

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
)
HAWAII GOVERNMENT EMPLOYEES)
ASSOCIATION, AFSCME, LOCAL 152,)
AFL-CIO,)
)
 Complainant,)
)
 and)
)
LINDA LINGLE, Governor, State of Hawaii,)
)
 Respondent.)

CASE NOS.: CE-02-559
 CE-03-559
 CE-04-559
 CE-06-559
 CE-08-559
 CE-13-559

ORDER NO. 2343

ORDER GRANTING HGEA'S MOTION
FOR SUMMARY JUDGMENT

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On April 13, 2004, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) filed a prohibited practice complaint against LINDA LINGLE (LINGLE), Governor, State of Hawaii with the Hawaii Labor Relations Board (Board). The HGEA alleged that an Arbitration Decision and Award was rendered to resolve the impasses in negotiations for bargaining units (BUs) 02, 03, 04, 06, 08 and 13 pursuant to the impasse resolution procedures of Hawaii Revised Statutes (HRS) § 89-11(g). The HGEA alleges that on or before April 8, 2004, Respondent LINGLE unlawfully repudiated the terms of a December 9, 2003 Memorandum of Agreement between the HGEA and the public employers and contrary to the requirements of HRS § 89-11(g), LINGLE urged the Hawaii State Legislature to reject the March 26, 2004 arbitration decision and award on cost items. The HGEA contends that LINGLE therefore wilfully violated HRS §§ 89-13(a)(1), (5), (6), (7), and (8).

At the prehearing conference held on May 10, 2004, the parties agreed to submit the case to the Board on a stipulated record. The parties also anticipated that the HGEA would file an amended complaint with the Board.

On May 13, 2004, the parties filed Stipulations with the Board consisting of documents designated as Joint Exhibits 1 through 9. Also on May 13, 2004, the HGEA filed a motion to amend complaint to include, inter alia, allegations that on April 8, 2004 LINGLE sent an "Open Letter to All State Employees" which disparaged union leaders, confirmed that she recommended the Legislature to reject the arbitration award and urged the employees to work with her in favor of a four percent pay increase. The complaint as amended also alleged

that after the Legislature approved the cost items on April 16, 2004, Respondent LINGLE vetoed the measure on May 3, 2004.

On May 14, 2004, the Board granted Complainant's motion to amend in Order No. 2250. On June 14, 2004, the parties filed their respective motions for summary judgment and their responsive memoranda on June 17, 2004. The Board conducted a hearing on the motions on June 18, 2004.

Based upon a thorough review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2, of public employees included in BUs 02, 03, 04, 06, 08 and 13.
2. LINDA LINGLE is the Governor of the State of Hawaii and a public employer as defined in HRS § 89-2, of employees of the State of Hawaii included in BUs 02, 03, 04, 06, 08 and 13.
3. In Chapter 89 as originally enacted, interest arbitration to resolve impasses over the terms of a new or renewed agreement was voluntary in HRS § 89-11. (Act 170, Session Laws of Hawaii (SLH) 1970.) In 1978, the statute was amended to mandate arbitration for Unit 11 firefighters (Act 108, SLH 1978) and Unit 12 police officers in 1984 (Act 219, SLH 1984). In 1995, the statute was amended to mandate arbitration for Unit 10 institutional, health and correctional workers (Act 202, SLH 1995) and Units 02 supervisory employees in blue-collar positions, 03 nonsupervisory employees in white-collar positions, 04 supervisory employees in white-collar positions, 06 educational officers and other personnel in the Department of Education, 08 University personnel, 09 registered professional nurses, and 13 professional and scientific employees (Act 208, SLH 1995). In 2001, the statute was amended to eliminate mandatory arbitration for BUs 02, 03, 04, 06, 08, 09, and 13 (Act 90, SLH 2001). In 2002, arbitration was restored for Unit 09 nurses. (Act 189, SLH 2002).
4. In 2003, the HGEA and its membership lobbied the Legislature to restore mandatory interest arbitration for BUs 02, 03, 04, 06, 08 and 13 in Senate Bill No. 768. Governor LINGLE vetoed the measure on or about June 20, 2003. Declaration of Randolph P. Perreira (Perreira), p. 3 and HGEA's Ex. 6 attached to its Motion for Summary Judgment. On July 8, 2003, the Legislature overrode Governor LINGLE's veto by a two-thirds vote in each chamber. (Act 6, Special Session 2003). Declaration of Perreira, p. 3.

