmembers of a union as a charge to defray the union's expenses in rendering services to nonmembership in the collective bargaining relationship." (Roberts' Dictionary of Industrial Relations (1966) p. 496)

Has our Legislature created a new form of service fee concept? Is the elimination of the inequitable "free-rider" situation no longer its prime purpose when it lumped member and non-member alike? Does this law tend to discourage membership in a union? The only answerable question is that this legislatively mandated service fee will be applied uniformly to all members of the bargainingunit, but who are permitted under Section 89-4(b) and (c) to make voluntary check off of membership dues, fees, insurance premiums and other benefit payments. On an apparent legislative assumption that the union dues structure will always be higher than the amount of the service fee, no double payment was obviously intended to be imposed.

The Petitioner argues that Section 89-4 can be interpreted to permit a service fee in an amount equal to the union dues structure. This contention must be rejected. By its deliberate choice and use of the words "costs for services rendered in negotiating and administering an agreement" throughout its legislative deliberations, the Board cannot find that amount of service fee can be equated to the amount of dues uniformly assessed against members of the union. To the contrary, the law deliberately and expressly removed or omitted reference to the union dues structure as a measure or criteria for the determination of the service fee. The service fee was to be determined on separate and distinct criteria

measured by costs of "negotiating and administering an agreement" so that the latter costs would seek and determine its own level independently of and uninfluenced by the then prevailing dues structure (aside from the dues-related ceiling imposed by the Board in its Rules and Regulations). The proof of amount and reasonableness of the service fee in this case must therefore be focused and determined solely by the statutory criteria irrespective of what the Petitioner's dues structure may be. The proportionate share of collective bargaining services may turn out higher than the union dues. This Board does not presume that the union dues structure includes all proper costs of collective bargaining under our law, particularly when the exclusive representative has been certified for the first time and the dues were established in a prior year when there was no bargaining experience or activity under our law. Thus, evidence of the union dues structure is deemed wholly irrelevant.

4. Statutory Criteria. What kind of "services rendered in negotiating and administering an agreement" are allowable in determining a reasonable service fee? By this language, the Legislature appears to be saying that the service fee should reflect a fair and equitable share of the union's bargaining efforts on his behalf along the lines suggested in the Nagy and Schermerhorn decisions.

> "It could be that thorough consideration might be given to the specific amount of contribution required under the agency shop provisions so that a non-union member would be making his fair contribution, only to the actual cost of the bargaining and the contract administration and not to the additional costs of other union expenses or activities which bear no relation to the services rendered and in which he plays no part or has no voice." (emphasis added) (Nagy v. City of Detroit, supra)

"If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of the collective bargaining costs the nonmember subsidizes the union's institutional activities." (emphasis added) (Retail Clerks v. Schermerhorn, supra)

This "fair share" rationale should focus upon the benefit received by the non-member as suggested by the Hopfl commentary:

"If contributions from the nonmembers are required, however, the payment should be only for those functions which benefit the nonmember. Unions use fees and dues for a variety of purposes. Since the nonmember only gets the services of a bargaining agent he should not be forced to pay for union institutional expenses, such as promoting legislation or favorable political candidates, financing litigation or low cost housing, and providing scholarships and charity to needy members. Since the nonmember is only paying for the collective bargaining function, he should naturally only pay a portion of the fees and dues of the member. Just as multi-level businesses must break down their various cost factors and allocate them to numerous divisions and subsidiaries, so must unions break down their costs so that members and nonmembers can pay their fair shares. Although the accounting involved might be a little burdensome, it is not an impossible task." (emphasis added) ("The Agency Shop Question", 49 Cornell Law Quarterly (1964) p. 480)

A "model agency shop statute" proposed by Jay W. Waks in his comment "Impact of the Agency Shop on Labor Relations in the Public Sector" in the same vein provides that "the agency service fee shall be a sum proportionately commensurate with the costs of collective bargaining and contract administration". (55 Cornell Law Review (1970) p. 578).

The Massachusetts law (see GERR No. 300, June 9, 1969, B-1) authorizes the negotiation of an agency service fee "proportionately commensurate with the cost of collective bargaining and contract administration". (Note: Under this law the Boston Teachers Union negotiated an annual service fee of $87.44 as compared to the annual union dues of $96.60 (see GERR No. 384, January 1, 1971, B-17).

By use of almost identical language, our Legislature apparently sought to equate the service fee to benefits derived and received from the collective bargaining representation efforts and services of the exclusive agent. Since the service fee as so determined is equally assessable against the union member as well as the non-union member in the bargaining unit, it would appear almost conclusive that our Legislature, by the deliberate choice of this criteria, intended to exclude from the computation of such service fee, the costs attributable to the internal, institutional activities of the union which are of little or no benefit to the non-member or not made available to him. There is an attempt, however inartistic and clumsy, to distinguish between "benefits from collective bargaining services" as against "union membership benefits", and to exclude the latter. This segregation of "union membership benefits" is what the statutory term of "reasonableness" also seeks to achieve. These union membership benefits are usually deemed to refer to contributions to a political party, candidate or incumbent, initiation fees, special assessments, membership drive costs, retirement and other fringe benefit costs, costs of educational, social, recreational and fraternal benefits and activities, financial, medical and legal assistance and

service. It is conceded that costs of such membership benefits and activities, in a large sense and broad perspective, contribute to the growth and strength of the union as an organization to render it a more effective bargaining representative. This, too, the Legislature must have known, but it has nonetheless required that an allocative line be drawn. This Board must attempt to draw that line.

