STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME, AFL-CIO,	)	Case Nos. SF-02-32 SF-03-33 SF-04-34 SF-06-35 SF-08-36 SF-13-37
Petitioner,	)	
and	)	
THEODORE B. JORDAN,	)	Decision No. 72
Intervenor.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

On August 25, 1975, the petitioner (also referred to herein as the HGEA) filed a consolidated petition for a modification of the service fee assessed against all employees in the six collective bargaining units for which it is the certified exclusive representative.

In Decision 57 (December 27, 1974), this Board had certified as reasonable the following service fee for the six units:

> "...[A]n annual service fee in the amount of .0075 times the straight time monthly salary of an employee times 12 plus the per capitas due to AFSCME and the State Federation of Labor [$1.70 per month]... In no event, however, shall said service fee be less than $7 per month or greater than $15 per month" (pages 9-10, Decision No. 57).

In its petition of August 25, 1975, the HGEA asked that the following service fee be certified as reasonable for the six units:

"Effective on September 1, 1975, the proposed amount of service fee is an annual service fee in the amount of .0075 x the straight time monthly salary of an employee in effect on September 1, 1975 x 12, plus the per capita dues to AFSCME and the Hawaii State Federation of Labor, AFL-CIO, provided that said service fee shall not be less than $7 per month nor greater than $15 per month and that this service fee shall continue to be deducted until August 31, 1976 and thereafter, unless the Board renders another decision to change said service fees." (HGEA petition)[1]

The Board conducted a hearing on the HGEA's petition on September 4, 1975. At said hearing, Mr. Theodore B. Jordan submitted a written petition to intervene in Case SF-08-36 which was granted.

Thereafter, on September 26, 1975, after Petitioner Jordan had filed a Motion to Dismiss for Lack of Notice of Hearing to Affected Parties, the Board issued Order No. 27 which denied the motion to dismiss but voided the hearing which had been held on September 4, 1975, because the Board found that notice by publication, which it believed should have been given, had not been given.

After due publication of legal notice in newspapers of general circulation and the posting of several hundred notices at work sites on every island, a de novo hearing commenced on November 5, 1975. (See, e.g., Board Ex. 7)

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[1]By oral statement during a hearing herein on May 25, 1976, the attorney for the HGEA stated the following amendment to the petition:

"Further, for new employees or employees hired after September 1, 1975, the service fee be computed on the salary in effect on the date of hire." (Tr. May 25, 1976, p. 8)

On November 17, 1975, by Order No. 32, the Board granted Intervenor Jordan's motion to serve written interrogatories upon the petitioner. Two days later, 98 written interrogatories were served upon the HGEA and filed with this Board.

By Order 35, dated December 4, 1975, the instant case was, at the request of the HGEA's attorney, continued until further notice.

Several letters from this Board were sent to Counsel for the HGEA urging prompt action in response to the interrogatories.

On March 8, 1976, the written answers to the interrogatories were filed with this Board; on May 12, 1976, attorney for the petitioner moved that the hearing herein be resumed, and on May 25, 1976, the Board resumed the hearings. The final hearing herein was held on August 11, 1976, and the HGEA submitted its post hearing brief on October 1, 1976.

A Stipulation entered into by the Petitioner and the Intervenor, through their attorneys, was filed with the Board on December 2, 1976. The Stipulation provided:

> "IT IS HEREBY STIPULATED by and between the Petitioner and the Intervenor herein, by their respective attorneys, that the attached documents entitled HGEA Fiscal Years 1974-75 and 1975-76 Budget Summary, Hawaii Government Employees' Association Final Budget Report--June 30, 1975 General Fund, Hawaii Government Employees' Association Final Budget Report--June 30, 1976 General Fund, HGEA Reconciliation of Categories of Expenses Budget Summary--Final Budget Report, June 30, 1975, and HGEA Reconciliation of Categories of Expenses Budget Summary--Final Budget Report, June 30, 1976, may be submitted by Petitioner and received by the Board as additional exhibits for consideration by the Board in the above-entitled cause

subject however to Intervenor's objection that the figures in and of themselves have little if any probative value for they are being presented by the Petitioner without cross examination. Intervenor contends that the cross examination of Petitioner's witnesses at the time of trial show that the 'Labels' and 'Headings' under which the Petitioner places its figures are not necessarily correct or descriptive of the purposes for which the money is budgeted and spent.

