

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.:	CE-03-357a
)		CE-10-357b
UNITED PUBLIC WORKERS, AFSCME,)		CE-13-357c
LOCAL 646, AFL-CIO and HAWAII)		
GOVERNMENT EMPLOYEES ASSOCIA-)	ORDER NO. 1590	
TION, AFSCME, LOCAL 152,)		
AFL-CIO,)	ORDER GRANTING COMPLAINANT'S	
)	MOTION FOR INTERLOCUTORY	
Complainants,)	RELIEF	
)		
and)		
)		
BENJAMIN J. CAYETANO, Governor,)		
State of Hawaii; LAWRENCE)		
MIIKE, M.D., Director, Depart-)		
ment of Health, State of Hawaii;)		
and STANLEY C. YEE, Chief,)		
Development Disabilities)		
Division, Department of Health,)		
State of Hawaii,)		
)		
Respondents.)		

ORDER GRANTING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF

On July 15, 1997, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) and the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) (collectively Unions) filed a prohibited practice complaint against BENJAMIN J. CAYETANO, Governor, State of Hawaii; LAWRENCE MIIKE, M.D., Director, Department of Health, State of Hawaii; and STANLEY C. YEE (YEE), Chief, Developmental Disabilities Division, Department of Health, State of Hawaii (collectively State) with the Hawaii Labor Relations Board (Board). Complainants alleged that the State breached its duty to bargain in good faith over the decision to contract out bargaining unit work at the Hale Hauoli on Kauai.

Subsequently, on July 16, 1997, Complainants filed a Motion for Interlocutory Relief with the Board. Complainants moved the Board for an order enjoining and restraining Respondents pending the issuance of a final order from (1) unilaterally implementing Respondents' decision to privatize bargaining unit work at the Hale Hauoli Center on Kauai; (2) implementing a reduction in force at Hale Hauoli Center on Kauai; and (3) refusing to negotiate with Complainants over the decision to privatize and its impact. On August 13, 1997, Respondents filed a Memorandum in Opposition to Complainants' Motion for Interlocutory Relief.

Thereafter, on November 13, 1997, Complainants filed a Motion to Amend Complaint to challenge the privatization of all Hale Hauoli programs in the State of Hawaii. On November 14, 1997, Complainants filed a First Amended Motion for Interlocutory Relief to request injunctive relief with respect to the privatization of the Hale Hauolis on Kauai, Hawaii, and Maui, and in addition, to enjoin the State from financing and allowing continued services at Hale Hauoli Kauai by the Association of Retarded Citizens-Kauai (ARC-K) and/or Hale Hauoli Hawaii by Goodwill Industries of Hawaii, Inc. (Goodwill).

At the hearing held on November 19, 1997, the Board granted Complainants' motion to amend its complaint to include the Hale Hauolis on Hawaii and Maui within the scope of these proceedings. Thereafter, Complainants made an oral motion to amend their complaint to specify that they seek to invalidate the contract between the State of Hawaii and the ARC-K as being contrary to Chapter 89, Hawaii Revised Statutes (HRS) and restore the status quo ante that preceded the entry into the contract with

ARC-K. The Board granted Complainants' second motion to amend the complaint on November 28, 1997 and Complainants filed a second amended complaint on November 28, 1997.

The Board conducted hearings in this matter on November 19, 1997, December 8, 16, and 17, 1997. On January 6, 1998, the Board heard arguments on Complainants' amended motion for interlocutory relief. After reviewing the record and the arguments presented, the Board hereby grants Complainants' motion.

Complainant UPW is the exclusive representative of employees in Unit 10, as defined in § 89-6, HRS.

Complainant HGEA is the exclusive representative of employees in Units 03 and 13 as defined in § 89-6, HRS.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and the public employer as defined in § 89-2, HRS, of employees of the State of Hawaii included in Units 03, 10, and 13.

Respondent LAWRENCE MIIKE, M.D., is the Director of Health, State of Hawaii and is a representative of the public employer as defined in § 89-2, HRS.

Respondent STANLEY C. YEE is the Chief of the Developmental Disabilities Division, Department of Health, State of Hawaii, and is a representative of the public employer as defined in § 89-2, HRS.

The public employers are parties to collective bargaining agreements with the UPW and the HGEA, respectively for Units 03, 10, and 13.

