STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES, AFSCME, LOCAL 152, AFL-CIO, Complainant, and LINDA LINGLE, Governor, State of Hawaii; CHIYOME L. FUKINO, M.D., Director, Department of Health, State of Hawaii; and MARK A. FRIDOVICH, M.D.,Administrator, Hawaii State Hospital, State of Hawaii, Respondents.	CASE NOS.: CE-02-632a CE-03-632b CE-04-632c CE-09-632d CE-13-632e ORDER NO. 2428 ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS' MOTION TO DISMISS IN LIEU OF AN ANSWER

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RESPONDENTS' MOTION TO DISMISS IN LIEU OF AN ANSWER

On November 17, 2006, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO ("Union" or "Complainant") filed a prohibited practice complaint with the Hawaii Labor Relations Board ("Board") against LINDA LINGLE, Governor, State of Hawaii, CHIYOME L. FUKINO, Director, Department of Health, State of Hawaii, and MARK FRIDOVICH ("FRIDOVICH"), Administrator, Hawaii State Hospital, State of Hawaii (collectively "Employers"). Complainant alleges that the Employers violated Hawaii Revised Statutes ("HRS") §§ 89-13(a)(1), (5), and (7) by the unilateral implementation of a campus-wide no smoking policy on or about November 29, 2006 at the Hawaii State Hospital.

The Employers responded on December 4, 2006 by filing a Motion to Dismiss in a Lieu of an Answer and the Board held a hearing on the motion on January 9, 2007.

After a full and fair consideration of the filings and arguments provided in consideration of this motion, the Board issues the following findings of fact, conclusions of law and order granting, in part, and denying, in part, Respondents' motion to dismiss.

FINDINGS OF FACT

1. At all relevant times, the Union was an employee organization within the meaning of HRS § 89-2.

2. At all relevant times, Respondents were employers within the meaning of HRS § 89-2.

3. The Union has been certified by the Board as the exclusive bargaining representatives for bargaining units 02, 03, 04, 09, and 13.

4. On or about July 27, 2006, the Employers transmitted to the Union a proposal to consult with the Union to establish a smoke free environment at Hawaii State Hospital, effective November 29, 2006.

5. On or about August 2, 2006, the Union advised the Employers of its opinion that the subject matter was negotiable and requested negotiations on the subject.

6. On or about September 11, 2006, the Employers advised the Union that it sought consensus in negotiating the establishment of a tobacco-free environment at the Hawaii State Hospital and enclosed a draft memorandum for review.

7. On November 2, 2006, FRIDOVICH issued a memorandum to the "Staff of Hawaii State Hospital" indicating that on November 16, 2006 the Smoke Free Hawaii law would be implemented without bargaining with the Union. The memo indicated that a smoking ban would be imposed campus-wide including all buildings and grounds of the hospital.

8. On November 16, 2006, S.B. No. 2362, Hawaii's Smoke Free law, took effect. The law identifies certain areas which must remain smoke free. These areas include: 1) facilities owned by the State or Counties; 2) enclosed or partially enclosed places open to the public; 3) enclosed or partially enclosed places of employment; and 4) within twenty feet of entrances, exits, windows that open and ventilation intakes. In addition, the law provides sole authority to an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area to declare an entire establishment to be smoke free.

9. On or about November 16, 2006, the Employers unilaterally altered their smoking policy and implemented a campus-wide smoking ban.

DISCUSSION

In this complaint, the Union asserts that a smoking ban is a mandatory subject of bargaining such that the refusal to bargain and its unilateral imposition constitute a refusal to bargain in good faith in violation of HRS §§ 89-13(a)(1), (5), and

(7). Respondents move for dismissal pursuant to the argument that the smoking ban is mandated or authorized by law and hence cannot be a mandatory subject for negotiation.

Argument on the motion to dismiss was preceded by a motion by Respondent to strike documents attached as exhibits to the Union's opposition to the motion to dismiss. The reason given for the motion was to avoid the consideration of the motion to dismiss as a motion for summary judgment pursuant to Hawaii Rules of Civil Procedures Rule 12(b). The functional rationale for the proposed striking was that neither party had prepared to argue a motion for summary judgment and preparation would require a continuance of the hearing on the matter. The Union opposed the motion to strike on the grounds that no authority had been presented in support of the motion and that striking would serve no meaningful purpose since the substantive content of the exhibits were incorporated into the complaint. Respondents concurred with the representation that the content of the exhibits were incorporated in the complaint and could provide no authority in support of the motion to strike. After consideration, the Board denied the motion to strike without prejudice to the right of Respondents to file a Motion for Summary Judgment.

MOTION TO DISMISS

A complaint should be dismissed for failure to state a claim if it appears beyond a reasonable doubt that complainant can prove no set of facts in support of its claim. The Board must determine whether or not there appears to a certainty under existing law that no relief could be granted under any set of facts that might be proved in support of the plaintiff's claim. De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978).

