

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
FRANK F. FASI, Mayor of the)
City and County of Honolulu,)
Petitioner,)
and)
HAWAII GOVERNMENT EMPLOYEES')
ASSOCIATION, LOCAL 152,)
AFSCME, AFL-CIO,)
and)
UNITED PUBLIC WORKERS, LOCAL)
646, AFSCME, AFL-CIO,)
and)
HAWAII STATE TEACHERS)
ASSOCIATION, NEA,)
and)
GEORGE R. ARIYOSHI, Governor)
of the State of Hawaii,)
Intervenors.)

Case No. DR-02-30

Order No. 172

ORDER THAT CASE BE HELD IN ABEYANCE
AND DENYING REQUEST TO DISQUALIFY BOARD
MEMBER FROM HEARING AND PARTICIPATING IN CASE

The instant Declaratory Ruling proceeding was commenced on November 18, 1977, when the Petitioner, Mayor Frank F. Fasi, filed with this Board a Petition for Declaratory Ruling.

In this case, the contention of the Mayor is that a particular arbitrator's interpretation of a provision in the Unit 2 collective bargaining agreement relating to promotions, violates "merit principles protected by HRS Section 89-1 and 89-9(d) . . ." The Mayor also contends that the award

"unreasonably interfere with the rights of the public employer to determine qualifications, the nature and contents of examinations and promote employees as protected by HRS Section 89-9(d)(2)."

All intervenors herein, except for Governor George R. Ariyoshi, a public employer, have filed motions to dismiss the instant case on the grounds that the Board lacks jurisdiction to entertain the City's petition. It has also been urged that good cause exists for the Board, in its discretion, to decline to hear the subject case.

Arguments on the motions to dismiss were heard on Tuesday, January 31, 1978.

At that time the Deputy Corporation Counsel for the City, during a discussion of the conclusions of law made by the Circuit Court in Frank F. Fasi vs. State of Hawaii Public Employment Relations Board et als., Civil No. 44559; Hawaii State Teachers Association (HEA-NEA), vs. Hawaii Public Employment Relations Board, et als., Civil No. 44580; and Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, AFL-CIO, vs. Hawaii Public Employment Relations Board, et als., Civil No. 44563, filed November 3, 1975, indicated that the City would have no objections if the Board decided to wait before proceeding with the instant case until a ruling had been received from the Supreme Court of Hawaii in the appeal from the above-cited cases. Supreme Court No. 6119.

The Circuit Court's conclusions of law and order presently on appeal in Supreme Court No. 6119 possibly may have a bearing on the instant case. They are:

"1. Having entered into the collective bargaining agreement and having agreed to the final and binding arbitration procedure in conformity with HRS 89-11(a), the parties were bound to follow such procedure and submit the dispute to an arbitrator.

2. The arbitrator, under the terms of the contract, shall first determine whether he has jurisdiction to act. If he decides he does not have jurisdiction, the dispute is returned to the parties. If the arbitrator decides he does have jurisdiction, then he should decide the matter on its merits.

3. After the arbitrator rules the matter may be appealed pursuant to HRS 658 to the Circuit Court. If the Court should find that the arbitrator exceeded his powers by accepting the case and disregarding the proper interpretation of HRS 89-9(d), the Court may vacate the award pursuant to HRS 658-9(4).

4. Under the circumstances of this case, the HPERB acted in excess of its statutory authority and jurisdiction.

III. Order Reversing Decision and Ruling of Hawaii Public Employment Relations Board

IT IS HEREBY ORDERED that the decision and ruling of the HPERB be and is hereby reversed on the ground that the Board lacked the authority and jurisdiction to issue a declaratory ruling on the matter which was pending arbitration, pursuant to a collective bargaining agreement entered into pursuant to Section 89-11(a), HRS.

IT IS FURTHER ORDERED that the HPERB dismiss the petition for declaratory ruling."

In view of the foregoing, and without reaching or evaluating the correctness or error, as the case may be, of the arguments raised by the intervenor unions herein in support of their respective motions to dismiss this case, the Board has determined that good cause exists for not proceeding with the subject declaratory ruling proceeding until a ruling is received in Supreme Court No. 6119.