In the final analysis, this almost impossible task of allocation can be best approached and undertaken by a process of exclusion of so-called "union membership benefit" costs from the total costs of operations as the statutory language seems to suggest. The approach suggested by the AFT of limiting allowable costs to direct-contact negotiations and bargaining must therefore be refused. We view the words "negotiating and administering an agreement" as a term of art which generally encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and "tooling up" process related to a negotiating contract and administering the same after its consummation. It virtually amounts to a residuum of the union's total activities after the "union membership benefits" have been isolated and removed. This is the "fair share" of the collective bargaining costs to be reflected in the service fee.

Otherwise, a narrow rule of interpretation may in all likelihood lead to the frustration and nullification of this union security provision. A narrow rule yielding a disparately lower service fee will not only give "free rides" to the

non-member but might result in significant erosion of union membership. This Board, in its administering of this law, declines to interpret and apply it in a manner that will discriminate against and cause discouraging of membership in the union, rendering the law vulnerable to invalidation. Given the choice of two interpretations of the law, one which might nullify and invalidate the same, we have no choice but to follow a construction which would effectuate and make it viable according to its statutory intendment. (50 Am Jur 372-375, Statutes, Sec. 386; Godbold v. Maniboq, 36 Haw. 206 at 217)

The Board deems it obligatory to adopt a statutory construction which will effectuate the principle of the agency shop, which not only seeks to eliminate the "free rider", but to render the exclusive representative financially stable and secure to properly carry out its representation responsibilities.

> "Whether it be in the context of a union that is free to strike, or of one where resort is had to arbitration, fact finding or any other device to avoid work stoppages, an indispensible element in making collective bargaining produce peaceful settlements that both sides can live with is the capacity of the union to exercise its responsibilities with a meaningful sense of security. It must have the security and policy making stability that flow from the fact that policy and strategy decisions affecting all employees in the bargaining unit have been sanctioned by a union membership that is as close as possible to being coextensive with the bargaining unit. It must also have the financial stability that flows from the fact that the costs entailed in exercising its responsibilities, as the bargaining representative for all employees in the bargaining unit, are being shared by all employees in that unit." (emphasis added) (I. J. Gromfine, "Union Security Clauses in Public Employment", New York University 22nd Annual Conference on Labor, Matthew Bender 1970, 287-288)

"It is to the benefit of all employees whose bargaining agents are unions that their agents are financially sound. A union with uncertain or inadequate financing would be a weak and timid representative and would be unable to carry out its function of representing the employees in an equitable manner. Knowing that it is supported by all, members and nonmembers, the union can maintain a responsible attitude throughout its dealing with the management; an attitude so important to the further development of the national economy." (emphasis added) (Charles E. Hopfl "The Agency Shop Question", 49 Cornell Law Quarterly, 501)

(See also Nagy v. City of Detroit (1969) 71 LRRM 2362 at 2364).

While this Board assumes a responsibility in the process of reviewing "reasonableness" of the service fee to prevent any financial windfall or "self-perpetuation and entrenchment" (see Board of School Directors v. Wisconsin Employment Relations Commission (1969) 168 N.W.2d, 92 at 97-98) by the certified representative, it is also convinced that the Legislature in adopting this far reaching agency shop concept sought to promote and assure effective and responsible collective bargaining efforts by the chosen representative on behalf of the public employees affected. This statutory intent and purpose cannot be achieved by a narrow interpretation of "service fee".

5. Political Activities. Section 89-10 of the PERA requires that "all cost items shall be subject to appropriations by the appropriate legislative bodies". Thus, political activity directed toward such legislative bodies to secure ultimate realization of the fruits of its bargaining must definitely be considered part of the progress of contract negotiations under our law. Thus, the usual sanctions against

inclusion of political activity costs in service fee negotiated in the private sector as enunciated by the Street and Allen cases (International Association of Machinists v. Street (1961) 367 U.S. 740; Brotherhood of Railway Clerks v. Allen (1963) 373 U.S. 113) should have no significant impact in the public sector (see Jay W. Waks--"Impact of the Agency Shop on Labor Relations in the Public Sector", 55 Cornell Law Review 574 at 583). The public sector union is much more politically oriented in makeup and activity than the private sector union and our Legislature has so recognized. Thus, the problem again imposes the difficulty and burdens of proper allocation, and it will become incumbent upon the union to characterize and distinguish its legislative efforts toward securing contract ratification as against ordinary political expenditures of contributing to political parties, candidates or of general political activity.

6. "Reasonableness". The test of "reasonableness" imposed by the Legislature upon the determinations of this Board in reviewing a proposed service fee has broad meaning and application. Primarily, it is a requirement that the employee's contribution or share of the costs of collective bargaining services be fair and equitable. It means that the fee must be reasonably related to the costs of contract negotiation and administration, and thus requires that the activities and expenditures of the union which do not benefit the non-member must be excluded. It means that the overall fee must be reasonable in amount to assure that the union will not become improperly enriched or that the non-member

pays more than his pro rata share of the union's representation services.

> "The public employee needs protection from the obligation to pay an unreasonable agency service fee. Union fees and dues reflect a variety of expenditures, many of which are unrelated to the services an objecting employee receives from the public employee union as bargaining agent. A troublesome problem in public employment concerns the propriety of using compulsory payments representing an agency service fee for purposes not germane to collective bargaining. Section 2(1) and its first proviso require only the payment of an employee's pro rata share of the costs of bargaining and administering the contract. Certainly, internal union provision for other expenditures, such as scholarship and emergency relief funds, remains the obligation of only the member." (Jay W. Waks, supra, 55 Cornell Law Review at 582)

On the other hand, the test of reasonableness is also designed to protect the Petitioner toward the final determination of a service fee that will not permit "free rides" nor undermine the financial stability of the union to hinder its proper performance. The Board has conducted its review and determination of the service fee as against this test of "reasonableness" as so explained and defined above.

