STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LINDA CROCKETT LINGLE, Mayor, County of Maui, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	)	CASE NO. CU-01-121 ORDER NO. 1333 ORDER GRANTING COMPLAINANT UPW'S MOTION FOR INTER-LOCUTORY RELIEF
In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and LINDA CROCKETT LINGLE, Mayor, County of Maui and COUNTY OF MAUI, Respondents.	)	CASE NO. CE-01-297

ORDER GRANTING COMPLAINANT
UPW'S MOTION FOR INTERLOCUTORY RELIEF

On April 4, 1996, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union), filed a motion for interlocutory relief in these consolidated cases with the Hawaii Labor Relations Board (Board). The UPW contends that Respondent LINDA CROCKETT LINGLE (LINGLE or Employer) engaged in inherently destructive conduct when she decided to privatize refuse collection and disposal work on the island of Maui because the UPW refused to

agree to modifications proposed by Respondent to the Uku Pau Agreement (i.e., task force policies). In addition, the Union contends that Respondent refused to negotiate over the decision to privatize bargaining unit work performed by approximately forty-one (41) employees of the solid waste division, Department of Public Works and Waste Management, County of Maui.

The UPW moved that the Board enjoin Respondent from (1) unilaterally implementing Respondent's decision to privatize refuse collection and disposal work in Maui County currently performed by bargaining unit 01 employees under the existing Uku Pau Agreement with the UPW; (2) threatening to privatize or contract out bargaining unit 01 work during negotiations over amendments to the Uku Pau Agreement between Maui County and the UPW; and (3) refusing to negotiate over the decision to privatize refuse collection and disposal work and its full impact on bargaining unit work and unit 01 employees.

The Board conducted a hearing on Complainant's motion for interlocutory relief on April 15, 1996 pursuant to an agreement between the parties. The parties submitted written memoranda on April 4, 1996, April 12, 1996, and April 15, 1996 in support of and in opposition to the motion. All parties were represented and had a full opportunity to present evidence and argument before the Board. After reviewing the record and considering the arguments presented on the motion, the Board orally granted Complainant's motion. Counsel for UPW was instructed to file a proposed order with the Board.

On April 18, 1996, Complainant, by and through its counsel, filed a proposed order with the Board. Thereafter, on May 6, 1996, Complainant filed an amendment to its proposed order which included a request to enjoin Respondent from rescinding a "Stop Work" order issued by Maui County Director of Finance Travis O. Thompson (Thompson) on April 26, 1996 to Ray A. Kraai, Division President and General Manager, Waste Management of Hawaii, Inc. (WMI). Thompson issued the order to WMI pursuant to Section 9 of the contract with Maui County to furnish curbside refuse and recyclables collection services in view of the Board's oral ruling granting the UPW's motion for interlocutory relief. By its amendment, the UPW requested that the stop work order be maintained pending a final decision by the Board.

On May 10, 1996, Respondent LINGLE, by and through her attorneys, filed objections to Complainant's proposed order. Respondent contends that the order is not supported by the evidence in the record. Respondent argues that the UPW mischaracterized the testimony adduced during the hearings and contends that the UPW's reliance on the cited legal authorities is misplaced.

After reviewing the additional materials submitted, the Board accordingly makes the following findings of fact and conclusions of law.

Complainant UPW is the exclusive representative of employees in bargaining unit 01, as defined in § 89-6, Hawaii Revised Statutes (HRS).

Respondent LINGLE is the Mayor of the County of Maui and thus, is the public employer as defined in § 89-2, HRS, of

employees of the County of Maui who are included in bargaining unit 01.

The UPW and the County of Maui are parties to a collective bargaining agreement, effective July 1, 1993 to June 30, 1995, covering bargaining unit 01 employees of the State of Hawaii and the various counties. The agreement was extended from July 1, 1995 through January 31, 1996, pursuant to a Memorandum of Agreement, dated June 29, 1995, and extended again from February 1, 1996 through June 30, 1996, pursuant to a Memorandum of Agreement, dated January 31, 1996.

The UPW and the County of Maui have been parties to successive collective bargaining agreements applicable to bargaining unit 01 employees since the 1970's. Historically, the terms and conditions of work for those engaged in refuse collection and disposal work in the County of Maui, County of Kauai and the City and County of Honolulu have been negotiated as separate Uku Pau Agreements between the UPW and each county.

