

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-244
DEPARTMENT OF PUBLIC SAFETY, State of Hawaii,)	ORDER NO. 2378
Complainant,)	ORDER GRANTING RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT
and)	
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS, OR IN THE ALTERNATIVE, ORDER
GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT

On December 13, 2005, Complainant DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or State) filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) with the Hawaii Labor Relations Board (Board). The PSD alleged the UPW in a previous case argued to the Board that HRS § 89-8(c) applied to shop stewards attending pre-disciplinary hearings and that statute provides that the number of participants from each bargaining unit with over 2,500 shall be limited to one member for each five hundred members of the bargaining unit. The PSD further alleged that according to HLRB Informational Bulletin No. 43, dated June 23, 2005, bargaining unit 10 has 2,808 members and therefore the UPW is entitled to a maximum of six shop stewards. The PSD also alleged that from June 15, 2004 to December 16, 2004, the UPW submitted letters to PSD identifying 50 shop stewards. The PSD therefore contends that the UPW wilfully violated HRS § 89-13(b)(4) by refusing to comply with the limitation on the number of stewards set forth in HRS § 89-8(c).

On December 19, 2005, Respondent UPW filed a Motion to Dismiss with the Board for failure to state a claim for relief and alternatively, for Summary Judgment. The UPW contended that as a matter of law HRS § 89-8(c) does not limit the number of union stewards which an exclusive representative may designate to enforce the terms of the Unit 10 collective bargaining agreement and pertains solely to participation of public employees in negotiating committees engaged in collective bargaining over changes to (and not enforcement of) the Unit 10 collective bargaining agreement.

Thereafter, on December 21, 2005, Complainant filed a Memorandum in Opposition to UPW's Motion to Dismiss. Complainant contended that UPW's counsel previously submitted an affidavit in Case No. CE-10-601, where the UPW charged that PSD was not allowing Union shop stewards to attend investigative "meetings" and pre-disciplinary hearings thereby violating HRS § 89-8(c). Here, Complainant argues that the UPW argues to the contrary. Complainant also argues that HRS § 89-8(c) is not limited to negotiations and that section specifically limits the number of employee participants in the collective bargaining process.

Also on December 21, 2005, Complainant filed a Motion for Summary Judgment with the Board. Complainant again argued that in Case No. CE-10-601, the UPW contended that HRS § 89-8(c) applies to union shop stewards attending pre-disciplinary hearings and UPW now takes a contrary position that HRS § 89-8(c) does not apply to Union shop stewards but only to employee participants at the bargaining table. Complainant contends that the UPW is estopped from taking inconsistent positions with regards to this issue. Moreover, Complainant contends that HRS § 89-8(c) does not limit its applicability to negotiations but merely notes that participation in negotiations is one example of engaging in the collective bargaining process. Complainant additionally contends that the only issue for the Board is to decide whether HRS §§ 89-8(c) and 89-3 apply to Union shop stewards.

On January 18, 2006, the Board conducted a hearing on the instant motions. The parties were given full opportunity to present evidence and arguments to the Board. Based upon a review of the record and consideration of the arguments presented, the Board hereby issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. PSD is an "employer" within the meaning of HRS § 89-2.
2. The UPW is an "employee organization" with the meaning of HRS § 89-2.
3. According to the HLRB Informational Bulletin No. 43, dated June 23, 2005, the total number of employees in bargaining unit 10 is 2,808. Exhibit A, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
4. On April 21, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Kauai Community Correctional Center and named 6 shop stewards. Exhibit B-7, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
5. On April 30, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Maui Community Correctional Center and named 5 shop

stewards. Exhibit B-6, Complainant's Motion for Summary Judgment, filed on December 21, 2005.

6. On May 6, 2004, the UPW submitted two letters to PSD listing the UPW shop stewards for the Halawa Correctional Facility and named 11 shop stewards. Exhibits B-2 and B-3, Complainant's Motion for Summary Judgment, filed on December 21, 2005. Also on May 6, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Waiawa Correctional Center and named 4 shop stewards. Exhibit B-5, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
7. On June 15, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Oahu Community Correctional Center and named 11 shop stewards. Exhibit B-1, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
8. On June 16, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Womens Community Correctional Center and named 9 shop stewards. Exhibit B-4, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
9. On December 16, 2004 and April 20, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Kulani Correctional Facility and named 3 shop stewards. Exhibits B-8 and B-9, Complainant's Motion for Summary Judgment, filed on December 21, 2005. Also, on December 16, 2004, the UPW submitted a letter to PSD listing the UPW shop stewards for the Hawaii Community Correctional Center and named 1 shop steward. Exhibit B, Complainant's Motion for Summary Judgment, filed on December 21, 2005.
10. The gravamen of PSD's instant complaint is that the UPW violated HRS § 89-8(c) by appointing approximately 50 shop stewards in PSD which exceeds the number allegedly allowed by the statute.
11. Based on the record, the UPW notified PSD of the number of stewards in 2004 and PSD knew or should have known that the number of stewards exceeded the amount allegedly permitted under HRS § 89-8 at that time. Thus, the instant complaint filed on December 9, 2005 was filed more than 90 days after the alleged violations occurred and is time-barred.
12. HRS § 89-8(c) provides as follows:

(c) Employee participation in the collective bargaining process conducted by the exclusive representative of the

appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections.