7. Effective Date; Retroactivity. The Contesting Union urges that liability for payment of the service fee under this law cannot be imposed or commenced until the collective bargaining agreement has been executed, ratified and consummated, thus the service fee cannot be assessed retroactively to a certification date, petitioning date or any other date prior to the consummation of the contract. This Board does not so read the law. It is true that the process of service fee deduction or check off does not commence until the employer receives a written statement specifying a service

fee which has been certified by the Board as to reasonableness. However, this law speaks of fees which are "necessary to defray the costs for its services rendered in negotiating and administering an agreement". "To defray" means to pay or make provision for payment, and the payment is for "services rendered". Under these words, obligation for payment of the service fee arises at least from the date of commencement of such services by the exclusive representative. In fact the law might permit an earlier date since it provides that the deduction shall "extend to any employee organization chosen as the exclusive representative", in other words, right from the date of certification. The Board can find no language in this statute which defers the imposition of a service fee until the contract is an executed and accomplished fact nor any language from which it can be inferred that the exclusive representative must bankroll the entire process of contract negotiations through its own resources until it produces a contract. Such a result would clearly defeat the "no free ride" objective of the agency shop as provided in this law and would destroy the concept of financial stability and responsibility of the representative implicit therein. The law does not speak in terms of "finished goods produced" but merely in terms of "services rendered". It may be that in other sectors and jurisdictions a service fee is not payable until a contract is in effect, but we have here in this case a new statute of unprecedented import gearing the service fee to "services rendered", irrespective of the fruitfulness or fruitlessness of those services performed. Therefore, this Board must confine itself to the interpretation and application of this statute.

Even in the absence of a statute, the principle of "retroactivity" is not unknown in the public sector.

> "The employees in the bargaining unit having enjoyed the fruits of the harvest should be required to share the costs of the cultivation which brought the contract to fruition. (emphasis added) (In the Matter of Swartz Creek Community Schools, Etc. (1971) GERR No. 414, August 16, 1971, E-1 to E-2)

If the exclusive representative is required by law to represent, negotiate and bargain for all constituents in the unit, a corresponding obligation to pay should arise at the commencement of performance of such services, and we so hold. Of course, the statute clearly provides that the deduction shall terminate when the union ceases to serve as the exclusive representative.

8. Actual or Estimated Costs. Holding as we do that our law provides for the imposition of a service fee, the liability for which relates back to the date when services commenced, an immediate problem arises in the case of all bargaining representatives petitioning for certification of service fee for the first time, because each will have no prior record of costs actually expended for collective bargaining services. In commenting on the effect of the second Smigel decision by the Michigan Court of Appeals, Attorney Erwin B. Ellmann pointed out this exact problem when he commented "you don't know what the cost of negotiating and administering a contract will be while you are bargaining". (GERR No. 363, August 24, 1970, B-4). With no actual or historial costs of bargaining available for proof, this law must be interpreted and applied by this Board in the case of all first time applicants to necessarily mean consideration of estimated costs as a basis

of determining the reasonable service fee. Actual costs will not be available until each representative has acquired a history and experience of actual collective bargaining. In reviewing all first time petitions under Section 89-4, this Board's review therefore must be confined to determining whether estimated costs of the services are reasonable or not, and permitting proof of all expenditures subsequent to certification as a basis of testing the reasonableness of those projected or estimated costs.

To effectuate the statutory purposes of this law, this Board will certify all first time petitions filed under Section 89-4 for an interim period of one year commencing from the effective date of such service fee. Thereafter, the service fee may be reviewed by the Board upon application of any affected employee or of the exclusive representative, or upon such other terms as the Board shall prescribe.

9. Exclusive Representative. Throughout this hearing, the Contesting Union made a continuing challenge to any participation by organizations affiliated with the collective bargaining representative in sharing or receiving any part of the service fee. It contends that only HSTA was certified as the exclusive representative and that only the HSTA petitioned for certification of this fee, thus no service fee or portion of service fee can properly be paid to any other affiliated organization (i.e., the H.E.A. and N.E.A.). The Certification of Exclusive Bargaining Representative (HSTA Exhibit No. 1) on its face indicates that "the HAWAII STATE TEACHERS ASSOCIATION (HSTA-H.E.A.-N.E.A.) has been certified as the exclusive bargaining representative for the teacher bargaining unit described

in said certification. We find nothing in the PERA, particularly in Section 89-2(4) on "certification", which limits or forbids any organization so certified from affiliating or undertaking other organizational arrangements for the performance and rendition of services to the bargaining unit as, for or on behalf of the certified bargaining representative. These "national-local" or "parent-subsidiary" organizational arrangements are commonplace phenomena in the union industry, both public and private sectors. No case in point has been discovered or cited to support Contesting Union's point. This Board will not rule that these affiliated entities cannot render collective bargaining and representation services to the public employees under this law nor to receive reasonable compensation in return therefor.

As the determination of service fee under our law is to be undertaken without reference to the union dues structure or organization of the exclusive representative, the technical nuances of the structurization of the bargaining representative becomes even less significant, since the primary focus of this Board must be upon the kind of services rendered and benefits received and the cost or value thereof. Since the employee under our law is emancipated from any burden or obligation to contribute any prescribed dues to the N.E.A. and H.E.A., the troubled discussion of the propriety or legality of such payments such as made by the Trial Examiner in Southgate Community School District and Linda Morrison (supra) and as found in Wollett and Chanin--"The Law and Practice of Teacher Negotiations", p. 3:80, become moot and wholly inapplicable to our case.

