STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainants, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and SAM CALLEJO, Comptroller, Department of Accounting and General Services, State of Hawaii, Respondents.	CASE NOS.: CE-05-314a CE-07-314b ORDER NO. 1402 ORDER GRANTING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING COMPLAINANTS' MOTIONS FOR SUMMARY JUDGMENT

On October 4, 1996, Complainants HAWAII STATE TEACHERS ASSOCIATION (HSTA) and the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) (collectively Unions or Complainants) filed a prohibited practice complaint against BENJAMIN J. CAYETANO, Governor, State of Hawaii and SAM CALLEJO, Comptroller, Department of Accounting and General Services, State of Hawaii (collectively State or Employer) with the Hawaii Labor Relations Board (Board). Complainants alleged that Respondents announced that they will unilaterally implement a payroll lag program in accordance with Act 80, Session Laws of Hawaii 1996 (SLH 1996) (Act 80), commencing on January 1, 1997. Complainants also alleged that Respondents have refused to negotiate over the terms and conditions of the payroll lag program with Complainants in violation of §§ 89-13(a)(5), (6), (7), and (8), Hawaii Revised Statutes (HRS).

On November 1, 1996, Complainants filed a motion for summary judgment with the Board. Complainants contend that there are no genuine issues of material fact present in this case and that they are entitled to judgment as a matter of law. Complainants contend that paydays and payroll periods are negotiable subjects under Chapter 89, HRS, and the unilateral implementation of a payroll lag program as announced by Respondents is a prohibited practice.

On November 8, 1996, Respondents filed a cross-motion for summary judgment seeking a determination that the implementation of an after-the-fact payroll is nonnegotiable. Respondents also contend that Complainants had not made a request to negotiate over the paylag and that Respondents have not unilaterally altered any working conditions. Respondents further contend that the implementation of an after-the-fact payroll is designed to maintain the efficiency of government operations and the implementation of the five-day paylag is a valid exercise of management's rights under § 89-9(d), HRS.

The Board held a hearing on the cross-motions for summary judgment on November 12, 1996 and took the matter under advisement. After considering the record and arguments in this case, the Board found that the record was unclear as to whether there was a demand and refusal to bargain or unilateral implementation by the Employer. After notice to the parties, the Board scheduled a further hearing in this matter on December 19, 1996. At the hearing, the parties submitted a stipulation of facts to the Board

addressing these issues. The HSTA also submitted further exhibits to the Board.

Based upon the record in this case and the arguments presented, the Board makes the following findings of fact and conclusions of law and hereby grants Complainants' motion for summary judgment.

Complainant HSTA is a labor organization and the exclusive representative, as defined in § 89-2, HRS, of bargaining unit 05, consisting of public school teachers and other personnel on the same salary schedule.

Complainant UHPA is a labor organization and the exclusive representative, as defined in § 89-2, HRS, of bargaining unit 07, consisting of the faculty of the University of Hawaii and the community college system.

BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer, as defined in § 89-2, HRS, and exercises control over the issues presented herein.

SAM CALLEJO is the Comptroller, Department of Accounting and General Services, State of Hawaii, who administers the payroll for employees of the State of Hawaii and the University of Hawaii.

The HSTA and UHPA are both at impasse with the respective public employers over the terms of their collective bargaining agreements which initially expired on June 30, 1995. The Board takes notice that in separate proceedings before the Board, each Complainant has proceeded through the mediation and fact-finding procedures set forth in § 89-11, HRS, and both bargaining units are in the cooling-off period. The issue of a paylag was not raised

nor discussed during the negotiations for the current contract nor during the contract resolution process.

The contract between the HSTA and the Board of Education, State of Hawaii expired on October 31, 1996. The contract between UHPA and the Board of Regents, University of Hawaii has also expired.

Section 78-13, HRS, sets forth the salary periods for public officers and employees and provides, with certain exceptions, that all officers and employees shall be paid at least semimonthly. According to the Comptroller, the State currently pays its employees on a predicted payroll basis. The payroll records are processed predicting that employees will have the same payroll status at the time they are paid. If an employee's status changes after the submission of the payroll information, an employee who is terminated from service or who has run out of leave may receive pay for which he or she is not entitled. The Comptroller states that the overpayment of employees is a major problem for the State and the chances of overpayment are reduced with an after-the-fact payroll.

