

Decision file

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
HAWAII GOVERNMENT EMPLOYEES')	Case No. <u>CE-03-28</u>
ASSOCIATION, LOCAL 152, HGEA,)	
AFSCME, AFL-CIO,)	Decision No. <u>73</u>
)	
Complainant,)	
)	
and)	
)	
FRANK F. FASI, Mayor, JAMES)	
K. SAKAI, Director of Finance,)	
GEORGE TAKABAYASHI, Chairman,)	
Liquor Commission, and HARRY)	
BORANIAN, Director of Civil)	
Service, CITY AND COUNTY OF)	
HONOLULU,)	
)	
Respondents.)	
.....)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

On July 27, 1976, complainant Hawaii Government Employees' Association (hereafter HGEA) filed with the Hawaii Public Employment Relations Board (hereafter HPERB) this prohibited practice charge against the above-named respondents of the City and County of Honolulu (hereafter collectively referred to as the City).

After due notice, a hearing was held on September 8, 1976. All parties were present and afforded an opportunity to call and cross examine witnesses, submit exhibits and present oral arguments and written briefs to this Board. Briefs were received on November 12, 1976.

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

FINDINGS OF FACT

Complainant HGEA is the exclusive representative of employees in bargaining unit 3 (non-supervisory white collar employees), as certified by the Board in Case R-02-5, Decision No. 4. Liquor control investigators employed by the City are included in Unit 3.

Respondents herein, Mayor Fasi, Director of Finance Sakai, Liquor Commission Chairman Takabayashi and Director of Civil Service Boranian, collectively constitute a public employer within the meaning of §89-2(9), Hawaii Revised Statutes (hereafter HRS).

The HGEA and the City are parties to the Unit 3 collective bargaining agreement. Prior to July 1, 1976, an agreement executed on February 13, 1973 (extended and amended by an agreement dated March 20, 1974) was in effect. An agreement executed on April 9, 1976, has been in effect since July 1. Nowhere in the current contract, or in the preceding contract, is there a specific provision concerning the installation, use and removal of two-way radios.

The liquor control investigators must use their personal vehicles in order to carry out their duties of enforcing City rules and regulations concerning the sale of liquor.

In an October, 1975 staff meeting, the City proposed the establishment of a two-way radio system to provide an improved means of communication and thereby insure the investigators' safety while performing their duties (Tr. 15, 85, 96-97, 99). Subsequently, it appears that a demonstration of the Handi-walkie unit, which was a part of the proposed system, took place.

On January 5, 1976, the City began implementing its proposal by installing two-way radios in the investigators' automobiles. When they learned that installation of the radio

consoles required the drilling of an antenna hole in their vehicles, some inspectors raised objections over the responsibility for repair of the antenna hole upon sale or replacement of the vehicles, the location of the console, and the mandatory nature of the installation. Installations were halted after investigators notified the union of their objections, and the HGEA sought to discuss and resolve these objections with the City (Tr. 9, 13, 141-142).

A committee comprised of investigators and an HGEA representative met with the City during the months of January and February, 1976, to discuss installation, removal costs and operating procedures for the two-way radio system. At the conclusion of these meetings in late February, the parties agreed that (1) installation of the radio console in investigators' personal vehicles would be optional for investigators then employed, and required for investigators hired in the future; (2) consoles could be installed anywhere in the automobiles, including in the trunks; and (3) the City would bear the costs of installation, and reimburse each investigator up to \$30 for repair of the antenna hole upon withdrawal of his automobile from investigative use (Tr. 10, 14, 142). The parties also agreed on operating procedures for the two-way radio system (Tr. 13, 144).

On March 15, 1976, the operating procedures for the two-way radio system were approved by the Liquor Commission. A memorandum dated March 18, 1976, from William Lucas, Executive Secretary of the Commission, advised the liquor control investigators of the Commission's action, and directed all of them to have the radios installed in their cars immediately (City Ex. 1).

Following the conclusion of the meetings, the HGEA reduced the agreement which had been reached between the union and the City to a written memorandum of understanding and transmitted it to the City for execution in March, 1976 (Tr. 45).

