

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

|                                |   |                          |
|--------------------------------|---|--------------------------|
| In the Matter of               | ) |                          |
|                                | ) |                          |
| GEORGE R. ARIYOSHI, Governor   | ) | Case No. <u>DR-11-29</u> |
| of the State of Hawaii;        | ) |                          |
| FRANK F. FASI, Mayor of the    | ) | Decision No. <u>81</u>   |
| City and County of Honolulu;   | ) |                          |
| HERBERT MATAYOSHI, Mayor of    | ) |                          |
| the County of Hawaii; ELMER F. | ) |                          |
| CRAVALHO, Mayor of the County  | ) |                          |
| of Maui; EDUARDO E. MALAPIT,   | ) |                          |
| Mayor of the County of Kauai,  | ) |                          |
|                                | ) |                          |
| Petitioners,                   | ) |                          |
|                                | ) |                          |
| and                            | ) |                          |
|                                | ) |                          |
| HAWAII FIRE FIGHTERS           | ) |                          |
| ASSOCIATION, LOCAL 1463,       | ) |                          |
| IAFF, AFL-CIO,                 | ) |                          |
|                                | ) |                          |
| Intervenor.                    | ) |                          |
|                                | ) |                          |

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECLARATORY RULING

Petitioners, public employers George R. Ariyoshi, Frank F. Fasi, Herbert Matayoshi, Elmer F. Cravalho, and Eduardo E. Malapit (hereafter Petitioners or Employers) filed the subject declaratory ruling petition with this Board, on July 19, 1977. Petitioners seek a declaration of whether, pursuant to Subsection 89-11, Hawaii Revised Statutes (hereafter HRS), the Hawaii Fire Fighters Association (hereafter HFFA) can lawfully withdraw matters agreed upon in negotiations with petitioners and change issues which they had previously certified were at impasse. Petitioners also ask this Board to determine whether the parties are currently at impasse as that term is defined in Chapter 89, HRS.

This Board granted the HFFA's Petition to Intervene on July 26, 1977. After due notice to the parties, and the public, a hearing was set for July 29, 1977. On July 28, 1977, the Petitioners moved for a Continuance Pending Ratification, stating that agreement on a new collective bargaining contract for the fiscal biennium 1977-1979 had been reached by the parties. This motion was granted by this Board on July 29, 1977.

Ratification having failed, this Board on August 4, 1977, published notice of its intent to hold a hearing on the subject petition.

The hearing on this petition, consolidated with a hearing on a prohibited practice charge (Case No. CU-11-20, Decision No. 82), was held on August 23, 1977.

All parties in the instant case were present and participated in the hearing.

#### FINDINGS OF FACT

The Petitioners and the HFFA stipulated to the following facts, which are adopted by the Board.

The Petitioners are public employers as defined in Subsection 89-2(9), HRS.

Intervenor HFFA is the exclusive representative, as defined in Subsection 89-2(10), HRS, of all State and county employees who are in bargaining unit 11 (firefighters).

This Board adopts, in its entirety, the written stipulation of facts submitted by the Petitioners and the HFFA.

It is hereby stipulated between Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO, by its attorney Rogers M. Ikenaga, and the Petitioners George R. Ariyoshi, Governor of the State of Hawaii; Frank F. Fasi, Mayor of the City and County of



Honolulu; Herbert Matayoshi, Mayor of the County of Hawaii; Elmer F. Cravalho, Mayor of the County of Maui, and Eduardo E. Malapit, Mayor of the County of Kauai, by their undersigned attorneys, that the following facts are admitted as evidence and shall become part of the record in the above entitled matter:

1. On October 5, 1976 the Employer and the Union began negotiations for a new contract for Bargaining Unit 11 Fire Fighters for the fiscal biennium 1977-78 and 1978-79, pursuant to the section of Duration of the Unit 11 collective bargaining agreement, which expired on June 30, 1977 and which was extended by mutual agreement until July 31, 1977.

