

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-13-368
	)	
HAWAII GOVERNMENT EMPLOYEES	)	ORDER NO. 1821
ASSOCIATION, AFSCME, LOCAL 152,	)	
AFL-CIO,	)	ORDER DENYING RESPONDENTS'
	)	MOTION TO DISMISS AND/OR
Complainant,	)	FOR SUMMARY JUDGMENT; NOTICE
	)	OF HEARING ON PROHIBITED
and	)	PRACTICE COMPLAINT
	)	
BENJAMIN J. CAYETANO, Governor,	)	
State of Hawaii and JAMES	)	
TAKUSHI, Director, Department of	)	
Human Resources Development,	)	
State of Hawaii,	)	
	)	
Respondents.	)	

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ORDER DENYING RESPONDENTS' MOTION  
TO DISMISS AND/OR FOR SUMMARY JUDGMENT;  
NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINT

On January 29, 1999, Respondents BENJAMIN J. CAYETANO, Governor, State of Hawaii and JAMES H. TAKUSHI, Director, Department of Human Resources Development, State of Hawaii (collectively State or Employer), by and through its counsel, filed a motion to dismiss and/or for summary judgment with the Hawaii Labor Relations Board (Board). Respondents contend that the instant prohibited practice complaint should be dismissed for lack of jurisdiction and for failure to exhaust contractual remedies. Alternatively, Respondents contend that there are no genuine issues of material fact presented and Respondents are entitled to judgment as a matter of law.

Thereafter on February 12, 1999, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed a memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment with the Board.

The Board conducted a hearing on the instant motion on September 30, 1999. The parties were represented by counsel and had full opportunity to present evidence and arguments to the Board.

The Union filed the instant complaint contending that on or about July 15, 1997, Respondents retroactively reduced shortage differentials for certain Unit 13 employees simultaneous with pay increases implemented pursuant to an Interest Arbitration award issued on January 31, 1997.

Respondents contend that the following pertinent facts in this case are not in dispute. The parties entered into a Memorandum of Agreement dated August 31, 1995 (MOA), concerning the compensation adjustments for individuals receiving shortage differentials for the period of July 1, 1995 to June 30, 1997. The MOA provides that adjustments to basic pay are to be as provided in the collective bargaining agreement. Further, all adjustments to shortage pay are to be done as provided in a separate management directive. Subsequently, the State of Hawaii issued the directive in Departmental Circular No. 95-5, dated August 31, 1995, which was amended on May 14, 1997 and corrected on May 27, 1997. The State of Hawaii and the Union were parties to an interest arbitration for Unit 13 and on January 31, 1997, an arbitration award was issued which included salary increases retroactive to July 1, 1996.

According to Respondents, the State implemented the adjustments for the Unit 13 members in accordance with the Circular, the MOA, and § 77-9, Hawaii Revised Statutes (HRS), which provides authority, guidelines and limitations for management to declare shortage categories. Respondents contend that shortage differential is not a mandatory subject of bargaining and is not subject to Chapter 89, HRS. Respondents contend that the Board previously held in Decision No. 389 in Case No. CE-10-250, United Public Workers, AFSCME, LOCAL 646, AFL-CIO, 5 HLRB 719 (1997), that shortage differentials are recruitment tools to attract and retain qualified applicants where there is a shortage in the labor market and thus fall within the area of management rights under § 89-9(d), HRS. Further, Respondents contend that shortage differentials are provided for in § 77-9, HRS, which permits the personnel director to determine when the shortage ends. In addition, Respondents contend that pursuant to Chapter 77, HRS, the Civil Service Commissions of the respective jurisdictions hear and decide appeals by employees and department heads from actions taken by the director under that part, and any appeals regarding the reduction of the shortage differential should be brought before the respective Civil Service Commission.

With regard to any alleged § 89-13(a)(8), HRS, violation, Respondents contend that the Union failed to exhaust its contractual remedies prior to filing the instant complaint with the Board. Respondents submit that the HGEA filed an informal grievance with the Employer but failed to fully exhaust its

contractual remedies. Accordingly, the State contends that summary judgment should be granted in its favor.

In its memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment, the HGEA also submits that the basic historical facts of the case are not in dispute. The parties completed an interest arbitration for Unit 13 on January 31, 1997, which award included salary increases retroactive to July 1, 1996. The parties entered into an MOA for individuals receiving shortage differentials for the period of July 1, 1995 to June 30, 1997.

The HGEA submits that the MOA dated August 31, 1995 became the basis of Departmental Circular 95-5 which Respondents claim includes the retroactive shortage differential adjustments. Randy Perreira, HGEA Field Services Officer (Perreira), states in an affidavit filed with the Board, that the retroactive feature in shortage differential adjustments was never raised during negotiations and was not addressed in the MOA or the Departmental Circular. Thus, the HGEA was unaware that Respondents intended to retroactively adjust shortage differentials when implementing the interest arbitration salary increases.

The HGEA further argues that the history of the parties has been to negotiate adjustments. In addition, the HGEA contends that the Board has jurisdiction over this complaint because the underlying dispute is over wages and the retroactive reduction of the shortage differentials effectively nullified the arbitrated pay increases for certain Unit 13 members.


Based on the arguments presented and the record before the Board, the Board finds that there is a genuine issue as to the

material facts presented in this case. The parties agree that they entered into an MOA regarding the shortage differentials and that the State promulgated the resulting Departmental Circular. The State contends that it retroactively reduced the shortage differential in accordance with the Departmental Circular but the HGEA contends that there is no provision in the Circular which provides for such retroactive adjustment. The Board is unable to determine on this record which provision of the Circular the State applied to retroactively reduce the shortage differentials and whether the State violated Chapter 89, HRS, as alleged by the HGEA. Thus, given the factual dispute between the parties and the state of the record, the Board hereby denies the Respondents' motion to dismiss and/or for summary judgment at this stage of the proceedings.

YOU ARE HEREBY NOTIFIED that the Board will conduct a hearing on the instant complaint on January 11, 2000 at 9:00 a.m. in the Board's hearings room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii, December 2, 1999.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO  
and BENJAMIN J. CAYETANO, Governor, State of Hawaii, et al.  
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CHESTER C. KUNITAKE, Board Member

Copies sent to:

Peter Liholiho Trask, Esq.  
James E. Halvorson, Deputy Attorney General  
Joyce Najita, IRC