EFiled: Aug 21 2017 03:17PM HAST
Transaction ID 61014864
Case No. 16-CE-01-883a & b

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and HAWAII HEALTH SYSTEMS CORPORATION, State of Hawaii, Respondent.	CASE NOS.: 16-CE-01-883a 16-CE-10-883b ORDER NO.: 3288 ORDER AMENDING BOARD ORDER NO. 3199 BY RESPONDING TO QUESTIONS POSED BY THE CIRCUIT COURT ON REMAND, AND DENYING THE UPW'S MOTION TO SET BRIEFING SCHEDULE TO ADDRESS REMANDED ISSUES

ORDER AMENDING BOARD ORDER NO. 3199 BY RESPONDING TO QUESTIONS POSED BY THE CIRCUIT COURT ON REMAND, AND DENYING THE UPW'S MOTION TO SET BRIEFING SCHEDULE TO ADDRESS REMANDED ISSUES

On October 28, 2016, the Hawaii Labor Relations Board (Board) issued in this matter Order No. 3199, Order Denying Hawaii Health Systems Corporation's Motion to Dismiss; and Granting, in Part, and Denying, in Part, United Public Workers, AFSCME, Local 646, AFL-CIO's Motion for Summary Judgment.

On November 14, 2016, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Motion for Award and Order of Costs, Attorney's Fees, and Civil Penalties along with supporting documents (Motion for Costs, Fees, and Civil Penalties). On November 21, 2016, Respondent HAWAII HEALTH SYSTEMS CORPORATION (HHSC) filed its opposition to the UPW's Motion for Costs, Fees, and Civil Penalties along with supporting documents. On December 8, 2016, the UPW filed a supplemental submission in support of its

Motion for Costs, Fees, and Civil Penalties; and on June 15, 2017, the UPW filed another supplemental submission in support of its Motion for Costs, Fees, and Civil Penalties.[1]

However, on November 25, 2016, the UPW filed a Notice of Appeal from Board Order No. 3199 with the Circuit Court of the First Circuit (Circuit Court) in Civil No. 16-1-2153-11 (RAN). On November 28, 2016, the HHSC also filed a Notice of Appeal from Board Order No. 3199 with the Circuit Court, in Civil No. 16-1-2163-11 (RAN).

On August 2, 2017, the Circuit Court in Civil No. 16-1-2163-11 issued its ORDER REMANDING TO THE HAWAII LABOR RELATIONS BOARD PART OF THE HAWAII LABOR RELATIONS BOARD ORDER NO. 3199 (Remand Order).

On August 3, 2017, the UPW filed a Motion to Set Briefing Schedule to Address Remanded Issues, pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(17)(B), to permit the parties to submit supplemental memoranda on the issues on remand in light of the Circuit Court's Remand Order to address four matters. The HHSC did not file an opposition to the UPW's motion. On August 11, 2017, the UPW filed a supplemental submission in support of its motion.

HAR § 12-42-8 governs proceedings before the Board, and subsection (g) specifically governs "hearings." HAR § 12-42-(g)(17) provides in relevant part:

> (17) Argument, briefs, proposed findings:
>
> * * *
>
> (B) Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings of facts and conclusions of law, or both, within such time as may be fixed by the board, but not in excess of fifteen days from the close of the hearing.
>
> * * *

By the rule's express language, a party is "entitled" to file a brief or proposed findings of fact or conclusions of law, or both, upon request made before the close of the hearing.

---

[1] The Board notes that both of the UPW's supplemental submissions state that its Motion for Costs, Fees, and Civil Penalties was filed on November 4, 2016; however, the Board's records indicate that the motion was filed with the Board on November 14, 2016.

The rule does not, on its face, apply to the situation here on remand. Furthermore, the parties were provided ample opportunity to brief any legal issues through the HHSC's Motion to Dismiss Unfair Labor Practice Complaint Filed July 25, 2016, filed on August 22, 2016, and the UPW's Motion for Summary Judgment, filed on August 24, 2016, and to also present oral arguments during the Board's Hearing on Dispositive Motions held on August 30, 2016. Accordingly, the Board finds and concludes that it is within the Board's discretion to permit briefing or other legal arguments in responding to the Court's Remand Order; however, the Board also finds and concludes that further briefing or argument is not necessary to the Board's consideration of the Remand Order, and therefore denies the UPW's motion.

