STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, Complainant, and DEPARTMENT OF EDUCATION, State of Hawaii, Respondent.	)	CASE NOS.: CE-03-170a CE-04-170b CE-13-170c ORDER NO. 912 ORDER GRANTING A STAY PENDING THE ISSUANCE OF FINAL BOARD DECISION

ORDER GRANTING A STAY PENDING
THE ISSUANCE OF FINAL BOARD DECISION

On October 15, 1992 at the close of the hearing on the merits of this case, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA) requested that the Board issue an interlocutory order enjoining Respondent DEPARTMENT OF EDUCATION, State of Hawaii (DOE, Employer or State) from implementing its proposed seven (7) day public service schedule on November 1, 1992. The parties submitted written memoranda on October 22, 1992. Based upon the arguments therein, the Board grants the requested stay pending the issuance of a final decision.

The DOE is the public employer, as defined in Section 89-2, Hawaii Revised Statutes (HRS), of the employees of the State of Hawaii and the Hawaii State Library, including the employees in bargaining units 3, 4 and 13.

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining units 3, 4, and 13.

This Board has jurisdiction over this matter pursuant to Section 89-13, HRS.

Both parties agree that the Board has the authority to issue an interlocutory order. Section 89-5, Hawaii Revised Statutes (HRS), provides that the Board may "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." Section 89-14, HRS, provides that prohibited practice complaints may be submitted in the same manner as set forth in Section 377-9, HRS. Section 377-9(d), HRS, states:

> After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all issues involved in the controversy and the determination of rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. . . . [Emphasis added.]

The Board's Administrative Rules Section 12-48-48 contains similar provisions to the foregoing statute. However, neither the statute nor the rule sets forth the standards by which an interlocutory order may be issued by the Board. In this case, the Complainant requests that a stay or preliminary injunction be issued against the Respondent preventing implementation of the proposed work schedule pending the issuance of a final Board decision. As such, we generally rely upon the standards applicable in the judicial system for interlocutory injunctive relief.

The Hawaii Intermediate Court of Appeals stated that the applicable test for interlocutory injunctive relief is threefold.

The decision maker should consider: 1) whether the party seeking the injunction is likely to prevail on the merits; 2) whether the balance of irreparable damage favors the issuance of the interlocutory injunction; and 3) whether the public interest supports the granting of the injunction. Penn v. Transportation Lease Hawaii, Ltd., 630 P.2d 646, 2 Haw.App. 272 (1981).

Complainant charges that the Employer unlawfully refused to bargain in good faith and violated the terms of applicable collective bargaining agreements by announcing its intention to modify the hours of operation and working conditions of employees without negotiation. The Employer maintains that it is management's prerogative to determine the days and hours of operation and staffing needs.

At the first Prehearing Conference held on August 27, 1992, the Employer conceded that the method by which employees are selected to staff the proposed schedule was negotiable. The hearing was rescheduled to allow the parties to negotiate and proposals and counter-proposals were exchanged. All of the Complainant's proposals contained financial incentives for employees for Sunday work and were rejected by the Employer because of the cost implications. It is undisputed that the negotiations between the parties have not resulted in an agreement.

The Employer now takes the position that Complainant's proposals for financial incentives interfere with the Employer's management rights under Sections 89-9(d)(4) and (5), HRS, and therefore makes the implementation of the seven (7) day public service schedule wholly non-negotiable. In support of this

contention, the Employer cites Decision No. 26, Department of Education, 1 HPERB 311 (1973) which, as in this case, involved a conflict between management rights and the duty to negotiate on terms and conditions of employment. In that case, the Board decided in favor of management rights.

What distinguishes Decision No. 26 from the case before us is that there, the Employer consistently maintained throughout the controversy that the matter in dispute was non-negotiable because it involved a legitimate exercise of management rights. In the instant case, the Employer conceded that at least a portion of the matter in dispute was negotiable and upon finding the negotiating proposals of the exclusive bargaining representative to be unacceptable, now seeks to declare the entire matter non-negotiable.

