STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEWIS W. POE, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-03-93 ORDER NO. 986 ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT
In the Matter of LEWIS W. POE, Complainant, and JOHN D. WAIHEE, Governor, State of Hawaii; SHARON Y. MIYASHIRO, Director, Department of Personnel Services, State of Hawaii and REX D. JOHNSON, Director, Department of Transportation, Respondents.	CASE NO. CE-03-183

ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

On March 10, 1993, LEWIS W. POE (POE or Complainant) filed a Prohibited Practice Complaint (Case No. CU-03-93) against the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) with the Hawaii Labor Relations Board (Board). The complaint alleges, inter alia, that the HGEA failed or refused to represent POE in his grievances regarding payroll

computational errors thereby breaching its duty of fair representation in violation of § 89-13(b)(4), Hawaii Revised Statutes (HRS).

Thereafter, on March 18, 1993, POE filed another Prohibited Practice Complaint (Case No. CE-03-183) with this Board against JOHN D. WAIHEE, Governor, State of Hawaii; SHARON Y. MIYASHIRO, Director, Department of Personnel Services, State of Hawaii; and REX D. JOHNSON (JOHNSON), Director, Department of Transportation, State of Hawaii (collectively Employer). Complainant alleges that the Employer failed to compensate him at the holiday overtime rate of one-and-one-half times the premium rate for one-and-one-half hours worked on April 17, 1992, Good Friday, a State-recognized holiday. In addition, Complainant alleges that the Employer failed to include an additional night differential in its calculation of his pay for work performed on the holiday, thus violating Articles 23 and 30 of the Unit 03 collective bargaining agreement. As such, Complainant alleges that the Employer violated § 89-13(a)(8), HRS.

On April 5, 1993, the Board found that the complaints involved substantially the same issues and parties and consolidated the cases for further proceedings.

On April 13, 1993, the HGEA filed a motion to dismiss complaint or in the alternative, motion for summary judgment. Thereafter, on April 15, 1993, the Employer filed a motion to join HGEA's motion to dismiss complaint or in the alternative, motion for summary judgment. On April 26, 1993, Respondent Employer also filed a motion for summary judgment in this case. On April 28, 1993, the Board conducted a hearing on HGEA's motion to dismiss or

for summary judgment. Subsequently, on May 12, 1993, the Board conducted a hearing on Respondent Employer's motion for summary judgment. All parties were afforded a full opportunity to present exhibits and argument for the Board's consideration. Based upon a thorough review of the record, the Board makes the following findings.

This Board has jurisdiction over this case pursuant to § 89-13, HRS.

Complainant POE is a Tower Operator I employed by the Harbors Division, Department of Transportation (DOT), State of Hawaii and a member of bargaining unit 03.

Respondent HGEA is the exclusive representative, as defined in § 89-2, HRS, of employees who are included in bargaining unit 03.

Respondents JOHN D. WAIHEE, Governor, State of Hawaii; SHARON Y. MIYASHIRO, Director, Department of Personnel Services, State of Hawaii and REX D. JOHNSON, Director, DOT, are or represent the public employer of POE.

Rule 56, Hawaii Rules of Civil Procedure, provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. In First Hawaiian Bank v. Weeks, 70 Haw. 392, 396 (1989), the Hawaii Supreme Court adopted the following definition:

> [A] summary judgment motion "challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he is entitled to prevail. . .because his

> opponent has no valid claim for relief or defense to the action as the case may be." 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 277, at 555-56 (1983). (footnote omitted).

In deciding whether to grant a motion for summary judgment, the Board reviewed the record and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, in this case, the Complainant.

The uncontroverted facts of this case involve compensation paid to the Complainant for work performed on April 16, 17, and 18, 1992.

On April 16, 1992, Complainant began his eight-hour work shift at 10:30 p.m. and worked until 6:30 a.m. on April 17, 1992, Good Friday. On the same day, Complainant commenced his normal work shift at 10:30 p.m. and worked until 6:30 a.m. on April 18, 1992.

Complainant was compensated for the two work shifts as follows: 1) with respect to the work performed between 10:30 p.m. on April 16 and 6:30 a.m. on April 17, he received one and one-half times his premium rate of pay (regular rate plus night differential) for the entire eight-hour work shift because the majority of his work shift (6.5 hours) occurred on the holiday; and 2) with respect to work performed between 10:30 p.m. on April 17 and 6:30 a.m. on April 18, Complainant received only his premium rate of pay because the major portion of his shift (6.5 hours) occurred on a non-holiday.

Furthermore, in determining the night differential ($.45 per hour) owed to Complainant, the Employer added the night

differential ($.45) only once to his rate of pay for purposes of calculating his overtime compensation.