In Department of Public Works, County of Maui v. United Public Workers, Local 646, (8/9/86), Arbitrator Ted T. Tsukiyama described the meaning and history of "uku pau" as follows:

> The "taskwork" (uku pau) system has been in existence prior to the first collective bargaining agreement between the parties. "Uku pau" is a colloquialism for the piece work contract work system under the refuse collection operations where a certain quantum of work is determined and designated as the equivalent of an 8-hour day's work, which can be completed at the will and pace of each work crew. We are indeed indebted to the Union's Post-Hearing Brief for its interpretation of the word and meaning of "uku pau", that is, in the Hawaiian language the word "uku" means "flea" and "pau" means "finish or complete",

thus to "uku pau" means "to jump around like a flea to quickly finish the work." The "uku pau" systems differ in each county in which the applicable work unit may be measured by poundage as in Honolulu, by housing units as in Kauai, or by route as is the case in the County of Maui. Each county (except County of Hawaii) has formulated and adopted an "uku pau" agreement in writing with the Union.

Commencing in 1983, the parties to the Unit 01 agreement incorporated the Uku Pau Agreements into the master agreement pursuant to § 51.02 and agreed that modifications to any Uku Pau Agreement would be submitted and negotiated in the same manner as proposals to modify the Unit 01 agreement under § 51.04. The term or duration of the Uku Pau Agreements and the Unit 01 agreement are co-terminous.

Relevant portions of the Unit 01 agreement state:

> 51.02 For the purpose of efficiency of operations, the parties agree to recognize the existing refuse collection task work (uku pau) system as a method of determining a day's work in the applicable jurisdictions.
>
> 51.04 Modification to existing Task Work Agreements titled "Task Work Policies for Refuse Collective Operations" of the County of Maui, "Policies and Procedures on Task Work for Refuse Collection" of the City and County of Honolulu, and "Task Work Policies for Refuse collection Operations" for the County of Kauai shall be made through negotiations between the applicable Employer and the Union. Submission of proposals and commencement of negotiations shall be made in accordance with Section 66.02 of this Agreement or as provided for in Section 63.01 of this Agreement.
>
> 66.02 Notices and proposals shall be in writing and shall be presented to the other party between July 1 and August 30, 1994. When any such notice is given, negotiations for a new Agreement shall commence on or about September 1 following the giving of such notice.

On September 13, 1994 Raymond Kokubun (Kokubun), Director of Personnel Services for the County of Maui, submitted five (5) proposals to modify the Uku Pau Agreement to the UPW. The County sought (1) to exclude Molokai employees from uku pau and change the starting times for all uku pau employees from 5:30 a.m. to 7:00 a.m., (2) to delete the overtime pay requirements of 1,750 accounts, (3) to modify the standard amount of trash pickups from 350 accounts to 24,000 pounds per route, (4) to permit the employer to introduce new technology and methods of refuse pickup through "consultation", and (5) to reduce the crew size from three to two employees. The UPW sought no changes to the existing Uku Pau agreement with the County of Maui.

On May 12, 1995, the parties commenced bargaining over the proposed contract modifications. Peter Trask was the spokesperson for the Union's negotiating committee which consisted of four employees from the island of Maui. Kenneth Taira, Deputy Director for Personnel Services, County of Maui was the spokesperson for the Employer. The UPW rejected Maui County's proposal to remove the Molokai refuse collection and disposal system from the Uku Pau Agreement. In addition, the UPW rejected an Employer proposal to reduce the refuse crew size from three employees (consisting of a driver and two collectors) to two employees. After the initial bargaining session, Raymond Kokubun, Director of Personnel Services, became the spokesperson for Maui County.

On June 20, 1995, the County of Maui announced that employees in the highways division of the Department of Public

Works and Waste Management would not be allowed to perform temporary assignment work as refuse crew leaders (drivers) and refuse collectors. Previously, temporary assignments were routinely granted from the highways division and were recognized as constituting a term and condition of work covered by the Uku Pau Agreement. UPW v. Department of Public Works, County of Maui, Grievance of Pau Kaina (Arb. Ishida, 4/14/86). County officials did not negotiate this change in temporary assignments with the UPW before unilaterally implementing it.

By letter dated June 21, 1995, from Kokubun to Gary Rodrigues, UPW State Director, the County indicated that the UPW had rejected all of the County's proposals at the first negotiation meeting held on May 12, 1995 without providing any explanation or offering any counter-proposals. The County provided reasons for its proposed changes and further proposed to extend the Uku Pau Agreement to January 31, 1996 in order to allow the parties to negotiate in good faith. The County also indicated that if an agreement was not reached by January 31, 1996, the County would not extend the Agreement and would be free to seek other methods to collect refuse.

On June 29, 1995, the County of Maui unilaterally implemented a change from a two-day pickup to a one-day refuse pickup system on Molokai. The Employer did not negotiate this change with the UPW prior to implementation.