The Union's claim relies principally on the "long recognized" principle that sweeping smoking bans are mandatory subjects of bargaining. See, e.g., W-I Forest Products Company, 304 NLRB No. 83, 304 NLRB 957, 138 LRRM 1089 (1991). The cited case found a premises-wide smoking ban to be a mandatory subject of bargaining and a substantial and material change from past practice, both necessitating negotiations. But in a footnote the NLRB noted a significant condition to its holding:

> We emphasize that we are concerned here with activities that are not prohibited by any law Nothing in this decision is meant to suggest that (9th NLSRA) would require employers to consider proposals under which violations of law would be immunized in the workplace." Id, at 1091, fn. 1.

It is precisely the principle behind this caveat that Employers base their motion to dismiss. They argue that Hawaii's smoke free law, which took effect on November 16, 2006 mandated or authorized the ban put into effect at the Hawaii State Hospital. For authority they rely on the Supreme Court's opinion in SHOPO v. Society of Professional Journalists, 83 Hawai`i 378, 927 P.2d 386 (1996) ("SHOPO") in which the court held that "a public employer is not free to bargain with respect to a proposal

which would authorize a violation of a statute," Id., at 405, and its necessary corollary that "parties cannot bargain for provisions that are contrary to the law." Id., at 404.

The Union contends that the new law and SHOPO do not compel dismissal because, 1) there is are disputed factual and legal questions of whether the hospital's ban exceeds the parameters of the new law, 2) whether the administrator of the hospital is statutorily authorized to exceed its express parameters, and 3) whether the legislature intended for whatever discretion was provided the administrator to be exempted from the bargaining obligations imposed by HRS Chapter 89.

Respondents argue that the portion of the law providing "the sole authority to an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area to declare an entire establishment to be smoke free" provides express unequivocal authority to the facility's director to impose a campus-wide ban.

The Board accepts the Respondents' argument that statutory mandates are beyond the scope of mandatory bargaining. But when a statute is ambiguous or leaves implementation to discretion, the interpretation the statute, exercise of discretion or implementation of the statute may be a subject of mandatory bargaining so it cannot be said that dismissal is required.

The statute at hand is made up of two discrete parts. First, it unambiguously identifies facilities and locations where smoking is to be banned. Second, it delegates authority to certain people to expand the ban to entire establishments. To the degree that the Union' complaint addresses the first set of prohibitions it would require the employer to bargain over a potential violation of state law. Therefore, to the degree that the complaint encompasses express, specific and unambiguous prohibitions, the motion to dismiss is granted as the law is express and unequivocal and no set of facts could be proven to establish the negotiability of conformance.

But with respect to the apparent delegation of discretion to make an entire establishment smoke free questions arise regarding the factual or legal circumstances. How far does the ban apply? Is the hospital an "establishment: within the meaning of the law? Is the director among those who are authorized to exercise the authorized power within the meaning of the law? Was this a proper delegation of legislative authority? Is such exercise of discretion or its implementation a mandatory subject of bargaining or consultation under Chapter 89? These questions make disposition far from a certainty so to the degree the complaint raises issues associated with the employer's authority exercised in accordance with the second part of Hawaii's Smoke Free Law, the motion to dismiss must be denied.

Hence, Respondent's motion to dismiss is ordered granted, in part, and denied, in part.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

2. A complaint should be dismissed for failure to state a claim if it appears beyond a reasonable doubt that complainant can prove no set of facts in support of its claim.

3. Statutory mandates are beyond the scope of mandatory bargaining. But when a statute is ambiguous or leaves implementation to discretion, the interpretation the statute, exercise of discretion or implementation of the statute may be a subject of mandatory bargaining

4. The statute at hand is made up of two discrete parts. First, it unambiguously identifies facilities and locations where smoking is to be banned. To the degree that the Union' complaint addresses the first set of prohibitions it would require the employer to bargain over a potential violation of state law. Therefore, to the degree that the complaint encompasses express, specific and unambiguous prohibitions, the motion to dismiss is granted as the law is express and unequivocal and no set of facts could be proven to establish the negotiability of conformance.

5. Second, the statute delegates authority to certain people to expand the ban to entire establishments. Questions arise regarding the factual or legal circumstances arise with respect to the apparent delegation of discretion to make an entire establishment smoke free. Thus, to the degree the complaint raises issues associated with the Employers' authority exercised in accordance with the second part of Hawaii's Smoke Free Law, the motion to dismiss is denied.

ORDER

The Board hereby grants Respondent's motion to dismiss the complaint, in part, and denies the motion, in part.

DATED: Honolulu, Hawaii, February 21, 2007.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO
v. LINDA LINGLE, Governor, State of Hawaii, et al.
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EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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