The Circuit Court's Remand Order provided in relevant part:

> Upon remand, the [Board] shall make a determination as to the following:
>
> 1) By granting summary judgment in favor of Complainant and against HHSC as to Counts 1, 2 and 3, is HLRB finding and/or concluding that its interpretation of Act 25 does not bar negotiations regarding the prohibition against tobacco and electronic smoking use under HRS Section 89-9(d), and in fact, mandates that HHSC engage in mandatory negotiations, such that the failure to do so by HHSC constitutes a "prohibitory practice" and a "willful refusal to negotiate." In other words, is HHSC under a duty to negotiate with Complainant as to the implementation and/or enforcement of Act 25; and
>
> 2) By granting summary judgment in favor of Complainant and against HHSC as to Counts 1,2 and 3, is HLRB finding and/or concluding that Act 25 (its implementation and/or enforcement) is pre-empted by Chapter 89, past practices (designated smoking areas in HHSC medical centers and facilities); and
>
> 3) By granting summary judgment in favor Complainant and against HHSC as to Counts 1, 2 and 3, is HLRB finding and/or concluding that notwithstanding Act 25, HHSC is under a duty to consult with Complainant as to the implementation and/or enforcement of Act 25; and
>
> 4) To address what effect, if any, that the "Hunter Award" has on its conclusion that notwithstanding Act 25, HHSC breached its duty to negotiate and/or consult as to the implementation and/or enforcement of Act 25.

Accordingly, Board Order No. 3199 is hereby amended to include the following clarifications in response to the Circuit Court's Remand Order:

1. By granting summary judgment in favor of Complainant and against HHSC as to Counts 1, 2 and 3, is HLRB finding and/or concluding that its interpretation of Act 25 does not bar negotiations regarding the prohibition against tobacco and electronic smoking use under HRS Section 89-9(d), and in fact, mandates that HHSC engage in mandatory negotiations, such that the failure to do so by HHSC constitutes a "prohibitory practice" and a "willful refusal to negotiate." In other words, is HHSC under a duty to negotiate with Complainant as to the implementation and/or enforcement of Act 25.

The Board clarifies that Act 25 does not bar effects bargaining. It is a fundamental principle of collective bargaining that although an employer is not required to bargain over certain business decisions, the employer may nevertheless have a duty to bargain about the effects of the decision on its employees. See, e.g., First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981). In Del Monte Fresh Produce (Hawaii), Inc. v. ILWU, Local 142, AFL-CIO, 112 Hawaii 489, 146 P.3d 1066 (2006), the Hawaii Supreme Court affirmed the Board's holding in an unfair labor practice complaint that the employer did not engage in good faith effects bargaining. The employer's decision in that case was to close down a plant; however, the employer was nevertheless required to engage in good faith effects bargaining even though the *decision* to close the plant was not subject to negotiations.

Here, Act 25 prohibits tobacco and electronic smoking use, and thus the *decision* to prohibit tobacco and electronic smoking use is not negotiable; Act 25 provides that "[p]ursuant to section 89-9(d), the tobacco and electronic smoking device ***prohibitions*** under this section shall not be subject to collective bargaining" (emphasis added). However, Act 25 does not prohibit bargaining over the effects of that law on wages, hours, or other terms or conditions of employment, and the wilfull failure to engage in good faith effects bargaining may constitute a prohibited practice.

2. By granting summary judgment in favor of Complainant and against HHSC as to Counts 1, 2 and 3, is HLRB finding and/or concluding that Act 25 (its implementation and/or enforcement) is pre-empted by Chapter 89, past

practices (designated smoking areas in HHSC medical centers and facilities).

The Board did not, and does not, find or conclude that Act 25 is preempted by HRS chapter 89, or that chapter 89 is preempted by Act 25. Generally, preemption occurs when a law expresses clear intent to preempt another law, when there is outright or actual conflict between the two laws. See, Norris v. Hawaiian Airlines, 74 Haw. 235, 245, 842 P.2d 634, 639 (1992). Here, as explained above, Act 25 is not necessarily in conflict with chapter 89, and it is possible to give effect to both, as the prohibition on tobacco and electronic smoking use is not negotiable, but the Board does not read Act 25 as prohibiting effects bargaining. Moreover, the Board did not hold that the HHSC cannot comply with Act 25 and prohibit tobacco and electronic smoking use, only that the HHSC committed a prohibited practice by willfully failing or refused to negotiate over the effects of the law.

With respect to "past practices" and designated smoking areas in HHSC medical centers and facilities: generally, under federal labor case law, an employer's established past practice can become an implied term of a collective bargaining agreement.[2] See, e.g., Railway Labor Executives v. Norfolk & Western Railway. Co., 833 F.2d 700, 705 (7th Cir. 1987); Brotherhood Railway Carmen v. Missouri Pacific Railroad Co., 944 F.2d 1422, 1429 (8th Cir. 1991); Martinsville Nylon Employees Council Corp. v. N.L.R.B., 969 F.2d 1263 (D.C. Cir. 1992). However, the Board does not reach the issue of "past practice," because that is an issue to be determined through the CBA's grievance procedure. HRS § 89-10.8, governing resolution of disputes, provides that a "public employer ***shall*** enter into written agreement with the exclusive representative ***setting forth a grievance procedure*** culminating in a final and binding decision, ***to***