The Board will assume that the Petitioner will function and render representation and bargaining services to the bargaining unit as a multi-levelled organization as certified, notwithstanding their separate corporate identities. The only germane inquiry here is what are the kinds of services and facilities to be rendered by each and what is the cost or value of each, respectively. The By-Laws of the HSTA and H.E.A. provide that each may or will contract with the other for the provision of accounting, record-keeping, printing and other similar services. The Contesting Union has pointed out that there is no binding commitment on the part of the affiliates to provide for any services nor of the HSTA to pay for them. HSTA argues that it cannot enter a binding contract to pay for such services until the Board has certified the service fee as reasonable. We disagree.

The Board has encountered difficulty in determining the reasonableness of the proposed services to be supplied by others in the absence of specific provision for such services. It is the Petitioner's burden to come up with a proposed fee and the justification therefor. The Board merely reviews and certifies the same. It is thus incumbent upon the Petitioner to first produce a service contract arrangement for these proposed services and the estimated cost or value thereof which it deems reasonable, even though it may be expressly made "subject to or conditioned upon the certification of reasonableness by HPERB". The Petitioner should therefore perform and carry out Section 5(d) of its By-Laws which requires it to contract with H.E.A. for the enumerated services setting forth the estimated cost or value therefor. The Board will likewise

require a service contract from N.E.A. enumerating the proposed services to be rendered or grants to be made and the estimated or specific cost or value thereof. The Board's order of certification will require that the service fee deduction shall not become effective until these two executed contracts are filed with the Board as part of this proceeding.

10. Service Fee in Excess of Dues. In like vein, Contesting Union argues that any service fee certified by the Board cannot exceed the sum of $30.00 which is the HSTA dues, as required by the Board's Rules. Rule 6.04(b) in question provides that the service fee "shall not be more than the amount of the membership dues paid by members in the bargaining unit". Only by the application of this rule does the subject of dues come into play. There was an abundance of testimony in this case that HSTA members are subject to a unified dues structure of $77.00 per member, not $30.00. It was made clear that a person cannot be a member of HSTA alone but is required to become a member of H.E.A. and N.E.A. at the same time for a single dues payment of $77.00. The attempt to so limit the proposed service to the sum of $30.00 must therefor fail.

V. Findings of Fact

Upon review of the Petition for Certification of Reasonable Service Fee, exhibits, seven volumes of transcripts of testimony, stipulated facts and upon consideration of arguments of the parties, both oral and written, this Board makes the following findings of fact:

1. Petitioner's Basic Case. The Hawaii State

Teachers Association had been certified as the exclusive bargaining representative for the subject bargaining unit as an organization affiliated with the Hawaii Education Association and National Educational Association, and so designated on this Board's Certification dated May 21, 1971.

The By-Laws of the H.E.A. indicate that it will affiliate with the N.E.A. and be represented at the N.E.A. Convention. Under such affiliation, N.E.A. provides assistance and services to its state affiliates (HSTA being considered as part of the State affiliate). Effective January 1, 1971, the H.E.A. reorganized by creating three separate corporate entities (the HSTA and two other units for education officers and University of Hawaii faculty) to perform the front line collective bargaining and representation services. H.E.A. retained its corporate organization together with its real property, building and other assets, to provide the housing and other centralized clerical and technical services for the three bargaining unit entities, that is, to be the administrative service organization for the three affiliates. The By-Laws of HSTA require that it shall contract with H.E.A. for accounting, record-keeping, printing and other services. The HSTA organization is further subdivided into twelve local chapters distributed throughout the state.

Since its incorporation, HSTA was primarily engaged in organizational efforts and election campaigning to win certification rights over the teacher bargaining unit. Since May 21, 1971, it has engaged in negotiations with the Department of Education for its first collective bargaining agreement and

has also engaged in preparing and training its staff, personnel and building representatives in the responsibilities, functions and duties under the anticipated contract with the Department of Education.

HSTA's Petition requests certification of a proposed annual service fee of $77.00 per person, which coincides in amount to the unified dues paid by each member of the HSTA affiliation. Petitioner's Exhibit No. 6--"Estimated Income and Value of Services" actually shows a total estimated value or cost of services in the sum of $851,386.00, which if divided by 9,227 (the estimated teacher head count), indicates a pro rata share of such services to be $92.00 per person per year. A breakdown of the estimated value of services to be received from each affiliate as shown in Column B of Exhibit No. 6 is reproduced as follows:

HSTA	$403,664.00
Local Chapters	18,454.00
H.E.A.	190,229.00
N.E.A.	239,039.00
Total	$851,386.00

Your Board has reviewed the separate exhibits setting forth the detailed items, description and estimated value of the services to be rendered from each source, has reviewed the testimony and particularly the cross-examination, and has made certain modifications and adjustments to these exhibits to meet the test of "reasonableness" and the statutory objectives of this law, as discussed in the following paragraphs.

2. Bargaining Unit Head Count. HSTA Exhibit No. 5 sets forth an estimated head count of teachers from whom the

service fee deduction would be made at the figure of 9,227. The testimony of the Deputy Director of Education indicates that from 35 to 50 persons, who were exclusions from the bargaining unit, were not considered in reaching the figure of 9,227. This Board will use the estimated head count figure of 9,177 to reflect the excluded categories from the bargaining unit.

3. Estimated Cost of HSTA Services. $403,664.00, the estimated cost of services rendered by HSTA, was derived from HSTA Exhibit No. 7. This exhibit shows expenditures of $236,832.00 for the six months period ending November 30, 1971, which purportedly excluded expenses incurred prior to certification as well as expenditures not related to contract negotiation and administration. This six months figure was adjusted and analyzed to reach an estimated annual expense budget of $500,664.00, from which $97,000.00 of N.E.A. services and grants spent through HSTA was deducted to yield $403,664.00.