5. On December 9, 2003, the public employers and the HGEA entered into an Alternate Impasse Procedure for BUs 02, 03, 04, 06, 08 and 13 pursuant to HRS § 89-11(a). Joint Ex. 3. The parties agreed to a procedure which would lead to a final arbitration decision. Id.
6. On March 25, 2004, prior to the issuance of the arbitration award, Governor LINGLE indicated that if the arbitration panel awarded the pay increases as expected for employees in BUs 02, 03, 04, 06, 08 and 13, she would recommend that the Legislature not approve the pay raises. HGEA's Ex. 12.
7. On March 26, 2004, the Impasse Arbitration Panel issued a Decision and Award. Joint Ex. 4. In its final offer at arbitration the Union proposed a two-year agreement with a four percent salary increase effective July 1, 2003 and another four percent increase effective July 1, 2004. Id. The Union also proposed step movements for the different bargaining units. Id. In its final offer, the Employer, inter alia, proposed a zero percent increase effective July 1, 2003 and a one percent across-the-board increase effective July 1, 2004. Id. The arbitration panel awarded the employees an across-the-board pay increase of five percent beginning January 1, 2005 and step movements. Joint Ex. 5.
8. Also on or about March 26, 2004, the State and University of Hawaii Professional Assembly (UHPA)¹ entered into a six year agreement which would give professors and instructors a 31 percent pay raise through 2009 and which would require the University of Hawaii to share the cost in the last three years. HGEA's Ex. 17. This pay increase would raise the average full professor's salary in excess of \$113,000. Pay increases of 1%, 3% and 2% in the first three years of the contract rise to 5%, 9%, and 11% in the last three years. Id.
9. On or about April 6, 2004, Governor LINGLE sent a Message to the Legislature Regarding Binding Arbitration Award for Hawaii Government Employees Association urging the Legislature to reject the arbitration award. Joint Ex. 6.
10. On or about April 8, 2004, Governor LINGLE sent an Open Letter to All State Employees advising them of the reasons for recommending the Legislature reject the arbitration award. Joint Ex. 7. Governor LINGLE criticized "union leaders" for rejecting what she claimed was a four percent wage offer and indicated that she would recommend to the Legislature a four percent wage offer for employees. Joint Ex. 8. She asked the public employees to join her request. Id.
11. On April 9, 2004, the Unit 07 faculty ratified the tentative agreement.

¹UHPA previously endorsed LINGLE for Governor in 1998 and 2002, unlike the HGEA. HGEA's Ex. 18.

12. On or about April 12, 2004, the Governor issued a News Release that she recommended a four percent increase for HGEA employees although the employer's last proposal in arbitration was for zero percent the first year and one percent the second year. Joint Ex. 8. No wage offer was presented to the Union. Declaration of Perreira, p. 5.
13. After the Legislature approved the cost items for the HGEA award, on or about May 3, 2004, the Governor transmitted House Bill No. 1043, S.D. 1, C.D. 1 to the Legislature without her approval and with a statement of objections, vetoing the arbitrated HGEA salary increases. Joint Ex. 9. Governor LINGLE indicated that salary increases of the magnitude awarded would create sustained budget deficits starting in fiscal year 2006 and cause serious cuts in government services. Id.
14. On May 3, 2004, the Legislature overrode the Governor's veto by a two-thirds vote in each house and the salary increases were appropriated in Act 53.
15. Governor LINGLE did not object to having an arbitration for Unit 12, police officers. Declaration of Perreira, p. 5. The State of Hawaii Organization of Police Officers (SHOPO) endorsed Governor LINGLE in 2002, and she supported significant pay increases awarded to for police officers. HGEA's Exs. 13 and 14.
16. The Board majority finds that the HGEA proved by a preponderance of evidence that Respondent repudiated the interest arbitration award even before it was issued and refused to accord the award "final and binding" effect by creating obstacles to effectuate the award by urging legislative rejection of the cost items needed to fund the pay increases and thereafter vetoing the cost items.

DISCUSSION

Summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

The parties agree that this case is ripe for summary disposition. Thus, each party contends in their respective motions that there are no issues of material fact presented and that they are entitled to summary judgment.

Complainant alleges that the Governor repudiated a final and binding interest arbitration award by urging the Legislature to refuse to fund the award, directly communicating a lower wage offer to all bargaining unit members, and then vetoing the Legislature's appropriation, in violation of HRS §§ 89-13(a)(1), (5), (6), and (7).² Respondent asserts that the Board can find no violation because the Legislature's override of the veto moots the controversy,³ it contests the finality of the arbitrator's award, and argues that the

²HRS § 89-13 provides, in part, as follows:

Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
- (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
- (7) Refuse or fail to comply with any provision of this chapter;

³Respondent contends that the instant controversy is moot because the Legislature overrode Governor LINGLE's veto and funded the pay increases. The Board majority, however, finds that the instant case falls within an exception to the mootness doctrine because the matter involves questions that affect public interest and are capable of repetition yet evading review. Linda Lingle v. Hawaii Government Employees Association, AFSMCE, Local 152, AFL-CIO, 107 Hawai'i 178, 111 P.3d. 587 (2005). The issues before the Board in this case involve questions affecting public interest and present a problem capable of repetition.

communications and veto are constitutional powers of the Governor⁴ which cannot be subject to statutory constraint.