While only the foregoing fact situation is before the Board, Complainant filed twelve grievances against the Employer alleging payroll computational errors on various dates. Respondent JOHNSON denied five grievances filed by POE because the computation of payment for overtime and night differential were consistent with the provisions under Articles 23 and 30 of the contract. Several miscalculations were discovered which resulted in a payroll adjustment of $.78. Additionally, a payroll adjustment of $2.71 corrected similar miscalculations of other payroll forms. The grievances were reviewed at Respondent MIYASHIRO's level who found that the Employer properly calculated POE's holiday overtime, ordinary overtime and night differential based upon Articles 23 and 30 of the contract.

Thereafter, on January 15, 1993, JOHNSON denied four grievances because they were based on the same allegations previously raised regarding the entitlement to double payment of night differential for the hours worked. However, the Employer discovered that the night differential for one-half hour, $.23, as provided under Article 30D was not correctly applied and adjusted POE's payroll accordingly.

Subsequently, POE's tenth grievance was reviewed and denied by Director JOHNSON. POE's eleventh and twelfth grievances are still pending before the Employer but deal with the same issues raised in the previous grievances.

POE was paid at the overtime rate for his eight-hour shift even though only six-and-one-half hours fell on Good Friday. POE contends that he is entitled under the contract to pay at the overtime rate for the additional one-and-one half hours he worked later that same day. POE relies upon Article 23.B.4 of the Unit 03 collective bargaining agreement which provides:

> 4. On any day which is observed as a legal holiday; whenever the major portion of a shift falls on a day observed as a legal holiday, work performed during the entire eight (8) hours shift shall constitute overtime work provided that no further credit because of the overtime work shall be granted notwithstanding any other provision of this Article. [Emphasis added.]

Complainant argues that under literal reading of the foregoing provision he is entitled to an additional one-and-one-half hours of compensation for working on Good Friday.

Respondents Employer and Union argue that Complainant completely ignores the operative language of the proviso, "whenever the major portion of a shift falls on a day observed as a legal holiday", in his interpretation of when the provision becomes operative. Respondents Employer and Union submitted affidavits and documents which explain the intent of the parties in negotiating the contractual language and also the past practice of the parties in interpreting the provision.

According to the Union, the intent of the proviso is to prevent an employee from receiving further holiday pay at the overtime rate for a particular holiday once the employee has already received holiday pay at the overtime rate for a work shift that fell on that particular holiday. The past practice confirms

that once an employee has received holiday pay at the overtime rate for working a shift of which a majority falls on a legal holiday, that employee is not paid holiday pay at the overtime rate for any other work that is performed on that legal holiday because of the proviso.

Based upon the plain language of the contract, the intent behind the provision and the past practice in interpreting the contract, Union Agent Royden Kotake concurred with the Employer's application of the contract and informed POE that his complaint has no merit and the Union would not pursue a grievance on Complainant's behalf. Kotake informed POE that he could individually pursue a grievance if he so desired.

The Board finds that the foregoing article provides that an employee is entitled to holiday pay at the overtime rate for the entire shift where a majority of the hours in that job shift fall within a legal holiday. The proviso in the contract states that once an employee has been paid holiday pay at the overtime rate for the whole job shift which falls on the holiday, the employee cannot collect any further holiday pay for the holiday in question.

Thus, based upon the evidence in the record, the Board concludes that POE failed to prove that the Employer and the Union committed prohibited practices by the Employer's denial of the holiday pay and the Union's refusal to grieve the denial.

Turning to the issue concerning night differentials, POE was paid for night differentials for straight-time hours and overtime hours that fell between 6:00 p.m. and 6:00 a.m. The

Employer multiplied the actual overtime hours worked by 1.5 (or time-and-a-half), then multiplied the overtime hours by $.45.

According to the Employer, POE's contentions regarding night differential are as follows:

> It is our understanding that you contend that your rate of pay for overtime worked and night differential should be $10.81 an hour [basic pay of $10.36 + night differential of $.45] plus $.45 for each hour of night differential performed at time and a half. Additionally, When (sic) compensatory time is elected for overtime work performed between the hours of 6:00 p.m. and 6:00 a.m., it is your position that you are entitled to night differential without the time and a half. It is also your interpretation that when one-half or more of your holiday overtime worked falls between 6:00 p.m. and 6:00 a.m. you are entitled to night differential for each hour actually worked at time and a half.

Complainant relies upon his literal application and interpretation of Article 30, which provides:

> ARTICLE 30 - NIGHT DIFFERENTIAL
>
> A. Whenever an Employee's scheduled straight-time hours, including holiday work, fall between the hours of six (6:00) p.m. and six (6:00) a.m., the Employee shall be paid, in addition to the Employee's basic compensation, the amount of forty-five cents ($.45) per hour for each hour of actual work performed during such six (6:00) p.m. to six (6:00) a.m. hours; provided, however, if one-half (1/2) or more of the Employee's scheduled straight-time hours fall between six (6:00) p.m. and six (6:00) a.m., the Employee shall be paid, in addition to the Employee's basic compensation, the amount of forty-five cents ($.45) per hour for each straight-time hours actually worked.
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> B. Whenever an Employee's overtime hours fall between the hours of six (6:00) p.m. and six (6:00) a.m., the Employee shall be paid the night differential for each hour of actual overtime work performed during such six (6:00) p.m. to six (6:00) a.m. hours.