13. HRS § 89-8(c) provides that elected officers of the union, employee representatives or shop stewards are entitled to reasonable time off during working hours to perform their union duties without loss of pay or benefits. While the statute can be read to specifically limit the number of participants to one member for each five hundred members where the bargaining unit is composed of 2,500 members, the literal application of this ratio to limit the number of shop stewards¹ in Unit 10 as argued by Complainant would lead to an absurd result. Based upon the composition of Unit 10, five or six shop stewards would then be responsible for assisting the 2,808 corrections and hospital workers across the State of Hawaii in their grievances and resolving workplace concerns. In the event that one steward is assigned to the correctional and hospital facilities on each island of Hawaii, Maui, and Kauai, two would remain to service Oahu. Based on the record, there are presently 35 stewards for the correctional facilities on Oahu. After reviewing the relevant legislative history to determine the legislative intent and resolve this ambiguity, the Board concludes that the legislature intended that the ratio of participants to employees referenced applied in the negotiations context and not to the shop stewards.

¹By definition, a shop steward is:

A representative of the union who carries out the responsibilities of the union at the department level. The steward generally handles grievances in their first stage, may collect dues, and performs other duties as required by the union. A steward is usually elected by the other members in the plant (or may be appointed by the union officers). The steward is protected while holding that position under the superseniority provisions with regard to layoff and frequently is paid for the time spent in handling grievances. The shop steward is also sometimes known as the union steward. Roberts' Dictionary of Industrial Relations, 4th Edition, 1994, p. 716.

14. When enacted in 1970, HRS Chapter 89 did not contain a provision which provided employees the right to participate in the collective bargaining process during regular working hours with pay. Act 171, SLH 1970; Appendix 1 to UPW's Reply Brief in Support of UPW's Motion to Dismiss Filed on December 19, 2005. Thereafter, in 1971, subsection (c) was added to HRS § 89-8. Appendix 2 to UPW's Reply Brief in Support of UPW's Motion to Dismiss Filed on December 19, 2005.
15. The Joint Select Committee of Kauai, Maui, Oahu and Hawaii Representatives amended the original bill, H.B. No. 124, with the following purpose:

The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable time off during working hours to carry out the duties of their office without loss of pay or benefits.

In the collective bargaining process, Act 171 Session Laws of Hawaii 1970, provides various grievance procedures in order to resolve disputes and disagreements between employer and employees. The State should do its utmost to avoid costly strikes by employees, and your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreements, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits.

Upon further consideration of the matter, your Committee believes that in addition to such representatives, if an employee can contribute to the fact finding, arbitration, mediation, and other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged. Accordingly, your Committee has amended the bill to permit at least one employee for each five hundred employees from a bargaining unit to participate in the collective bargaining process, provided such participation will not interfere with the operations of government.

* * *

Standing Committee Report No. 609, 1971 House Journal 948.

16. Thereafter, the S.C. Rep 678 from the House Finance Committee provides, in part, as follows:

The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable amount of time off during working hours to carry out the duties of their offices without loss of pay or benefits.

Your Committee concurs with the findings of your Committees on Public Employment and Joint Select Representatives in Stand. Com. Rep. Nos. 117 and 609, respectively, which are hereby incorporated herein by reference.

17. The Senate Committee on Ways and Means stated, in part, in Standing Committee Report No. 729 on H.B. No. 124, H.D. 2, as follows:

The purpose of this bill is to provide elected officers, employee representatives or shop stewards of duly recognized employee organizations a reasonable amount (sic) time off during working hours to carry out the duties of their offices without loss of pay or benefits.

Your Committee believes that whenever employee representatives can materially assist in the resolution of any disputes or disagreements, they should be permitted reasonable amount of time off during working hours without loss of pay or benefits.

Your Committee believes that in addition to such representatives, if an employee can contribute to the fact finding, arbitration, mediation, and other proceedings in the collective bargaining process, thereby resolving disputes before a strike becomes necessary, such participation during working hours should be encouraged.