During the 1996 session, the Legislature passed Act 80 which amends § 78-13, HRS, to permit the Governor to allow a one-time, once a month payroll to effect a conversion from a predicted payroll system to an after-the-fact payroll. Section 78-13, HRS, as amended, reads as follows:

> § 78-13 Salary periods. Unless otherwise provided by law, all officers and employees shall be paid at least semimonthly except that substitute teachers, part-time hourly rated teachers of adult and evening classes, and other part-time intermittent, or

> casual employees may be paid more than once a month and that the governor, upon reasonable notice and upon determination that the payroll basis should be converted from predicted payroll to after-the-fact payroll, may allow a one-time once a month payroll payment to all public officers and employees to effect a conversion to after-the-fact payroll; provided that the conversion time schedule shall occur over a one-year period.

On June 5, 1996, CAYETANO approved Act 80. Thereafter, the State announced the implementation of a payroll lag program in accordance with Act 80 commencing on January 1, 1997. Under this program, the State would delay the payment of all State employees' paychecks by one pay period. This will be accomplished by lagging the pay dates, commencing in January 1997, by one day until a two-week lag is accomplished on September 15, 1997. The pay which is lagged will be held by the Employer until each employee separates from work.

Complainants filed the instant prohibited practice complaint with the Board on October 4, 1996. By letter dated October 10, 1996, Governor CAYETANO proposed an option to the payroll lag set forth in Act 80 to J.N. Musto, Executive Director of UHPA, as the parties entered into negotiations for upcoming contracts. The Governor proposed a five-day adjustment to the pay date which would be implemented over a five-month period. Thus, the paydates from February through June 1997 would be adjusted by one day per month, resulting in the paydates being the 5th and 20th of each month effective July 1997.

By letter dated October 14, 1996, Musto wrote to CAYETANO to clarify the purpose of CAYETANO's letter. Musto asked the

Governor whether the proposal was a formal bargaining proposal or whether it was distinct from all other issues at impasse.

By letter dated October 22, 1996, CAYETANO responded that the proposal was not a bargaining proposal nor a specific proposal to increase salaries contingent upon acceptance of a payroll lag. In addition, CAYETANO indicated that the five-day adjustment would have a lesser impact on the employees than the paylag originally proposed and at the same time, would achieve its stated goal. CAYETANO further stated that Act 80 authorized him to adjust the salary pay periods of public officers and employees and to be cost effective, it must be applied to all employees on the same date.

As to HSTA, by letter dated October 10, 1996, CAYETANO also proposed the same five-day paylag to June Motokawa, HSTA President. By letter dated October 30, 1996, Motokawa requested clarification of CAYETANO's proposal as it referred to "upcoming contract negotiations." Motokawa inquired whether CAYETANO proposed to enter into a four-year contract from 1995-1999. Motokawa also sought clarification whether CAYETANO intended to negotiate the terms of the paylag in conjunction with salary increases. Motokawa indicated however, that if CAYETANO intended to unilaterally impose the five-day lag on teachers the Union would pursue the instant prohibited practice complaint which was pending with the Board.

Thus, based upon the record, the Board finds that in June 1996, Respondents announced the conversion to an after-the-fact payroll pursuant to Act 80. Respondents intended to implement a two-week paylag in January 1997. Presently, however,

Respondents propose a five-day adjustment of pay which would be implemented by delaying the issuance of payroll checks one day each month until the five-day adjustment is accomplished.

Although Respondents initially argued that Complainants had not requested to negotiate over the paylag since Act 80 became effective on June 5, 1996 and Respondents have not unilaterally altered any working conditions, the parties stipulated that Complainants requested bargaining over the paylag and that the State indicated that the matter is not bargainable and therefore refused such demands. In addition, the parties stipulated that the State intends to implement some form of payroll lag in the near future. The parties also stipulated that the case is ripe for decision. Thus, the issue before the Board is whether the Respondents violated Chapter 89, HRS, by refusing to negotiate over the paylag prior to its implementation.

In reviewing the legislation at issue, the Board finds that Act 80 does not specifically refer to or supersede Chapter 89, HRS. Act 80 permits the Governor, in his discretion, to convert to an after-the-fact payroll but does not mandate the conversion nor provide any details over its implementation.

Respondents contend that the relevant legislative history evidences an intent that the implementation of the after-the-fact payroll is nonnegotiable. Respondents cite the report from the Senate Committee on Agriculture, Labor, and Employment which states:

> Although well aware of the State's current financial crisis, your Committee has serious concerns over legislating over what it deems to be an issue more appropriately

> addressed through collective bargaining. However, realizing the necessity to keep many financial alternatives alive so that a suitable budgetary solution may be crafted by the Legislature, your Committee believes this bill should move forward. Stand. Com. Rep. No. 2432 on H.B. No. 3341, H.D. 2, S.D. 1.