[2] The Board notes that the language of the National Labor Relations Act (NLRA) is similar to provisions in HRS chapter 89, but is not identical. For instance, with respect to written agreements, the NLRA provides in 29 U.S.C. § 158, which govern unfair labor practices, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and ***the execution of a written contract incorporating any agreement reached if requested by either party***" (emphasis added) (29 U.S.C. §158(d)). By contrast, HRS § 89-10, which governs written agreements, provides in relevant part that the "agreement ***shall be reduced to writing and executed by both parties***" (emphasis added). However, here, the question of whether a past practice regarding smoking is an implied term of the parties' CBA is an issue to be decided through the CBA's grievance procedure and not by the Board, as discussed above.

be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable[.]" Accordingly, the issue of "past practice" is a matter for the grievance procedure.

3. By granting summary judgment in favor Complainant and against HHSC as to Counts 1, 2 and 3, is HLRB finding and/or concluding that notwithstanding Act 25, HHSC is under a duty to consult with Complainant as to the implementation and/or enforcement of Act 25.

As a preliminary matter, Act 25 does not expressly mention or prohibit "consultation" between the HHSC and a union. Consultation is distinct from negotiation. Pursuant to HRS § 89-9(a), the parties are required to "negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment, which are to be embodied in a written [collective bargaining] agreement but such obligation does not compel either party to agree to a proposal or make a concession." By contrast, pursuant to HRS § 89-9(c), "[e]xcept as otherwise provided by this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director shall be subject to consultation with the exclusive representative of the employees concerned."

In Board Decision No. 104, in Board Case No. CE-09-41, Hawaii Nurses Association and George R. Ariyoshi, et al., 2 HPERB 218 (1979), the Board explained that the primary reason for the consultation provision in chapter 89 is "to facilitate employee participation in joint decision making on substantial and critical matters affecting employee relations which are normally determined by management alone" and that "[t]he concepts of negotiation and consultation are distinctly different. It is unlikely the Legislature intended to overlap these concepts and require that negotiable matters be also subject to consultation." (2 HPERB at 226).

Accordingly, a duty to consult may arise from a non-negotiable decision by the employer. Here, it is the Board's conclusion that Act 25, which renders the *decision* to prohibit tobacco and smoking device usage non-negotiable, does not prohibit or preempt consultation over the HHSC's changes to its policies and procedures that are impacted by Act 25.

4. To address what effect, if any, that the "Hunter Award" has on its conclusion that notwithstanding Act 25, HHSC breached its duty to negotiate and/or consult as to the implementation and/or enforcement of Act 25.

As noted above, pursuant to HRS § 89-10.8, the grievance procedure shall be invoked in the event of any dispute concerning the interpretation or application of a written agreement, and it shall be valid and enforceable. And pursuant to § 89-10.8, the Board has required parties to exhaust a grievance procedure before bringing a prohibited practice charge under HRS § 89-13 for violation of collective bargaining agreement.

However, HRS § 89-13 has other categories of prohibited practices than just violation of collective bargaining agreement. And pursuant to HRS § 89-14, the Board has ***exclusive original jurisdiction*** over prohibited practices. Thus, while the Board must, pursuant to HRS § 89-10.8, defer to the grievance procedure for alleged violation of a collective bargaining agreement, the Board has exclusive original jurisdiction over all other controversies involving alleged prohibited practices. Furthermore, under HRS § 89-5, it is the Board's responsibility to "ensure that collective bargaining is conducted in accordance with this chapter" (§ 89-5(a)); to "resolve controversies under this chapter" (§ 89-5(i)(3)); and to "[c]onduct proceedings on complaints of prohibited practices . . . and take such actions with respect thereto as it deems necessary and proper" (§ 89-5(i)(4)).

Accordingly, while the Board respectfully defers to the "Hunter Award" with respect to any alleged violation of collective bargaining agreement, the Board does not defer to a grievance procedure with respect to any other alleged prohibited practice, as it is the Board's statutory duty to resolve such controversies.

Therefore, Board Order No. 3199 is hereby amended to incorporation the Board's clarifications discussed above, in response to the Circuit Court's Remand Order. The Board reaffirms Order No. 3199 in all other respects.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. HAWAII HEALTH SYSTEMS CORPORATION
CASE NOS.: 16-CE-01-883a, 16-CE-10-883b
ORDER AMENDING BOARD ORDER NO. 3199 BY RESPONDING TO QUESTIONS POSED BY THE CIRCUIT COURT ON REMAND, AND DENYING THE UPW'S MOTION TO SET BRIEFING SCHEDULE TO ADDRESS REMANDED ISSUES
ORDER NO. 3288

DATED: Honolulu, Hawaii, August 21, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono
SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copy:

Herbert R. Takahashi, Esq.
Darin R. Leong, Esq.
Eileen C. Zorc, Esq.