Jurisdiction

The Hawaii Labor Relations Board is an administrative agency. As such our jurisdiction is strictly limited to that provided by the Legislature in our enabling legislation. See, HRS § 89-5.⁵ As such, the Board's jurisdiction does not include passing on the

⁴Article III, Section 16 of the Hawaii State Constitution provides:

APPROVAL OR VETO

Section 16. Every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses and shall thereupon be presented to the governor. If the governor approves it, the governor shall sign it and it shall become law. If the governor does not approve such bill, the governor may return it, with the governor's objections to the legislature. Except for items appropriated to be expended by the judicial and legislative branches, the governor may veto any specific item or items in any bill which appropriates money for specific purposes by striking out or reducing the same; but the governor shall veto other bills, if at all, only as a whole.

The governor shall have ten days to consider bills presented to the governor ten or more days before the adjournment of the legislature sine die, and if any such bill is neither signed nor returned by the governor within that time, it shall become law in like manner as if the governor had signed it.

Article V, Section 5 provides:

EXECUTIVE POWERS

Section 5. The governor shall be responsible for the faithful execution of the laws. The governor shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion. The governor shall, at the beginning of each session, and may, at other times, give to the legislature information concerning the affairs of the State and recommend to its consideration such measures as the governor shall deem expedient. (emphasis added.)

⁵HRS § 89-5 provides, in part, as follows:

constitutionality of our enabling legislation or the Board's own interpretation and application of the law. HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 736 P.2d 1271 (1987). Questions regarding the constitutionality of statutes or their administrative application being the sole province of the courts. Id.

In the instant proceeding, Respondent does not challenge the constitutionality of any statute per se. Rather the constitutional powers of the Governor are raised as a defense which avoids the application of the literal language of Chapter 89 proposed by the Union. This defense is therefore pertinent if Respondent's conduct would otherwise be violative of Chapter 89. In essence it seeks to have the Board conclude that any finding of a violation resulting from the Governor's complained of conduct would be unconstitutional. Since such questions are the exclusive province of the courts, the Board must defer disposition to the courts.⁶

Interestingly, the literal expression of the Governor's powers are not the only constitutional provisions potentially at issue. For Chapter 89 itself is a direct result of a Constitutional mandate. Article XIII, Section 2 of the Hawaii State Constitution provides:

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

And Chapter 89 was designed to implement this provision. Thus to the degree that the Governor's power to veto and communicate with the Legislature conflict with public employees' rights to organize and bargain, there may exist a conflict between constitutional provisions. While we must defer to sorting out of any conflict between constitutional provisions to the courts, the Board must still be guided by the provision from which our enabling legislation springs and which reflects the very foundation of legislative intent.

Interest Arbitration

In House Standing Committee Report No. 1085-03, SLH 2003, the House

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

- (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper; . . . (emphasis added.)

Committee on Labor and Public Employment succinctly stated the Legislature's rationale and purpose for reinstating interest arbitration in S.B. No. 768, S.D.1, H.D. 1:

The purpose of this bill is to minimize the disruption of public services and programs by reinstating binding arbitration for employees of collective bargaining units (2), (3), (4), (6), (8), and (13) in the event of an impasse between the employer and the exclusive representative of the collective bargaining unit.

* * *

The "right to strike" by public employees of specific bargaining units was reinstated in 2000 by Act 253, Session Laws of Hawaii 2000, otherwise known as the Civil Service Reform Act. At the time, it was believed that reinstating the "right to strike" would promote meaningful and forthright bargaining by both labor and management. However, concerns were raised regarding the impact a strike by public workers would have on the provision of necessary governmental services and the State's fragile economy.

Your Committee finds that the use of binding arbitration is a reasonable way of settling labor disputes between a public employer and an exclusive representative of a collective bargaining unit. Through the use of arbitration, continuity of governmental services remains intact, and there is no disruption in the provision of public services and programs. Moreover, the use of a neutral third party to render a decision on a dispute between a public employer and an exclusive representative of a collective bargaining unit appears to be fair to all parties involved.

HGEA's Ex. 4-5.

The Legislature was less succinct but equally emphatic in identifying the status which was to be accorded the arbitration awards:

(g) The decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel. If the parties have reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii public employees health fund by the tenth working day after the arbitration panel issues its decision, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions agreed to by the parties. If the parties have not reached agreement with respect to the amounts of contributions by the State and counties

to the Hawaii public employees health fund by the close of business on the tenth working day after the arbitration panel issues its decision, the parties shall have five days to submit their respective recommendations for such contributions to the legislature, if it is in session, and if the legislature is not in session, the parties shall submit their respective recommendations for such contributions to the Legislature during the next session of the legislature. In such event, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions established by the legislature by enactment, after the legislature has considered the recommendations for such contributions by the parties. It is strictly understood that no member of a bargaining unit subject to this subsection shall be allowed to participate in a strike on the issue of the amounts of contributions by the State and counties to the Hawaii public employees health fund. The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement. The parties may, at any time and by mutual agreement, amend or modify the panel's decision.