Subsequently, the City suggested that the expiration date of the memorandum of understanding be changed from December 31, 1976, to June 30, 1977, so that the memorandum would run concurrently with the new Unit 3 collective bargaining contract. The new contract, which became effective on July 1, 1976, has an expiration date of June 30, 1977 (Tr. 46).

The HGEA redrafted its memorandum of understanding, incorporating the proposed expiration date of June 30, 1977 (HGEA Ex. 1), and resubmitted the document to the City for signature in April, 1976 (Tr. 46).

In May, 1976, upon inquiry as to the status of the amended memorandum, the HGEA was informed that the City had not yet signed it (Tr. 46).

In June, 1976, in response to a second inquiry regarding the status of the memorandum, the City indicated that it might not sign the memorandum because it considered the matters covered in the memorandum to be within the area of management prerogatives. As such, in the City's view, consultation rather than negotiation was required, and the terms of the agreement could be implemented without reduction to writing (Tr. 47). The HGEA, on the other hand, contended that reduction of the agreement to writing was necessary because the matters covered by the agreement constituted terms and conditions of employment. The HGEA then requested a written indication of whether or not the City would sign the memorandum of understanding (Tr. 48).

The City's response was contained in a letter to the HGEA, dated June 22, 1976, signed by Director of Finance Sakai and approved by Director of Civil Service Boranian (Exhibit A, attached to Board Ex. 1). The letter pointed out that liquor inspectors were required to use their personal vehicles to accomplish work assignments. With respect to the two-way radios, it stated that the City would be responsible for repair of the hole caused by removal of the antenna, and authorized up to \$30 for such repair. The letter also stated that the procedures and amount would be in effect from January 1, 1976, to June 30, 1977; after that period, it suggested that the matter be included in the appropriate collective bargaining contract. The letter of June 22, 1976, constituted the first formal notification to the HGEA that the City would not execute the amended memorandum of understanding (Tr. 49).

On July 28, 1976, the HGEA filed this prohibited practice charge against the City. In its complaint, the HGEA alleged that the City had violated §89-9(a), HRS. Such violation allegedly occurred on June 22, 1976, when the City, through its letter, unilaterally imposed a new term and condition of employment (e.g., the installation of two-way radios in the investigators' personal vehicles) upon the liquor control investigators, and refused to negotiate and to reduce to writing any agreement reached on the matter.

In its answer to the prohibited practice charge (Board Ex. 4), the City denied that it was required to negotiate with the HGEA on the installation of two-way radios. It contended that it was prohibited from doing so by §89-9(d), HRS. The City further contended that the complaint had not been filed in a timely manner pursuant to §3.02(a), HPERB Rules and Regulations; and it urged the Board to defer the subject charge to arbitration.

CONCLUSIONS OF LAW

The central issue in this case is whether or not the City's refusal to negotiate with the union on the installation, use and removal of two-way radios in the liquor control investigators' personal vehicles is violative of §89-9(a), HRS. However, before turning to the merits of the dispute, the Board must first resolve two threshold issues raised by the City in its answer.

The first question is whether or not complainant HGEA filed its complaint with the Board in a timely manner pursuant to §3.02(a), HPERB Rules and Regulations, which states:

"3.02 Complaint. (a) WHO MAY FILE; TIME LIMITATION. A complaint that any public employer, public employee or employee organization has engaged in any prohibited act may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation." (emphasis added)

The City contends that the alleged unilateral imposition of a new term and condition of employment occurred in January, 1976, when the City began installing two-way radios in the investigators' personal vehicles. This contention is based on the argument that, at the time of installation, it was obvious that management had decided to install the radios and did not find it necessary to reduce any agreement on this matter to writing.

However, the Board is of the opinion that the events in January, 1976, did not form the basis of this prohibited practice charge for the following reasons:

1. The City halted its installation efforts when objections were raised by the investigators and the union.

2. The City failed to repudiate HGEA's memorandum of understanding immediately after its transmittal to the City for execution. In fact, the City even suggested amending the expiration date of the memorandum; and such amendment was made by the HGEA.
3. At no time prior to June 22, 1976, did the City provide any written statement to the HGEA of its intention not to negotiate over the installation of two-way radios, or to sign any agreement reached on the matter.

Accordingly, this Board finds that the City's actions in June, 1976, were within the ninety day limitation period, and HGEA's complaint was timely filed.

