STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LINDA LINGLE, Governor, State of Hawaii, Petitioner, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; MUFI HANNEMANN, Mayor, City and County of Honolulu; HARRY KIM, Mayor, County of Hawaii; BRYAN J. BAPTISTE, Mayor, County of Kauai; and ALAN M. ARAKAWA, Mayor, County of Maui, Intervenors.	CASE NOS.: DR-01-68a DR-02-68b ORDER NO. 2442 ORDER DENYING UPW'S MOTION TO DISMISS

ORDER DENYING UPW'S MOTION TO DISMISS

In 1997, due to an apparent conflict in the interpretation of provisions of Bargaining Units ("BUs") 01 and 02 contracts, Mr. Kapuwai, a senior blue-collar worker in BU 01, represented by the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW") was denied a temporary assignment ("TA") to the position of his supervisor who was in BU 02, represented by the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO. This apparently minor simple problem has generated more than a decade of litigation involving seven parties (State of Hawaii, UPW, HGEA, and Honolulu, Hawaii, Maui and Kauai counties), at least 12 attorneys of record and, four forums (arbitration, the Board, Circuit Court, Supreme Court with renewed arbitral, Board and Circuit Court rulings pending). Proceedings before just the Board produced more than five feet of filings by the parties. Board proceedings have included a petition for declaratory relief filed by the State; intervention by the other parties; a prohibited practice complaint filed by the State; a consolidation of the DR and CU cases; a dismissal of the petition on the grounds of mootness; a reversal of the dismissal by the Circuit Court; and an affirmation of the reversal by the Supreme Court resulting in a remand back to the Board whose composition has changed at least six times since the initiation of this matter. On the instant remand, there was filed and withdrawn a motion for an evidentiary hearing and a current motion to dismiss in deference to arbitration in light of a new class grievance on the matter and the potential consolidation of all such grievances by the Circuit Court to

allow for a tripartite grievance arbitration. The Board is now being advised by the majority of the parties to start anew.

It is an adage that the time, expense and complexity of a legal proceeding multiplies in proportion to the number of lawyers involved. This appears to have been proven true with regard to time and expense. With respect to complexity, a cursory review of the files suggests that at least the following issues must be addressed:

1. What standards are to be applied in choosing between conflicting contractual provisions?

2. Did the employer establish a past practice or custom which effectively amended the Unit 01 agreement as to provide TA preference to its members?

3. If so, was the Unit 02 agreement correspondingly amended?

4. If so,

   a. How could such an amendment be made without the HGEA's knowledge and consent?
   b. Did such unilateral amendment constitute a contract violation or prohibited practice?
   c. Did the change in terms and conditions of employment resultant from such amendment constitute a prohibited practice or contract violation?
   d. Did such amendment constitute a prohibited practice or contract violation in that the amendment intruded into HGEA's status as the "exclusive" bargaining agent for BU 02?

5. If the HGEA contract was not amended by the purported past practice, how is the employer properly supposed to choose between the two conflicting provisions and in doing so how can employer avoid committing a prohibited practice or contract violation?

6. If past practice is not established to have amended the UPW contract, did UPW commit a prohibited practice or contract violation in prosecuting the alleged violation of a nonexistent contract provision?

7. In terminating and disavowing the past practice in favor of honoring the HGEA contract, did employers commit a prohibited practice or contract violation by repudiating a valid contract provision?

8. In terminating and disavowing the past practice in favor of honoring the HGEA contract, did employers commit a prohibited practice or contract violation by unilaterally altering wages, hours and terms and conditions of employment of Unit 01 employees without negotiation and mutual consent?

9. Does the management rights identified in Hawaii Revised Statutes ("HRS") § 89-9(d) provide employers with an absolute right to make TAs?

   a. If so, did employers, unions or both commit a prohibited practice or contract violation in entering into literal or inferred contract provisions which "interferes" with those rights?

      i. And have any such rights been waived or estopped by the employers' conduct?
      ii. Does the TA system proposed by either union maintain efficiency without interfering with management rights so that its adoption is required?

   b. If not, what are the proper parameters of such rights in assigning TAs?

10. Did the UPW proposal to give priority to senior Unit 01 employees to Unit 02 TAs constitute a a prohibited practice or contract violation by intruding upon the exclusive representational status of the HGEA?

11. Does the UPW's position violate the proviso in HRS § 89-9(d) which limits permissible bargaining regarding promotional and transfer procedures to negotiations between the employer and exclusive representatives to positions "within" a bargaining unit?