It is further stipulated that the amended contract covering Bargaining Unit 8 which Intervenor submitted for filing and to which Petitioner took exception is now admitted as an exhibit without objection."

Upon a full review of the record herein, this Board makes the following findings of fact, conclusions of law and orders.

FINDINGS OF FACT

The HGEA is and was at all times relevant the certified exclusive representative of employees in bargaining units 2, 3, 4, 6, 8, and 13.

Theodore B. Jordan is a "public employee" as that term is defined in Section 89-2(7), Hawaii Revised Statutes (hereafter HRS). He is an employee in Unit 8 (personnel of the University of Hawaii and the community college system other than faculty).

The public employer of Unit 8 is the Board of Regents of the University of Hawaii.

Intervenor Jordan's intervention is restricted to Case No. SF-08-36.

All employees in the subject units regardless of whether they are members of the HGEA are required to pay service fees to the HGEA under Section 89-4(a), HRS. Decision No. 7 rendered January 17, 1972, by Special Hearings

Officer Ted T. Tsukiyama; affirmed by Order of the Board dated January 24, 1972; affirmed in memorandum opinion form, Naud v. Amioka, Civil No. 35588.

The number of employees in the respective units are:

Unit	Number of Employees (HGEA members and non-members)
2	552
3	7,627
4	357
6	549
8	855
13	3,429
Total:	13,369

Based upon the salary schedules in effect for these employees as of September 1, 1975, it was estimated that the service fee requested by the HGEA would produce revenues of $1,485,149 for fiscal year 1975-1976. If the number of employees remained essentially constant, the service fee revenues for fiscal year 1976-1977 would also be $1,485,149.

The breakdown by units to reflect this anticipated service fee income is as follows:

Unit	No. of Employees	Service Fee Revenues
2	552	$ 91,061
3	7,627	691,333
4	357	50,467
6	549	97,978
8	855	116,338
13	3,429	437,972
	13,369	$1,485,149

The HGEA submitted as Exhibit C affixed to its Petition a Budget Summary:

BUDGET SUMMARY

		1975-1976	1976-1977
I.	Wages and Salaries (including fringes)	$ 973,022	$1,107,280
II.	Payroll Taxes	49,609	55,451
III.	Land (Mortgages and Rents)	100,140	114,180
IV.	Administrative Expenses	766,609	817,310
V.	Office of the Director	30,794	33,257
VI.	Education & Training	16,221	17,518
VII.	"The Public Employee"	66,500	71,820
VIII.	Fiscal Services	4,070	4,395
IX.	Office Services	20,950	22,626
X.	Membership Services	58,897	63,608
XI.	Neighbor Island Services	79,374	86,995
XII.	Board of Directors	36,260	23,058
XIII.	Committees	14,450	15,606
XIV.	Elections	7,800	3,074
XV.	Legislative Services	20,000	82,600
	TOTALS	$2,244,696	$2,518,778

Based upon its prior decisions, testimony adduced at the hearings, and more detailed information contained in Intervenor's Exhibit 3, the Board will disallow certain portions of some of the items contained in the Budget Summary to reflect the Board's opinion as to what are proper charges against service fees under the terms of Section 89-4(a), HRS.

The Board will disallow the following amounts from the Budget for 1975-76 on the ground that they are not properly chargeable to service fee revenues:

$60,102	the total recreation budget for recreational programs from which non HGEA members are excluded. All HGEA recreational programs are only for HGEA members.
$10,500	portion of recreation coordinator's salary spent on above activities.
$36,036	portion of administrative expenses attributable to computer services for associate members.
$29,260	portion of cost of "Public Employee" assignable to associate members.
$ 1,048	portion of office services budget assignable to associate members.

$10,300 portion of membership services budget assignable to retiree members and private industry organizing.

$ 3,969 portion of Neighbor Island Services budget assignable to associate members.

$ 2,000 portion of board of director's budget used to make donations to "certain people associated with HGEA." This item might be allowable had the petitioner been less vague in describing the purposes for which it is used.