Agreements reached pursuant to the decision of an arbitration panel and the amounts of contributions by the State and counties to the Hawaii public employees health fund, as provided herein, shall not be subject to ratification by the employees concerned. All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies.

HRS § 89-11(g) (emphasis added).

Finality

The crux of this complaint lies in the finality of the arbitrators' award. This question turns on the meaning of application of the language of HRS § 89-11(g). The Union essentially argues that the unambiguous language of the law, ("The decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel" and "The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement") both mandates finality and imposes an obligation upon the Governor, as a public employer, to recognize and effectuate the award. It concludes that the Governor's public opposition to, and veto of, the appropriation of funds necessary to

effectuate the award violated both the explicit terms of the law and the rights of employees provided therein.

Respondent contests the finality of the award at the time of the complained of activities. It argues that the subjecting of cost items to legislative appropriation ("All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies") conditions finality upon the conclusion of the legislative appropriations process so that at the time of the Governor's actions in the course of the appropriations process renders the award only advisory and the actions could not have offended the award's finality or any duty imposed thereby.

In Peterson v. Hawaiian Electric Light Co., Inc., 85 Hawai'i 322, 327-28, 944 P.2d 1265 (1997), the Hawaii Supreme Court identified "several basic principles of statutory construction":

First, "the fundamental starting point for statutory interpretation is the language of the statute itself." (citations omitted.) Second, "where the statutory language is plain and unambiguous our sole duty is to give effect to its plain and obvious meaning." (citations omitted.) Third, implicit in the task of statutory construction is "our foremost obligation to ascertain and give effect to the intention of the legislature, which is primarily to be obtained from the language contained in the statute itself." (citations omitted.) Fourth, "[w]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists." (citations omitted.) And fifth, [i]n construing an ambiguous statute, the meaning of ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool. (citations omitted.)

After applying these principles to the contested language the Board must conclude that the Legislature intended that the arbitration award be binding on the Governor at the time of its issuance. The statutory language unambiguously generates a "plain and obvious meaning." The legislative mandate that "The decision of the arbitration panel shall be final and binding upon the parties..." and "The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement" are crystalline expressions using words of common usage that unambiguously reflects both the intent and effect of the mandate. Thus, the Board's "sole duty is to give effect to its plain and obvious meaning." Respondent's actions to defeat and veto the appropriations necessary to fund the award would seem to equally as unequivocally fly in the face of this mandate.

Respondent, however, attempts to introduce a level of ambiguity into the expression by arguing that finality and effectuation are conditioned by the requirement of appropriations by the respective legislative bodies. Even if the contextual condition introduces an element of ambiguity to the otherwise unequivocal language, the Board is unconvinced that the resolution of this ambiguity sanctions the complained of conduct.

The plain language claimed condition ("All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies") makes no reference to gubernatorial conduct. Its sole instrumental reference is to the "appropriate legislative bodies" so that if any conditions on finality are imposed they would literally be limited to the effect on the legislative bodies. Thus the plain language of the statute mitigates against an exception to finality for the Governor.

But Respondent argues that the requirement of "appropriations" necessarily incorporates executive participation in the appropriations process. The Board must reject this argument because the interpretation would render null much of the collective bargaining rights and schemes of Chapter 89. Such an interpretation would thereby contravene the intent of the Legislature.

The Governor, as a public employer,⁷ is a party to collective bargaining. As such the Governor is subject to identified duties with respect to negotiating collective bargaining agreements as summarized⁸ in HRS § 89-1(b):

⁷HRS § 89-2 provides in part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

⁸These requirements are explicitly mandated in HRS § 89-9 as follows:

§ 89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the April 16 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii public employees health fund to the extent allowed in subsection

2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to section 76-1;

Thus the Governor is under a statutory duty to meet, and negotiate in good faith on matters affecting wages, hours and conditions of employment. He or she may offer or reject proposals but is not compelled to accept any proposals or make any concessions. The only express constraint on the conduct of the exclusive representative of the State is the duty to bargain in good faith. What is envisioned or intended are mutually negotiated final and binding collective bargaining agreements.

If an agreement cannot be negotiated, for units which proceed to mandatory binding arbitration the powers and duties of the Governor include good faith participation in mediation, selection of an arbitrator, the formulation and submission of a final position, and defense of its final position.⁹

(e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.

⁹HRS § 89-11 (e) provides:

(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit (10), institutional, health, and correctional workers; bargaining unit (11), firefighters; bargaining unit (12), police officers; or bargaining unit (13), professional and scientific

employees, the board shall assist in the resolution of the impasse as follows:

- (1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.
- (2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

* * *

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.