By letter dated June 30, 1995, Gary Rodrigues responded to Kokubun's letter dated June 21, 1995, stating that the County

appeared to be deliberately violating §§ 51 and 66 of the Unit 01 Agreement and Chapter 89, HRS.

On September 19, 1995, Maui County implemented its proposal for a reduced refuse crew size in certain situations. Maui County did not negotiate to impasse the proposed change in crew size before implementation.

On October 18, 1995, the UPW filed a prohibited practice complaint with the Board in Case No. CE-01-275 challenging the above series of unilateral changes implemented by Maui County without prior negotiation.

On November 21, 1995, the UPW and County negotiators convened their second bargaining session. County negotiators narrowed the focus of their proposed changes by withdrawing its proposal on new technology and methods of refuse pickup, and changing their proposal to reduce the refuse crew size from three (3) to two (2) (i.e., making the reduction optional). The parties exchanged their respective views on these issues.

On December 1, 1995, at the third bargaining session, Maui County negotiators decided to withdraw three more of their proposals after the UPW negotiating committee rejected them. In a letter dated December 7, 1995, Kokubun informed Peter Trask that the County of Maui had decided to focus their effort on one change in the Uku Pau Agreement (i.e., a modification to the standard of refuse pickup each day). Under the existing Uku Pau Agreement refuse crews are assigned to 350 residential pickups per day (or 1,750 accounts per week). Maui County proposed that production level be increased to 500 residential pickups per day. In his

letter of December 7, 1995, Kokubun set December 22, 1995, as a "deadline" for a response from the UPW to the new proposal. On December 21, 1995, Peter Trask responded to Kokubun's letter confirming that the negotiable issues had been reduced by Maui County's withdrawal of all but one proposal for modification to the Uku Pau Agreement.

Raymond Kokubun, in a letter to Peter Trask dated December 27, 1995, informed the Union that Maui County was considering the issuance of a request for proposals for private refuse collection.

LINGLE decided to issue a request for proposals after the third bargaining session held on December 1, 1995 with the UPW. LINGLE's motivation for her decision was "because there was no movement or there appeared to be no movement on the part of the Union with respect to amending the Uku Pau Agreement." LINGLE consulted with Raymond Kokubun before making her decision; Kokubun confirmed that a "causal connection" existed between LINGLE's decision to issue a request for proposal and the UPW's failure to grant Maui County a "concession" in uku pau negotiations by December 21, 1995.

On January 5, 1996, Respondent LINGLE issued a news release to announce that the Department of Public Works and Waste Management had issued a request for proposals to coordinate residential refuse pickup for the island of Maui on a privatized basis effective July 1, 1996.

As of December 21, 1995, the UPW and the County of Maui were not at impasse in uku pau negotiations. The parties met on January 8, 1996 for their fourth bargaining session, during which Maui County's proposal to increase refuse pickups from 350 to 500 per day was discussed. The Union's negotiating committee from Maui remained unconvinced about the need for a modification which would increase their hours of work because the Employer did not provide the "facts and figures" to support their position. On January 19, 1996, Raymond Kokubun transmitted a partial response to the Union's request for information.

On January 31, 1996, the parties to the Unit 01 agreement extended the term of their agreement to June 30, 1996, thereby extending the term of the Uku Pau Agreement between the UPW and Maui County. In spite of the contract extension, Respondent LINGLE did not cancel the request for proposals issued on January 5, 1996 for privatized refuse collection.

Seven private companies submitted responses to the request for proposals in February 1996, including WMI, whose representatives began having meetings with officials of the Department of Public Works and Waste Management in June 1995. Sometime in October or November 1995, Respondent LINGLE, Raymond Kokubun, and David Goode, Deputy Director of the Department of Public Works and Waste Management met with representatives of WMI to discuss WMI's experience with privatization in county landfill operations on the Big Island and Oahu.

On February 23, 1996, Respondent LINGLE decided to proceed with implementation of her decision to privatize refuse

collection and disposal on Maui by selecting WMI as the successful bidder. Respondent began negotiations with WMI over the terms of the contract with Maui County on and after February 23, 1996.

The evidence in the record indicates that Respondent LINGLE unilaterally implemented her decision to privatize refuse collection and disposal work on Maui without any prior notification or bargaining with the UPW over the decision or its impact. At an employees' meeting held on March 19, 1996 at the Kahului Community Center, LINGLE announced to forty-one (41) employees of the refuse division that they would no longer be employed in refuse collection and disposal after June 30, 1996 and that the uku pau system would be replaced by the private collection and disposal of refuse effective July 1, 1996 through a subcontract with WMI.