The Office Manager of HSTA brought all vouchers for the six months period covered by Exhibit No. 7 and testified in explanation of, and was vigorously cross-examined on, the nature and purpose of expenditures included in the six-month financial report. Your Special Hearings Officer, with leave the parties, conducted an informal audit personally reviewing the vouchers covering this same six-month period. On the whole very little, if any, expenditures reported on Exhibit No. 7 accrued prior to certification date. However, your Hearings Officer has made some exclusions and deductions on the basis that certain items were essentially non-related to collective bargaining. These deductions totalled $9,987.35,

a representative sample, together with an abbreviated explanation in parenthetical phrases, are listed below:

$4,890.00 - Summer pay (reimbursements to teachers for lost pay time, probably for election work)

$ 695.61 - Cardinal Mailing Service (not explained - probably mailing material to membership only)

$ 544.97 - Political Action Committee (not proven to be legislative ratification efforts)

$ 425.50 - Corporate Review Committee (analysis of present organizational structure)

$ 900.00 - HSA, FTA (professional education and training)

$ 100.00 - Teacher training (not a collective bargaining benefit)

$ 85.27 - Late Tax Penalty (deemed an "institutional" item)

$ 38.00 - Gerhard Rothstein (election report)

It is conceded that some of the foregoing deductions, if more properly identified and explained, might be converted to allowable items. The items concerning hotel, travel and food expenses for "Yoshiichi Tanaka" totalling $3,844.00 was at first deemed disallowable. These are expenses incurred by the member of the negotiating team from the outside island incurred in the course of negotiations. Since this party was specifically selected as an outside island representative and there are numerous non-union members in the bargaining unit from the outside island whose interests he would represent, these expenditures were ultimately allowed.

The vouchers up to November 30, 1971 did not yet reflect the cost of legal services, additional time, printing, preparation of proposals and exhibits, etc. necessitated by the mediation and fact-finding sessions resulting from the negotiation "impasse". In fact, the "annualization" procedure used by Petitioner to estimate its one-year budget does not appear to have anticipated or made provision for the probable extraordinary costs of continued impasse negotiations, including further possible impasse settlement expenses, probable strike expenses, and the long process of legislative ratification that may arise during the second half. The so-called "annualization" process may therefore prove unrealistic and the results underestimated. In fact, it would appear that all first time bargaining representatives will encounter extraordinarily higher costs of bargaining during the first several years until experience and a pattern of costs are established. All these highlight the difficulty of administering this law, worded as it is.

After deducting $9,987.00 to reach an adjusted six months expenditure figure of $226,845.00 and following the same adjustment and annualizing process on HSTA Exhibit No. 7, the adjusted estimated annual expense results in a figure of $480,690.00. After deducting the $97,000.00 N.E.A. figure, the estimated cost of HSTA services, as adjusted, is $383,690.00.

4. Estimated Cost of H.E.A. Services and Facilities. An itemization of all of the facilities and services rendered or supplied by H.E.A. to HSTA were set forth in HSTA Exhibit No. 12, as supported by an estimated H.E.A. budget for 1971-1972 and audited financial statements for fiscal year ending

August 31, 1971. The costs, expenditures and allocations set forth in these exhibits were testified to by the Acting Director of H.E.A., whose testimony generally was not enlightening, largely owing to the fact that he had only served one month previously in that office. The problem here essentially involves cost accounting analysis and proper allocation of costs and expenses attributable to services and facilities supplied by H.E.A. to HSTA. Your Special Hearings Officer has reviewed and re-analyzed HSTA Exhibit No. 12 in the interest of achieving a more realistic and reasonable allocation and has accordingly effected numerous modifications and deductions as explained below:

(1) Housing and Parking Facilities. With leave of parties, Special Hearings Officer conducted a field inspection of the H.E.A. property, building and interior. The figure of $25,326.00 estimated use value of the building and parking based on a 75% usage allocation factor by HSTA results in a figure of 37 1/2 cents per square foot which is deemed quite reasonable for that particular building and business neighborhood. This rental value could probably be increased by including a building depreciation factor in the "building and maintenance cost" of $37,768.00, which if tested on a 30 year straight line depreciation would show a 44 cents per square foot figure. The rental payment made by HSTA for its second floor facilities checks out to about 30 cents per square foot, which is extremely reasonable for finished space. The subtotal of $16,626.00 for "housing and parking facilities" checks out reasonable.

(2) Rental Value of Furniture Supplied by H.E.A.

The basis and explanation for reaching an estimated $9,000.00 rental value for H.E.A. furniture used by HSTA upstairs, was deemed unsatisfactory. With leave of the parties, the Special Hearings Officer requested and obtained cost figures and an inventory list of the subject furniture and equipment, such data being admitted in evidence as Board Exhibit D. The cost figure shown of $5,521.00 differs vastly from using the annualized short-term rental rate of $1,500.00 per month for the same furniture. The IRS allows depreciation from 8-12 years and applying a eight-year life to this furniture, the annual rental value of this furniture and equipment is, $690.00.

(3) Annual Use Value of H.E.A. Furniture and Equipment (Downstairs). A depreciation schedule of five years for office furniture and equipment is deemed too rapid and is readjusted and computed on an eight-year basis, resulting in a figure of $6,003.00 instead of $9,765.00.

