

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
JAHNE HUPY,	)	Case No. <u>CE-09-23</u>
	)	
Complainant,	)	Decision No. <u>77</u>
	)	
and	)	
	)	
GEORGE R. ARIYOSHI, Governor,	)	
GEORGE A. YUEN, Director of	)	
Department of Health, and	)	
DONALD BOTELHO, Director of	)	
the Department of Personnel	)	
Services,	)	
	)	
Respondents.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER

The prohibited practice charges which are the subject of this decision were filed by Hawaii Nurses Association (hereafter HNA) as a representative of Complainant Jahne Hupy on November 28, 1975.

The Petition herein charges that the employer violated Subsections 89-13(a)(1), (3), (5), (7) and (8), Hawaii Revised Statutes (hereafter HRS), and Articles 1, 2, 6, 7 and 22 of the collective bargaining agreement for Unit 9 (registered professional nurses) by unilaterally taking the following actions without consulting with or receiving the agreement of the HNA:

1. withdrawing the action to appoint Marie Freeman in Position No. 20739 (director of nursing at Samuel Mahelona Hospital);
2. "announcing and posting for in the same position";
3. maintaining Marie Freeman in a limited term appointment in this position.

In their answer, the respondents deny engaging in any prohibited practice and also assert that Position No. 20739 is excluded from collective bargaining and hence is not protected by either Chapter 89, HRS, or the Unit 9 contract.

A hearing on the complaint was scheduled to commence on December 29, 1975. However, because of numerous delays, the hearing actually commenced on May 24, 1976, and was also held on May 27, May 28 and June 4, 1976. By Order No. 75, dated September 30, 1976, this Board agreed to hold its decision in the instant case in abeyance until it reached a decision in Case No. RA-09-26. The Board issued its decision in Case No. RA-09-26 in Decision No. 75, dated March 10, 1977. The brief from counsel for the Complainant was submitted on April 27, 1977.

Based upon the entire record herein, the Board makes the following findings of facts, conclusions of law, and order.

#### FINDINGS OF FACT

The HNA is the exclusive representative of collective bargaining unit 9 and filed the Petition herein as a representative of Complainant Jahne Hupy.

The Respondents are public employers as that term is defined in Subsection 89-2(9).

Complainant Jahne Hupy is a public employee as that term is defined in Subsection 89-2(17), HRS. She is, and was at all times relevant, a registered professional nurse employed by the Department of Health's School Health Branch on the Island of Kauai. (II Tr. 280) She is a member of collective bargaining unit 9 and is active in a leadership role in the HNA. (II Tr. 281-282, 287)

She was approached by Richard Johnston, County/State Hospitals Systems administrator for Kauai, to see if she would be interested in filling Position 20739, director of nursing at Samuel Mahelona Hospital on Kauai. (I Tr. 27) She applied for promotion to the position in June, 1975. (I Tr. 28)

At the time Miss Hupy wrote her application, Position No. 20739 was classified as RPN VII, Salary Range (hereafter SR) 26.

After the posting of the position in June, 1975, at the SR 26 level, both Jahne Hupy and Marie Freeman applied for the position in June, 1975. There were procedural irregularities with both applications; i.e., both were untimely filed, but both were accepted by the Department of Health.

The position was reallocated to an RPN VI, SR 24, by the Department of Personnel Services on September 5, 1975.

