STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HARRY KIM, Mayor, County of Hawaii and PATRICIA ENGELHARD, Director, Department of Parks and Recreation, County of Hawaii, Petitioners, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; COUNTY OF MAUI; and KATHLEEN N.A. WATANABE, Director, Department of Human Resources Development, State of Hawaii, Intervenors.	CASE NO. DR-01-90 ORDER NO. 2276 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING PETITION FOR DECLARATORY RULING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING PETITION FOR DECLARATORY RULING

On August 29, 2003, HARRY KIM, Mayor, County of Hawaii and PATRICIA ENGELHARD, Director, Department of Parks and Recreation, County of Hawaii (Hawaii County or Petitioner) filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board) pursuant to Hawaii Administrative Rules (HAR) § 12-42-49.

By Order No. 2217, dated September 17, 2003, the Board granted Petitions to Intervene filed by the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) (collectively, Unions) the COUNTY OF MAUI (Maui County); and Director KATHLEEN N.A. WATANABE, Esq., Director, STATE OF HAWAII, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT (State) (collectively including Hawaii County, Employers), pursuant to HAR § 12-42-9(e).

On September 17, 2003, Intervenor UPW moved to dismiss for good cause Hawaii County's Petition pursuant to HAR § 12-42-9. The Board conducted oral arguments on November 6, 2003. The HGEA joined UPW's motion to dismiss. Petitioner was joined by Maui County and State in opposing UPW's motion to dismiss the petition pursuant to HAR § 12-42-9(f).

FINDINGS OF FACT

1. Petitioner Hawaii County, and Intervenors Maui County and State are public employers within the meaning of Hawaii Revised Statutes (HRS) § 89-2.

2. Intervenors UPW and HGEA are employee organizations within the meaning of HRS § 89-2.

3. On November 20, 2002, Arbitrator Ronald D. Libkuman issued a Decision and Award in Grievance No. 02-02[1] between the UPW and Petitioners, involving Hawaii County employees in Groundskeeper I positions, who perform golf cart work at Hilo Municipal Golf Course, and UPW's grievance over Hawaii County's removal of the golf cart work from the Groundskeeper job description and contracting out the golf cart work to a private vendor. Arbitrator Libkuman set forth the following Conclusions of Law:

    1. The Arbitrator has jurisdiction to consider the issues raised by Grievance 02-02 including the application of the CBA and the provisions of HRS Chapter 89 and other civil service laws to Grievance 02-02.

    2. The County, by unilaterally amending the Position Description Forms of Groundskeeper I Union members breached Sections 1.01, 1.02 (sic) 1.05 and 14.01 of the CBA between the Union and the County in that the County failed to engage in collective bargaining regarding this change which affected working schedules, job descriptions, and other conditions of employment and resulted in the loss of the equivalent of 2.5 Union jobs. A breach of Sections 1.01, 1.02 and 1.05 of the CBA stands alone and does not require a breach of any other section of the CBA to support a grievance.

    3. The County amending the Position Description Forms of Groundskeeper I Union members did not breach Sections 23 and 26 of the CBA.

    4. The Arbitrator has jurisdiction to consider the constitutional issues regarding the application of

---

[1]Grievance No. 02-02 was filed in accordance with the grievance procedure of the Unit 01 collective bargaining agreement in effect from July 1, 1999 through June 30, 2002 (Contract).

Article XVI to the issues raised by Grievance 02-02 including the issue of privatization.

5. Groundskeeper I Union members were civil service employees as defined by Article XVI of the Hawaii State Constitution and HRS Sec. 76-77 HRS and were therefore entitled to the protection of Article XVI of the Hawaii State Constitution and civil service laws of the State of Hawaii including HRS Chapters 89, 76 and 77. The County, by unilaterally amending the Position Description Forms of Groundskeeper I Union members violated the rights of the Union members under Article XVI of the Hawaii State Constitution and HRS Sec. 76-77 by privatizing the equivalent of 2.5 Union jobs. The Union has standing to exercise these constitutional rights for Union members.

6. The Union has raised several other issues in this case including a claim that the County-Acia contract is contrary to public policy and violates Section 14.01; the Acia contract contravenes the prevailing wage statute (Section 103-55) and therefore violates Section 14.01. The Arbitrator concludes that it is not necessary to rule on these issues. The Union also requests the Arbitrator to issue declaratory relief to prevent future violations of the CBA. Assuming the Arbitrator had authority to issue such relief, there is no necessity to do so in this arbitration. The Union also requests compensatory damages due to the fact that some Groundskeeper I employees lost wages. While Groundkeeper I employees may have lost some income in the form of overtime, overtime income is not guaranteed. The loss of straight time, if any, is not significant and this request is therefore denied.