Hale Hauoli on Kauai is a facility providing day activity programs for developmentally disabled adults residing in the

county. The program serves between 25 and 38 clients per day and is administered by the Developmental Disabilities Division of the Department of Health (DOH). Since 1974, services have customarily been performed by employees of the State of Hawaii DOH included in bargaining units 03, 10, and 13.

The Hilo Day Activity Center operates at 30 Rainbow Drive in the old Hilo Hospital. The services offered there are substantially the same as that offered in Kauai and Maui. The Center serves approximately 30 clients. Public employees included in bargaining units have been employed since 1976 and currently eight employees work at the Center.

In Maui, the employees at Hale Hauoli have been included in bargaining units since 1974. There are ten employees including an occupational therapist, a special education teacher, a clerk typist, and seven para-medical assistants.

Act 189, Session Laws of Hawaii (SLH), was enacted in 1995, and provides in part:

(a) . . . Not later than June 30, 1998, all programs and services falling under this chapter shall be provided in the community, including services presently provided at Waimano training school and hospital. When the private sector does not provide or is not able to provide the services, the department shall provide the services. Clients at Waimano training school and hospital shall be placed into community-based programs provided appropriate support services are available. The department shall convene a panel not later than August 1, 1995 to create a plan to provide services in the community and to ensure that the transition of Waimano training school and hospital residents to the community will be client-centered, taking into consideration the health, safety, and happiness of the residents and the concerns of the families. The panel shall consist of but not be limited to consumers, families,

representatives from the private sector, employees and employee representatives, professionals, representatives of the University of Hawaii affiliate program, and representatives of the state planning council on developmental disabilities.

* * *

(e) The department shall maximize its funds for community services using such funds as state funds as state matching funds for Title XIX programs, other governmental finance participation programs, and private finance programs as necessary and when possible.

In the summer of 1995, YEE and DOH Deputy Director William Christoffel decided to contract out the bargaining unit work at the neighbor island Hale Hauolis. Christoffel testified that one consideration which prompted him to privatize was the legislative mandate to maximize the use of public funds within the DOH. Christoffel believed that the DOH could service twice as many clients with the same appropriation of State General Funds if a private contractor applied for the Medicaid waiver monies. If the DOH applied for the Medicaid waiver monies, one-to-one matching federal funds would be reimbursed to the State General Fund which would not directly benefit the DOH. Although the Hale Hauolis could have participated in the Medicaid waiver program in previous years, the DOH never sought such funds. However, the DOH received Medicaid monies for Waimano Training School and Hospital.

In 1996, Respondents issued a "request for interest" to find out whether there was any private sector interest in replacing public employees at the Hale Hauolis. Based upon the interest generated by the request, Christoffel decided to issue a notice of request for proposals (RFPs) for all neighbor island centers. On March 31, 1997, an RFP was issued in the Garden Island newspaper.

The RFP for the Hale Hauoli on Kauai proposed privatization from October 1, 1997 to June 30, 1999 for the same services provided by the public employees. A similar RFP was issued in 1997 for the Hilo Day Activity Center which proposed privatization from January 1, 1998 to June 30, 1999. The RFP stated that the contractor shall provide adult day activity centers for the developmentally disabled in east Hawaii as currently being provided at the Hilo Day Activity Center. In May and October 1997, the RFPs were issued by Respondents for Hale Hauoli on Maui.

In May 1997, ARC-K submitted a proposal to Respondents for the operations on Kauai. On June 9, 1997, the DOH informed ARC-K that it had been "awarded a contract" for \$233,616 for fiscal year 1998 and \$311,487 for fiscal year 1999 to operate the Hale Hauoli on Kauai effective October 1, 1997. The understanding was that ARC-K would provide the services previously provided by the public employees.

On June 12, 1997, Respondents informed the UPW and the HGEA of their decision to privatize the Hale Hauolis. By letters dated July 15, 1997 and July 16, 1997, the UPW and the HGEA, respectively, requested bargaining over the decision to privatize and its impact. On July 23, 1997, Respondent MIIKE responded that they did not believe that the contracting out of the adult day care services to community-based service providers required negotiations. Thus, the Respondents declined to negotiate with the Unions as requested.

By letter dated June 25, 1997, all employees of the Hale Hauoli on Kauai were notified by MIIKE of a reduction in force to be effective on September 30, 1997. The letters to all employees

stated that the center would be assumed by the private contractor on October 1, 1997. The private contractor, ARC-K, began actively recruiting to replace the public employees on August 20, 1997. On September 23, 1997, the State and ARC-K entered into a contract to provide adult day care services from October 1, 1997 to June 30, 1999 for \$545,103.