Respondent LINGLE told the County employees that her decision to privatize was made "because we couldn't reach an agreement in contract negotiations" with the UPW. Rodney Figueroa, a member of the UPW's negotiating committee in uku pau bargaining felt he was "losing a job" because he and others who were involved in negotiations "took a stand in bargaining and refused to grant the concession" which Maui County sought at the bargaining table. When asked how he felt about participating in negotiations in the future Figueroa stated, "why should I do it again, get into future Union negotiations because I already going to get burned once now by losing my job. If I do it again, I can lose my job again."

Respondent was aware that the decision to privatize meant that forty-one (41) refuse worker positions currently in bargaining unit 01 would be eliminated and replaced by WMI-offered jobs. At

the meeting, LINGLE urged the affected County employees to apply for vacancies in other County positions and said that the "biggest difference is, you will work a normal, regular eight-hour day."

Under the existing uku pau system, refuse collectors and drivers normally complete their work in approximately four hours a day and are able to work at a second job. LINGLE also informed the employees that unless they submitted their application for County vacancies by May 1, 1996, they would all be transferred to laborer positions in the highways division of the Department of Public Works and Waste Management, effective July 1, 1996. For refuse truck drivers such an involuntary transfer means a demotion to a lower job classification. LINGLE informed the affected employees that they would retain their "seniority" over other bargaining unit 01 employees.

Prior to announcing the various changes in hours of work, and other terms and conditions of employment affecting bargaining unit 01 employees on March 19, 1996, Respondent failed to notify or negotiate with their exclusive bargaining agent, the UPW.

Respondent LINGLE was also aware that as a consequence of her decision to privatize, Maui County would no longer need to bargain with the UPW over the Uku Pau Agreement because the entire concept of uku pau would cease to exist in Maui County after June 30, 1996.

After making her announcement to bargaining unit 01 employees on March 19, 1996, Respondent LINGLE sent a letter via fax to the UPW informing the Union of the decision to subcontract with WMI. On March 20, 1996, Gary Rodrigues requested Respondent

LINGLE "to cease and desist from undertaking unilateral changes in wages, hours of work, and terms and conditions of employees." The Union requested bargaining over "the decisions to privatize and its impacts." The UPW also submitted a request for information and asked for a response within seven days. Respondent LINGLE never responded to the UPW's request for bargaining.

On March 21, 1996, Respondent LINGLE, in a radio news broadcast, announced her reasons to privatize. She said "And we based that decision on our perception of the union leadership's inability and unwillingness to negotiate sincerely with us. And I want to make clear that the distinction, when I say the union, I'm talking about the union leadership in Honolulu."

In an amended prohibited practice complaint filed on April 10, 1996, the UPW alleges that Respondent LINGLE engaged in unlawful discrimination to discourage participation in collective bargaining in violation of §§ 89-13(a)(1), (3), and (7), HRS, and unlawfully refused to negotiate over the decision to privatize bargaining unit work and its full impact in violation of §§ 89-13(a)(1) and (5), HRS.

On April 12, 1996, Maui County officials completed their negotiations with WMI and Respondent LINGLE signed the contract to privatize refuse collection and disposal work on Maui.

At the outset, the Board finds that it has jurisdiction over this dispute pursuant to § 89-5(b)(4), HRS, and is empowered in a prohibited practice case to take such actions "as it deems necessary and proper." Section 89-14, HRS, provides that

prohibited practice complaints may be submitted in the same manner as set forth in § 377-9, HRS. Section 377-9(d), HRS, states:

> After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all issues involved in the controversy and the determination of rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. . . . [Emphasis added.]

The Board's Administrative Rules § 12-48-48 contains similar provisions to the foregoing statute.

The Board has relied upon the analysis provided by the Hawaii Intermediate Appellate Court in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272 (1981), in considering whether interlocutory relief is appropriate. HGEA v. Dept. of Education, Case Nos. CE-03-170a, CE-04-170b, CE-13-170c, Order No. 912 (Dec. 10/29/92); UPW v. Stephen Yamashiro, et al., Case Nos. CE-01-260, CE-10-273, CE-01-274, Order No. 1277 (Dec. 1/12/96). The three requirements for granting interlocutory injunctive relief are: 1) Is the party seeking relief likely to prevail on the merits? 2) Does the balance of irreparable damage favor issuance of injunctive relief? 3) Does the public interest support the granting of injunctive relief? The Court also noted that:

> The more the balance of irreparable damage favors the issuance of the injunction, the less the party seeking the injunction has to show likelihood of success on the merits. [Citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits the less he has to show that the balance of

> irreparable harm favors the issuance of the injunction.

