

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of )

HAWAII GOVERNMENT EMPLOYEES' )  
ASSOCIATION, LOCAL 152, )  
AFSCME, AFL-CIO, )

Petitioner, )

and )

CITY AND COUNTY OF HONOLULU, )

Employer. )

Case No. RA-02-15  
RA-03-16  
RA-04-17  
RA-13-18

In the Matter of )

HAWAII GOVERNMENT EMPLOYEES' )  
ASSOCIATION, LOCAL 152, )  
AFSCME, AFL-CIO, )

Petitioner, )

and )

CITY AND COUNTY OF HONOLULU, )

and )

UNITED PUBLIC WORKERS, LOCAL )  
646, AMERICAN FEDERATION OF )  
STATE, COUNTY AND MUNICIPAL )  
EMPLOYEES, AFL-CIO, )

and )

HAWAII TEAMSTERS AND ALLIED )  
WORKERS, LOCAL 996, )

and )

MTL, INC., )

Intervenors. )

Case No. DR-02-12  
DR-03-13  
DR-04-14  
DR-13-15

Order No. 77

ORDER DENYING MOTION THAT MTL, INC.  
IS AN INSTRUMENTALITY OF THE CITY  
AND COUNTY OF HONOLULU

The instant consolidated cases were filed with this Board in April (the RA cases) and May (the DR cases), 1975, by petitioner Hawaii Government Employees' Association (hereafter

HGEA). The RA (unit clarification) cases allege that employees of MTL, Inc. are public employees within the meaning of Chapter 89, Hawaii Revised Statutes, (hereafter HRS) "and should be included within any of Units 2, 3, 4 or 13." The petition further alleges, "MTL, Inc. is an agency of the City and County of Honolulu, a public employer."

In the DR (declaratory ruling) cases, the petitioner as the exclusive representative of Units 2, 3, 4, and 13 seeks a ruling "as to whether employees of MTL, Inc., a public agency of the City and County of Honolulu, a public employer, are public employees."

This Board commenced hearings in the DR cases and continued them until notified that the National Labor Relations Board (hereafter NLRB) would hold a hearing on a representational petition filed by the Teamsters, Local 996. Order 19, July 28, 1975.

On April 26, 1976, the NLRB in MTL, Inc. and Hawaii Teamsters and Allied Workers, Local 996, 223 NLRB No. 157, after a hearing in which all parties in the instant case participated either as named parties or intervenors, issued a Decision and Order in which it ruled:

"Inasmuch as the City owns all equipment, exercises significant managerial control, and plays an important role in the negotiation process, and is involved with MTL in operation, management, and function, we find that MTL is an instrumentality of the City. Accordingly, since the City is an exempt employer under Section 2(2) of the Act, we shall dismiss the petition."

Section 2(2) of the National Labor Relations Relations Act states in relevant part:

"When used in this Act—

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof."

Under Chapter 89, HRS, generally speaking a person is a public employee if he is "employed by a public employer." Section 89-2(7), HRS.

The term public employer is defined as follows in Section 89-2(9):

"(9) 'Employer' or 'public employer' means the governor in the case of the State, the respective mayors in the case of the city and county of Honolulu and the counties of Hawaii, Maui, and Kauai, the board of education in the case of the department of education, and the board of regents in the case of the university of Hawaii, and any individual who represents one of these employers or acts in their interest in dealing with public employees."

On June 4, 1976, this Board granted the HGEA's motions to reactivate the DR cases and to consolidate with them the subject RA cases. Order No. 54.

Thereafter on July 20, 1976, the HGEA filed with this Board a Motion for Order that MTL, Inc. is an Instrumentality of the City and County of Honolulu.<sup>1</sup>

The motion of the HGEA is based on two arguments. The first is in the nature of a preemption argument which, in summary form, is as follows: HPERB and the parties in the instant case are bound by the ruling of the NLRB that MTL, Inc. is an instrumentality of the City and County of Honolulu "because Federal law governs the determination of this issue."