On October 30, 1997, all bargaining unit employees at Hale Hauoli Kauai were terminated and replaced by employees of ARC-K. The private contractor assumed operations control of the day care center at the same location in Kapaa. Services are provided to the same clientele previously served by the included employees. The Center is open substantially during the same period. According to two para-medical assistants (PMAs) who were hired by ARC-K, the staffing remains essentially the same with six PMAs. ARC-K confirms that the staffing remains the same under the private operations.

Thus, in Kauai, as a result of the privatization, ten employees were terminated by the DOH. Two employees were placed into vacant positions with a reduction in pay step for one employee. Four employees exercised bumping rights in a process which resulted in the displacement of three other DOH employees. One of the bumping employees took a demotion from PMA IV to PMA III. Two of the three employees who were bumped had to relocate from Kauai to Molokai, and Wahiawa, Oahu, to continue their employment with the State of Hawaii. The third employee refused to relocate and is currently unemployed. Four of the remaining employees could not bump or be placed in State jobs. A former PMA found another State job with a demotion and change in

hours. Two former PMAs applied for and were hired by ARC-K. The employees who found other jobs experienced significant changes in pay, hours of work, and/or other working conditions.

In Hilo, Respondents received an application for the operations of the Hilo Day Activity Center from Goodwill on October 1, 1997. On October 29, 1997, the State informed Goodwill that it had been awarded a contract to provide adult day services in east Hawaii for \$102,599 for 1998 and \$249,870 for 1999. On October 29, 1997, employees at the Hilo Day Activity Center were notified of the decision to privatize their work. Letters were provided to the various employees of a reduction in force and their terminations were to be effective January 30, 1998.

Goodwill plans to hire seven employees to replace the public employees in Hilo. Privatization is currently planned for implementation on February 1, 1998. Respondents did not ask Goodwill to retain the public employees. No written contract has been entered into between the State and Goodwill. The planned actions calls for a two-year arrangement with 100% State funding. Goodwill will essentially replace the existing work unit at the Hilo center and serve the same clientele.

After the announcement to privatize at the Hilo Center, one employee indicated that she would retire. Eight employees will be terminated on January 31, 1998. Five of the employees have bumping rights and may affect other State employees.

On Maui, Respondents issued RFPs in May and October 1997. Respondents were not satisfied with the responses received. However, Respondents intend to proceed with privatization and another RFP is planned for January 1998. The privatization of Hale

Based on the Penn analysis, then, where the movant shows a great 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 record in this case is clear that the Unions requested bargaining over the decision to contract out the services provided at the Hale Hauolis and the impact of the decision to privatize. Further, the record is clear that the Respondents refused to negotiate over the subject matter and proceeded to unilaterally implement their decision to contract out the work previously and presently performed by bargaining unit members. On October 1, 1997, ARC-K began providing services previously performed at the Hale Hauoli on Kauai and on February 1, 1998, Goodwill is scheduled to begin services in Hilo. Respondents also appear to concede that the impact of the privatization is negotiable but argue that the layoff provisions in the contracts have already been negotiated and are applicable.

With respect to the likelihood of success on the merits, the threshold issue is whether the Legislature intended to preempt the Chapter 89 bargaining obligations by the enactment of Act 189. The Unions contend that Act 189 does not expressly require the privatization of the Hale Hauolis. The Unions argue that the Hale Hauoli program is already community-based and that Act 189 was intended to deinstitutionalize Waimano Training School and Hospital and phase it into a community-based program. The Unions further contend that a review of the legislative history of Act 189 reveals that the Legislature initially intended that all services provided under the chapter be provided by the private sector no later than

June 30, 1998. The bill was later amended to eliminate that requirement and to provide that the services be provided in the community. Thus, Act 189 is not a legislative mandate to privatize the Hale Hauolis.

Respondents contend that Act 189 requires the privatization of the Hale Hauoli program and that Complainants have failed to prove otherwise.

Act 189 repealed all sections in Chapter 333F, HRS, referring to Waimano Training School and Hospital effective June 30, 1998, but it did not alter or modify in any way § 333F-3, HRS, relating to community services for the developmentally disabled.