(f) An arbitration panel in reaching its decision shall give weight to the following factors and shall include in its written report or decision an explanation of how the factors were taken into account:

- (1) The lawful authority of the employer, including the ability of the employer to use special funds only for authorized purposes or under specific circumstances because of limitations imposed by federal or state laws or county ordinances, as the case may be;
- (2) Stipulations of the parties;
- (3) The interests and welfare of the public;
- (4) The financial ability of the employer to meet these costs; provided that the employer's ability to fund cost items shall not be predicated on the premise that the employer may increase or impose new taxes, fees, or charges, or

-
- (5) develop other sources of revenues;
 - (5) The present and future general economic condition of the counties and the State;
 - (6) Comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other persons performing similar services, and of other state and county employees in Hawaii;
 - (7) The average consumer prices for goods or services, commonly known as the cost of living;
 - (8) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received;
 - (9) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings; and
 - (10) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, arbitration, or otherwise between the parties, in the public service or in private employment.

(g) The decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel. If the parties have reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii public employees health fund by the tenth working day after the arbitration panel issues its decision, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions agreed to by the parties. If the parties have not reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii public employees health fund by the close of business on the tenth working day after the arbitration panel issues its decision, the parties shall have five days to submit their respective recommendations for such contributions to the legislature, if it is in session, and if the legislature is not in session, the parties shall submit their respective recommendations for such contributions to the legislature during the next session of the legislature. In such event, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions established by the legislature by enactment, after the legislature has considered the recommendations for such contributions by the parties. It is strictly understood that no member of a bargaining unit

What is envisioned and intended is a final and binding award issued by the arbitration panel.

The reading urged by the Respondent would introduce a whole new gubernatorial prerogative into the statutory scheme. By exercising a veto on any necessary appropriation, the Governor would simply be able to negate the results of the collective bargaining process. He or she would not only retain the rights and obligations of a good faith participant, but also reserve the right to be the ultimate arbiter of cost items. This power is argued not to be limited to interest arbitration awards but to negotiated agreements as well due to language similarly conditioning cost items upon legislative appropriation. (HRS § 89-10(g) "All cost items shall be subject to appropriations by the appropriate legislative bodies.")

By such power the Governor will retain the power to attempt to prevail in negotiations, failing that she will retain the power to attempt to prevail in mediation, failing that she will retain the power to try to prevail in mandatory arbitration, failing that she may claim the power to try and convince the public and Legislature to reject any cost item award, and failing that she now claims the penultimate power to veto any cost item award appropriated by the legislative bodies and thereby render all that occurred before a nullity with respect to cost items.

Recently in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 100 Hawai'i 138, 58 P.3d 649 (2002), the Hawaii Supreme Court considered that validity of an analogous interposition on the scheme of collective bargaining. In 1999, the Hawaii State Legislature by section 2 of Act 100 amended HRS § 89-9 to impose a moratorium upon the negotiation of cost items for the 1999-2001 biennium. The union claimed the moratorium was violative of the Constitutional right of public workers to engage in collective bargaining under Article XII, section 2 of our Constitution, supra. The trial court found for the union and the Supreme Court concurred:

subject to this section shall be allowed to participate in a strike on the issue of the amounts of contributions by the State and counties to the Hawaii public employees health fund. The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement. The parties, may at any time by mutual agreement, amend or modify the panel's decision.

Agreements reached pursuant to the decision of an arbitration panels and the amounts of contributions by the State and counties to the Hawaii public employees health fund, as provided herein, shall not be subject to ratification by the employees concerned. All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies. (emphasis added.)

Here, the intent and object of the framers who adopted article XII, section 2 was to extend to public employees similar rights to collective bargaining previously adopted for private employees under article XII, section 1. Defendants' construction of article XII, section 2 would render that provision meaningless, because, if we follow the Defendants' reading of that provision to its logical conclusion, it would be possible for the legislature to establish a freeze in contractual terms on cost items not only for two years but for two decades. Surely, the framers did not contemplate such an absurd and unjust result, especially in light of the fact that their foremost intent in drafting this constitutional provision is to improve the standard of living of public employees. Accordingly, we reject Defendants' contention that the phrase "as provided by law" gave the legislature complete discretion to take away public employees' right to organize for the purpose of collective bargaining. Such reading is contrary to the underlying object and purpose of the constitutional provision. [footnotes omitted.]

While the jurisdiction of the Board does not extend to ruling on the constitutionality of our authorizing legislation, we are compelled to follow the guidance of our Supreme Court regarding its interpretation and application. Here, by the reading urged by Respondent, the Governor through the exercise of her power could "establish a freeze in contractual terms on cost items not only for two years but for two decades." And the Board must concur that such an outcome is "an absurd and unjust result, especially in light of the fact that their foremost intent in drafting this constitutional provision is to improve the standard of living of public employees."