Upon consideration of the bill, your Committee has found that the five hundred to one ratio for participation in the collective bargaining process, creates inequities in several of the existing bargaining units. Accordingly your Committee has amended the bill to provide that in bargaining units of less than twenty-five hundred members, there shall be at least five participants one of whom shall reside on each of the counties. By applying this

method for the smaller bargaining units, it assures the employees for the purpose of negotiations, the same number of representatives as provided for the employer in Section 89-6(b), Hawaii Revised Statutes. The requirement that at least one participant reside in each of the counties however does not apply to the unit established by Section 89-6(a)8 (University non-faculty) as such requirement may conflict with normal operations and service of the neighbor island programs of the University of Hawaii system. [Emphasis added.]

Standing Committee Report No. 729, 1971 Senate Journal 1122.

17. The parties have negotiated provisions in the Unit 10 collective bargaining agreement pertaining to stewards, which state as follows:

Section 5 UNION STEWARDS AND UNION REPRESENTATIVES.

5.01 RECOGNITION.

The Employer recognizes and shall work with Union stewards and representatives in all matters in this Agreement.

5.02 DUTIES.

In addition to the primary responsibilities as an Employee, Union stewards are recognized as participants in maintaining meaningful Employee-Employer working relations.

5.03 TIME OFF.

Stewards shall be permitted time off with pay during working hours to investigate complaints and resolve grievances that have arisen, and ascertain whether or not this Agreement is being observed within their respective work area of coverage as a steward, and attend meetings between the Employer and the Union to discuss and/or resolve complaints and grievances.

5.04 MEETING.

In the event the Employer is unable to arrange a meeting to discuss and/or resolve complaints or grievances at the steward's

respective work area, the Employer shall endeavor to provide the steward with transportation to and from the meeting.

5.05 NUMBER.

5.05a. The election or appointment of Union stewards is the function of the Union provided, that the number of stewards shall be selected according to department, geographic location, work area or other subsidiary category of work location.

5.05b. The number of stewards shall be a subject of consultation between the Union and the Employer.

5.06. LIST

The Union shall provide the Employer with a list of Union stewards and their assigned coverage and maintain its currency.

5.07. AMBULANCE STEWARD

When the responsibilities of a steward in Ambulance Services require the steward to leave the ambulance work station during work hours and if arrangements for temporary replacements must be made, the appropriate supervisor shall be notified fifty-two (52) hours in advance.

Exhibit 2 to UPW's Motion to Dismiss, filed on December 19, 2005.

18. According to Article 5.05b of the Unit 10 agreement above, the number of stewards is subject to consultation between the union and the employer.

CONCLUSIONS OF LAW

1. HAR § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints pursuant to HRS § 89-13 as follows:

Complaints that any public employer, public employee or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed . . . within ninety days of the alleged violation.

2. The limitations period is also prescribed by statute. HRS § 89-14 requires controversies “concerning prohibited practices . . . be submitted . . . in the same manner and with the same effect as provided in sections 377-9; . . .” HRS § 377-9(l), in turn, provides that, “No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.”
3. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when “an aggrieved party knew or should have known that his statutory rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).
4. The Board concludes that UPW notified PSD of the number of shop stewards for each facility and their identities in 2004. Thus, PSD knew or should have known of any alleged violations of HRS § 89-8(c) in 2004. The instant complaint was filed on December 13, 2005. The Board concludes that Complainant’s charges of alleged violations of HRS § 89-13(b)(4) by refusing to comply with the provisions of HRS § 89-8(c) by limiting the number of participants in each bargaining unit are barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a). Accordingly, the Board lacks jurisdiction over the instant complaint.
5. Alternatively, summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).
6. The issue raised by Complainant requires the interpretation of HRS § 89-8(c). Statutory construction is guided by established rules. The Hawaii Supreme Court stated in State v. Naititi, 104 Hawai’i 224, 231, 87 P.3d 893 (2004):

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory

language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....

In construing an ambiguous statute, “[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.” HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai‘i at 148, 931 P.2d at 590 (quoting *State v. Toyomura*, 80 Hawai‘i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider “[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning.” HRS § 1-15(2)(1993). “Laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.” HRS § 1-16 (1993).

State v. Kaua, 102 Hawai‘i 1, 7, 72 P.3d 473, 479 (2003) (quoting *Rauch*, 94 Hawai‘i at 322-23, 13 P.3d at 331-32) (quoting *State v. Kotis*, 91 Hawai‘i 319, 327, 984 P.2d 78, 86 (1999) (quoting *State v. Dudoit*, 90 Hawai‘i 262, 266, 978 P.2d 700, 704 (1999) (quoting *State v. Stocker*, 90 Hawai‘i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting *Ho v. Leftwich*, 88 Hawai‘i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 87 Hawai‘i 217, 229-30, 953 P.2d 1315, 1327-28 (1998)))))))(ellipsis points and brackets in original).