C. The Employee's basic compensation plus the night differential will be used in determining the cash payment of overtime work pursuant to Article 23, Overtime.

D. For the purpose of granting differential for work performed for a portion of an hour, the differential shall be twenty-three cents ($.23) for work of one-half (1/2) hour or less, and forty five cents ($.45) for work of more than one-half (1/2) hour.

Complainant contends that he is entitled to night differential for all straight time hours worked when a major portion of the shift falls between 6:00 p.m. and 6:00 a.m. under Article 30A. Also, POE claims he is entitled to night differential for all overtime hours worked between 6:00 p.m. and 6:00 a.m. under Article 30B. In addition, under Articles 23I.1 and .2, POE claims that compensation for overtime worked should include an additional payment of the night differential.

Articles 23I.1 and .2, provide:

I. Cash Payment for Overtime Worked.

1. The basic compensation for an Employee who performs overtime work shall include all differentials an Employee is receiving when performing overtime work, except for hazard pay differentials. To convert an Employees' basic compensation to an hourly rate, the following formula shall be used: (monthly salary plus the amount of monthly differentials) multiplied by 12 months then divided by 2,080 hours; plus any hourly differentials the Employee is earning.

2. Cash payment for overtime work shall be calculated as follows: (basic rate of pay plus differentials as determined in I.1) multiplied by the number of hours worked or fraction thereof computed to the nearest fifteen (15) minutes multiplied again by one and one-half. (E.g. $15.00 + .31) x 8 hours of overtime work x 1-1/2 = $183.72)

Complainant contends that when he works between 6:00 p.m. and 6:00 a.m. on a holiday, he is entitled to an extra $.45 per

hour for each hour of actual work performed as a night differential under Article 30A. Since Article 30C of the contract states that the basic compensation plus the night differential will be used in determining the cash payment for overtime work pursuant to Article 23, POE contends that he is entitled to an additional night differential of $.45 per hour to his pay period in spite of the fact that he already received a night differential under Article 30A.

POE's literal application of the contract provisions amounts to double payment of a night differential for the same hours worked. The Board finds that POE's interpretation is a strained reading of the contract provisions and results in a windfall which the evidence indicates was never intended by the parties. In this regard, the Board finds that the contract is ambiguous and reviewing the evidence presented by Respondents, including the affidavit of Michael Ben, which explains the intent of the parties in negotiating the contract language as well as provides an example of the application of the provision, the Board concludes that POE failed to establish that the Employer's calculation of night differential was erroneous. See Gealon v. Keala, 60 Haw. 513 (1979). Further, Kotake indicated to POE that the Union concurred in the Employer's interpretation of the contract and would not pursue a grievance which would result in the double payment of night differential under the subject contract provisions. We find that the Union agent's action were appropriate in view of its interpretation of the contract.

In addition, POE alleges that the Employer overpaid him in night differential when he elects to take compensatory time-off because the Employer should use the straight time rate, rather than the overtime rate, in calculating the amount of night differential to be paid. When POE elects to take compensatory time off in lieu of cash payment, only overtime hours worked are converted to compensatory time off, and night differential payments as provided under Article 30 are not affected by such election. The Employer determined that DOT properly calculated POE's night differential for overtime, by multiplying the overtime rate by the number of overtime hours worked, and adding $.45 to each hour. The Board notes, however, that Complainant is not prejudiced by the Employer's calculation of night differential when compensatory time off is elected. Thus, the Board finds that POE has not suffered any injury by the Employer's interpretation of the applicable contract and therefore has no standing to bring this claim before the Board.

With respect to the HGEA's denial of support for Complainant's grievances, the Board recognizes that a union has a certain degree of discretion in its decision to file or otherwise support the filing of a grievance. Clearly, where both the Employer and Union are in total agreement over the interpretation and application of certain contractual provisions, it would be illogical and irresponsible on the part of the union to challenge an interpretation to which it subscribes.

Based upon a thorough review of the record in this case, the Board concludes that there is no genuine issue as to any

material fact and Respondents Employer and Union are entitled to summary judgment as a matter of law. The Board holds that the interpretation of the language in Articles 23 and 30 of the Unit 03 collective bargaining agreement is consistent with the positions of both respondents, as applied to the uncontroverted facts of this case.

The Board, therefore, hereby grants Respondents Employer and Union's motions for summary judgment.

DATED: Honolulu, Hawaii, October 27, 1993.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

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