The second question is whether this dispute should be deferred to arbitration. The City's position is that deferral is appropriate because the dispute arises from the interpretation and application of Article II (Personnel Policy Changes) of the Unit 3 contract. This provision deals with the City's duty of consulting with the union on matters involving employee relations. The HGEA, on the other hand, argues that this dispute involves the statutory question of whether the installation, use, and removal of the two-way radios constitutes a term and condition of employment subject to negotiation under §89-9(a), HRS. Because no specific contractual provision requires interpretation, the union asks the Board to take jurisdiction over the case.

The Board agrees that the dispute involves an interpretation of §89-9, HRS, rather than any specific provision of the unit 3 collective bargaining agreement; and deferral is inappropriate.

Previously, in HPERB case No. CE-05-4, Decision 22 (October 24, 1972), this Board stated:

"It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." (emphasis added)

The Board's policy of deferring contractual issues to arbitration is similar to that followed under federal labor law, wherein deferral is favored when a substantial claim of contractual privilege is involved. Joseph Schlitz Brewing Co., 175 NLRB 23, 70 LRRM 1472 (1969); Collyer Insulated Wire, 192 NLRB 150, 77 LRRM 1931 (1971). Both the Schlitz and the Collyer cases dealt with situations where specific contractual provisions covered the subject of the employers' unilateral actions. In Schlitz, the core of the dispute was whether the employer's unilateral act of shutting down certain machines during relief periods contravened a "past practices" contract provision dealing with relief periods, as well as two other contract provisions. In Collyer, the contract contained a specific provision on wage rate changes, which covered the employer's unilateral act of changing the incentive and non-incentive wage rates.

However, where the employer's action involves a subject not covered by the contract, deferral is not appropriate. Cloverleaf Division of Adams Dairy Co., 147 NLRB 133, 156 LRRM 1321 (1964). In that case, the NLRB refused to defer to arbitration a charge that the employer had unilaterally subcontracted out its driver-salesmen's largest account, reasoning at 1323:

"The contract subjects to its arbitration procedures only such disputes as concern 'the interpretation and application of the terms of this Agreement.' But in the instant case, the precise Union claim, which is the subject of the complaint before us, does not relate to the meaning of any established term or condition of the contract. It is directed instead at Respondent's denial to it of a statutory right guaranteed by Section 8(d) of the Act namely, the right to be notified and consulted in advance, and to be given an opportunity to bargain about substantial changes in the working conditions of unit employees in respects not covered by the contract. As the particular dispute between the Union and Respondent now before us thus involves basically a disagreement over statutory rather than contractual obligations, the disposition of the controversy is quite clearly within the competency of the Board, and not of an arbitrator who would be without authority to grant the union the particular redress it seeks. . . ." 56 LRRM at 1323.

In the instant case, there is no provision in the unit 3 contract which specifically covers the use of two-way radios. Consequently, there can be no dispute over contractual rights and obligations. Instead, the question here is whether the installation, use and removal of the radios violates statutory rights under §89-9, HRS. The Board finds that deferral to arbitration is therefore unwarranted, and it now proceeds to the merits of this controversy.

The final issue requiring the Board's determination is whether or not the City has violated §89-9(a), HRS, by refusing to negotiate with the union on the installation, use and removal of two-way radios in the liquor control investigator's personal vehicles. The HGEA takes the position that the City's refusal to sign its memorandum of understanding, evidenced by the June 22, 1976, letter to the union, constitutes a refusal to negotiate over a term and condition of employment, as required by §89-9(a), HRS. The City maintains that

the subject of the two-way radios does not require negotiation pursuant to §89-9(a), but requires only consultation pursuant to §89-9(c) and §89-9(d), HRS. In essence, the City has interposed its "management rights" defense to the HGEA's claim that the subject is negotiable. After considering the balance which must be struck between management prerogatives and employee rights under Chapter 89, the Board concludes that the proper balance in this case weighs in the employees' favor.

In earlier decisions, the Board evaluated the relationship between various subsections of §89-9, HRS, in order to establish the proper balance between employer and employee interests. It emphasized:

"In the Board's initial decision regarding the scope of bargaining, it held that §89-9(a), (c) and (d), HRS, must be considered in relation to each other. It was of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in §89-9(d), HRS. . .