The HNA, Jahne Hupy and other nurses on Kauai protested the downgrading of the position. (II Tr. 288, 268; I Tr. 141-142, 49)

Marie Freeman, at the time she applied for the position at Samuel Mahelona Hospital, was the director of nursing at Ka'u Hospital. Ka'u Hospital is part of the County/State Hospitals System. She had previously been administrator at Lanai Hospital. She was a member of the HNA. (I Tr. 133, 141-143)

An HNA representative attempted to dissuade Mrs. Freeman from applying for the position because the HNA did not want the position filled at the SR 24 level. (I Tr. 141-142) This conversation with the HNA representative made Mrs. Freeman feel troubled and threatened. (I Tr. 142) At a convention they were both attending at the Ilikai Hotel in September, she sought the advice of Department of Health Deputy Henry Thompson. He asked her whether she wanted the job. When



she indicated she did, he said, "Well, try for it." (I Tr. 142) At the time of this conversation, Mrs. Freeman's application had already been submitted. (I Tr. 131, 140) There are no facts in the record of any explicit or implicit commitment of the position to Mrs. Freeman until after her interview when she was formally selected for the position.

Although he ultimately selected Mrs. Freeman for the post, a selection which gave rise to the first of the three charges in this case, this Board is of the opinion that Richard Johnston appeared for some time to favor Jahne Hupy for the position and well may have given her the impression that she was his choice for the job. (II Tr. 286, 221-222, 268, 269; I Tr. 43, 26, 27)

Miss Hupy displayed reluctance to take the position at SR 24. Petitioner's Exhibit 9. (I Tr. 50; II Tr. 288) However, she did hand Mr. Johnston a letter of acceptance on September 29, 1975. Petitioner's Exhibit 11. It was at that time he informed her he had selected Marie Freeman. Petitioner's Exhibit 13.

Mr. Johnston appeared to be dragging his feet on filling the position. This fact would be consistent with his own concern over the downgrading of the position, and tacit backing of the HNA protest over the reallocation. It does not indicate an anti-union or anti-Jahne Hupy attitude on his part.

At Volume I of the Transcript on page 43, Counsel for the HNA asks Mr. Johnston:

"Q: Isn't it a fact, Mr. Johnston, that you told Jahne Hupy, 'Those buggers in Honolulu cut a deal' to wit, that for the Director of Nursing position [at Samuel Mahelona Hospital] there would be no re-examination provided the RPN 5 position would likewise not be reexamined and they would remain at the SR level, isn't that correct?"

"A: Yes."

Mr. Johnston selected Marie Freeman for the position on the weekend of September 27, 1975. (I Tr. 62)

The appointment was made subject to the approval of Mr. Henry Thompson, deputy director of the Department of Health. (I Tr. 154)

After Mrs. Freeman had been selected, she was placed in the subject position as an RPN VI, SR 24, on October 20, 1975, on a non-competitive promotional basis. The position had, as stated earlier, been advertised at the SR 26 level.

After the appointment on October 20, 1975, the HNA continued to have and express serious concerns about the reallocation of Position No. 20739 from SR 26 to SR 24.

On November 7, 1975, a meeting was held concerning the matter. Those present were Mr. Takahashi, counsel for the HNA; Mrs. Christine Taylor, associate director of the HNA; Mr. Rikio Tanji, Hospitals Executive Officer for the County/State Hospitals Division, Department of Health, and Mr. Stanley Wild, county/state hospitals systems personnel management specialist. (II Tr. 340) At the meeting, the HNA representatives were apprised of the Department of Health's intention to investigate vacating the position because of the irregularity in filling it at the SR 24 level while having advertised it at the SR 26 level. (II Tr. 340-341)

As a result of said meeting, a letter was written by Mr. Tanji to the Director of Personnel Services. Petitioner's Exhibit 32. The letter indicates that the November 7 meeting was a rather probing one going into, among other things, Mrs. Freeman's qualifications to apply for the position.

On November 14, 1975, George Yuen, Director of Health, State of Hawaii, wrote a letter to Christine Taylor of the HNA. Petitioner's Exhibit 34:



"This will acknowledge receipt of your letter of appeal dated November 5, 1975 and contains the required decision for Step 3 on the grievance submitted by the Hawaii Nurses Association on behalf of Mrs. Jahne Hupy, Registered Professional Nurse IV, a member of the School Health Branch, Department of Health.