$12,000 portion of legislative services budget item is disallowed because HGEA admitted using fund for political surveys and other political purposes not proper under rulings of this Board. A portion of this $20,000 sum ($8,000) is for allowable lobbying expenses (See Decision 7).

$ 2,500 portion of membership services item for "organizing" non-members.

The Board will disallow the following amounts from the Budget for 1976-77 on the ground that they are not properly chargeable to service fee revenues:

$65,000 the approximate recreational budget for recreational programs from which non-members are excluded.

$10,500 portion of recreation coordinator's salary spent on above activities.

$36,036 portion of administrative services attributable to computer services for associate members.

$31,601 portion of cost of "Public Employee" assignable to associate members.

$ 1,131 portion of office services budget assignable to associate members.

$10,300 portion of membership services budget assignable to retiree members and private industry organizing.

$ 4,350 portion of neighbor island services budget assignable to associate members.

$ 2,000 portion of board of director's budget used to make donations to "certain people associated with HGEA." This item might be allowable had the petitioner been less vague in describing the purposes for which it is used.

$74,460	portion of legislative services budget item is disallowed for same reason stated above for disallowing item ($12,000) for fiscal year 1975-76.
$ 2,500	portion of membership services item for organizing non-members.

RECAPITULATION OF MODIFICATIONS MADE TO BUDGET SUMMARY BECAUSE OF DISALLOWING ABOVE AMOUNTS

Total budgeted expenses submitted for FY 1975-76	$2,244,696
Total disallowed by HPERB	167,715
Adjusted budgeted expenses for FY 1975-76	$2,081,981
Total budgeted expenses submitted for FY 1976-77	$2,518,778
Total disallowed by HPERB	237,758
Adjusted budgeted expeneses for FY 1976-77	$2,286,020

The above adjusted expense figures would still leave the HGEA in a deficit situation because of the fact that its service fee income will be $1,485,149.00 for each of the fiscal years.

The main reasons given by the HGEA for the need for a service fee increase were increases in the salaries of its employees. Additionally, there has been an increase in the AFSCME per capita from $1.80 per unit member per month to $2.15 per month for an estimated increase of $35,700 annually. Also, there are projected increases in various administrative and fiscal services.

At the time the hearing herein was held, the only data available for fiscal year 1975-1976 was that contained in the Budget Summary set forth above. The opportunity to cross examine the HGEA's witness was restricted of necessity to such data. The Board considers it reasonable then to use the Budget Summary data to demonstrate what it considers dissallowable. Obviously, the data submitted with

the Stipulation filed December 2, 1976, showing the 1975-1976 actual expenditures demonstrates that the HGEA spent more than it anticipated in some areas and less then it planned to in others in 1975-1976. For example, while it budgeted $60,102 for recreation in said fiscal year, it actually expended $46,669.93; it budgeted $973,022 for wages and salaries but actually expended $996,562. This Board considers the reasons for the amounts it dissallowed for fiscal year 1975-1976 to be clear and expects the Petitioner to heed these reasons and to make appropriate adjustments.

It is clear whether one looks at the proposed expenditures or the actual expenditures for allowable purposes that the HGEA would still be in a deficit situation because of the fact that its service fee income will be approximately $1,485,149.00 for the fiscal years for which it submitted its budget.

A comparison of HGEA expenditure projections, as adjusted by HPERB, by fiscal years, is as follows:

FY 1974-1975	$1,849,141 (See Decision 57)
FY 1975-1976	$2,081,981
FY1976-1977	$2,286,020

The exhibits introduced at the hearing herein give the actual total expenditures for the fiscal year 1974-1975 as $1,887,138. The data submitted with the aforementioned Stipulation shows total actual expenditures for fiscal year 1975-1976 of $2,246,766, an increase of $359,628.

The Board would have found it far easier to conclude that a service fee increase was warranted if the data submitted to it had been more refined. Nonetheless, the Board is of the opinion that the data submitted does demonstrate that there has been an increase in the expenditures of Petitioner which justify an increased service fee.

The HGEA membership includes a retirees unit which does not have any members of the bargaining units in it and is self supporting out of dues paid by its own members.