The percentage allocation estimate of 90% attributable to HSTA usage of such furniture is questioned and closely scrutinized. If the use allocation is based on a straight proportion of total HSTA bargaining unit to non-bargaining unit personnel using total H.E.A. facilities, an allocation of 92% is reached. However, if the 75% allocation estimate made for HSTA usage of the entire building and parking facilities is a more accurate estimate, then applying the same 75% allocation estimate to HSTA usage of H.E.A. facilities alone would result in an allocation percentage of approximately 82%. Either the 75% estimate is too low or the 90% allocation is too high. The 90% allocation percentage is supported by no

study, usage count, time or other use records but was generally made on an "eyeball estimate" of HSTA usage as stated by the Acting Director. It may well be that better record keeping hereafter may ultimately justify the 90% use allocation, but when it is considered that H.E.A. has its own membership and organizational functions and activities to perform, including the insurance servicing program, together with services and facilities to be furnished to the U. H. Faculty union, the 90% use allocation by HSTA appears overstated. The Special Hearings Officer will indulge in an "eyeball guesstimate" of his own and apply an 85% allocation percentage for the HSTA use factor. 85% of $6,003.00 yields an annual rental value of $5,103.00.

(4) Automatic Data Processing. The $10,000.00 H.E.A. budget item for the ADP Fund was allocated 90% for HSTA use. Again, considering work for its H.E.A. membership records, insurance work and the other union's work, an 85% factor was used to give a subtotal of $8,500.00.

(5) Office Supplies, Postage, IBM Fees, Etc. Nine separate items from the H.E.A. activities budget under the general expense category totalling $33,057.00 was multiplied by the 90% factor. Item 310 - "United Educator and Community Relations" of $5,000.00 was deleted because this is a membership publication only and the community relations job was not filled. Item 315 - H.E.A. Trustee's travel allowance of $4,232.00 was reduced by one-third. The resulting adjusted total of $25,237.00 was multiplied by an 85% allocation factor to produce a subtotal of $21,451.00.

(6) Professional and Staff Salaries. Evidence showed that a $15,000.00 public relations executive position was filled for only four and one-half months, with no prospects of rehiring during the fiscal year. Assuming that two-thirds of this salary would not be used, $10,000.00 was subtracted from professional salaries. The evidence appears to indicate that not only the insurance clerk but the equivalent of another clerk should be deducted from the staff salary to reflect a lesser burden of HSTA work upon H.E.A. staff established in testimony, so that total salary was adjusted downward to $89,722.00. After deductions for "Tuttle reserve" and "management fee" the resulting subtotal of $58,705.00 was multiplied by the 85% allocation factor to give a subtotal for this category of $50,070.00.

(7) Staff Fringe Benefits, Etc. The sum of $35,765.00 for total items in this category should be adjusted for the portion ofpayroll costs excluded in Item (6) above by 23%. The resulting $27,539.00 multiplied by the 85% allocation percentage gives a subtotal for this category of $23,408.00.

(8) Telephone Costs, Auxiliary Hires, Etc. Item 410 - Office Equipment in the sum of $5,500.00 included in this category should be deleted as a duplication since rent for this office equipment is being charged through Item (3) above. The remaining $12,000.00 multiplied by an 85% allocation estimate gives a subtotal for this category of $10,200.00.

The adjusted sum total of the estimated costs of H.E.A. services and facilities as shown on HSTA Exhibit No. 12 is $139,398.00.

The foregoing analysis and adjustments made by the Board are not intended as a fixed determination or valuation of H.E.A. contributory services, but merely to serve as a process of testing the "reasonableness" of the estimates and to suggest areas where more exact allocations can be made to reflect the true worth of services received by the bargaining unit from H.E.A. With greater attention paid to the requirements of this law together with the guidelines suggested herein, Petitioner may show better records and allocation methods to value the cost of H.E.A. contributory services after the interim certification period has expired.

There was testimony that the parties were working on a service contract between H.E.A. and HSTA to provide for the foregoing services and facilities. The foregoing review and adjustments of the proposed H.E.A. services demonstrates that the parties should take a closer look at the problem of proper allocation of costs between the collective bargaining functions and the purely membership benefit aspects of the cost of H.E.A. operations. As discussed under paragraph 9 of the Conclusions of Law, these parties will be required to produce an executed contract specifying the exact services and facilities to be provided by H.E.A. and the estimated value or cost thereof as a condition to the deductibility of this service fee certification.

5. Local Chapter Services. Evidence shows that the 12 local chapters located throughout the State are organized of "school representatives" who are represented on the Executive Board and who generally perform the "shop stewards" work at the local school level within each district.

This organization provides the direct contact with the teacher constituency to communicate progress of contract negotiations, union policy, undertake training sessions and provide "feedback" as to the problems and concerns of the teachers. This is an essential link in the process of collective bargaining and contract administration. The no dollar value was placed upon these services and cost of chapter operations although dues income of $2.00-$5.00 per member was received for financing its work. The estimated figure of $18,454.00 will be accepted.

6. Estimated Value of Funds and Direct Services from N.E.A. HSTA Exhibit No. 8 shows six items totalling $216,000.00 specifying the amount of direct grants and expenses for services and salaries assumed by N.E.A. for contract negotiation and preparation and training for contract administration. These items appear to be extraordinary expenditures being furnished or contributed by N.E.A. to meet the pressing needs of the first time negotiation and contract preparation experience of HSTA. This exhibit was thoroughly explained and the Board is satisfied that the funds and services listed here are directly attributable to, in the words of the witness, "winning a contract and then to administer it". HSTA Exhibit No. 9 itemizes the indirect services supplied by N.E.A. conservatively valued at $23,039.00. Generally these indirect services include the availability of a legal defense fund, financing for public education, legal and research assistance, general assistance to state and local associations and professional excellence. With the exception

of legal and research assistance and general professional and consultation assistance to the local affiliates, the remainder of the items appear to be of the general membership services and benefits furnished by or made available by the N.E.A. which have not been directly tied in or related to "collective bargaining functions and services" and therefore must be disallowed. The expertise consultation, legal and research assistance and field services, with further detailed explanation, might be so related. Furthermore, no proof of the estimated cost of value of these latter items was adduced, so that the total sum of $23,039.00 for "indirect N.E.A. services" will be disallowed.