The Committee amended the bill to require the Governor to consult with the exclusive bargaining representatives of affected public employees prior to initiating any payroll conversion. Thereafter, the Senate Committee on Ways and Means deleted the consultation requirement without specific comment. Senate Standing Committee Report No. 2694 on H.B. No. 3341, H.D. 2, S.D. 2.

Respondents contend that the elimination of the consultation provision by the Senate Committee on Ways and Means indicates that the paylag was intended to be nonnegotiable. To the contrary, however, in the Board's view the inclusion of the consultation requirement in the bill indicates that the subject was nonnegotiable since consultation is a term with legal significance and only applies to nonnegotiable matters. Thus, the later deletion of the consultation provision by the Senate Committee on Ways and Means can be interpreted to suggest that the paylag was intended to be negotiable.

Based upon a review of the relevant legislative history, clearly the purpose for Act 80 was to minimize salary overpayments and to result in a one-time savings of approximately $ 47,000,000. The Board agrees with Complainants, however, that it is difficult to ascertain whether the Legislature intended the paylag to be negotiable or nonnegotiable. As such, the Board relies upon the unambiguous language of the statute which does not make reference

to or supersede Chapter 89, HRS. When the statutes are read together then, the Board concludes that Respondents may implement a paylag but must comply with bargaining obligations imposed by Chapter 89, HRS. The issue before the Board then, is whether under the provisions of Chapter 89, HRS, the paylag is negotiable.

Section 89-9, HRS, sets forth the scope of negotiations and provides in relevant part:

> Section 89-9 Scope of negotiations. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.
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> (c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.
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> (d) The employer and the exclusive representative shall not agree to any proposal which would . . . interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain

> efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; . . .

In explaining the interrelationship of §§ 89-9(a) and (d), HRS, the Board stated in Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253, (1972) (the HSTA case) :

> As joint-decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours and conditions of employment, even those which may overlap with employer rights as enumerated in Section 89-9(d), are now shared rights up to the point where mutual determinations respecting such matter interfere with employer rights which if necessity, cannot be relinquished because they are matters of policy "which are fundamental to the existence, direction and operation of the enterprise." West Hartford Education Association v. DeCourcy, 80 LRRM 2422, 2429 (Conn. Sup. Ct. 1972).

Id. at 266.

In Decision No. 84, Hawaii Government Employees' Association, AFSCME, Local 152, AFL-CIO, 1 HPERB 763, 770 (1977) (the HGEA case), the Board determined that there must be a conclusive showing of the impact of an issue on the employment relationship to compel negotiation under § 89-9(a), HRS. The Board adopted the National Labor Relations Board's interpretation of a similar provision of the National Labor Relations Act, which provides that "[a] mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms of conditions of employment." Id. at 770-71.

The Board in the HGEA case, applied the balancing test evolved under § 89-9, HRS, in concluding that § 89-9(d), HRS,

rendered the subject of employee parking non-negotiable. Id. at 771. The Board discussed Decision No. 26, Department of Education, 1 HPERB 311 (1973), in which the Board found that while the issue of teacher workload had a significant impact on working conditions, agreement on the issue would interfere substantially with the DOE's right to determine the methods, means and personnel by which it conducted its operations and would interfere with its responsibility to the public to maintain efficient operations. In addition, the Board cited the HSTA case, supra:

> While we held that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concomitantly expressed the view that said section should not be too liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective operation of the public school system.

Id. at 771.

Complainants contend that the date on which employees are paid and the applicable pay period are mandatory subjects of bargaining because any delay in the payment of wages has a significant impact on employees. Complainants argue that the net effect of the paylag program announced by Respondents is that each employee will receive only one-half pay for the month of February 1997. Complainants contend that the payroll lag will have a material and significant effect on the public employees' terms and conditions of employment and Respondents violated §§ 89-13(a)(5), (6), (7), and (8), HRS, by refusing to negotiate over the subject matter prior to implementation.

Complainants rely upon Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer County Local 842, City of Troy Unit and City of Troy, 28 NYPER 4657 (1995), where the administrative law judge found that City violated its bargaining obligation by unilaterally implementing a one-week paylag to effect a change from a weekly to a biweekly payroll. Relying upon long-standing case precedent in New York, the administrative law judge held that the date upon which employees are paid, the method of their payment and the applicable payroll period were mandatory subject of negotiations.