Id. at 276.

Based on the Penn analysis, then, where the movant shows a greater probability of succeeding on the merits, the less the movant has to show that the balance of irreparable harm favors the issuance of the injunction.

The facts in the record before the Board clearly establish that the parties were engaged in negotiations over the Uku Pau Agreement and during the course of such negotiations, without reaching impasse, LINGLE decided to privatize refuse collection for Maui County. LINGLE admitted, under questioning by her own counsel, that her "motivation" for privatizing was "because there was no movement or appeared to be no movement on the part of the union with respect to amending the Uku Pau Agreement." Raymond Kokubun, the spokesperson for Maui County in uku pau negotiations, testified that there was a "causal connection" between Respondent's decision to privatize and the employer's "inability to get the concessions" it wanted in uku pau negotiations. Thus, it appears that LINGLE's decision to privatize refuse collection was reactive to the UPW's lawful exercise of rights expressly set forth in §§ 89-3[1] and 89-9(a), HRS, to engage in negotiations and that

---

[1]Section 89-3, HRS, states:

> Employees shall have the right to self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose

Respondent LINGLE's decision was unlawfully motivated and inherently destructive of the rights of bargaining unit 01 employees.

Section 89-9(a), HRS, states in relevant part ". . . the employer and the exclusive bargaining representative shall meet at reasonable times . . . and shall negotiate in good faith with respect to wages . . . and other conditions of employment which are subject to negotiations . . . but such obligation does not compel either party to agree to a proposal or make a concession." The right of either party to stand firm on its substantive positions in bargaining has long been recognized. NLRB v. Reed & Prince Mfg. Co., 305 F.2d 131, 134, 32 LRRM 2225, 2228 (1953); Atlanta Hilton & Tower, 271 NLRB 1600, 1603, 117 LRRM 1224 (1984); Standard Roofing Co., 290 NLRB No. 27, 129 LRRM 1058, 1060 (1988). As the National Labor Relations Board (NLRB) stated in Atlanta Hilton & Tower, supra:

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on

---

of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

> any specific issue or to adopt any particular position." [Emphasis added].

Atlanta Hilton & Tower, 117 LRRM at 1227. Likewise, an employer may not "compel" a union "to agree to a proposal or make a concession" in negotiations by threatening to privatize or by implementing a decision to permanently contract out bargaining unit work. International Paper Co., 319 NLRB No. 150, 151 LRRM 1033, 1052 (1995).

The record indicates that LINGLE decided to issue a request for proposals after the third bargaining session held on December 1, 1995, when the parties were not at impasse in uku pau negotiations. They had met on three occasions and bargaining focused on the Employer's proposal to increase refuse pickups from 350 to 500 per day. On January 5, 1996, the County published the request for proposals before a fourth bargaining session where UPW negotiators requested information on the impact of the proposed change in production standards. On January 31, 1996, parties extended the Unit 01 agreement to June 30, 1996. On February 23, 1995, LINGLE selected WMI as the private contractor.

The UPW contends that LINGLE's actions are "inherently destructive" of the right of employees to engage in collective bargaining. The UPW relies on NLRB v. Great Dane Trailers, 388 U.S. 26, 33-34 (1967), where the U.S. Supreme Court declared:

> Some conduct . . . is so inherently destructive of employee interests that it may be deemed proscribed without the need for proof of an underlying improper motive . . . [Such conduct] carries with it "unavoidable" consequences which the employer may not only foresee but which he must have intended and thus be as its own indicia of intent. [Emphasis added].

The Court further stated that:

> . . . if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, <u>no proof of antiunion motivation is needed</u> and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [Emphasis added].

In addition, the UPW argues that Respondent LINGLE's actions have had severe impacts on the rights of bargaining unit 01 employees.

> The impact of the respondent's conduct was correspondingly severe on the unit employees' exercise of their Section 7 rights. By resisting the Respondent's bargaining proposals and adhering to the Union's negotiating positions, the unit employees were exercising their fundamental statutory rights under Section 7 of the Act to assist the Unions and to bargain collectively through the Unions as their representative. The Respondent's permanent subcontracting rendered nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status.

<u>International Paper Co.</u>, 319 NLRB No. 150, 151 LRRM 1033, 1052 (1995). LINGLE's actions would "inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." <u>Swift Independent Corp.</u>, 289 NLRB No. 51, at 18, 131 LRRM 1173 (1988); remanded sub nom. <u>Esmark v. NLRB</u>, 887 F.2d 739 (1989).