4. Arbitrator Libkuman found that Petitioner violated the "mutual consent" provision of Section 1.05 of the Unit 01 Contract, as well as HRS § 89-9 requiring good faith negotiations and HRS §§ 89-13(a)(5), (7) and (8), based on the actions taken by Hawaii County "involving the transfer of 'golf cart work' to Union employees in 1997 accomplished by a change in the Position Description Forms made in 1996 and then the subsequent contracting out of these duties to a private contractor in February 2002 by a second change in Position Description Forms . . . . The transfer of 'golf cart work' from Union members to a private contractor was done without collective bargaining and without the 'mutual consent' of the Union."

5. Regarding the Petitioner's application of HRS § 89-9(d) as a defense to not negotiating the elimination of golf cart work from the job description of Groundskeeper I positions, Arbitrator Libkuman specifically addressed the matter as follows:

> The County's defense of Section 89-9(d): The County contends that the "mutual consent" provisions of Section 1.05 of the CBA do not apply to the change in the Job Description Forms for Groundskeeper I positions because these changes were authorized by and excluded from negotiations by section 89-9(d). Section 89-9(d) is quoted above under the paragraph captioned 'Substantive Jurisdictional Issues' and excludes some matters from negotiations.
>
> Section 89-9(d) cannot be interpreted in isolation or read disjunctively but must be read in conjunction with the entire section, including Sections 89-9(a), (c) and (d). See *University of Hawaii Professional Assembly v. Tomasu*, 79 Hawaii 154, 161, 900 P.2d 161, 168 (1995):
>
> * * *
>
> When the County unilaterally amended the Job Positions Forms it changed the job descriptions for all Groundskeeper I positions, changed Groundskeeper I employees working hours, and more significantly contracted out the equivalent of 2.5 Union jobs which were intended by HRS Chapter 89, and specifically Chapter 89-9 (Scope of Negotiations) to be the subject of collective bargaining. These were issues that both the Union and County intended to be the subject of collective bargaining when they entered into the CBA, particularly Section 1.05 requiring "mutual consent" for "changes in wages, hours or other conditions of work." Over the years these are the types of issues that the Counties and Union negotiated hundreds of times per year memorializing their agreements in Memorandums of Agreement or letters of agreement.

6. On March 31, 2003, the Libkuman Decision and Award, was confirmed and judgment entered in favor of UPW, pursuant to HRS § 658-12. The Circuit Court order provides, in part, that:

> 1. The Decision and Award of Arbitrator Ronald Libkuman dated November 20, 2002 regarding the reassignment and privatization of golf cart maintenance duties and services

at the Hilo Municipal Golf Course "drew its essence" from the unit 1 collective bargaining agreement by and between the Employer and Union, and was rendered consistent with the issue submitted by the parties. United Steel Workers of America v. Enterprise Wheel & Car. Corp., 363 U.S. 593, 597 (1960). The Employer shall comply with the remedial terms specified in the award.

2. No motion to vacate, modify, and/or correct the November 20, 2002 Decision and Award has been filed in accordance with Sections 658-9, 658-10, and 658-11, Hawaii Revised Statutes (HRS).[2]

7. Petitioner did not move to vacate, correct, modify the Libkuman Decision and Award, or appeal to the Hawaii Supreme Court the judgment entered in Special Proceeding No. 02-1-0514.

8. On May 9, 2003, the UPW filed a prohibited practice complaint in Case No. CE-01-532,[3] against Petitioner and William Takaba (Takaba), Director, Department of Finance, County of Hawaii.[4] In the course of said proceedings, Petitioner made clear that it disputes whether the Libkuman Decision and Award has final and binding effect upon the expiration of the current Contract in 2005 as a result of the enactment of Act 90, 2001 Session Laws of Hawaii (SLH).

---

[2]Order Granting Union's Motion to Confirm Arbitrator Ronald Libkuman's Decision and Award Dated 11/20/02, Filed 11/21/02, In the Matter of the Arbitration Between, United Public Workers, AFSCME, Local 646, AFL-CIO, Union, and County of Hawaii, Dept. of Parks and Recreation; Sec. 1, 14, 23, 26; GWR-02-02; 2002-007, Employer. Special Proceeding No. 02-1-0514, in the Circuit Court of the First Circuit before the Honorable Dexter Del Rosario.

[3]The Board takes administrative notice of Case No. CE-01-532, pursuant to Hawauu Administrative Rules (HAR) § 12-42-8(g)(8)(G). A decision by the Board is pending based upon the admission of facts in the complaint and the parties' closing memoranda submitted on August 18, 2003.