Accordingly, the Board must take the Legislature at its word and conclude that the arbitration award was "final and binding" upon the Governor at issuance and imposed a concurrent duty to "take whatever action is necessary to carry out and effectuate the final and binding agreement." By repudiating and opposing the funding of the award Respondent offended its finality and failed to carry out and effectuate it in violation of HRS § 89-11(g). This, in turn, interfered with rights under Chapter 89, provides conclusive indicia of the failure to bargain in good faith, and a refusal to comply with the provisions of the chapter, in violation of HRS §§ 89-13(a)(1), (5), (6), and (7).¹⁰

¹⁰The HGEA argues that the Board should find on this record that Respondent's conduct was inherently destructive of employee rights. An employer engages in inherently destructive conduct when it undertakes a course of action to undermine the union, diminish its capacity to effectively represent its employees, and creates visible and continuing obstacles to the future exercise of employee rights under the labor statute. NLRB v. Haberman Constr. Co., 641 F.2d 351, 360 (1981). The HGEA argues that Governor LINGLE's conduct undermined "good faith" participation in final and binding arbitration process as contemplated under HRS 89-11.

Retaliation

Complainant further suggests that the Governor's opposition to the funding of their contract was, inter alia, an act of retaliation and thus in violation of Chapter 89.

Essentially the HGEA argues that the disparate treatment of public workers unions which didn't endorse Respondent's campaign for Governor in 2002 (e.g., HGEA) and those which did (e.g., UHPA and SHOPO) demonstrate a retaliatory and punitive motive for Respondent's complained of actions.

Respondent's negotiations with UHPA, which endorsed her in 1998 and 2002, culminated on April 9, 2004 with the union's ratification of the tentative agreement, after Respondent's agreement and execution, of an unprecedented six year collective bargaining agreement containing an aggregate 31% pay increase for union members which would raise the average full professor's salary to in excess of \$113,000. Two days before, the Governor had transmitted to the Legislature a message urging them to reject funding the arbitration award of the HGEA, which had never endorsed her, because it exceeded a two-year aggregated four percent increase. Complainant suggests that this disparity is evidence of bad faith in the treatment of the HGEA award.

Ironically, the application of the law argued for herein by Respondent would render the UHPA contract illusory or at least of conditional validity. The Legislature appropriates funds on a biennium basis. Thus it has not, and could not have, appropriated funds for the cost items in the UHPA contract beyond its first two years. Governor LINGLE argues herein that a bargaining agreement is only "advisory" until funds are appropriated. Accordingly, pursuant to that argument, the contract is only advisory, in whole or significant part. The Governor also argues herein that nothing in the law curtails her power to oppose or to veto any

The UPW alleges that even before the arbitral process was completed, Governor LINGLE repudiated the arbitration award. The Governor immediately urged legislators to reject the cost items. She denounced the third party process in her message to the legislators on or about April 7, 2004. Within days of the arbitration award, LINGLE sent a letter to all State employees criticizing the union leaders and suggested direct dealing with the employees. On April 12, 2004, she sought to renegotiate the terms of the agreement and proposed a four percent increase which had not been previously proposed. The UPW argues that all of these actions undermined or interfered with the UPW's role in representing the employees as well as undermined the integrity of the arbitration process as contemplated in HRS 89-11 and created obstacles to the process of final and binding arbitration by her conduct.

If the Board were to find Respondent's conduct to be inherently destructive of employee rights, the Board would not need to find motive on the part of Respondent to establish a prohibited practice. While it can be argued that Respondent's actions appear to be aimed at undermining the stature of the Union in the eyes of its membership, the Board finds that Respondent's conduct was wilful given the thoughtful and deliberate nature of her actions which resulted in violating the terms of HRS § 89-11 and the spirit of bargaining in good faith underlying Chapter 89.

appropriation made by the legislature to fund the bargained for cost items. Accordingly, Respondent would retain the right to oppose and veto funds which she had negotiated, promised, but not provided. And finally, the last three years of the UHPA contract falls after the expiration of the current Governor's term. The bulk of the raises (5%, 9%, 11%) fall within this period. Accordingly, with the argued for powers, the Respondent, or her successor, could repudiate the agreement by opposing or vetoing the significant raises after obtaining the benefits of the bargain for three years at relatively little cost (1%, 3%, 2%).

This scenario is not before the Board at this time so, the Board need not address the propriety of any position taken by Respondent or her successor regarding the UHPA contract. But, within the context of the collective bargaining rights conferred by statutes and our constitution, the possible "absurd and unjust" results which could follow upon the exercise of the unconditional rights argued for in this proceeding demonstrate the necessity of giving meaning to the "final and binding" nature of a collective bargaining agreement.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. The public employer commits a prohibited practice in violation of HRS § 89-13(a)(1) by interfering with employee rights guaranteed under Chapter 89.
3. The Board majority concludes that employees in BUs 02, 03, 04, 06, 08, and 13 engaged in concerted activity to be entitled to the arbitration of their impasses in negotiations. Respondent wilfully interfered with the rights of employees to have their instant arbitration award effectuated in accordance with HRS § 89-11 by repudiating the award, urging rejection of the award by the Legislature, and thereafter vetoing the passage of cost items.
4. The public employer commits a prohibited practice in violation of HRS § 89-13(a)(5) by refusing to bargain collectively in good faith with the HGEA as required under HRS § 89-9.
5. The Board majority concludes that Respondent refused to bargain in good faith by refusing to accord the arbitration award rendered in the instant impasse pursuant to HRS § 89-11, final and binding effect.
6. The public employer commits a prohibited practice in violation of HRS § 89-13(a)(6) by refusing to participate in good faith in the mediation and arbitration procedures set forth in HRS § 89-11.