The legislative history of Act 189, indicates that the bill passed by the Senate as Senate Bill No. 1461, S.D. 2, contained language mandating privatization of services provided for the developmentally disabled. It stated, in part:

Not later than June 30, 1998, all programs and services falling under this chapter shall be provided by the private sector, including services presently provided at Waimano training school and hospital. When the private sector does not provide or is not able to provide the services after the department's request for private service providers, the department shall provide the services on an interim basis, and shall develop a plan to create services and resources necessary within the private sector. [Emphasis added.]

The bill was later amended in the House Health Committee, which specifically eliminated the requirement that "all services be provided by the private sector." S.B. No. 1461, S.D. 2, H.D. 1. The House Committee amended the bill to provide that the programs shall be provided in the community. The House Standing Committee

Report specifically stated that the bill was amended by eliminating the requirement that all services be provided by the private sector.

Thereafter, the Conference Committee deleted the language in the bill which mandated the DOH to seek private service providers. Conference Committee Report No. 86, stated, in part:

Your Committee, upon further consideration, has made the following amendments to S.B. No. 1461, S.D. 2, H.D. 2:

(1) Clarified that when the private sector does not or is not able to provide the services specified in section 333F-2, Hawaii Revised Statutes, the department of health shall provide them. Restrictive language mandating that the department make a request to private services providers in all instances has been deleted. [Emphasis added.]

Based upon the foregoing, the Board agrees with the Unions that the Legislature specifically eliminated the requirement for privatization and provided that programs and services were to be community-based. The Legislature also eliminated any language requiring the DOH to first make a request of private service providers in each instance. Thus, the Board finds that Act 189 does not require or mandate the privatization of the Hale Hauoli programs and there is nothing in the legislation which expressly preempts or nullifies existing bargaining obligations under Chapter 89, HRS.

Respondents contend, however, that Chapter 89, HRS, is inoperative because obstructing the privatization of the Hale Hauoli programs would jeopardize the State's receipt of federal funds. Respondents argue that Act 189 requires the DOH to maximize federal funds and that any Chapter 89, HRS, bargaining obligations

are inoperative because they may jeopardize the receipt of federal funds.

Section 89-20, HRS, provides that if any provision of Chapter 89, HRS, jeopardizes the receipt of any federal allotments of money, those provisions will be deemed to be inoperative. In the Board's view, however, there is a distinction between the Legislature's requirement to maximize the DOH funds and the jeopardizing of the receipt of federal funds. The Board finds that the record is insufficient in this case to establish that preservation of the status quo at the Hale Hauolis will jeopardize the receipt of federal funds. Presently, the DOH does not receive federal funds for the Hale Hauoli programs. While federal funds have been available in past years, the DOH inexplicably never applied for such funds although funds were sought for the Waimano Training School and Hospital. Respondents presented testimony suggesting that privatization would permit a better use of available State funds because the private contractor could obtain matching federal funds and service twice as many clients than under the Hale Hauoli format. Respondents' witness, however, was unable to detail the funding and reimbursement procedures to explain how this would be accomplished. Thus, the Board concludes that Respondents failed to show that enforcing the bargaining obligations in this case would jeopardize the receipt of federal funds.

When a public employer unilaterally implements changes in wages, hours, and other terms and conditions of employment, such conduct is tantamount to a refusal to bargain. Univ. of Hawaii Prof. Assem. v. Tomasu, 79 Haw. 154, 159, 900 P.2d 161 (1995)

(Tomasu case). Further, under the Tomasu case, the Hawaii Supreme Court held that where there is discretion, choice, or latitude in the application of a federal statute, the duty to bargain over wages, hours, and working conditions affected in the implementation of the federal mandate applies. In this case, the Board believes that Act 189 does not mandate privatization, and the Respondents had a choice or latitude in their decision to privatize the Hale Hauoli program.

Turning to the question whether the decision to privatize and its impact are subject to negotiations, the Board traditionally applies a balancing test to determine the nature and impact of the subject on terms and conditions of employment, i.e., whether there is a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 63 (1977). The Board has relied 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 (1980), to determine whether an issue is a mandatory subject of negotiations.