* * *

. . . This Board, appreciating that it was necessary to achieve a balance between the employer's and the employee's interests to effectuate the policy of the Act expressed the view that while §89-9(d), HRS, should not be narrowly construed so as to negate the purpose of bargaining, concomittantly, said section should not be too liberally construed so as to divest the employer of its rights protected thereunder. . ." HPERB Case CE-02-17, Decision 62 (July 14, 1975).

The installation, use and removal of two-way radios must therefore be considered in light of §89-9(a) and §89-9(d), HRS, to determine whether or not the subject constitutes a term and condition of employment, and whether or not agreement on that subject interferes with management rights.

Safety requirements are generally considered terms and conditions of employment under the National Labor Relations Act. Similarly, insofar as the two-way radios were ostensibly installed in the investigators' private vehicles for safety reasons, the installation is comparable to such safety requirements as safety glasses, Metalcraft Products Co., 58 LA 925 (1972), or safety shoes, U.S. Plywood-Champion Papers, 58 LA 544 (1972), costs of which are usually borne by the employer. The operating procedures governing the use of the two-way radio system, are likewise analogous to safety rules, NLRB v. Gulf Power Co., 384 F.2d 822, 66 LRRM 2501 (1967). As such, the installation, use and removal of the two-way radio system is a negotiable term and condition of employment under §89-9(a), HRS, except to the extent its negotiability is limited by §89-9(d), HRS.

The correct balance between employee rights and management prerogatives is set forth in the language of §89-9(d), HRS, which provides in pertinent part:

"The employer and the exclusive representative shall not agree to any proposal . . . which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies." (emphasis added)

An otherwise negotiable subject is rendered non-negotiable only when it interferes with management rights. This was the holding in HPERB Case DR-05-5, Decision 26

January 12, 1973). There the Board held the HSTA's proposals on workload and preparation periods to be non-negotiable because of their resultant interference with the DOE's management rights:

" . . . [W]hile the work load proposal is admittedly a significant term and condition of employment, we must determine, nevertheless, whether the proposal so interferes with management's right to establish educational policy and operate the school system efficiently as to render it non-negotiable under Section 89-9(d).

* * *

. . . The effect of the work load proposal, in the instant case, would be to force the DOE to hire personnel and expand facilities regardless of its rights and duty to maintain efficiency of operations. . . Other consequences that may ensue if the DOE is required to implement the work load proposal would run counter to the mission of the DOE, i.e., to provide the best educational system possible for the children of Hawaii. . .

* * *

Therefore, it is our opinion that the specific proposal on work load which is here at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with DOE's responsibility to establish policy for the operation of the school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations." (emphasis added)

In this case, however, nothing in the record indicates how the City's management rights will be interfered with through mutual agreement on the installation of two-way radios, and reduction of that agreement to writing. In fact, the Board fails to see how the installation of equipment in employees' personal vehicles could be an exclusive management prerogative

under §89-9(d), HRS, when such questions as responsibility for installation and removal costs, or location of the equipment in the vehicles, are involved.

Most of the City's testimony on operating procedures governing the use of two-way radios attempted to show the overall efficiency of the radio system. Yet the City failed to establish how agreement on this subject would interfere with efficient liquor control operations. Both the City's and the HGEA's testimony tended instead to show that mutual agreement on this matter improved the efficiency of operations by removing the causes of employee dissatisfaction over the system.

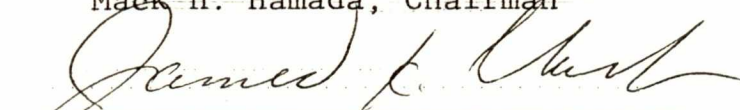
The Board therefore finds that the installation of two-way radios does constitute a term and condition of employment under §89-9(a), HRS; and the City is not precluded from negotiating on this matter by the provisions of §89-9(d), HRS.

ORDER

In view of the foregoing, the Board hereby orders the City to comply with the requirements of §89-9(a), HRS. Accordingly, the City is ordered to negotiate with the HGEA on the installation, use and removal of two-way radios in the liquor investigators' personal vehicles; and to reduce to writing any agreement reached on this matter.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member

Dated: January 7, 1977

Honolulu, Hawaii