The HGEA has associate members who pay dues to the union. No associate member is a member of a collective bargaining unit. The income received by the HGEA from associate members' dues totals $491,202.

The HGEA also receives annual income from self-supporting insurance programs (administrative fees) of $150,000.

The HGEA is affiliated with AFSCME and the State Federation of Labor, AFL-CIO. For each employee in the bargaining units, it is required to pay $2.15 per month to AFSCME and 20 cents per month to the State Federation.

Among the direct services provided by AFSCME to the HGEA are training of HGEA employees to participate in collective bargaining, provision of AFSCME staff members to assist in negotiations, and research.

AFSCME is a major force in public sector collective bargaining for state and municipal employees across the nation.

Affiliation with the State Federation permits the HGEA to have a role in major labor policy decisions in Hawaii. The HGEA looks to the Federation for support in collective bargaining. The Federation engages in lobbying.

The State Federation and AFSCME are AFL-CIO affiliates. Membership in any one entity requires membership in all three.

At the hearing herein a great deal was made of the fact that some (but not all) educational classes provided by AFSCME include recreational or leisure time training, such as ukulele and hula lessons. Other courses do directly

concern education related to collective bargaining matters. All AFSCME classes are open to all employees in all units regardless of whether such employees are members of the HGEA.

In the opinion of witness Russell Okata, Deputy Executive Director of the HGEA, the value of services related to contract negotiations and administration the HGEA receives from AFSCME exceeds the amount the HGEA pays to AFSCME through the per capitas.

Mr. Okata expressed his conviction that strength through unity is essential to effective collective bargaining and that any program which fostered better communication among employees fostered, in turn, a stronger union capable of greater effectiveness at the bargaining table.

The AFSCME and State Federation affiliations also bring the HGEA into the AFL-CIO family of unions and protect it from raids from other AFL-CIO affiliates.

The HGEA keeps its books for all of its activities on a consolidated basis. It would be preferable, for service fee hearing purposes, if it would keep separate books showing service fee revenues and proper expenses out of service fees and separate books for its other income and expenses. The Board accepts the proposition that revising a bookkeeping system, perhaps one of long standing, might be arduous and expensive, but urges the HGEA to refine its present system.

On an annual basis the minimum salary for employees in the six units ranges from $5,292 per year to a maximum of $32,592 per year ($441 per month to $2,716 per month).

The HGEA is expending an undisclosed portion of its legal services to attempt to "organize" through various legal proceedings employees of MTL, Inc. It appears that

these legal fees are being charged to service fees. This is considered an improper use of service fee monies. It will be discussed further hereinafter.

CONCLUSIONS OF LAW

The amounts proposed to be expended by the HGEA for servicing the units it represents, as adjusted hereinabove and less the amount of all legal fees being paid to "organize" MTL, Inc.,[2] are considered to be for proper purposes under Section 89-4(a), HRS. Said section states:

> "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."

A number of legal conclusions are implicit in the disallowance of certain items in the HGEA budget made in the Findings of Fact portion of this Decision and the accompanying notations. Disallowing these items is consistent

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[2]Mr. Russell Okata estimated that about $10,000 was spent to organize MTL, Inc., during fiscal year 1974-75. He said he expected this sum to be reimbursed by AFSCME but did not have a firm committment concerning the expected reimbursement. No figure was introduced as to amounts expended in fiscal year 1975-76 or thereafter to organize MTL, Inc.

with Decision 7 wherein, through its special hearings officer, this Board ruled:

> "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 annual union dues of $96.60 (see GERR No. 384, January 1, 1971, B-17).
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> 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 benefits 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.
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> 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 Confernce on Labor, Matthew Bender 1970, 287-288)

'It is to the benefit of all employees whose bargaining agents are unions that their agents are finacially sound. A union with uncertain or inadequate financing would be a weak and timid representative and would be unable to carry out its function or representing the employees in an equitable manner. Knowing that it is supported by all, members and non-members, 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. Hopft '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 gratification as against ordinary political expenditures of contributing to political parties, candidates or of general political activity."