In addition, LINGLE met directly with the employees to inform them of the privatization and that they would no longer be employed in refuse collection after June 30, 1996. LINGLE informed

the employees that they would have to apply for other County vacancies by May 1, 1996 or they would be transferred to laborer positions in the highways division, effective July 1, 1996. This direct dealing with the employees indicates that the Respondent undermined or interfered with the UPW's role in representing the subject employees. Thus, based upon the record and arguments presented, the Board finds there is a strong likelihood that the UPW will prevail on the merits of its complaint that Respondent LINGLE engaged in unlawful interference with employees' rights and unlawfully discriminated against bargaining unit 01 employees in violation of §§ 89-13(a)(1), (3), and (7), HRS. The Board, however, reserves ruling on whether LINGLE's statements to the public and the employees constituted threats in violation of §§ 89-13(a)(1), (3), and (7), HRS.

Moreover, the preponderance of the evidence presented in this case establishes that Respondent LINGLE violated her duty to negotiate over the decision and impact of contracting out bargaining unit 01 work currently performed by forty-one (41) refuse crew leaders and collectors in Maui County. Thus, the evidence establishes that LINGLE violated § 89-13(a)(5), HRS, by her refusal to bargain in good faith.

An employer commits a prohibited practice when it unilaterally implements a policy which has a material and significant impact on terms and conditions of employment of covered employees and fails to negotiate either the nature of the action or its impact on the bargaining unit and employees of the bargaining unit prior to implementation. The evidence indicates that

Respondent LINGLE's privatization of refuse collection and disposal work for Maui County will result in the displacement of forty-one (41) refuse collectors and drivers who must seek other employment within the County of Maui. Those who do not apply for existing vacancies by May 1, 1996 will be involuntarily transferred to laborer positions in the highways division of the Department of Public Works and Waste Management. In addition, all uku pau employees will be required to work longer hours in their new positions and may not have the opportunity to be employed in second jobs as currently permitted. Further, the Union also argues that the seniority of these employees will be affected and their relative rights to promotions, temporary assignments, and other work opportunity will be impacted in relation to other employees of the County of Maui.

Effective July 1, 1996, the uku pau system will cease to exist and the Uku Pau Agreement between Maui County and the UPW will be a nullity. While the number of bargaining unit 01 positions will remain constant, the UPW will nevertheless have lost all forty-one (41) refuse worker positions in Maui County. These positions will be replaced by WMI jobs which will assume substantially the same role and function which have historically and customarily been performed by government employees for more than twenty-five (25) years.

In this case, LINGLE admits that her decision to initiate and implement privatization of Maui County's uku pau system was motivated by her perception that the UPW would not grant her concessions during uku pau negotiations. LINGLE admits that her

actions were undertaken "because there was no movement or there appeared to be no movement on the part of the union with respect to amendments to the Uku Pau Agreement." Clearly, in light of Respondent's stated reason for privatization, reliance on a belated assertion of "management rights" pursuant to § 89-9(d), HRS, to avoid the obligations set forth in § 89-9(a), HRS, is misplaced. LINGLE further admits that cost savings through privatization was not a reason for her actions at the time she made her decision. While LINGLE also now contends that recycling was a significant concern, the Board notes that the record does not indicate that the subject of recycling was raised in the negotiations with the UPW.

When a public employer unilaterally implements changes in wages, hours, and others terms and conditions of employment, such conduct is tantamount to a refusal to bargain. As the Hawaii Supreme Court recently held in UHPA v. Tomasu, 79 Haw. 154, 159 (1995):

> The duty to bargain arises in two circumstances potentially applicable to this decision: First, the obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. See, e.g., NLRB v. Katz, 369 U.S. 736, 737, 82 S.Ct. 1107, 1108, 8 L.Ed.2d 230 (1962) (unilateral implementation of automatic wage increases, changes in sick-leave benefits and numerous merit increases violated the statutorily imposed duty to bargain collectively); Burlington Fire Fighters Ass'n v. City of Burlington, 142 Vt. 434, 457 A.2d 642 (1983)

(principle that unilateral imposition of terms of employment is a violation of duty to bargain is equally applicable to public sector bargaining); First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). Therefore, when the employer attempts to promulgate a policy that will affect bargainable topics, the employer cannot do so without first initiating bargaining on such topics.

Second, the duty to bargain also arises if a union unilaterally demands "mid-term" bargaining, that is, bargaining mid-way through an active applicable collective bargaining agreement on bargainable subjects such as wages, hours, or terms of employment.