However, in Dec. No. 382, Linda Crockett Lingle, 5 HLRB 650 (1996)¹, Case Nos. CU-01-121 and CE-01-297 (Lingle case), the Board considered, inter alia, whether the employer committed a prohibited practice by contracting out work performed

¹Mayor Lingle appealed Decision No. 382 to the Second Circuit Court in Civil No. 96-0766(3). The appeal was subsequently dismissed without prejudice and the case remanded to the Board for further proceedings in light of Konno v. County of Hawaii, 85 Haw. 61, 937 P.2d 397 (1997).

by Unit 01 uku pau workers in Maui County. In that decision, the Board stated that in its view:

. . . 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 Employer fails to appreciate that negotiation of the effects of its decision immediately prior to implementation is 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 determined and negotiated in a contract or subcontract with the private enterprise and there is no room to fully accommodate the concerns of the employees affected by the decision. 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.

Id., p. 675.

Using the Board's traditional balancing test, the Board finds in this case that the impacts of Respondents' decision to privatize on the employees in the respective bargaining units are clear. The employees were subjected to the layoff provisions of the applicable collective bargaining contracts and were displaced, terminated, or demoted. Two employees moved to different islands to remain in the State system. In addition, the bargaining unit was affected by the loss of bargaining unit work and further displacements due to the reduction in force. As to the Employer's interests, Respondents contend that the Legislature mandated privatization, they were required to maximize federal funds and ultimately a larger clientele will be served.

The record indicates that under the applicable contract, ARC-K will receive approximately \$500,000 and Goodwill will receive \$400,000 of State funds over the next two years to provide services substantially similar to that performed by the Hale Hauoli personnel to approximately the same number of clients. Thus, the work performed previously and presently by the public employees continues to exist in substantially the same context. The record also suggests that the DOH could have applied for matching federal funds under the Medicaid waiver program over a number of years but failed to do so. Clearly, this undercuts the Respondents' arguments that they seek to privatize to service a larger clientele. In this case, on balance, the material and significant impacts of the privatization on the bargaining unit and the employees involved outweigh the employer's interests in this case. Thus, the Board finds that Respondents' unilateral implementation of changes in wages, hours, and other terms and conditions of work supports a finding of a refusal to bargain in good faith.

With respect to the showing of irreparable harm, the Board agrees with the Unions that there will be irreparable harm to the ongoing negotiations process if the Respondents were permitted to privatize the Hale Hauolis. Respondents contend that the parties have already negotiated over the impacts of the privatization in the existing layoff provisions of the contracts and that the Respondents properly released the employees pursuant to the applicable contract provisions due to lack of work and lack of funds. The reality, however, is that the work, services to the developmentally disabled, continues to exist and the DOH is ultimately responsible to provide these services. Moreover, if the

Respondents in fact lacked funds, they would be unable to contract for the provision of services.

Thus, the Board agrees with the Unions that the balance of irreparable harm tips in their favor. The Board finds that the Unions have shown a strong likelihood of prevailing on the merits of their complaint and the Board also finds that under the Penn analysis, that the Unions have a lesser burden of establishing that the balance of irreparable harm favors the issuance of the interlocutory order.


With regard to the public interest, the Board finds, that the policies underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government is further by the issuance of the subject order. While the public interest also supports the provision of quality care for the developmentally disabled adults, there is nothing in the record to support a finding that the continuation of the services provided by the public employees at the Hale Hauolis would disserve or prejudice their clientele. Thus, the Board finds that the public interest supports the issuance of this order to preserve the integrity of the bargaining process. The Respondents should not be permitted to keep its unilaterally implemented decision which is subject to negotiations in place pending a final determination in this case.

Based upon the foregoing, the Board hereby orders the Respondents to cease and desist from unilaterally implementing their decision to privatize or contract out bargaining unit work at the Hale Hauolis on the different islands. The Board also orders the Respondents to cease and desist from implementing any further

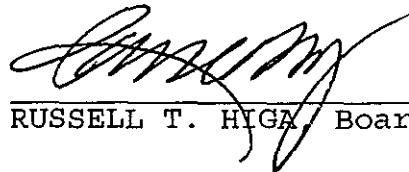
reductions of force at the Hale Hauoli centers on the neighbor islands, including the islands of Hawaii and Maui. The Board further orders Respondents to cease and desist from refusing to negotiate over the decision to privatize and its impact. In fashioning a remedy in this case, the Board orders that the status quo ante be restored. The employees who were displaced at the Hale Hauoli on Kauai shall be made whole, and should return to bargaining work or be otherwise compensated.

DATED: Honolulu, Hawaii, January 30, 1998.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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