STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of FRANK F. FASI, Mayor of the City and County of Honolulu, and DEPARTMENT OF PUBLIC WORKS, City and County of Honolulu, Petitioners, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO; and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Intervenors.	CASE NO. DR-01-48 ORDER NO. 715 ORDER GRANTING UPW'S MOTION TO DEFER TO ARBITRATION AWARD AND TO DISMISS PETITION FOR DECLARATORY RULING

ORDER GRANTING UPW'S MOTION TO DEFER TO ARBITRATION AWARD AND TO DISMISS PETITION FOR DECLARATORY RULING

On July 13, 1987, Petitioners FRANK F. FASI, Mayor of the City and County of Honolulu and the DEPARTMENT OF PUBLIC WORKS, City and County of Honolulu [hereinafter referred to as Employer] filed a Petition for Declaratory Ruling with this Board. Petitioner's seek a ruling that its Excessive Sick Leave Policy is a legitimate exercise of its management rights and not subject to negotiations under Subsection 89-9(d), Hawaii Revised Statutes [hereinafter referred to as HRS].

On August 26, 1987, the Board issued a Notice of Receipt of Petition for Declaratory Ruling; Notice of Deadline

for Filing Petitions for Intervention. Pursuant thereto, the UNITED PUBLIC WORKERS, AFSCME LOCAL 646, AFL-CIO [hereinafter referred to as UPW], the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO [hereinafter referred to as HGEA], and the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY [hereinafter referred to as UHPA] filed petitions to intervene in the proceedings. On January 5, 1988, the Board granted the petitions for intervention. Thereafter on January 20, 1988, counsel for UPW filed a Motion to Continue Hearing Until After Arbitrator's Award. This motion was granted by the Board in Order No. 673, dated February 8, 1988.

On April 24, 1988, Arbitrator Robert Castrey issued his award. Arbitrator Castrey held, inter alia, that the Employer violated Sections 1 and 37 of the collective bargaining agreement, when it failed to negotiate and reach mutual consent in the matter of implementing its new policy. The Employer sought to vacate the arbitration award in the Circuit Court of the First Circuit. This motion was denied. Thereafter, the UPW filed a Motion to Confirm Arbitration Award which was granted by the Court on June 16, 1988. The denial of the Employer's motion to vacate was appealed to the Hawaii Supreme Court.

On July 22, 1988, the UPW filed a Motion to Defer to Arbitration Award and to Dismiss Petition for Declaratory Ruling with this Board. The UPW, relying on Olin Corp., 268 NLRB 573, 115 LRRM 1056 (1984), seeks such dismissal on the bases that the contractual issues determined by Arbitrator Castrey factually parallel the issues presented in this declaratory ruling petition

and since the Arbitrator was presented generally with facts relevant to both cases, this Board should defer to the Arbitrator's decision and the judgment of the Circuit Court.

The Employer opposes the UPW's motion on the bases that the applicability of Subsection 89-9(d), HRS, to the Employer's Excessive Sick Leave Policy is a legal issue that must be determined by the Board and concerns a subject not covered by the applicable collective bargaining agreement. Further, the Employer argues that the UPW fails to meet the deferral standards established by the National Labor Relations Board [hereinafter referred to as NLRB] in Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955), and Olin Corp., supra.

Intervenor UHPA joined in the UPW's motion. The HGEA did not submit any written arguments for or against the motion and did not participate in the hearing held on October 28, 1988.

After considering the arguments presented and the record before us, the Board is persuaded by the arguments submitted by the Intervernor UPW and finds good cause to defer to the arbitration process and hereby dismisses the instant declaratory ruling petition.