It also appears that Respondent LINGLE engaged in a pattern of unilateral changes in working conditions commencing in June 1995. Before reaching impasse in uku pau negotiations, LINGLE allegedly implemented a change in refuse pickup on the island of Molokai, changed temporary assignments practices within the highways division and reduced the crew size from three (3) to two (2) in 1995. She issued a request for proposals to privatize the refuse pickup on January 5, 1996 and made a decision to privatize on February 23, 1996. All of these changes were accomplished without bargaining with the Union. She did not notify nor negotiate with the UPW before announcing multiple changes in the employees' hours of work and other conditions of employment at the employees' meeting on March 19, 1996. More importantly, LINGLE failed to respond to a request to bargain sent by the UPW on March 20, 1996 before consummating an agreement with the private contractor (WMI) on April 12, 1996. Respondent's unilateral course of conduct not only violated her duty to negotiate, it also undermined the proper authority and role of the exclusive

bargaining agent. Allied Signal Inc., 307 NLRB No. 118, 140 LRRM 1121, 1122 (1992).

Respondent Maui County contends that in a similar case involving the privatization of Hawaii County landfill operations, Dec. No. 347, Case No. CE-01-186, UPW v. Yamashiro, et al., 5 HLRB 239 (1994) (Yamashiro case), the Board previously held that the employer's decision to privatize is a management right and does not require prior negotiation. The Board held however, that the employer is required to negotiate over the impacts of the decision prior to its implementation of any unilateral action.

In the Yamashiro case, the Board found that Hawaii County had committed a prohibited practice by refusing to negotiate with the Union over the impact of its decision to privatize prior to implementing its decision. The Board found that the effects of the County's decision were negotiable because of the impact of the decision on the bargaining unit. However, the Board found that there was a substantial impact on the terms and conditions of employment by the loss of job opportunities, in the form of promotions, transfers and temporary assignments for bargaining unit members and the denial of the opportunity for bargaining unit expansion. In that case the Board found that the negotiations should have occurred prior to the implementation of the decision, i.e., prior to the contract being negotiated, for the union to be given a meaningful opportunity to participate in the matter. Hawaii County offered to negotiate over the effects of its decision immediately prior to the opening of the landfill thus foreclosing any apparent opportunity for meaningful negotiation.

On appeal, the Third Circuit Court reversed the Board's decision finding that there was no evidence that the County ever refused to participate in effects bargaining. The Court found that in fact the Union had rebuffed the employer's offer to negotiate. The case is currently on appeal to the Hawaii Supreme Court.

Upon consideration of the Board's previous decision and the arguments presented in this case, the Board is inclined to find that the decision to privatize and its impact are so intertwined that the negotiation over the impact of the decision necessarily involves the decision to privatize. The difficulty in the effects bargaining cases as raised by the Employer in her objections to the UPW's proposed order is that the Employer views negotiation prior to implementation of the decision to be so far removed in time from the actual decision to privatize that the union is effectively shut out of any meaningful input. By the time the employer is prepared to negotiate with the union over the effects of its decision, if at all, the parameters of the scope of services have already been established in a contract or subcontract with the private enterprise and there is no room to fully accommodate the concerns of the employees affected. In this regard, the Board does not consider the impact to be limited to the effects on specified employees but the impact of the decision upon the bargaining unit as a whole.

The test as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether it has a material and significant effect

on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 63 (1977). The Board relies upon the analysis used in Dec. No. 26, Department of Education, 1 HPERB 311 (1973) and Dec. No. 102, Hawaii Fire Fighters Association, 2 HPERB 207 (1979) to determine whether an issue is negotiable where the employer claims an interference with management's rights.

Here, the Board believes that the impact of privatization on the Unit 01 refuse workers and the bargaining unit is clear. LINGLE's decision has a significant impact on the working conditions of the employees; on July 1, 1996, their jobs will no longer exist and unless they qualify for other County vacancies, they will be transferred to laborer positions in the highways division. While LINGLE represented that the biggest difference would be that they would be working eight-hour days, the fact is that the employees will be doing different work under different working conditions. On the other hand, LINGLE claims that she was ultimately concerned with the issue of recycling and the filling up of the landfills which prompted a major change in the County's direction with regard to refuse collection. She contends that negotiations with the Union, if required, would interfere with her right to establish such policy and determine the methods and means to operate an efficient refuse collection system for the County of Maui.

Under these facts, in striking a balance between the conflicting requirements in § 89-9, HRS, that working conditions be negotiated and which prohibit agreements which interfere with management's rights, the Board finds that the balance tips heavily

in favor of negotiations. Here, the impact on the forty-one (41) refuse workers is so significant and immediate as to require negotiations prior to implementing the Employer's decision to privatize.