A major issue in this case is the validity of using a percentage formula to determine how much a particular employee will pay as a service fee. This issue was first grappled with by the Board in its Decision No. 57, which also involved the HGEA. In that case the Board ruled:

> "3. It is obvious to all who have participated in this case that the difficult issue to be dealt with is whether all members of a unit must pay an equal dollar amount of the service fee or whether a computation, based on a percentage of one's salary, is permissible. This is a question of first impression for this Board because in all prior service fee cases, petitioners have asked for equal dollar amount payments from each unit member regardless of salary and the Board has approved the deduction as asked for. The Board has reviewed the briefs submitted by the HGEA, the oral and written testimony of opponents to the percentage method of computation, the legislative history of Section 89-4, HRS, and the language of the relevant statutory provision. Additionally, the Board has reviewed cases

in which the term pro rata has been defined. From this review it is clear that pro rata frequently means not equal. In Chaplin v. Griffith, 97 A.409 (Pa. 1916), it was held that the term pro rata never means equality or equal division. There also is a general rule that the term has no meaning unless it is referrable to some rule or standard. To adopt this rule as a sole means of interpreting the term in our statute would cast a cloud of doubt upon all earlier decisions of the Board wherein the division was an equal dollar amount. However, to totally deny the interpretation advanced by the HGEA would be to read the term pro rata in a twisted way. It becomes rather clear from a reading of the legislative history of the subject section that the Legislature used the term without precision. For example, in an earlier draft, the Legislature had before it language which was self contradictory by its own terms. S.B. No. 1696-70, S.D. 1, H.D. 2, H.D. 3 provided:

'service fees . . . be computed on a pro rata basis by dividing total costs by the total number of employees within the appropriate bargaining units . . .'

However, in Conference Draft of said bill, the draft which became law, the words 'by dividing total costs by the total number of employees in the bargaining units. . .' were left out after the words 'computed on a pro rata basis.' Not without reason, the HGEA has cited this modification as demonstrating a legislative intent that the notion of equality be rejected. The argument would be fully persuasive if H.D. 3 did not use the words pro rata side by side with the language denoting equality of dollar amount as though they meant the same thing.

Based on the review of the above authorities and guides such as they are, this Board believes the term pro rata as used in the law is ambiguous and provides little guidance as to what is intended. The Board thus finds it appropriate to read the statute as requiring that the service fee deduction and computation be reasonable and equitable as applied to all unit members.

The Board finds nothing in the law which precludes it, once it has determined that the cost figures presented to it in

service fee hearings are reasonable, from determining that a computation based on an equal percentage of salary is also reasonable.

The Board is of the opinion that if this interpretation of the statute is incorrect, it would be in order for the Legislature to review the section under consideration and clarify its intent as to the manner of computation.

Opponents to the percentage scale have asked that it be demonstrated that the cost of serving them as individuals at their salary ranges is greater than servicing a lower paid person subject to the same scale. Obviously, this cannot be done. Rather the HGEA has rested its case on a benefit theory. The Board does not find this to be an unreasonable method of computing the service fee. Under computation systems using either the costs or the benefits theory, there are bound to be inequalities. Conceivably the lowest paid member of a unit represented by the HGEA could find himself involved in a grievance that consumed hundreds of hours of HGEA staff time. Yet he would pay no more for this service under the opponents' theory than any other unit member. Servicing unit members involves costs which cannot be precisely allocated to each individual member. Such services do provide benefits, and the record demonstrates that the higher paid members derive greater benefits, especially when percentage salary increases are negotiated. Moreover, it must be borne in mind that this Board has found that the total service fee is based on the cost theory. It is only the computation of what each person pays as his fair share of these costs that is based on a benefits theory.

This has not been an easy case, but there is substantial weight in favor of the HGEA's position that pro rata does not mean an equal dollar amount. However, for the reasons stated above, especially the ambiguous way in which the Legislature used the term, this Board will not adopt so rigid a reading of Section 89-4, HRS. It will, however, adopt the position that the term pro rata does not always mean an equal dollar amount and some other reasonable method of computing the service fee is permissible under the language of Subsection 89-4, HRS, as presently written."

The Board continues herein to follow the reasons stated in support of its conclusion in Decision 57 that a percentage basis for computing service fees is reasonable.

