

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-260
)	
UNITED PUBLIC WORKERS, AFSCME,)	ORDER NO. 1265
LOCAL 646, AFL-CIO,)	
)	ORDER DENYING RESPONDENTS'
Complainant,)	MOTION TO DISMISS COMPLAINT
)	
and)	
)	
STEPHEN K. YAMASHIRO, Mayor,)	
County of Hawaii and MICHAEL R.)	
BEN, Director, Department of)	
Civil Service, County of Hawaii,)	
)	
Respondents.)	
)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT

On August 29, 1995, Respondents STEPHEN K. YAMASHIRO, Mayor, County of Hawaii and MICHAEL R. BEN, Director, Department of Civil Service, County of Hawaii (collectively Hawaii County), by and through their attorney, filed a motion to dismiss the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board). Respondent Hawaii County contends that the complaint and the state law underlying the complaint are preempted by the federal law from interfering with the implementation of the federally mandated commercial driver's license (CDL) drug and alcohol testing.

Respondents contend that the instant complaint seeks to prevent the Respondents from implementing a drug/alcohol testing program for CDL driver employees. Respondents contend that the drug/alcohol testing program is expressly mandated by federal statutes and rules which expressly and impliedly preempt this

Board's prohibited practice statute to the extent that it would otherwise interfere with the implementation of the program.

Respondents allege that the applicable regulations, 49 C.F.R. Part 382, provide a comprehensive program for preemployment, reasonable suspicion, and random and post-accident testing of CDL drivers. In addition, in Subpart D, the regulations also provide for specific guidelines for handling test results, record retention, and confidentiality. Subpart E provides for the consequences for drivers engaging in Substance Use-Related Conduct, including removal from safety-sensitive functions, evaluation and testing, and federal penalties, including civil and criminal sanctions.

Respondents further contend that the regulations specifically provide for the preemption of State and local laws. Thus, Respondents argue that to the extent that the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW and Union) seeks to invoke the jurisdiction of this Board to stop the implementation of the program, Chapter 89, HRS, conflicts with the federal mandate and cannot be enforced to stop implementation.

Respondents contend that § 382.109, Preemption of State and local laws, provides:

(a) Except as provided in paragraph (b) of this section this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the

accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

Respondents contend that these preemption provisions were specifically intended to prevent obstruction of the federal testing program by the collective bargaining law. Respondents argue that the Congressional findings underlying Part 382 indicate as follows:

[E]mployers and employees are not free to bargain away any of the requirements of these rules. Whatever rights they may have to bargain collectively or otherwise agree on employer-employee relations, they cannot change or ignore Federal safety standards.

59 Federal Register 7317 (1994).

Respondents further contend that they do not contest consultation and bargaining obligations over the administration and enforcement of the federal program but that such discussions cannot block implementation of the federally mandated testing. In addition, Respondents contend that the issues of disciplinary propriety are premature. Thus, Respondents contend that the Board lacks jurisdiction to enforce Chapter 89, HRS, in a manner which would present an obstacle to the accomplishment and execution of any requirement of 49 C.F.R. Part 382.

In response, the UPW contends that this Board lacks jurisdiction to rule on the constitutionality of Chapter 89, HRS, its governing statute. Further, the UPW argues that the Respondents failed to prove that the federal rules and

Congressional intent preempt state collective bargaining laws on the subject.

The Board conducted a hearing on Respondents' motion to dismiss on September 5, 1995. Based upon the record and the arguments presented, the Board hereby denies the Respondents' motion to dismiss.

In Decision No. 242, Hawaii Fire Fighters Association, 4 HLRB 164 (1987), the fire fighters union sought negotiations with respect to the application of the Fair Labor Standards Act (FLSA) and the effect upon the existing agreements between the parties. The FLSA contains certain requirements on minimum wage, maximum hours, overtime pay and other topics and was made applicable to the State and municipal employers pursuant to a recently decided U.S. Supreme Court case. The public employers however, unilaterally implemented the provisions of the FLSA without negotiation with the fire fighters union.

The Board found that the compliance with federal statutes was not negotiable but that there was a distinction between negotiation over compliance and negotiation over implementation of the statutes. The Board considered that the duty to bargain applies where the employer has discretion under the federal law or regulations in implementing the law. The Board also held that where such discretion or latitude is reasonably apparent, the duty to bargain over issues of wages, hours, and working conditions affected in the process of implementation of federal mandates applies. Thus, the Board concluded that the only topics upon which bargaining was not required regarding FLSA implementation were

matters of "mandatory or essential compliance." The Board therefore found that the employers committed prohibited practices by refusing to bargain in good faith and also by violating the terms of the contract by the unilateral implementation of the FLSA.

Thereafter, in Decision No. 303, University of Hawaii Professional Assembly, 4 HLRB 689 (1990) the Board held that the Board of Regents did not refuse to bargain over the implementation of the Drug Free Workplace Act because its promulgated Executive Policy merely implemented the essential terms of the Act. After reviewing the federal law and the Executive Policy, the Board concluded that the Executive Policy merely complied with the dictates of the DFWA rather than adding discretionary terms of implementation to the policy which would require negotiations. The Board noted that the actual implementation of the apparatus required for the execution of the mandates of the DFWA may give rise to the duty to bargain.

Based upon the foregoing cases, it is clear that the Board has previously held that where there is a federal statute requiring compliance, the employer's promulgation of the essential terms of the federal statute and the regulations promulgated thereunder does not give rise to a duty to bargain. However, where there is discretion in the implementation of the federal law, the Board recognizes that the duty to bargain may apply. Whether the duty to bargain applies in this case and the extent to which any duty applies, remains to be shown. Thus, while the Board appreciates Respondents' preemption arguments, the Board is unable to determine at this stage of the proceedings and upon this record,

inter alia, whether compliance with both the State or local requirement is possible or whether compliance with the State or local requirement is an obstacle to the accomplishment of any requirement. Thus, the Board hereby denies Respondents' motion to dismiss the prohibited practice complaint.

DATED: Honolulu, Hawaii, November 22, 1995.

HAWAII LABOR RELATIONS BOARD



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

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