[4]The complaint alleged that on or about April 11, 2003 Petitioner "unilaterally decided once again to contract out golf cart maintenance services at the Hilo Municipal Golf Course effective July 1, 2003 . . . and proceeded to announce changes in work hours, and to unilaterally implement their contracting out decision through the procurement process." See, Complaint in Case No. CE-01-532. As such, UPW charged that Petitioner and Takaba violated HRS §§ 89-13(a)(1), (7) and (8) by failing to give the Libkuman Decision and Award final and binding effect in accordance with HRS § 89-10.8, and Section 15.20b of the Unit 01 Contract; and by failing to negotiate, any mid-term changes in the terms and conditions of employment of groundskeepers at Hilo Municipal Golf Course.

9. Petitioner's Memorandum of Authorities, attached to its Petition for Declaratory Ruling filed on August 29, 2003, states the issue as follows:

> Petitioner seeks a declaratory ruling as to whether its actions in reassigning employees by relieving them from certain duties and amending the position descriptions of those employees accordingly is a matter excluded from the subjects of negotiations, pursuant to H.R.S. Section 89-9(d).

10. Petitioner seeks a ruling, which this Board finds would be contrary to Arbitrator Libkuman's Decision and Award, over the County of Hawaii's action to eliminate the golf cart maintenance duties of groundskeepers at Hilo Municipal Golf Course. Specifically, Petitioner argued the following points:

    A. Petitioner's reassignment by elimination of golf cart maintenance duties clearly falls within management rights under H.R.S. Section 89-9(d) which are not subjects of negotiations. . . .

    B. It is contrary to public policy to arbitrate management rights which are conferred by statute. . . .

    C. The arbitrator's assumption of arbitral jurisdiction of this case was in contravention of Article 15 of the CBA, and contractual provisions are therefore null and void.

11. Petitioner also seeks a ruling or clarification as to what are management's rights to reassign and direct its employees and privatize the golf cart maintenance work in light of the Libkuman Decision and Award when the Unit 01 Contract expires in 2005.

DISCUSSION

The threshold issue raised by the Unions' motion to dismiss, is whether there is good cause to refuse to issue a declaratory ruling pursuant to HAR § 12-42-9(f).[5]

---

[5]HAR § 12-42-9 states as follows:

> **§ 12-42-9 Declaratory rulings by the board.** (a) Any public employee, employee organization, public employer, or interested person or organization may petition the board for a declaratory order as to the applicability of any statutory provision or of any rule or order of the board.
>
> * * *
>
> (f) The board, may for good cause, refuse to issue a declaratory

The petition for a declaratory ruling filed by Hawaii County seeks "to reaffirm its right to direct its employees and to determine methods, means, and personnel by which the employer's operations are to be conducted pursuant to HRS 89(d)(1), (3), (5) and (7)" (sic) and in light of an Arbitration Decision and Award by Arbitrator Ronald D. Libkuman issued on November 20, 2002. Petitioner asks this Board to clarify or define what are its managements rights, in light of Arbitrator Libkuman's Decision and Award, as follows:

> Petitioner submits that its actions, in reassigning the duties and redescribing the Groundskeeper I position descriptions, thereby eliminating the duties of golf cart staging, were clearly within its rights as a public employer to direct, assign, relieve duties, maintain efficiency, and determine methods, means, and personnel to conduct its operations, pursuant to H.R.S. 89-9(d).
>
> Petitioner respectfully requests that this Board issue a declaratory ruling that such actions shall be excluded from the subjects of negotiations and that contract provisions under sections 1.01, 1.02, 1.05 and 14.01 are null and void as pertaining to this case.

More specifically, Petitioner urges the Board not to overturn the Libkuman's Decision and Award, but rather to provide some guidance in setting certain parameters in its future application over the intervening Employers, who were not parties to the underlying class grievance. In anticipation of the Unions' application of the Libkuman Decision and Award involving the State and Maui County, who were not parties to the underlying class grievance,

---

order. Without limiting the generality of the foregoing, the board may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future.

(2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.

(3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.

(4) The matter is not within the jurisdiction of the board.

(g) The board shall consider each petition submitted and, within a reasonable time after the submission thereof, either deny the petition in writing, stating its reason for such denial, or issue a declaratory order on the matters contained in the petition.

the Employers seek a ruling or guidance as to its impact and far-reaching implications over subjects such as privatization, and management's rights to direct and assign employees.

The Intervenor State further argues that the Libkuman Decision and Award is inconsistent with, and therefore violates, management's rights as set forth in HRS § 89-9(d), thereby creating a controversy within the meaning of HRS § 89-5, as amended by Act 253.[6] Hence, the Employers contend that the impact of the Libkuman Decision and Award, creates such a controversy under the collective bargaining law, which only this Board has jurisdiction to resolve. On this basis, the Intervenor State contends, there is no good cause for this Board to refuse to issue a declaratory ruling. Furthermore, Intervenor State argues that prior rulings by the Board where it refused to accept jurisdiction over Petitions for Declaratory Rulings where parties sought interpretations of arbitration decisions ought not to apply. See, e.g,. Board of Education, 1 HPERB 523 (1974); Frank F. Fasi, 2 HPERB 236 (1974). The Board disagrees.