2. After several negotiation sessions, the parties were unable to achieve a settlement. No ground rules were established for these negotiations. On April 27, 1977, the Union filed a Notice of Impasse before the Hawaii Public Employment Relations Board (hereinafter HPERB). See Exhibit 1. On May 4, 1977 the Union amended its Notice of Impasse. See Exhibit 2. The only issues at impasse involved the following subjects:

- a. Section 18, Hours of Work
- b. Section 19, Overtime
- c. Section 21, Night Shift Differential
- d. Section 23, Temporary Assignments and Special Assignments
- e. Section 34-A, Annual Physical Examinations

Wages were not certified as an issue in dispute, according to the amended Union notice. The Notice of Impasse filed by the Union certified that the statements made regarding issues at impasse were made in good faith. This good faith certification was signed by Mr. Francis Kennedy, Jr., business agent for the Union.

3. After the filing of the Notice of Impasse and the certification of the issues at impasse by the HFFA, HPERB found that an impasse existed.

4. On May 9, 1977, HPERB issued its Finding of Impasse and Appointment of a Mediator in Case No. F-11-29 (sic). HPERB appointed Mr. Gayle Wineriter of the Federal Mediation and Conciliation Service to serve as Mediator. Throughout the mediation process, the issue of wages was never discussed or mediated.

5. After the conclusion of mediation, HPERB then appointed a Fact Finding Board consisting of Mr. Stanley Ling, Chairman; Mr. Donald

Wolfhope, Member, and Ms. Joyce Najita, Member. After a full opportunity to submit briefs and exhibits, call witnesses and present oral arguments, the fact-finding panel issued its report on June 11, 1977. At no time during the fact-finding process was the issue of wages an issue for fact finding before the panel. No evidence was presented by either side concerning any proposal or counter-proposal on wages. No facts, exhibits, or testimony were ever presented on wages. The fact-finding report was accepted in its entirety by the Employer. The Union completely rejected all recommendations of the panel's report. See Exhibit 3. The report was made public. The parties could not agree to refer the dispute to final and binding arbitration.

6. The Public Employers accepted all the recommendations of the fact-finding panel and indicated that they were not prepared to submit the issues at impasse to final and binding arbitration.

7. In spite of the fact that wages were not certified as an issue at impasse, nor were wages subject to mediation or fact finding, on June 17, 1977 in a letter from Francis Kennedy, Jr., business manager, to Mr. James Takushi, Chief Negotiator for the State of Hawaii, the Hawaii Fire Fighters Association withdrew its tentative agreement to all matters discussed relative to the new agreement and further withdrew its proposals on issues to which it certified an impasse had existed. In this communication the Union made a new proposal which reopened the issue of wages by proposing the wage increase inconsistent with the tentative agreement previously reached with the Public Employers prior to impasse.

8. At no time prior to the issuance of this letter was any attempt made by the Union to confer with the Employer to re-open negotiations and initiate further negotiations on wages. At no time prior the the (sic) issuance of the letter of withdrawal did the Union or its representatives consult, discuss, bargain or negotiate with the Employer concerning the issuance of said letter and the withdrawals contained therein. At no time subsequent to the issuance of said letter did the Union rescind its letter of June 17, 1977 or any of the matters contained therein.

9. The Union also issued public statements that they believed that wages was the only issue now before the parties. See Exhibits 4a, 4b, 4c and 4d. They were no longer negotiating the five items previously certified to be at impasse. These statements have never been modified or retracted.



This Board also adopts the addition to the written stipulation, read into the record by Deputy Attorney General Kumabe:

10. In addition, the union has sought to and continues to seek to negotiate wages and other issues not stated in the amended notice of impasse filed with the Hawaii Public Employment Relations Board since the issuance of the aforesaid letter of June 17, 1977;

The Board also finds, based upon an oral stipulation of the parties, that the wage proposal over which the parties had tentative agreement at the time the impasse was declared to exist was different from the wage proposal later made by the employer, accepted by the Union negotiators, but rejected by the unit members in the ratification vote.