7. The Board majority concludes that the Respondent wilfully refused to participate in the arbitration procedures set forth in HRS § 89-11 by repudiating the arbitration award, refusing to recognize the award as “final and binding,” and refusing to “take whatever action is necessary to carry out and effectuate the final and binding agreement,” thereby undermining the interest arbitration process.
8. The public employer commits a prohibited practice in violation of HRS § 89-13(a)(7) by refusing to comply with any provision of Chapter 89.
9. The Board majority concludes that Respondent committed a prohibited practice by refusing to comply with the provisions of HRS § 89-11.
10. The Board dismisses the claims of retaliation because the HGEA failed to prove by a preponderance of evidence that Respondent retaliated against the HGEA because the Union and its employees engaged in concerted action by not endorsing her candidacy in previous gubernatorial elections.

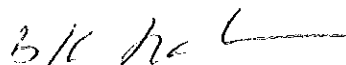
ORDER

Based on the foregoing, the Board issues the following:

1. Respondent shall cease and desist from engaging in the foregoing prohibited practices.
2. Respondent shall immediately post copies of this decision on her website and in conspicuous places at the work sites where employees of the affected bargaining units assemble, and leave such copies posted for a period of 60 days from the initial date of posting.
3. Respondent shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, June 30, 2005.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member

DISSENTING OPINION

I respectfully dissent on the grounds the instant complaint became moot upon the passage of Act 53 of the 2004 Legislative Session overriding the Governor's veto of salary increases for public employees and members of the HGEA. Therefore, I would have granted the Employer's motion for summary judgment, denied the Union's motion for summary judgment, and dismissed the instant prohibited practice.

The mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised." In re App'n of J.T. Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254-55 (1990) (quoting Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 394, 616 P.2d 201, 203-204 (1980)). The Board's duty is to decide actual controversies by a judgment which can be carried into effect, not to declare principles or rules of law which cannot affect the matter in issue in the case before it. Id. There is no dispute that the Governor's veto of House Bill No. 1043, entitled "Making Appropriations for Salary Increases for Public Employees," which was included in the amended complaint in this case, passed as Act 53, 2004 SLH by veto override on May 3, 2004. As a result, the Legislature appropriated the funds for the public employee pay raises awarded by an arbitration panel in accordance with HRS § 89-11. Thus, the controversy at issue in the amended complaint is moot.¹¹

Assuming arguendo, the case is not moot, I disagree with the Board majority's reasoning that the Employer's reading of "final and binding" "would introduce a whole new gubernatorial prerogative into the statutory scheme." The Governor's veto power is nothing new. Nor is the Legislature's power to override a veto new. Indeed, when it comes to public employee wages the Legislature's power to appropriate is explicit under HRS § 89-11.¹² Furthermore, implied within the statutory scheme are the Governor's power to veto, and the Legislature's power to override a veto. The Legislature could not abrogate the Governor's constitutional power to veto funding of public employee pay raises, by giving "final and

¹¹The exception to the mootness doctrine does not apply to the funding of public employee pay raises contained within the arbitration award, because it cannot be said that the questions involved over the appropriation process is capable of repetition yet evading review. Okada Trucking Co. Ltd. v. Board of Water Supply, 99 Hawai'i 191, 196-98, 53 P.3d 799, 804-06 (1002).

¹²HRS § 89-11(g) provides that, "All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies[.]"

binding” effect to an arbitration award under Chapter 89, HRS. To effectuate the award the Governor transmitted the cost items to the Legislature. The power to fund the pay raises is in the hands of the Legislature as part of the appropriation process. That’s what happened in this case, and it is consistent with the statutory scheme provided under HRS § 89-11(g).¹³

The Board majority interprets “final and binding” to occur upon issuance of an arbitration award. I disagree. I would adopt the Employer’s interpretation that arbitration awards involving costs items subject to appropriations under HRS § 89-11(g), are advisory only “unless and until the appropriation process under the Hawaii State Constitution is fully completed.” Furthermore, the Board majority’s interpretation of HRS § 89-11(g) abrogates the Governor’s constitutional power to veto an appropriation measure, or for that matter to give the Legislature information about the affairs of state within the Governor’s constitutional powers under Section 5, Article V, of the Hawaii State Constitution. Such an interpretation is contrary to the general principle of law that a state constitution is controlling over statutes, not vice versa.

