

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
GEORGE R. ARIYOSHI, Governor)	Case No. <u>CU-11-20</u>
of the State of Hawaii;)	
FRANK F. FASI, Mayor of the)	Decision No. <u>82</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,)	
)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERS

On July 19, 1977, the public employers, George R. Ariyoshi, Governor, State of Hawaii; Frank F. Fasi, Mayor, City and County of Honolulu; Herbert Matayoshi, Mayor, Hawaii County; Elmer F. Cravalho, Mayor, Maui County; and Eduardo E. Malapit, Mayor, Kauai County (hereafter Petitioners or Employers), filed with this Board a prohibited practice charge alleging that the Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO (hereafter HFFA), had violated subsection 89-13(b)(2), Hawaii Revised Statutes (hereafter HRS) "in withdrawing its tentative agreement to matters discussed relative to a new collective bargaining agreement with Petitioners and further, by withdrawing its proposals on issues to which it had previously certified an impasse had existed."

The HFFA filed its answer on July 25, 1977, denying all allegations in the petition and requesting that the prohibited practice charge be dismissed.

On July 28, 1977, petitioners filed a motion to continue the hearings on its petition, pending the outcome of a ratification vote by members of bargaining unit 11 on an agreement for a new collective bargaining contract for the fiscal biennium 1977-1979.

The Board filed notice of its intent to resume proceedings on the subject petition on August 4, 1977, and scheduled the hearing for August 23, 1977.

All parties were present and participated in the hearing, which was a consolidated proceeding with a related declaratory petition. (Case No. DR-11-29, Decision No. 81).

FINDINGS OF FACT

The following facts were stipulated to by the parties, and are hereby adopted by this Board.

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

Respondent 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 to 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 additions 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.

This Board also makes the following findings of fact.

The June 17, 1977 letter from Francis Kennedy, Jr., to James Takushi, which was referred to in the written stipulation, reads 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"

An agreement for a collective bargaining contract for the fiscal biennium 1977-1979 was reached between the HFFA and the employers. This contract was submitted to the bargaining unit for ratification. (See Motion for Continuance Pending Ratification, Affidavit of Lawrence D. Kumabe)

* CONCLUSIONS OF LAW

Section 89-13(b)(2), HRS, provides that:

"(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9..."

The petitioners have asserted that the HFFA violated this section by (1) withdrawing its tentative agreement to matters discussed relative to a new agreement between itself and the public employers, and (2) withdrawing its proposals on issues to which it had certified an impasse had existed. However, the Board concludes that the HFFA did not bargain in bad faith for the reasons which follow.

Good faith bargaining has been defined variously as:

"[T]he connotation of the phrase 'duty to bargain collectively'...is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to find a common ground." NLRB v. Montgomery Ward & Co., 133 F. 2d 676, 686, 12 LRRM 508 (9th Cir. 1943).

"'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-155, 38 LRRM 2042 (1956), (J. Frankfurter, concurring and dissenting opinion).

A finding of good faith bargaining is based upon consideration of the totality of circumstances, or the respondent's entire course of conduct. General Electric Co., 150 NLRB 192, 57 LRRM 1491, 1500 (1964); NLRB v. Stevenson Brick & Block Co., 393 F. 2d 234, 68 LRRM 2086 (1968).

The withdrawal of tentative agreements might normally appear to evince an obstructive attitude towards settlement, and thereby reflect a refusal to bargain in good faith. Here, however, the HFFA continued to seek negotiations with the employers after it rejected the fact-finding panel's recommendations. The union also agreed to a contract in which the amount of wages was different from the 4.5% tentatively agreed upon earlier.

Under these circumstances, the HFFA's withdrawal of its tentative agreement, and the withdrawal of demands over which the parties had been at impasse, constituted movement away from a deadlocked position towards one upon which there could be agreement. Thus, we believe that the totality of the HFFA's actions evinced an effort to find a basis for agreement; and the Board accordingly finds that the HFFA committed no prohibited practices under Section 89-13(b)(2), HRS.

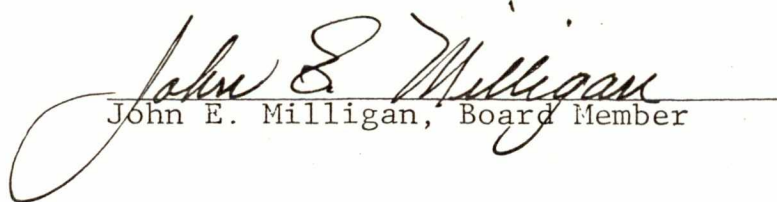
ORDER

The subject prohibited practice charges against the HFFA are hereby dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: August 26, 1977

Honolulu, Hawaii