12. What evidentiary, precedential or legal guidance can or should be obtained from the more than five conflicting arbitrations on the issues presented?

13. Should the Board dismiss the petition in deference to pending arbitration?

   a. What consideration should be given to potential and actual conflicting arbitral decisions?

b. What considerations are to be given to limitations of the arbitrator's jurisdiction to one contract?

c. What consideration should be given to fact that tripartite arbitrations have not yet been ordered by the circuit court and there is no indication that all parties to the instant proceeding will be made parties to the arbitration?

d. What consideration should be given to the necessity for statutory interpretation of Chapter 89?

e. What consideration should be given to superceding policy considerations?

Complexity certainly seems to exist, but inasmuch as the issues make clear that their answers require interpretation of Chapter 89, the identification of actual or potential prohibited practices, substantial policy considerations, and may induce further conflicting arbitral results, the Board must DENY the UPW's instant motion to dismiss.

But by assuming jurisdiction over the petition, the Board does not sanction or require any further litigation over this matter at this time. If litigation were to proceed in this forum, all parties would have to be afforded any necessary evidentiary hearings replete with sept-parte witnesses, cross examination, motions, briefing and argument. And even if the Board were to finally issue a decision, our rulings on any or all issues could be subject to sept-parte appeal(s), prohibited practice complaints and more petitions for declaratory relief.

The Board majority is of the conviction that the preferred dispute resolution mechanism envisioned by the framers of Chapter 89 was not eternal litigation. Rather by its very title and identification of principles and policies, the preferred method is joint decision-making via collective bargaining. And this method appears not to even have been attempted in this case.

Accordingly, the Board will suspend further proceedings in this case and ORDERS that the parties engage in collective bargaining to attempt to resolve this dispute.

DATED: Honolulu, Hawaii, April 11, 2007.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

CONCURRING AND DISSENTING OPINION

For the reasons discussed below, I concur with the Board Majority's decision to deny the UPW's Motion to Dismiss; however, I respectfully dissent from the Board Majority's decision to order the parties to engage in collective bargaining over this dispute.

I. Denial of the Motion to Dismiss

As the UPW argues, Hawaii's public policy has long favored arbitration as the means to settle disputes more expeditiously and inexpensively. See Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 259, 842 P.2d 634, 645 (1992); Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Haw. 332, 334, 460 P.2d 317, 318 (1969). However, the arbitral forum must be authorized and competent to resolve the dispute brought before it. Norris, 74 Haw. at 260, 842 P.2d at 645. In the context of collective bargaining disputes, the role of the arbitrator is to interpret the labor contract and to apply the agreement to the facts of a dispute; on the other hand, the arbitrator ordinarily cannot consider public interest, and does not determine violations of law or public policy. Id. at 261, 842 P.2d at 645-46.

Here, the UPW filed a class-action grievance against the Department of Transportation of the State of Hawaii ("DOT"); additionally, the UPW has filed with the circuit court a motion to compel a consolidated arbitration proceeding involving the UPW, DOT, and the HGEA. However, it is unclear whether such a proceeding is authorized pursuant to HRS § 658A-10, which provides in relevant part that a court may order consolidation of "separate arbitration proceedings[.]" As the HGEA argued at hearing, there is no evidence that the HGEA has an arbitration "proceeding" currently pending against the DOT that may be consolidated by court order. Chapter 658A does not define the term "arbitration proceeding." Accordingly, it is not currently clear that there is an "arbitral forum" that is "authorized and competent to resolve the dispute" that is before this Board involving the multiple employers and multiple unions. Should the class arbitration proceed without the HGEA, the problem of potential conflicting arbitration awards would continue.

Additionally, this Board has allowed the City and County of Honolulu, the County of Kauai, the County of Maui, and the County of Hawaii to intervene in this proceeding. The class grievance filed by the UPW involves only the DOT as an employer, and it is not clearly established that the interests of the remaining employers in this Board

proceeding would be adequately addressed[1] at the multi-party arbitration proceeding the UPW seeks via order of the circuit court.