Immediately prior to the arguments on the above-mentioned motions to dismiss this case, a City request to disqualify Board member Clark from hearing and participating

in this case because of his alleged involvement, before becoming a member of this Board, in the negotiations of the Unit 2 contract was heard. The Board ruled from the bench that the request to disqualify member Clark would be denied and indicated that a written statement of its reasons would be forthcoming.

The Board keenly appreciates the importance of impartiality in all of its proceedings; it also appreciates the importance of avoiding giving even the appearance of partiality. While the Board believes that member Clark can hear this case with impartiality, it does not reach the question of whether grounds exist for his disqualification because the "doctrine of necessity" requires him to participate in this case.

In essence, the doctrine of necessity dictates that even if a judge or an officer exercising quasi-judicial functions is disqualified, for one reason or another, he must act in the proceeding if his disqualification, as by the destruction of a quorum, would prevent a decision from being rendered in the proceedings. Brinkley v. Hassig, 83 F2d 351 (10th Cir. 1936); Caminetti v. Pacific Mut. Life Ins. Co. of California, 22 CA2d 344, 139 P2d 908 (1943), cert. denied, 320 U.S. 802 (1944); DAVIS, ADMINISTRATIVE LAW TEXT, Section 12.05 (3rd ed. 1972); Carey v. Discount Corp., 35 Haw. 811 (1941).

Section 89-5, HRS, calls for the Hawaii Public Employment Relations Board to have a three-member board. The section states in relevant part:

"Any action taken by the board shall be by a simple majority of the members of the board. All decisions of the board shall be reduced to writing and shall state separately its findings of fact and conclusions. Three

members of the board, consisting of the chairman, at least one member representative of management, and at least one member representative of labor, shall constitute a quorum. Any vacancy in the board shall not impair the authority of the remaining members to exercise all the powers of the board. The governor may appoint an acting member of the board during the temporary absence from the State or the illness of any regular member. Any acting member, during his term of service, shall have the same powers and duties as the regular member."

Thus the Board is to have three members, and a quorum must consist of three members.

The term quorum is generally defined as the minimum number of members who must be present for the valid transaction of business. Jones v. Pa., 34 Haw. 12 (1936). Therein the court stated:

"The Board of commissioners of public archives is composed of only 3 members. To the 3 members and not to a lesser number are committed the legal duties imposed by the statutes. Obviously if one of the members, either by reason of absence from the Territory or otherwise, fails to attend the meetings of the board, the board cannot function. Although the rule of majority obtains when all of the members are present, the presence of only a majority is not sufficient. The liability of an impasse when only a majority is present is too obvious to require comment. The temporary absence of Mr. Robertson renders the commission impotent."

Under Section 89-5, HRS, it is only when there is a vacancy on the Board that the Board may proceed with just two members. The term vacancy means that there is no incumbent. In Re Application of Sherretz, 40 Haw. 366, 372 (1953).

It is true that the Governor^{*} may appoint an acting member under Section 89-5(a), HRS, and Section 26-36,

*The City, it should be noted, asked the Board to appoint a replacement for Mr. Clark. There is no legal authority for the Board to appoint its members.

HRS, but he may do so only in specific situations: (1) when a regular Board member is temporarily absent from the State, or (2) when a regular member is ill. There is no provision for temporary appointments in case of disqualification.

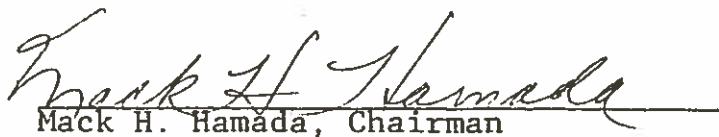
In short, there exists here a classic situation requiring invocation of the doctrine of necessity because disqualification of Mr. Clark would destroy the Board's quorum.

Chapter 84, HRS, relating to standards of conduct of public employees incorporates the doctrine of necessity in Section 84-14(a). There it is stated that even if a member of a board or commission has a substantial financial interest in a business or undertaking or is engaged in a representative capacity in any private undertaking which will be directly affected by any official action he takes, he may nevertheless take such action if his participation "is necessary in order to constitute a quorum to conduct official business," provided he has complied with the financial disclosure requirements of Section 84-17, HRS.

Mr. Clark has complied with the financial disclosure requirements of Section 84-17.

It is because of the doctrine of necessity that the Board denied the City's request that Mr. Clark be disqualified.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: February 10, 1978

Honolulu, Hawaii