The aforementioned letter dated June 17, 1977, from Francis F. Kennedy, Business Manager of HFFA, to James Takushi, chief spokesman for the employers, is as follows:

"Dear Mr. Takushi:

The Hawaii Fire Fighters Association, exclusive representative of the employees of Bargaining Unit 11, does hereby withdraw its tentative agreement on all matters discussed relative to an agreement to succeed our existing agreement which expires on June 30, 1977. We do hereby also withdraw our proposals on Hours of Work, Overtime, Night Shift Differential, Temporary and Special Assignments and Physical Examinations.

In lieu of the abovementioned matters and proposals, we do hereby present the following counter-proposal to amend the existing agreement:

Effective July 1, 1977, the existing collective bargaining agreement covering employees of Unit 11 shall be renewed with the following amendments:

Section 27. Wages shall be amended to provide for an across the board wage increase of 7% effective July 1, 1977 and a subsequent across the board wage increase of 7% effective July 1, 1978.

Section 42. Duration shall be amended to provide for an effective date of July 1, 1977 and an expiration date of June 30, 1979. This Section shall be further amended to provide for renewal in accordance with statutes unless written notice by either party during the period August 1, 1978 to August 31, 1978 is given to the other party of its desire to modify, amend or terminate the Agreement.

In addition to the above, we do hereby propose to extend the existing collective bargaining agreement covering employees of Unit 11 from its present expiration date of June 30, 1977 to and including August 31, 1977 or until a successor agreement is reached, whichever comes first.

We further propose that the public Employer make a counter-proposal with respect to a successor agreement which, if unacceptable to the Hawaii Fire Fighters Association, shall be submitted, together with our counter-proposal presented above, to an arbitrator for a final and binding decision subject only to legislative approval as provided by law.

We further propose that the public Employer select any experienced interest arbitrator it desires for this purpose from the official active roster of the American Arbitration Association. The arbitrator so selected by the Employer shall base his decision, after a hearing, on the criteria for such decisions contained in Senate Bill 237 (1977 Session).

We propose further that the public Employer chose whether the method of arbitration shall be final-offer or conventional arbitration.

Finally we propose that all expenses and cost incurred by either party in the arbitration proceeding shall be borne by the party incurring the cost or expense, except that all costs and expenses of the arbitrator shall be borne equally by the parties.

Very truly yours,

Francis Kennedy, Jr.  
Business Manager"



## CONCLUSIONS OF LAW

In their petition for declaratory ruling, the public employers ask for:

"... a declaration of its rights as to whether pursuant to Section 89-11, Hawaii Revised Statutes, after rejecting the fact-finding panel's recommendations, and indicating it would not submit unresolved issues to arbitration, the Hawaii Fire Fighters Association can lawfully withdraw matters agreed upon and change the issues which they had previously certified were in dispute; further, Petitioners seek a declaration as to whether the parties are currently at impasse."

The position of the Public Employers is as follows:

"Petitioners contend that Section 89-11, Hawaii Revised Statutes, prohibits an exclusive representative from withdrawing its agreement on issues resolved and changing the issues previously submitted as unresolved to the fact-finding panel. The effect of such an act, if found lawful under the statutes, would require the parties to pursue the collective bargaining process from step one with no issues being resolved at the present time.

Petitioners request that this Board issue an order finding that the subject withdrawal is not lawful and that the exclusive representative cannot reopen the issue of wages.

In the alternate, if this Board finds the subject withdrawal was lawful, Petitioners request that this Board order the parties to proceed to resolve differences, and failing such, to proceed through mediation, fact-finding and arbitration prior to the initiation of any procedures for a strike."

This Board holds that the action of the HFFA in withdrawing matters tentatively agreed upon during negotiations and in withdrawing the issues over which this Board had declared the parties to be at impasse were not unlawful. The Board further is of the opinion that an impasse, as that term is used in Sections 89-11 and 89-12, HRS, exists.