We have reviewed the basis for the alleged violations of your Contract, and we find the cited articles of the Agreement between the State of Hawaii and the Hawaii Nurses Association do not apply in this case since the position referred to is an excluded position, not covered by the Collective Bargaining law.

However, your request was discussed informally by my representative with you on November 7, 1975. Based on that meeting, we requested an opinion from the Department of Personnel Services of our selection of Mrs. Marie Freeman for the position of the Director of Nursing, Registered Professional Nurse VI, SR-24, Position Number 20739 at Samuel Mahelona Memorial Hospital. That opinion is contained in the attachment to this letter.

Based on that opinion, and after carefully considering all the factors involved, we have decided to take the following remedial action.

- 1.) We have withdrawn the action to appoint Mrs. Marie Freeman to an initial probationary appointment as Registered Professional Nurse VI, SR-24, Position Number 20739 at Samuel Mahelona Memorial Hospital.
- 2.) We will take action to announce the vacancy of this position at the Registered Professional Nurse VI, SR-24 level through the Department of Health. A copy of this announcement stating requirements and criteria for appointment will be provided to you.
- 3.) Pending the completion of this recruitment effort, we will place Mrs. Marie Freeman in a Limited Term Appointment and status to provide coverage for the Director of Nursing position at Samuel Mahelona Memorial Hospital.

We feel that this action will serve to resolve the procedural problems described in the grievance and mentioned in the attachment."

The placement of Mrs. Freeman in the position on a limited term appointment is an unusual use of the limited term appointment but is consistent with the position made rather clear to this Board throughout the hearing that the appointing authorities deemed Marie Freeman to be the person best suited for the job. It was not shown that this preference was predicated on any anti-union animus on the part of the employer. Thus, while the record may support an employer accommodation of Mrs. Freeman, it does not support a finding of anti-union animus or discrimination against Jahne Hupy or any improper conduct toward her caused by the exercise of any rights she possesses by virtue of the Unit 9 contract or the provisions of Chapter 89, HRS.

The position was readvertised at the SR 24 level on November 18, 1975. Petitioner's Exhibit 43. Although the advertising at the lower level opened the opportunity of applying for the job to a larger number of nurses, only Mrs. Freeman and Miss Hupy applied.

On November 26, 1975, Jahne Hupy applied for the position. Petitioner's Exhibit 44. She was interviewed on December 26, 1975. Petitioner's Exhibit 45.

Marie Freeman was interviewed on January 8, 1976. Petitioner's Exhibit 46. On January 16, 1976, Richard Johnston wrote Jahne Hupy telling her he had selected another candidate for the position, effective January 16, 1976. The job was given to Marie Freeman.

The position of Director of Nursing at Samuel Mahelona Hospital is and was at all times excluded from collective bargaining unit 9. HPERB Decision No. 75, March 10, 1977.



### CONCLUSIONS OF LAW

The Board has reviewed the entire record as though a case of discrimination had been properly pleaded in this case, even though the pleadings do not technically allege discrimination. Despite the shortcomings of the pleadings, the Board felt that liberality in this regard would satisfy better the purposes of Chapter 89, HRS, than would a strict construction of the petition.

As a threshold matter, it should be noted that the fact that the subject position is an excluded one would not have been an adequate defense for the employers if they had discriminated against Jahne Hupy because of the exercise of protected rights on her part so long as she was an employee under Chapter 89, HRS. This is so even though she was a candidate or applicant for an excluded position. NLRB v. Bell Aircraft Corporation, 206 F 2d 235, 32 LRRM 2551 (2nd Cir. 1953); Pacific American Shipowners Assn., 29 LRRM 1376 (NLRB 1972).

As this Board indicated in its Findings of Fact, there is no support in the record for the conclusion that Marie Freeman was selected over Jahne Hupy because of the exercise of any protected right on the part of Jahne Hupy. One could conclude reasonably from the record herein that Jahne Hupy was preferred by Richard Johnston while Honolulu based officials of the Department of Health preferred Marie Freeman. However, there is no evidence that any Honolulu based official acted out of anti-union animus or that there was any nexus between the selection of Marie Freeman or the failure to select Jahne Hupy and proscribed employer conduct under the collective bargaining law or contract.