Regarding Governor’s LINGLE’s recommendation to the Legislature to reject the arbitration award, I would find that the Governor is free to express an honest opinion about the ramifications on the financial plan and a balanced budget. Under HRS § 89-11(g), the parties are mandated to “take whatever action is necessary to carry out and effectuate the final and binding agreement.” This means the Governor, as the Public Employer, has a duty to transmit to the Legislature the cost items in the arbitration award regardless of the opinion that the Legislature should not appropriate the monies to fund arbitrated pay raises. While the State’s Chief Executive’s recommendation to disapprove the cost items transmitted to the Legislature would probably discourage the workforce morale,¹⁴ it does not prove by a preponderance of evidence a prohibited practice under HRS § 89-13(a). This issue was decided in Decision No. 111, Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO, 2 HPERB 286 (1979) (Hawaii Fire Fighters), upon which the Employer relies for the underlying substantive correctness of its conduct in arguing that the prohibited practices alleged in the instant complaint were not wilful.

In Hawaii Fire Fighters, the union charged the public employers with failing to participate in HRS § 89-11 arbitration in good faith before, during and after the arbitration proceedings by not effectuating any decision adverse to the employers. In Hawaii Fire Fighters, then Governor Ariyoshi, submitted the cost items as he was required to do under HRS § 89-11. Under separate cover the Governor informed the Speaker of the House and Senate

¹³In exercising their powers, both the State’s chief executive and lawmakers, are answerable to the electorate.

¹⁴In this case, the Governor’s use of the bully pulpit to explain her disapproval over the arbitrated pay increases, was not just demoralizing to the workforce, but demeaning to the point where the Union alleges the Governor was punishing the HGEA and its membership for not endorsing her bid for Governor. Although that perception may be the reality, it is not the standard of proof which the Board needs to apply in interpreting HRS § 89-11(g).

President, that he could not support approval of the cost items by the Legislature. Governor Ariyoshi explained he had "grave reservations" over the wage increases which the State and counties could not afford, and the impact on negotiations with the rest of the bargaining units. The State Legislature adjourned without acting on the cost items in the arbitration award. The Hawaii Fire Fighters Board Chairman found the union did not establish a prohibited practice under HRS § 89-13, and stated as follows:

In the circumstances, it might have been more prudent for the Governor to transmit the cost items without comment. The writing and transmitting of the letter, however, did not constitute a refusal on the part of the Governor to participate in good faith in the arbitration procedures set forth in Section 89-11, HRS. A different question might be presented if a causal connection could be established between the Governor's letter and legislative action. If such a connection had been established, then the Board would have to examine the extent to which, if at all, Section 89-13, HRS, could hinder the expression *by any party* to a Section 89-11(d) arbitration proceeding of his honest opinion about the desirability or undesirability of a rendered award.

The Chairman is inclined to believe that honest and fair comment about an award is lawful although such comment may not always make for good employment relations. Hawaii Fire Fighters, *supra*, at 298.

In a concurring opinion, one HPERB member stressed the constitutional powers of the Office of the Governor, and stated,

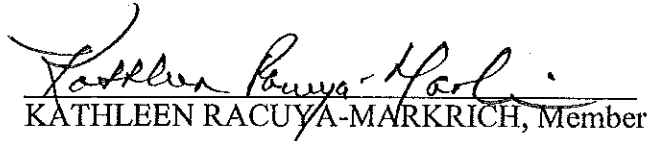
Section 5 of the Article IV¹⁵ of the Constitution, which is concerned with the subject of Executive Powers, in my judgment elevates statements and recommendations concerning the affairs of the State made by the Governor to the Legislature beyond the reach of any restrictions which otherwise might be placed upon them under Section 89-13, HRS. The constitutional provision states, in relevant part:

Section 5. The governor shall be responsible for the faithful execution of the laws. He shall be commander in chief of the armed forces of the State and may call out such forces to executive the laws, suppress or prevent insurrection or lawless violence or repel invasion. *He shall, at the beginning of each session, and may, at other times, give to the legislature*

¹⁵See Article V of the Hawaii State Constitution.

information concerning the affairs of the State and recommend to its consideration such measures as he shall deem expedient.
(Emphasis added).

Although the Hawaii Fire Fighters case did not involve a veto of the interest arbitration award, the Employer contends the same constitutional principles apply. I agree. Nothing short of a constitutional amendment can take away the Governor's power to veto any bill granted by Section 16 of Article III of the Hawaii State Constitution. Certainly, the Governor's duty as a public employer to "take whatever action is necessary to carry out and effectuate the final and binding agreement" set forth in HRS § 89-11(g), cannot be interpreted to suspend the Governor's power as chief executive to veto the Legislature's appropriation of the arbitrated pay raises. In this case, the Legislature overrode the Governor's veto, and therefore, the controversy is moot.


KATHLEEN RACUYA-MARKRICH, Member

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