The N.E.A. witness testified that the funds and services listed in Exhibit 8 were "firm commitments" and further testified that N.E.A. expected repayment in some form for the funds and services so supplied and rendered. This Board will also require that HSTA enter into a service and assistance contract with N.E.A. specifying the exact financial assistance and services to be rendered and supplied by N.E.A. together with the estimated value thereof, also as a condition to the deductibility of this certification.

7. Recapitulation. In summary, the adjusted totals for the estimated cost of services rendered from each source now read: HSTA - $383,690.00, local chapters - $18,454.00 (unadjusted), H.E.A. - $139,398.00 and N.E.A. - $216,000.00. The sum total of the above estimated costs come out to $757,542.00 and dividing this sum by the revised teacher head count of 9,177, produces a pro rata share of costs of $82.54 per person. A summary statement of the basic adjusted figures

of the estimated costs of services from each source has been separately recapitulated and attached hereto as "Schedule A".

8. Service Fee Not to Exceed Dues Structure. Rule 6.04(b) of the HPERB Rules and Regulations provides:

> "(b) SERVICE FEE SHALL NOT BE MORE THAN MEMBERSHIP DUES. The service fees to be paid by any employee in an appropriate bargaining or optional appropriate bargaining unit shall not be more than the amount of membership dues paid by the members in the bargaining unit."

The evidence shows that the amount of unified membership dues paid by members of the HSTA is $77.00 per year. In the face of Rule 6.04(b) no service fee certified by the Board can exceed the sum of $77.00 per person per year, irrespective of the proof showing a pro rata share of the costs of collective bargaining services to be $82.54 per person. This Board will therefore certify an annual sum of $77.00 per person as a reasonable service fee to be assessed against every member of the bargaining unit.

9. Interim Certification. It has been previously noted and discussed that the costs of collective bargaining to be considered and included in the determination of a service fee for the first year of operation must necessarily be based on estimates or projections, and accordingly, this Board's initial review of the service fee is largely aimed at testing the reasonableness of such estimated cost of services. Therefore, the certification ordered by this Board shall be effective for a period of one year from June 1, 1971, the retroactive date of effect certified herein. Upon the expiration of the interim period the Board will undertake a further review of the reasonableness of the service fee at the initiative of

any employee and/or of the Petitioner, based upon a history of actual costs and expenditures made by the Petitioner during the interim. It is suggested that financial statements and accounts then presented should be specifically geared to proper allocation and isolation of the general costs of collective bargaining as against the purely institutional or membership benefit activities. Also, more specific time accounting records and use meter records and use of service requisition orders should be maintained and more detailed explanations of use and purposes should appear on the face of the vouchers. The annual financial report required by Section 89-15 might serve as the occasion and vehicle for a review and redetermination of the service fee after actual costs have been expended.

10. Effective Date. The Petitioner was certified as exclusive representative on May 24, 1971. This Board has already ruled that the service fee may relate back to the date of commencement of performance of services by the exclusive representative. Although there is some evidence of preliminary discussions with the employer in the last week of May 1971, informal negotiations, preparation and planning and training activities had commenced by June 1st, thus this Board will fix June 1, 1971 as the effective date from whence deductibility of the service fee shall commence, applied retroactively. If the employee's date of hire is later, the date of hire shall constitute the date of commencement for computation purposes.

11. Service Fee Deduction Procedures. The parties agreed as to seven items of procedures deemed necessary to effectuate the deduction of the service fee under Section 89-4 and the Petitioner has requested two additional items quoted below which have not been agreed to by the public employer, viz.:

> "8. Those persons in the bargaining unit who are members of the exclusive representative, and who have been paying their dues by payroll deductions, shall have the amount already paid credited against any retroactive amount of service fees approved, and their dues deduction authorizations shall be reduced by the amount of the service fee required to be paid in succeeding payroll periods.
>
> "9. The names of those persons in the bargaining unit who are members of the exclusive representative and who have paid their annual dues to said representative in cash shall be certified by said representative to the Department of Accounting and General Services, and to the employer, and no deduction for service fees shall be made from their payroll for the balance of the 1971-1972 school year."

The first seven items of procedures will be incorporated in this Board's Order. This Board does not have the authority to issue orders against the State Comptroller as to methods or procedures to be followed in said service fee deduction, but will require the public employer and exclusive representative to sit down in negotiation toward achieving mutual acceptable settlement of the remaining two issues. Failing such settlement, the parties may petition the Board for further consideration of such issues.

VI. Recommended Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is the recommendation of the undersigned

Special Hearings Officer that the Board issue its order as follows:

1. The Board hereby determines and certifies as reasonable an annual service fee in the sum of $77.00 for each employee in the bargaining unit. Said service fee shall be deductible in accordance with Section 89-4 as of an effective date commencing June 1, 1971.

2. This certification of service fee shall be effective for an interim period of one year from June 1, 1971. Upon the expiration of said one-year interim certification period, the Board will undertake a further review of the reasonableness of said service fee, upon application of any one or more employees and/or of the exclusive representative. The amount of service fee so reviewed shall be based upon a history of actual costs and expenditures incurred by the exclusive representative during said interim period.

3. Upon filing with this Board the two executed service and assistance contracts with H.E.A. and N.E.A., respectively, as hereinabove required, the exclusive representative may thereafter file a written statement with the public employer specifying the annual service fee of $77.00 per person to be deducted by the employer from the payroll from every employee in the subject bargaining unit.