Finally, the Petitioner in this matter requested this Board to make a declaratory ruling on "whether, in the exercise of its management rights, the award of a temporary assignment for a Unit 2 position to a Unit 1 member without first considering efficiency and determining availability of other lower level Unit 2 employees is consistent with §§ 89-6, 89-9(d), and 89-13, H.R.S." Intervenor HGEA has taken the position that "HRS section 89-9(d) makes it illegal for a public employer and a representative of the public employees to enter into an agreement, even through past practice, that provides for the manner in which the public employer will promote, transfer, or assign employees from one bargaining unit to another bargaining unit, provided that a public employer and an exclusive representative of a bargaining unit may negotiate procedures governing the promotion and transfer of employee positions within the bargaining unit." Without passing on the merits of the HGEA's position, it should be noted that the issues raised by the Petitioner and the Intervenor involve a determination of law and/or public policy that is beyond the scope of an arbitrator's duties pursuant to the rule articulated in Norris.

For these reasons, I concur with the Board Majority's decision to deny the Motion to Dismiss.

II. Order to Engage in Collective Bargaining

Hawaii Administrative Rules § 12-42-9 ("Rules") governs declaratory rulings by the Board. Specifically, § 12-42-9(g) provides that the Board "shall consider each petition submitted and, within a reasonable time after the submission thereof, either deny the petition in writing,. stating its reason for such denial, or issue a declaratory order on the matter contained within the petition." Put simply, the Board has two options in this matter: deny the petition submitted, or issue a declaratory order on the matter within a reasonable time. The Board Majority's order requiring the parties to negotiate this matter falls under neither of the two available options provided for by the Rules, and accordingly I believe such an order is clearly erroneous or an abuse of discretion.

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[1]For example, in its Petition to Intervene, the County of Hawaii argued that, "Although there is a similarity to the procedures followed by the State in the present case to the procedure followed by the County concerning temporary assignments for Unit 2 vacancies, such similarity is only superficial. . . . The nature, size and scale of operations is substantially different. The County only employs approximately 409 Bargaining Unit 1 members and 43 Unit 2 members in various departments. Some of the State's employees assigned to baseyards in Units 1 and 2 are bigger than the County's entire complement of Unit 1 and 2 employees." Other counties expressed concern that because of the potential widespread effect of a declaratory ruling, they should be given an opportunity to present their positions.

Furthermore, I believe the Board Majority's discussion unnecessarily complicates the issue presented in the Petition. The scope of the DOT's request for declaratory ruling, while involving important issues of law and two separate and possibly conflicting collective bargaining agreements, does not warrant staying the proceedings and delaying a ruling in this matter. Additionally, the very concerns the Board Majority raises - multiple appeals, prohibited practice complaints, and more petitions for declaratory relief, and I will add conflicting arbitration decisions - may have arisen precisely *because* the Board has not ruled on this issue during the nearly ten years since the Petition was first filed, and thus I believe a timely ruling by the Board is in the public's and the parties' best interests.

It should also be noted that the positions taken by the Petitioner and the Intervenors raise questions involving the scope of bargaining that is allowed under HRS § 89-9(d). It would seem futile to order the parties to bargain over an issue where there is uncertainty or disagreement as to the extent to which such bargaining is allowed by statute. A legal ruling by the Board on the scope of bargaining allowed pursuant to HRS § 89-9(d) would appear to be a prerequisite to successful bargaining on this issue.

Finally, the Board Majority's order is not clear on the scope or effect of negotiations. Do all parties need to reach agreement? What if some, but not all, of the parties reach agreement - will those parties who are in agreement be required to reduce the agreement to writing and execute it, pursuant to HRS §§ 89-10(a) and 89-6(e)[2]? What if a single employer - for example, one of the counties - does not agree? Will the entire matter and all the parties return before the Board? And even if all the parties to this proceeding commendably reach agreement during negotiations, what effect, if any, will that have upon the public employers who are not a party to this proceeding? The Chief Justice of the Supreme Court for the Judiciary, and the Hawaii Health Systems Corporation Board for the Hawaii Health Systems Corporation, were not defined as "employers" for purposes of collective bargaining when the current Petition was filed on October 20, 1997 (see 2000 Haw. Sess. Laws Act 253), and accordingly would not have been able to intervene at that time; the conflict between the Unit 01 and Unit 02 agreements would continue for these employers. As a practical matter, a substantive ruling by the Board pursuant to the Petition would be the best way to resolve this issue.

III. Summary

For the reasons discussed above, I concur with the Board Majority's decision to deny the UPW's Motion to Dismiss; however, I respectfully dissent from the Board Majority's decision to order the parties to engage in collective bargaining over this dispute.

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[2]HRS § 89-6(e) provides in relevant part that "each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees[.]"

LINDA LINGLE and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, et al.
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SARAH R. HIRAKAMI, Member

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