This Board, despite the respectable arguments made on this point by counsel for the HGEA, cannot accept the conclusion urged upon it. The Board is of the opinion that federal law does not govern the Hawaii Public Employment Relations Board

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1. All other parties were given an opportunity to submit memoranda on said motion to the Board and on August 12, 1976, the Board heard oral arguments on this motion.

except when the NLRB rules that particular employees are subject to the NLRA. When the NLRB makes a ruling such as it did in the MTL case, that ruling is not determinative of the applicability of Chapter 89, HRS, to a particular employer or group of employees. In short, rather than the NLRB ruling being a preclusive one, it is regarded by this Board as an operative fact in the instant cases.

The second ground asserted by the HGEA in support of its motion is that the "issue decided by the NLRB cannot, by reason of collateral estoppel, be relitigated in this action."

The Board agrees with the HGEA that collateral estoppel may be applied to the rulings of administrative bodies. K. DAVIS, ADMINISTRATIVE LAW TREATISE, §18.01 et seq. (1958).

The Board agrees with the HGEA that the following elements necessary for the evocation of collateral estoppel are present in this case:

1. Identity of parties;
2. A final ruling on the merits by the NLRB;
3. The claims before the NLRB and this Board are different (a test relevant in determining the applicability of collateral estoppel but obviously not res judicata).

This Board, however, is not convinced that there is present the requisite identity of issues to justify invocation of collateral estoppel.

The law is not completely clear in this area; however, it appears that the weight of what authority there is supports the conclusion that identity of issues is absent, or perhaps irrelevant in a subsequent proceeding, if a prior decision to which preclusive effect is sought to be given is reached under a different statute.


"In Thompson v. Flemming, 188 F. Supp. 123, (D. Or. 1960), a finding by the Veterans' Administration that plaintiff's disability prevented his engaging in substantially gainful employment was held not binding upon the Social Security Administration. The issue was identical except that it arose under a different statute. The court quoted with approval from NLRB v. Pacificmountain Express Co., 228 F.2d 170, 176 (8th Cir. 1955), certiorari denied 351 U.S. 952, 76 S. Ct. 850, 100 L. Ed. 1476 (1956): 'Each fact finding agency is entitled to make its own decision upon the evidence before it and the fact that another tribunal has reached a different conclusion upon the same issue . . . does not invalidate any decision which has evidentiary support'." K. DAVIS, ADMINISTRATIVE LAW TREATISE, SUPPLEMENT, p. 616 (1970) (Emphasis added)

Other commentaries which give support to the conclusion expressed by Professor Davis can be found in Groner and Sternstein, Res Judicata in Federal Administrative Law, 39 IOWA L. REV. 300, 313-314 (1954); A. VESTAL, RES JUDICATA/PRECLUSION, pp. V-242 - V-243 (1969). Also, see Lane v. Railroad Retirement Board, 135 F. 2d 819 (6th Cir. 1950); Neel v. Ribicoff, 204 F. Supp. 914 (D. Or. 1962); Dolan v. Celebrezze, 250 F. Supp. 932 (E. D. N. Y. 1966).

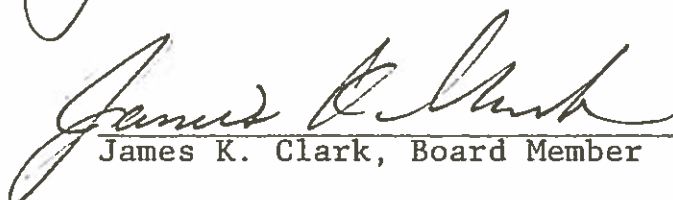
Over the years, through its adjudicatory process, the NLRB has developed its "instrumentality" [of a State or political subdivision] concept for the purpose of effectuating the policies of the NLRA which by its own terms is not applicable to public sector employment. This Board regards itself as charged with the duty of interpreting and applying Chapter 89, HRS, guided primarily by the statutory language contained therein, the purposes of the Chapter and the policies to be effectuated thereunder. Whether the "instrumentality" issue is one which the Board must of necessity deal with in this case and if so, whether it will use different standards in ruling upon said issue, are still open questions. For all of the aforesaid reasons, this Board will not apply collateral estoppel in this case.

The subject motion is therefore denied.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
John E. Milligan, Board Member

  
James K. Clark, Board Member

Dated: October 18, 1976

Honolulu, Hawaii