Petitioner requested that, within the parameters of the $7 floor and the $15 ceiling, its service fee be automatically increased, without hearing, whenever there is an increase in the AFSCME or State Federation dues. This request the Board will not grant.

This Board is of the opinion that the AFSCME and State Federation affiliations do provide the HGEA with strength, backing, support, expertise and experience which are directly related to its bargaining effectiveness. The amounts of the per capita dues clearly are not unreasonable.

Intervenor Jordan asked for a disclosure of all political candidates who receive HGEA support. Inasmuch as this Board considers it improper to use service fee funds to support political candidates or parties, and herein disallows the use of service fee funds for such purposes by the HGEA, it denies this request without reaching the question of whether it possesses the authority to require such disclosure.

The Intervenor has also in these proceedings, by motions, asked this Board to (1) set aside Decision 57 as extended by Order 23; (2) order the HGEA to return the service fees collected since September 1, 1975, on the grounds that Order 23 was unconstitutional; (3) compel an accounting of all service fees collected by the HGEA to date; (4) require an annual accounting of political contributions; (5) disgorge and repay HGEA political contributions.

Intervenor submitted no authorities or supporting grounds in support of motions (1), (2), (3), (4).

More importantly all of the above motions asked relief which it is beyond this Board's authority to provide and go beyond the scope of this proceeding.

The motion of the Intervenor to Dismiss the Petition filed by the HGEA for Failure to Carry Burden of Proof is also denied. This Board has found that the service fee requested by the HGEA is reasonable. Admittedly, a better bookkeeping system could be devised; more detailed information could have been provided. Nevertheless, this Board is convinced that the HGEA utilizes service fee revenues for purposes of defraying its costs for its services rendered in negotiating and administering collective bargaining agreements for the units it represents.

It should be noted that a narrow construction of Section 89-4, HRS, which would impede consolidated record keeping for all of the units represented by the HGEA would be highly unrealistic. It would tend to divide one entity into six separate entities diminishing whatever strength there may be in numbers and unity.

This Board appreciates keenly that the law must in this case strike a fair and reasonable balance between the policy of Chapter 89, HRS, to foster effective collective representation, on the one hand, and to protect the individual rights of employees such as Intervenor Jordan, who if the law allowed it, would by his own testimony obviously not wish to be covered in any way by the collective bargaining law for Hawaii's public employees.

The statute itself attempts to strike such a balance[3] and this Board in these proceedings and in this opinion has similarly attempted to achieve this balance.

ORDERS

An annual service fee in the amount of .0075 x the straight time monthly salary of an employee in bargaining units 2, 3, 4, 6, 8, or 13, in effect on September 1, 1975 x 12 plus the per capita dues to AFSCME ($2.15 per month) and the Hawaii State Federation of Labor (20 cents per month) shall be deducted by the employer from the payroll of the employee and the aggregate of such deductions from all such employees shall be transmitted to the HGEA. Such deductions shall be made each payroll period in an amount which, to the extent possible, is equal to the annual service fee divided by 24 payroll periods.

The increased service fee shall be retroactive to September 1, 1975, for all employees on the payroll at that time. For all persons hired after such date, the service fee shall be computed on the basis of the salary in effect

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[3] "Sec. 89-3. Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section 89-4."

on the date of hire and shall be retroactive to the date of hire or effective as of the date of hire, as the case may be. The deductions shall commence at the earliest possible date.

In no event shall the service fee be less than $7 per month or more than $15 per month for any employee.

The service fee certified herein as reasonable shall continue to be deducted until such time as this Board directs otherwise.

The Board may, upon its own motion or the petition of the HGEA or any affected employee, review the reasonableness of the subject service fee whenever it deems such a review would be appropriate.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

John E. Milligan, Board Member

James K. Clark, Board Member

Dated: December 10, 1976

Honolulu, Hawaii

DISSENTING OPINION

The majority has approved as reasonable the HGEA's request for a service fee based on a percentage of salaries in effect for all employees in Units 2, 3, 4, 6, 8, and 13. Also approved is a floor of $7 and a ceiling of $15 per month for said service fee.

Mindful of the fact that I was with the majority in Decision 57 when an almost identical service fee was approved, I have, however, after much thought and reflection concluded that regardless of the imprecise use of the word pro rata by the Legislature in Section 89-4, HRS, it truly intended a flat fee.