This holding, particularly with reference to the withdrawal of the five issues over which this Board found the parties were at impasse, may appear, at first blush, to totally

vitiate the impasse resolution mechanisms contained in Section 89-11, HRS.\* However, to hold otherwise would result in converting these mechanisms into a cement-like process which would

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\*Subsection 89-11(b), HRS, states:

"A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth an impasse procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement. In the absence of such a procedure, either party may request the assistance of the board by submitting to the board and to the other party to the dispute a clear, concise statement of each issue on which an impasse has been reached together with a certificate as to the good faith of the statement and the contents therein. The board, on its own motion, may determine that an impasse exists on any matter in a dispute. If the board determines on its own motion that an impasse exists, it may render assistance by notifying both parties to the dispute of its intent.

The board shall render assistance to resolve the impasse according to the following schedule:

- (1) Mediation. Assist the parties in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of the public, from a list of qualified persons maintained by the board, within three days after the date of the impasse, which shall be deemed to be the day on which notification is received or a determination is made that an impasse exists.
- (2) Fact-finding. If the dispute continues fifteen days after the date of the impasse, the board shall appoint, within three days, a fact-finding board of not more than three members, representative of the public, from a list of qualified persons maintained by the board. The fact-finding board, shall, in addition to powers delegated to it by the public employment relations board, have the power to make recommendations for the resolution of the dispute. The fact-finding board, acting by a majority of its members, shall transmit its findings of fact and any recommendations for the resolution of the dispute to both parties within ten days after its appointment. If the dispute remains unresolved five days after the transmittal of the findings of fact and any recommendations, the board shall publish the findings of fact and any recommendations for public information if the dispute is not referred to final and binding arbitration.
- (3) Arbitration. If the dispute continues thirty days after the date of the impasse, the parties may mutually agree to submit the remaining differences to arbitration, which shall result in a final and binding decision. The arbitration panel shall consist of three arbitrators, one selected by each party, and the third and impartial arbitrator selected by the other two arbitrators. If



force unions (but never employers) to adamantly remain in fixed negotiating deadlocks, unable to change a negotiating position aimed at achieving agreement for fear of losing the right to legally strike should settlement not result from their efforts.

We are dealing here with a change in bargaining position during the 60-day cooling off period after fact finding. Our conclusion might be very different if the change of issues had occurred before or during the fact-finding process. If a change of issues during the 60-day cooling off period after fact finding destroys a Chapter 89 impasse, then no union, after going through mediation and fact finding in good faith without achieving a contract, would venture to make a new offer or proposal designed to bring about settlement for fear of having the impasse it must have in order to strike legally declared to be nonexistent. To rule as the employers would have this Board rule would have so chilling an effect upon

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either party fails to select an arbitrator or for any reason there is a delay in the naming of an arbitrator, or if the arbitrators fail to select a neutral arbitrator within the time prescribed by the board, the board shall appoint the arbitrator or arbitrators necessary to complete the panel, which shall act with the same force and effect as if the panel had been selected by the parties as described above. The arbitration panel shall take whatever actions necessary, including but not limited to inquiries, investigations, hearings, issuance of subpoenas, and administering oaths, in accordance with procedures prescribed by the board to resolve the impasse. If the dispute remains unresolved within fifty days after the date of the impasse, the arbitration panel shall transmit its findings and its final and binding decision on the dispute to both parties. The parties shall enter into an agreement or take whatever action is necessary to carry out and effectuate the decision. All items requiring any monies for implementation shall be subject to appropriations by the appropriate legislative bodies; and the employer shall submit all such items agreed to in the course of negotiations within ten days to the appropriate legislative bodies.

- (4) The costs for mediation and fact-finding shall be borne by the board. All other costs, including that of a neutral arbitrator, shall be borne equally by the parties involved in the dispute.

negotiations as to freeze the parties to issues over which the prospect of achieving agreement is hopeless.

Moreover, to rule as the employers urge---that a change of issues after fact finding destroys an impasse---would result in a precedent likely to be abused in such fashion as to result in absurdity and gross injustice to unions: whenever employers were in an impasse facing a strike, they, merely by changing issues, or adding issues, could destroy the impasse. (It must be borne in mind that employers may initiate impasse procedures at this Board also.)