Complainants also rely on Children's Aid Society and Michigan AFSCME, Council 25, Local 1640, 7 Michigan Public Employment Rep. 25048 (1994), where the Michigan Employment Relations Commission found that the employer violated its duty to bargain by unilaterally changing the lag period between the last day worked and the delivery of paychecks from four days to two weeks. The Commission found that the lag period was a mandatory subject of bargaining because of the significant impact on the wage earner. In discussing the impact on the employees, the Commission stated:

> First, the change in the lag period is a mandatory subject of bargaining. The test to be used here is whether or not the change had a significant impact on wages, hours or working conditions. (Cite omitted.) The amount of the time an employee must wait to receive a pay check, while not as significant was the amount of pay, may still have a significant impact on the wage earner. As noted by the Union, employees who are on a strict budget or have timely bills to pay will find the delay in pay dates to be a true hardship. . . .

Respondents contend that the paylag is merely a delay in the receipt of wages and is a valid exercise of management's rights provided in § 89-9(d), HRS. Respondents contend that the paylag is designed to maintain efficiency in payroll operations and an exercise of their right to determine the methods, means and personnel by which the operations are to be conducted.

After considering the record and the arguments presented, the Board finds that payroll dates concern wages which are conditions of work and are mandatory subjects of bargaining because they have a significant effect on the employees' working conditions. The Board agrees with the analysis of the Michigan Commission, supra, in its view that a delay in the receipt of paychecks has a significant and material impact on employees. The Board notes that the semimonthly paydates for public officers and employees have remained constant for decades. The five-day pay adjustment will result in the delay in the payment of wages for affected public employees who will receive one less paycheck in the calendar year in which the lag is implemented. The Board finds that employees who are on a strict budget or who have timely bills to pay will find a delay in pay dates to be a hardship. The Board thus concludes that a delay in the receipt of wages resulting from the paylag, whether it consists of fourteen or five days, has a significant and material impact on the employees' working conditions in creating a financial hardship for the employees. The lag will affect the compensation for the individual employees and the magnitude of the impact requires negotiations prior to the implementation of the payroll adjustment.

With respect to the issue of whether imposition of the paylag is a valid exercise of management's rights, the Board agrees with Complainants that the paylag does not address how the Employer's operations or assignments are to be carried out, does not define the Employer's missions and goals and does not affect how the Employer's operations are run. The paylag concerns only when the employees are paid once services have been rendered. Thus, the determination of the payroll date is not a matter of policy which is fundamental to the existence or operation of the enterprise. As such, in the Board's view, it is not encompassed within the methods, means and personnel by which the employer's operation is to be conducted and therefore is not a matter preserved by the management's rights clause in § 89-9(d), HRS.

It may be arguable that the conversion to the after-the-fact payroll will promote the efficiency of government operations by the reduction in salary overpayments. In this regard, Respondents submitted a study of salary overpayments which shows $ 2,000,000 in overpayments up to the month of September 1996. Given the wide disparity in the amounts of overpayments by State departments, the Board is not convinced that a paylag applied to every State officer and employee is an exercise to maintain efficient government operations. The Board takes notice of Act 231, SLH 1996, which amends § 78-12, HRS, to recover salary overpayments to public employees. While the Board appreciates the Employer's concerns, 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 to maintain efficiency of operations, the Board finds that the balance tips in favor of negotiations. The Board finds that the magnitude of the impact of the paylag on the employees' wages outweighs Respondents' management rights to minimize the salary overpayments.

Here, the Respondents admit that they refused to negotiate over the paylag. The Board thus finds that Respondents frustrated the bargaining process and their actions were wilful as the natural consequence of the Respondents' refusal to negotiate was the deprivation of the Union's and employees' rights guaranteed under Chapter 89, HRS. Hence, the Board concludes that Respondents' actions constitute a refusal to bargain in good faith in violation of § 89-13(a)(5), HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over this case pursuant to §§ 89-5 and 89-13, HRS.

The Respondents violated their duty to bargain in good faith by refusing to negotiate over the paylag as requested by the Unions. The Respondents actions are deemed to be wilful violations of § 89-13(a)(5), HRS.

Complainants have failed to argue that Respondents violated §§ 89-13(a)(6), (7), and (8), HRS. Accordingly, those allegations are hereby dismissed.

ORDER

Based on the foregoing, the Board orders the following:

(1) The Respondents shall cease and desist from refusing to bargain in good faith with the Unions over the pay adjustment;

(2) The Respondents shall cease and desist from making unilateral changes in wages, hours of work, and terms and conditions of employment during the bargaining process;

(3) The Respondents shall, within thirty (30) days of the receipt of this order, post copies of this order in conspicuous places on the bulletin boards at the worksites where Units 05 and 07 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting; and

(4) The Respondents shall notify the Board within thirty (30) days of the receipt of this order of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, January 17, 1997.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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