Mr. Johnston's interview notes show that Mrs. Freeman had prior director of nursing experience, but that Jahne Hupy had none. This factor appeared to loom large in the selection.

In any event, there is not sufficient evidentiary support for the proposition that the failure to select Jahne Hupy was a violation of any of the subparts of Section 89-13(a), HRS, or the Unit 9 contract.

The HNA only represents employees in Unit 9. Section 89-8, HRS. The duty of consultation imposed by Section 89-9(c), HRS, pertains only to "matters affecting employee relations." Individuals occupying excluded positions are not "employees" within the meaning of Chapter 89, HRS. Section 89-2(7), HRS. The manner and means used by the employer to fill excluded positions are not subject to any right, authority, or responsibility of an exclusive representative in the absence of discrimination or other prohibited practice against employees represented by the exclusive representative. No discrimination or other prohibited practice was made out in this case.

Thus, in turning to the charges actually pleaded in the petition respecting the duty to consult with the HNA, this Board is of the opinion that the public employer was under no duty whatsoever to negotiate or consult with the HNA concerning advertising the excluded position, vacating the excluded position, or filling the excluded position.

It is relevant to the question of whether a duty to consult the HNA would have been present if the subject position had been an included one to review this Board's Decision 74 (January 26, 1977), wherein it was stated:

"Of course, even if Maui County has no duty to negotiate with the HFFA over the creation of a new firefighter class, this does not mean that the County lacks

any additional obligations to the Union pursuant to §89-9, HRS. Section 89-9(c), HRS, sets forth the following duty of consultation:

c) 'Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.'  
(Emphasis added.)

Whether the County should have consulted with the Union over the subject classification matter requires a determination that the subject falls within the prescriptions of §89-9(c), HRS, since consultation is not required for each and every employer action. Consultation is, however, required for major or 'substantial and critical' matters affecting employee relations, as pointed out by this Board in HPERB Case No. CE-07-6, Decision 37 (October 9, 1973), and HPERB Case No. CE-07-8, Decision 54 (September 3, 1974)." (Emphasis in last paragraph added.)

On the facts developed in the record of this case, the decision to rescind an appointment to one nursing position, readvertise the position properly, and fill the interim vacancy created by the rescission, do not constitute "substantial and critical" matters affecting employee relations and hence would not require consultation under Subsection 89-9(c), HRS.

It is the employers' position in this case that consultation took place in any event. Chiefly relied upon is Mr. Yuen's letter of November 14, 1975, to Mrs. Taylor. This letter standing alone merely gives the HNA notice of impending employer action. Consultation ordinarily requires more than mere notice. Consultation contemplates asking for




(and listening to) the advice or opinion of the union; it contemplates, short of requiring negotiation, deliberating together and comparing views. The purpose of consultation obviously is to require management to hear union input even on matters about which unions are not able to negotiate. Although the letter from Mr. Yuen falls short of consultation, the record discloses a meeting between HNA representatives and Department of Health representatives on the issues sub judice. There even is an allusion to a meeting with Mr. Susumu Ono of the Governor's Office. If the employer actions in question had been of a major and critical nature so as to require consultation, the employer would have had to put on additional evidence to convince the Board that consultation took place. One can do no more than reasonably infer that it did from the record in this case, which is an insufficient basis upon which to make a sound finding of fact; in cases where the duty to consult does exist, the record should be more explicit than it is herein. The inadequacy of evidence on this point is, however, not significant because there was no duty to consult.


ORDER

The subject prohibited practice charges are dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
John E. Milligan, Board Member

  
James K. Clark, Board Member

Dated: May 6, 1977

Honolulu, Hawaii