The scheme established by Section 89-11, HRS, contemplates that after the parties to an impasse go through the fact-finding process without resolution of their dispute, they must go through a 60-day cooling off period before there may be a legal strike.

During this cooling-off period, it is provided that:

"(c) If the parties have not mutually agreed to submit the dispute to final and binding arbitration, either party shall be free to take whatever action it deems necessary to end the dispute; provided that no action shall involve the disruption or interruption of public services within sixty days after the fact-finding board has made public its findings of fact and any recommendations for the resolution of the dispute. The employer shall submit to the appropriate legislative bodies his recommendations for the settlement of the dispute on all cost items together with the findings of fact and any recommendations made by the fact-finding board. The exclusive representative may submit to the appropriate legislative body its recommendations for the settlement of the dispute on all cost items." §89-11(c), HRS. (Emphasis added)

During the cooling-off period, making a proposal in negotiations or changing issues over which deadlock has been achieved and continues, so long as such actions do not constitute prohibited practices, are, in the opinion of this Board, lawful actions which may be deemed necessary to end the dispute.



As noted earlier, to rule otherwise freezes parties in deadlock, discourages bargaining, renders the 60-day period after fact finding purposeless and defeats the fundamental purposes of Chapter 89, HRS.

This Board fully appreciates that §89-11, HRS, was designed, in part, to provide an orderly dispute resolution process, protect the public from hasty strikes and permit a public airing and reflective consideration of the fact-finders' report. The section, as interpreted herein, serves this purpose. Subsection 89-11(b) is, in large measure, a schedule of processes to which a dispute must be submitted. The instant dispute has gone through those processes. The public is not being kept in the dark as to what is going on. The fact-finders' report can be studied. This Board has ruled in a separate decision that the actions of the HFFA do not constitute a prohibited practice. Against this background, this Board holds that it will not sacrifice the therapy and the policy of Subsection 89-11(c), HRS, which encourages actions designed to end disputes by reading the provisions of Subsection 89-11(b), HRS, so as to rigidly incorporate the formalistic rigidity of the latter into and as a limitation upon the former.

It must be noted that an impasse under Chapter 89, HRS, is not the exact counterpart of a private sector impasse. A Chapter 89 impasse is statutorily defined:

"'Impasse' means failure of a public employer and an exclusive representative to achieve agreement in the course of negotiations." Subsection 89-2(12), HRS.

This definition has been judicially construed in Board of Education v. Hawaii Public Employment Relations Board, 56 Haw. 85 (1974):

"Thus the proper construction of HRS §89-2(12) is that impasse means failure of a public employer and an exclusive representative to

achieve agreement in the course of good faith negotiations (bargaining)." (56 Haw. 85, 87)  
(Emphasis in original)

The HFFA and Public Employers were found to be at impasse after good faith negotiations. They continue to be at impasse until they achieve agreement.


It follows from the above that the HFFA has complied with all of the requirements of Section 89-11, HRS, relating to resolutions of disputes and that Unit 11 is a unit involved in an impasse.

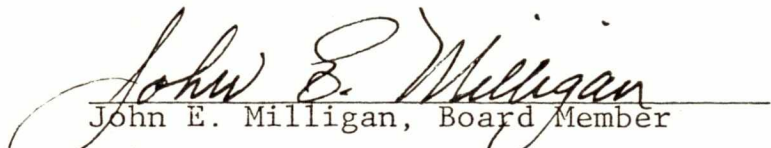
DECLARATORY RULING

The actions of the HFFA in putting aside a tentative agreement and withdrawing from negotiations the issues over which a Unit 11 impasse had been declared to exist were lawful; Unit 11 is a unit involved in an impasse.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Maek H. Hamada, Chairman

  
James K. Clark, Board Member

  
John E. Milligan, Board Member

Dated: August 26, 1977

Honolulu, Hawaii