In Olin Corp., supra, the NLRB discussed its deferral policy at p. 1057:

> In its seminal decision in Spielberg, the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The Board in Raytheon Co., further conditioned deferral on the arbitrator's having considered the unfair labor practice

> issue. Consistent application of the Raytheon requirement has proven elusive, and as illustrated by the recent Propoco case, its scope has expanded considerably. Accordingly, in his dissent in Propoco, Member Hunter proposed certain standards limiting the application of Raytheon. As set forth below, we adopt these standards which in our view more fully comport with the aims of the Act and American labor policy.

The Board further adopted the following standard for deferral to arbitration awards.

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Id. at p. 1058.

After reviewing the record, the Board concludes that the Spielberg standards of deferral were met by the arbitral proceedings and the prohibited practice issue was adequately considered by the arbitrator. The material issues are factually parallel. The central issue before the Arbitrator was whether the Employer violated specified sections of the Unit 1 collective bargaining agreement by the unilateral implementation of the policy. The Arbitrator discussed the management rights issue stating:

> In the course of digesting this gargantuan mass of information, one basic arbitral decision recurred time after time. That is, the Employer in the private sector has an unfettered right under the Management Rights clause to promulgate, initiate or change the system of controlling excessive sick leave. So too does the City and County of Honolulu have that same right, but in each case where this decision has prevailed in public or private sector there has been recognition and awareness that in order for this unfettered right to prevail it must not conflict with previously agreed to language in the parties' present collective bargaining agreement. At pp. 10-11.

This issue would have also been considered by the Board in deciding whether the Employer committed a prohibited practice by refusing to negotiate the policy. The Arbitrator further stated, at p. 15:

> To conclude the analysis of Section 37, it is clear under subsections 37.09 and 37.13 that there is no contractual restriction, real or implied, against an employee's entitlement to use, as legitimately needed, any amount of accumulated or advanced sick leave to his or her credit. For the Employer to unilaterally impose a policy whereby legitimate use of accumulated sick leave set forth in the contract can now be subjected to disciplinary action, is clearly a change in the conditions of work. Such a change clearly falls within the meaning of the mutual consent required under Section 1.05 when changes are made in "wages, hours or other conditions of work contained herein". Therefore, to hold that the Employer met its obligations under Section 1.05 by offering to consult with the Union about the New Policy would not comport with this Arbitrator's opinion and with the overwhelming body of arbitral opinion that has been reached when the terms of Section 1.05 is the pivotal issue in consideration.

Thus, the Arbitrator held that the implementation of the policy constituted a change in the working conditions requiring mutual consent.

It is also equally clear to us that the Arbitrator was presented generally with the facts relevant to resolving the prohibited practice. While the Employer suggests that evidence of the impact of the contractual provisions on the operations of the City as a public employer are critical to the prohibited practice proceeding, we believe that the Arbitrator was presented with facts indicating the negative impact of excessive absenteeism on the Employer's operations. Thus, the evidence before the Arbitrator was essentially the same necessary for determining the merits of the prohibited practice charge.

Finally, we do not find that Arbitrator Castrey's award is "palpably wrong" or repugnant to Chapter 89, HRS. The Employer has failed to establish that the award is not susceptible to an interpretation consistent with Chapter 89, HRS. The Arbitrator essentially held that the Employer had already bargained for a sick leave policy with no restriction on the use of legitimately earned leave. As the Arbitrator felt that the policy constituted a change in working conditions, as provided for by the contract he held that the failure to negotiate the subject matter constituted a violation of the contract.

Hence, under the facts of this case we defer to the arbitration award and accordingly dismiss this petition.

FRANK F. FASI, Mayor of the City and County of Honolulu, and DEPARTMENT OF PUBLIC WORKS, City and County of Honolulu and UNITED PUBLIC WORKERS, AFSCME LOCAL 646, AFL-CIO; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO; and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; CASE NO. DR-01-48

ORDER NO. 715

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DATED: Honolulu, Hawaii, November 1, 1988.

HAWAII LABOR RELATIONS BOARD

MACK H. HAMADA, Chairperson

JAMES R. CARRAS, Board Member

GERALD K. MACHIDA, Board Member

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