The Unions contend there is good cause to refuse to issue a declaratory order as proscribed under HAR § 12-42-9(f), on any one of the following grounds: (1) the petition is untimely based on the 90-day statute of limitations made applicable to prohibited practice complaints under HRS § 377-9(l), and HAR § 12-42-42; (2) the Board lacks substantive jurisdiction to overturn a court confirmed arbitration award and the petition is a collateral attack on a judgment of the circuit court; (3) the issue as defined by Petitioner and the Employers is purely hypothetical and speculative; (4) Petitioner lacks standing to challenge the final and binding effect of the Libkuman Decision and Award; and (5) based on the claim for relief sought by Petitioner undermines the strong public policy favoring arbitration, which is final and binding, to resolve labor disputes arising under collective bargaining.

First, the Board rejects the Unions' contention that the petition is untimely and barred by the statute of limitations provided under HRS § 377-9 and HAR § 12-42-42, as a basis for refusing to issue a declaratory order.

Second, if Petitioner were seeking to overturn Libkuman's Decision and Award, which has been confirmed and judgment entered in favor of UPW, pursuant to HRS § 658-12, the Board would tend to view the petition as a collateral attack on the circuit court judgment. On that basis, and lacking substantive jurisdiction the Board would refuse to issue a declaratory ruling. However, since Petitioner makes clear it is not seeking to overturn the Libkuman Decision and Award, has followed the arbitration decision and has no plans to deviate from it, the Board would agree with the Unions' contention that Petitioner has no standing to challenge the final and binding effect of the arbitration award by seeking a declaratory ruling. To do so,

---

[6]In 2002, the State Legislature enacted Act 253 in an effort to reform Hawaii's "public employment laws." Conference Committee Report No. 115, S.B. No. 2859, S.D. 1, H.D. 1, C.D. 1 at page 1. Act 253, SLH 2002, amended HRS § 89-5 to make clear that in light of the reform measures being enacted, the Board has a statutory responsibility to "[r]esolve controversies under [Chapter 89]".

would undermine the strong public policy favoring arbitration to resolve labor disputes, as well as the integrity of collective bargaining.

Finally, with respect to the Employers who seek a ruling on the impact and future applicability of the Libkuman Decision and Award on management's rights, the Board must conclude the issue is purely hypothetical and speculative. The Employers failed to persuade this Board that the question on the impact and applicability of the Libkuman Decision and Award involves existing facts or facts which can reasonably be expected to exist in the near future.

The primary concern of the Employers, is that the Unions will expand Libkuman's interpretation of the collective bargaining provisions that mandate negotiations over changes in the terms and conditions of employment to include public employers who were not parties to the underlying class grievance. That is why the intervening Employers, who were not party to the underlying class grievance from which the Libkuman Decision and Award resulted, want some guidance as to whether any preclusive or precedential effect ought to be recognized, or even exists.

While the Board may agree that a reading of the Libkuman Decision and Award could have far reaching implications on subjects such as privatization and management's rights to direct and assign its employees, the arbitration award, in and of itself, does not create a controversy[7] under collective bargaining law for Employers who were not parties to the underlying class grievance. Without existing facts, a declaratory ruling on the impact and applicability of the Libkuman Decision and Award on management's rights, who were not parties to the underlying grievance, would be purely hypothetical and speculative.

CONCLUSION OF LAW

The Board concludes that there is good cause to refuse to issue a declaratory ruling on the impact and applicability of the Libkuman Decision and Award where there is no controversy involving existing facts.

ORDER

The Board hereby orders the petition in the above-captioned matter, be denied.

---

[7]Assuming arguendo, Act 253, as amended, broadens the statutory authority of the Board to resolve any controversy under Chapter 89, the Board is not convinced that the issues before the Board are ripe for a declaratory ruling, i.e, what is the impact and future applicability of the Libkuman Decision and Award on management's rights when the Unit 01 contract expires in 2005 or if used against the State and County employers who were not parties to the arbitration award.

DATED: Honolulu, Hawaii, September 23, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Joseph Kamelamela, Deputy Corporation Counsel
Herbert R. Takahashi, Esq.
Peter Liholiho Trask, Esq.
Wendy Matsumoto-Chun, Deputy Attorney General
John D. Kim, Deputy Corporation Counsel
Joyce Najita, IRC