“[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality.” *State v. Griffin*, 83 Hawai‘i 105, 108 n. 4, 924 P.2d 1211, 1214 n. 4 (1996) (quoting *State v. Mollify*, 80 Hawai‘i 126, 137, 906 P.2d 612, 623 (1995) (citations and internal quotation marks omitted)) (brackets and internal quotation

marks omitted). *See also* HRS § 1-15(3) (1993) (“*Every construction which leads to an absurdity shall be rejected.*”).

Gray, 84 Hawai`i at 148, 931 P.2d at 590. *State v. Hagen*, 104 Hawai`i 71, 76-77, 85 P.3d 178, 182-183 (2004) (quoting *State v. Cordelia*, 84 Hawai`i 476, 484, 935 P.2d 1021, 1029 (1997) (emphases added)) (some brackets added and some in original).

In *Southern Foods Group, L.P. v. State, Dept. of Educ.*, 89 Hawai`i 443, 453, 974 P.2d (1999), the Court stated:

“The starting point in statutory construction is to determine the legislative intent from the language of the statute itself. *State v. Kaakimaka*, 84 Hawai`i 280, 289, 933 P.2d 617, 626, *reconsideration denied* 84 Hawai`i 496, 936 P.2d 191 (1997) (quoting *State v. Ortiz*, 74 Haw. 343, 351-52, 845 P.2d 547, 551-52 (citations omitted), *reconsideration denied*, 74 Haw. 650, 849 P.2d 81 (1993)).

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....

In construing an ambiguous statute, “[t]he meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.” HRS § 1-15(10) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. *Gray v. Administrative Dir. of the Court*, 84 Hawai`i 138, 148, 931 P.2d 580, 590 (1997)] (quoting *State v. Toyomura*, 80 Hawai`i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also

consider “[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning.” HRS § 1-15(2) (1993). “Laws in *pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.” HRS § 1-16 (1993).

Korean Buddhist Dae Won Sa Temple of Hawaii, 87 Hawai`i at 229-30, 953 P.2d at 1327-28 (quoting *State v. Cullen*, 86 Hawai`i 1, 8-9, 946 P.2d 955, 963-64 (1997) (some brackets in original and some added)).

“[A] statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses.” *State v. Toyomura*, 80 Hawai`i 8, 19, 904 P.2d 893, 904 (1995) (citing 2A N. Singer, *Sutherland Statutory Construction*, § 45.02, at 6 (5th ed.1992)) (internal quotation marks omitted). “[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable[.]” *State v. Jumila*, 87 Hawai`i 1, 9, 950 P.2d 1201, 1209 (1998) (quoting *Keliipuleole v. Wilson*, 85 Hawai`i 217, 221-22, 941 P.2d 300, 304-05 (1997) (brackets, internal quotation marks, and citations omitted)). “The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,], and illogicality.” *State v. Arceo*, 84 Hawai`i 1, 19, 928 P.2d 843, 861 (1996) (citation and internal quotation marks omitted).

Kim v. Contractor’s License Bd., 88 Hawai`i 264, 269-70, 965 P.2d 806, 811-12 (1998) (some brackets added and some in original).

7. Based on the record in this case and viewing the facts in the light most favorable to the nonmoving party, the Board finds that there is no material fact in dispute and concludes that the statutory limitation on the number of collective bargaining participants in HRS § 89-8(c) does not limit the number of shop stewards Unit 10 is entitled to. There is an ambiguity in the statute because a literal reading of the statute would limit the number of shop stewards representing the 2,808 employees in Unit 10 to 5 which would be an absurd result, having each steward veritably representing possibly unfamiliar employees in grievances in unfamiliar hospitals and correctional facilities on each island. The Board concludes that the literal interpretation of the statute, urged by the Complainant is unreasonable and impractical and would produce an unjust

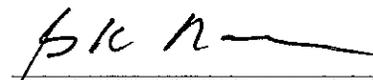
result. Therefore, we conclude the literal construction is clearly inconsistent with the purposes and policies of the statute. In reviewing the legislative history of HRS § 89-8(c) it becomes clear that the Legislature intended the employer to give the shop stewards and union officers reasonable time off to perform their union duties and the limitation on the number of participants in the process referred to the negotiating team involved in mediation, fact finding and arbitration. In its committee report, the Legislature specifically ensured that in the smaller units, there would be at least one participant from each county paralleling the representation of the employer's negotiating team.

ORDER

Based on the foregoing, the Board hereby grants Respondent's motion to dismiss the instant complaint for lack of jurisdiction. Alternatively, the Board grants summary judgment in favor of the UPW.

DATED: Honolulu, Hawaii, June 23, 2006

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



EMORY J. SPRINGER, Member



KATHLEEN RACYA-MARKRICH, Member

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