Even if a percentage were reasonable and supportable under Section 89-4, HRS, the floor and ceiling have no reasonable relationship to the legislative purpose of requiring employees to pay a fair share for services rendered in negotiations and contract administration and eliminating free rides. Under the formula approved of by the majority, the lowest paid employees pay more than even a pure pro rata share, and all who make more than $24,000 enjoy a free ride to the extent that they pay less than their fair share, on a percentage basis, because of the protection afforded them by the $15 ceiling.

Moreover, I do not believe service fees should equal dues as they do in the case of the HGEA. My concern in this area is intensified because the use of a percentage formula results in some nonmembers in units paying more than HGEA members in the same units with lower salaries do.

I do, of course, appreciate in this case that the HGEA has "outside income" in addition to its service fee revenues and that this income can apparently be applied to

activities which benefit members only and may even be subsidizing some collective bargaining costs. But I think outside income should be an irrelevancy in service fee determinations. Employees should be assessed what it costs to represent them in collective bargaining, not more nor less. than such sum.

Additionally, I am of the opinion that Petitioner has failed to show sufficient connection between its expenditures and the purposes for which it may receive funds pursuant to Section 89-4, HRS.

It also failed to show a sufficient connection between the percentage assessment and such expenditures. The following colloquy between Attorney Jaffe and the witness Mr. Okata on cross examination in the instant hearing illustrates the point:

> "[Q] The question I am really interested in is if I get a one thousand dollar a year raise as a member of Unit 8, my obligation for Union dues is going to go up because I pay a percentage of my income for Union dues. But it seems to me that your costs of administering and negotiating this contract don't go up a penny because of that. Isn't that right?
>
> [A] At that point in time, I would say -- I would answer to your question, no, it will not affect the expense. However, you have to appreciate my point of view, which is that we at HGEA believe that the employees' salary and place in the organizational structure has a direct relationship on the employees' benefits from the Union.
>
> Take, for example, that you are denied the right to take your vacation on December 31, 1975. The employer knocked off three days of your vacation from your accumulated vacation and your rate of pay is a hundred dollars a day. You stand to lose three hundred dollars and its attendant benefits as opposed to an employee that earns fifty dollars per day. That is the basis for our percentage.

[Q] I can appreciate that the more money I make the more it costs me when I get docked a day for vacation or going to play around. I am not talking about what it costs the employee. I am talking about your cost of administering the contract and negotiating the contract, because that is all the service fees are supposed to reimburse you for. How are your costs of negotiation and administration affected by my $1,000 increase in salary or by the fact that I get docked three days of vacation?

[A] I understand your point.

[Q] It is not affected at all, is it?

[A] In that context, I would agree with you.

[Q] Don't you think it would be more appropriate to keep detailed records on each of the bargaining units you represent so that you could ascertain the actual costs of negotiation and contract administration for each unit so that you are not, in effect, levying a graduated tax against the higher income people to support the Union activities of organizing and administering the entire HGEA?

[A] No. Because even in Unit 8, sir, if you look at the salary schedule in the back of the contract, you will find that we have employees that earn as little as probably, what? $8,000 per annum to thirty odd thousand dollars per annum.

[Q] I think the lowest one is $8,684.00 and the highest one is $32,500, if I am reading it correctly.

Well, my point is -- I think we have agreed on the point. Your cost of negotiating and administering are not affected by the type of example that I gave you, where I get the $1,000 a year raise and my Union dues go up accordingly and -- the service fee. I tend to think of them as the same thing. Isn't that true? Your costs are not affected by that?" (Tr. pp. 150-151)

I believe that the HGEA is an honest union doing an honest job to service the units it represents. I believe the heart of the problem in this case is the lack of refinement of essential data.

What I look for in the way of refinement of data is a segregation of service fee income from other income and a segregation of proper expenses under Section 89-4, HRS, from other expenses, a good faith effort to appreciate the difference between dues and service fees, and a willingness to prepare clear, accurate, and sufficient exhibits and develop an adequate record in service fee cases.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

Dated: December 10, 1976

Honolulu, Hawaii