It is undisputed that Respondent LINGLE did not respond to the Union's request to negotiate over the decision to privatize nor the effects of that decision. The evidence indicates that the Employer met with the employees and announced what the Employer unilaterally determined to be the ramifications of her decision to privatize, including the changes in the employees' working conditions. These matters were not negotiated nor even submitted for consultation with the Union. Although the Employer contends that the biggest difference between the uku pau refuse worker jobs and the laborer jobs in the highways division is the required hours of work, it seems clear that the responsibilities and work to be performed are significantly different. Based upon this record, the Board finds that the Union is likely to succeed on its claim that Respondents violated their duty to bargain in good faith over the privatization of the refuse collection system. The Board finds that the result of LINGLE's unilateral decision was the elimination of the uku pau system and the employees' jobs as refuse collectors.

Even under the Board's prior ruling in the Yamashiro case, Respondent was required to negotiate with the Union over the impact of her decision to privatize on terms and conditions of employment before implementing her decision. Based on the record before the Board, we find that the evidence strongly supports the UPW's claim that Respondent LINGLE never responded to the Union's

request to negotiate prior to implementation of her decision and therefore LINGLE violated § 89-13(a)(5), HRS.

With respect to the showing of irreparable harm, the Board finds that the movant has established that the forty-one (41) employees currently engaged in refuse collection and disposal work will suffer irreparable harm because their positions will be eliminated on July 1, 1996 and the Uku Pau Agreement will be a nullity. There will be significant changes to the employees' hours of work and employees will be transferred to other jobs with materially different working conditions. Some employees will lose their second jobs because of the increased hours of work. Employees who are not placed in other County jobs will suffer demotions to laborer positions if they currently occupy crew leader (driver) positions under the Uku Pau Agreement. Competing claims to seniority by other County employees will place the refuse collectors and drivers in a relative position of disadvantage for promotions, work opportunity, and other terms of employment.

In addition, Respondent LINGLE's actions are inherently destructive of employee rights and will deter bargaining unit employees from participating in labor negotiations in the future.

By unilaterally implementing privatization without bargaining, Respondent LINGLE has undercut the basic ground rules of negotiations and the integrity of the bargaining process. Injunctive relief is clearly warranted when a party to the employment relationship threatens to undermine the integrity of the collective bargaining process through unilateral actions which change and alter the status quo ante which is essential to good

faith negotiations. Eisenberg, Etc. v. Wellington Hall Nursing Home, 651 F.2d 902, 906-907 (1981); Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878 (1990).

Respondent's contention that the County of Maui will suffer irreparable harm because the benefits of the WMI contract will not be realized misses the mark. Before signing the subcontract with WMI on April 12, 1996, Respondent LINGLE was fully aware of the UPW's pending motion for interlocutory relief. To avoid irreparable harm to the integrity of the bargaining process, this Board must restore the "status quo ante" which existed before Respondent committed her prohibited practices.

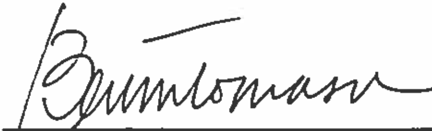
With regard to the public interest, the Board finds that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government, is furthered by the issuance of the subject order. Restoring the integrity of the bargaining process is in the public's interest. Board of Educ. v. Hawaii Pub. Emp. Relations Bd., 56 Haw. 85, 528 P.2d 809 (1974).

Based on the foregoing findings of fact and conclusions of law, the Board hereby enjoins Respondent LINGLE and the County of Maui from taking any further actions to implement the decision to privatize refuse collection and disposal work in Maui County currently performed by bargaining unit 01 employees under the existing Uku Pau Agreement with the UPW. Respondent shall cease and desist from implementing the terms of the WMI-Maui County agreement of April 12, 1996 which displaces bargaining unit 01 employees from County employment effective July 1, 1996.

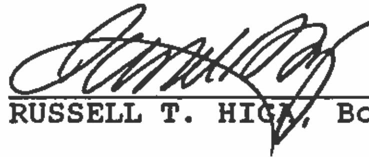
Respondent's stop work order issued by Travis Thompson on April 26, 1996 shall be maintained pending a final decision by the Board. Respondent is ordered to negotiate in good faith over the decision to privatize refuse collection work on bargaining unit work and Unit 01 employees with the UPW and cease and desist from making unilateral changes in wages, hours of work, and terms and conditions of employment during the bargaining process.

DATED: Honolulu, Hawaii, May 17, 1996.

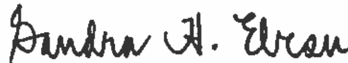
HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

Copies sent to:

Howard Fukushima, Deputy Corporation Counsel
Herbert R. Takahashi, Esq.
Joyce Najita, IRC