4. Upon receipt of said written statement from the exclusive representative, the public employer shall deduct and pay over to the exclusive representative the amount of service fee in accordance with the requirements of Section 89-4, Hawaii Revised Statutes and with the following procedures:

(a) The State Comptroller will communicate with the exclusive representative to provide an alternative between (1) deduction of the retroactive amount on a lump-sum basis, or (2) deduction of the retroactive amount on a spread-out basis. If the exclusive representative chooses the former, the entire retroactive service fee amount computed to the time of the first actual deduction will be deducted with the initial regular semi-monthly service fee amount. If the exclusive representative chooses the latter alternative, the retroactive service fee amount will be deducted on a spread-out basis mutually agreeable to the State Comptroller and the exclusive representative.

(b) Computation of the regular semi-monthly payroll deduction for service fee will be made by dividing the annual service fee of $77.00 by 24 payroll periods, which produces the deductible sum of $3.20 per payroll period.

(c) For the purpose of computer control of the total service fee amount, the total service fee of $77.00 will be established as an annual limit. Since the service fee deduction will be mechanically limited to $77.00 per year, differences due to rounding will be corrected by adjusting the final annual service fee deduction to an amount that will equal $77.00 per year.

(d) For the purpose of identifying employees from whom the service fee deduction is to be made, the State Comptroller will obtain from the Department of Education a list of employees in the appropriate bargaining unit, excluding those employees described in Section 89-6(c).

(e) For new employees or employees returning to the State's central payroll, deduction of the regular semi-monthly service fee will begin with the first full semi-monthly pay period worked by the employee. Actual payment to the exclusive representative, in such cases, shall commence when the employeebegins to receive compensation for such full semi-monthly pay period.

(f) Once a service fee deduction has been initiated for the bargaining unit under the State's central payroll, designation of the appropriate bargaining unit will be preprinted on the payroll change schedule submitted by employing departments every semi-monthly pay period. The employing department will be responsible for the continued maintenance of the bargaining unit code on the payroll change schedules, effecting whatever changes are proper by the normal notation means employed under the present payroll system.

(g) Service fee deduction amounts will not be adjusted for partial payroll payments; the regular semi-monthly deduction will be made to the extent pay from which the deduction may be made is available.

5. The Board shall request that the parties promptly negotiate in good faith over the remaining unsettled issued concerning the mechanics of said service fee deduction and the public employer is requested to prepare and provide for said deductions and to commence making said deductions at the earliest possible payroll period achievable through its best efforts.

DATED: Honolulu, Hawaii, this 17th day of January, 1972.

Ted T. Tsukiyama

TED T. TSUKIYAMA
Special Hearings Officer
Hawaii Public Employment
Relations Board

ADJUSTED DETERMINATION OF PRO RATA
SHARE OF COST OF SERVICES

1. Potential Service Fee Head Count

9,227 (HSTA Exh. No. 5) less 50 exclusions..... 9,177

2. Total Estimated Cost of Services (Revise Column B of HSTA Exh. No. 6)

Local Chapters	$ 18,454	
HSTA (Revised HSTA Exh. No. 7)	383,690	(1)
HEA (Revised HSTA Exh. No. 12)	139,398	(2)
NEA (HSTA Exh. No. 8)	216,000	
Total.....		$757,542

3. Pro Rata Share

$757,542 divided by 9,177.....$82.54

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(1) Revised HSTA Exh. No. 7

Adjusted expenses for first 6 months	$226,854
Less 3 mos. salaries and fringes	27,000
	$199,845
Annualize 6 mos. adjusted expenses x 2	$399,690
Add 9 mos. salaries and fringes	81,000
Estimated annual expenses for HSTA	$480,690
Less NEA grants	97,000
TOTAL ESTIMATED VALUE OF SERVICES.....	$383,690

SCHEDULE A

(2) Revised HEA Exh. No. 12

1.	Housing and Parking Facilities		$ 16,626*
2.	Rental Value of HEA Furniture (Upstairs) $5,521 cost divided by 8-year depreciation.		690
3.	Use Value of HEA Equipment (Downstairs) $48,829 cost divided by 8-year depreciation =	$6,003	
	$6,003 x 85% HSTA use allocation.....		5,103
4.	Automatic Data Processing Fund $10,000 x 85% HSTA use allocation.....		8,500
5.	Office Supplies, Postage, Etc. Delete Item 310 (publication & PR)	$5,000	
	Reduce Item 315 by 33%	7,820	
	$25,237 adjusted cost x 85% allocation....		21,451
6.	HEA Professional and Staff Salaries Deduct from Item 401 (vacant PR position)	$10,000	
	Deduct from Item 403 additional clerk	8,100	
	Follow other adjustments		
	$58,705 adjust cost x 85% allocation.....		50,070
7.	Staff Fringe Benefits, Etc. Adjust by 23% down to reflect reduction of salary costs above		
	$35,765 x 77% =	$27,539	
	$27,539 adjusted cost x 85% allocation....		23,408
8.	Telephone, Auxiliary Hires, Etc. Delete Item 410 (office equipment duplicated)	$ 5,500	
	$12,000 adjusted cost x 85% allocation....		10,200
	TOTAL ADJUSTED COSTS.....		$139,398

*(If building depreciation factor added in, at say on a 30-year life basis, additional $4,200 may be added on to readjust maintenance cost to $41,968. Using same adjustments thereafter, this cost comes out to $19,976. Adjusted total for NEA services would then become $142,948, and total adjusted costs would increase to $760,892, producing a pro rata share figure of $82.91 per bargaining unit member.)