The Employer further suggests that its unilateral implementation of the new schedule is lawful because the existing collective bargaining agreement shift work provisions set forth the manner in which employees are to be chosen to staff the new schedule. In essence, the Employer's position is that what it conceded to be negotiable has already been negotiated and is contained in the collective bargaining agreements. The Board majority, however, is not at this stage of the proceedings convinced that the work schedule of affected employees would constitute "shift work" as contemplated under the respective contracts.

Based on the unique factual circumstances of this case, in which the Employer conceded a matter to be negotiable and after presumably good faith bargaining proposals were made by the

Complainant which the Employer found unacceptable, the Employer now takes the position that the matter is non-negotiable, the majority of the Board finds that there is a likelihood that the Complainant will prevail on the merits.

With respect to the balance of irreparable damage if a stay is not issued, the Board is not convinced by the Employer that it will suffer irreparable damage if the proposed schedule is not implemented on November 1, 1992. Although the Employer cites as irreparable its projected shortfall in the payroll budget of approximately $750,000, the State Librarian testified that cost savings in operations can be accomplished by other means. Additionally, the State has not demonstrated any compelling reason for the proposed schedule to go into effect on November 1, 1992. On the other hand, the hardships caused to Complainant's bargaining unit members by virtue of curtailment or limitations on weekend activities, second jobs, family obligations, religious practices, etc., will create irreparable harm. Moreover, on balance it would be more disruptive to the employees and the public to implement the proposed schedule as announced and have it later rescinded than to prudently wait until the issuance of the Board's final decision.

Regarding the question of whether the public interest supports the preservation of the status quo, there appears to be conflicting views on whether the proposed schedule will benefit the public. Given the public policy articulated by the Legislature in Section 89-1, HRS, recognizing the right of public employees to be given a voice in the decisionmaking process affecting wages and working conditions, the Board majority believes the greater public

interest will be served by granting the interlocutory order requested by Complainant.

Based upon the foregoing, the Board hereby issues a stay of the Employer's seven (7) day public service schedule pending a final determination on the merits of this case.

DATED: Honolulu, Hawaii, October 29, 1992.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

DISSENTING OPINION

I respectfully dissent from the majority decision granting interlocutory injunctive relief. The Complainant failed to carry its burden in establishing its case for injunctive relief pending the issuance of the final decision.

As to the likelihood of the Complainant prevailing on the merits of the case, based on the record before us I am unable to make such a finding. The subject matter is a hybrid issue, containing policy making issues which have a significant impact on working conditions. If the Employer can determine days and hours of operation, which all parties agree are inherent management rights, but cannot staff its operations with bargaining unit employees absent a new negotiated agreement with the Union on how

they are to be selected, this constitutes interference with management's rights under Section 89-9(d)(4) and (5), HRS.

The established method for selecting employees to work the new schedule is already set forth in the various collective bargaining agreements or by existing work rules. The Employer was, however, willing to negotiate alternate methods of selecting employees. In the absence of any new agreement, existing work rules and contract provisions on selection of employees are applicable.

The parties made several attempts to negotiate an alternate method of selecting employees. From the record, it appears clear that the Union's proposals will so interfere with management's prerogatives to efficiently manage its operations so as to render their proposals non-negotiable. See, Department of Education, 1 HPERB 311 (1973); Hawaii Government Employees' Association, 1 HPERB 559 (1975); George R. Ariyoshi, et al., 2 HPERB 207 (1979). Furthermore, the Union's proposals during negotiations contained financial incentives for the employees which may have constituted a reopening of cost items during the term of current collective bargaining agreements, quite possibly in violation of Section 89-10(c), HRS.

The majority of the Board appears to require a resolution of issues for negotiations to successfully take place. Section 89-9(a), HRS, provides that the duty to bargain does not compel either party to agree to a proposal or make a concession, only that they negotiate in good faith. In my judgment, the Employer satisfied its duty to bargain.

With respect to irreparable damage, the Complainant's showing of resulting hardships to its bargaining unit members is not compelling. While the new schedule may be disruptive and may pose a major inconvenience, the Union was nevertheless willing to allow its members to be inconvenienced provided they receive financial incentives. Therefore, it appears that any damage or harm suffered could be compensated monetarily.

RUSSELL T. HIGA, Board Member

Copies sent to:

Dennis W. S. Chang, Esq.
Francis Paul Keeno, Deputy Attorney General
Joyce Najita, IRC