

92 APR -7 P200

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

STATE OF HAWAII

In the Matter of)	P.C. NO. 89-2
CORPORATION "A",)	
a Hawaii Corporation,)	DECLARATORY RULING
)	
Petitioner.)	
_____)	

DECLARATORY RULING

This declaratory ruling pursuant to § 91-8 of Hawaii Revised Statutes, (hereinafter "H.R.S."), and §§ 12-1-5 and 12-506-9 of the Hawaii Administrative Rules, is made in response to a petition for declaratory ruling filed by the petitioner on August 23, 1989. The petitioner has been designated as "Corporation A."

FACTS AS PRESENTED BY THE PETITIONER

Petitioner is a Hawaii corporation doing business in the State of Hawaii. Petitioner has employed more than fifty persons in the last twelve months. Petitioner anticipates having to temporarily or permanently shut down its operations due to a pending takeover of its business interests by another company. However, because of the negative impact public disclosure of the takeover would have upon the petitioner's business, petitioner desires to close its business without giving forty-five days advance notice of the closing. Petitioner is willing to pay its employees their usual salary for forty-five days after closing.

ISSUE AS PRESENTED BY THE PETITIONER

If petitioner is found to be a "covered establishment" within Chapter 394B, H.R.S., and its closure would be a "closing" as is defined in § 394B-2, H.R.S., could it satisfy the forty-five day notice requirement of § 394B-9, H.R.S. by immediately closing its business but agreeing to pay its employees their usual salary for forty-five additional days after the closing? In other words, may the petitioner pay forty-five additional days of salary to its employees in lieu of giving them forty-five days notice of the closing of business?

RULING

This ruling includes the following assumptions:

1. It is assumed that the shutdown of petitioner's operations will be permanent. Because the portion of Chapter 394B, H.R.S., which was amended by Act 377, S.L.H. 1987, (hereinafter "Act 377"), applies only to "permanent" shutdowns, any discussion of a temporary shutdown would be moot.

2. It is assumed that the "usual salary" of the employees includes all benefits and other forms of compensation in addition to the employee's base salary.

3. It is assumed that these "usual salary" items would be received or accrued by the employees at least by the time they would normally be received if there had been no shutdown.

Based on the above facts and assumptions, if the terms "close" and "closing" as used by the petitioner are intended in the legal sense as defined in § 394B-2, H.R.S., then the Director of Labor and Industrial Relations, State of Hawaii (hereinafter "Director"), would rule that § 394B-9, H.R.S., requires the petitioner to give forty-five days notice prior to the "closing." This would be true irrespective of whether or not the petitioner pays the employees their usual salary for forty-five days after the closing. But if by these terms the petitioner is actually referring to a "shutdown of operations," the Director would rule that the actual closing for the purposes of Act 377 would not occur until forty-five days after the shutdown of operations. Therefore, written notification to the employees and Director otherwise in compliance with § 394B-9, H.R.S., given by the date of the shutdown of operations, would be timely. Of course, the notification under § 12-506-7 would have to reflect the actual facts of the situation.

Assuming that petitioner, when it used the terms "close" and "closing" was actually referring to a "shutdown of operations," the dispositive question in this matter would appear to be when a "closing" would occur for the purposes of § 394B-2, H.R.S. This statutory section defines a "closing" as:

the permanent shutting down of all operations within a covered establishment due to the sale, transfer, merger, and other business takeover or transaction of business

interests which results in or may result in the lay-off or termination of employees of a covered establishment by the employer.

Section 12-506-4(a) of the Hawaii Administrative Rules (hereinafter "Rule 12-506-4(a)") further provides:

- (a) In order for there to be a closing, there shall be:
 - (1) A sale, transfer, merger, and other business takeover or transaction of business interests;
 - (2) A permanent shutting down of all operations within a covered establishment due to paragraph (1); and
 - (3) An actual or potential lay-off or termination of employees of a covered establishment by an employer as a result of paragraph (2).

It appears that the first two requirements of Rule 12-506-4(a) would be met under the facts as presented by the petitioner. However, in spite of the shutdown of operations, the employees, for a subsequent forty-five day period, would receive their usual salary, including all benefits and other forms of compensation. Because of this, they would de facto not be laid off or terminated until the end of this period for the purposes of the statute. Therefore, the third requirement of Rule 12-506-4(a) would not be met until the end of this forty-five day period. At the end of forty-five day period, the employees would have the right to claim other benefits under Act 377 such as is provided for in §§ 394B-10 and

394B-11, H.R.S. This interpretation is consistent with the intent of Act 377.

This ruling is not intended to prejudice any rights the employees may have to receive unemployment benefits under Chapter 383, H.R.S., prior to the expiration of the forty-five day period after the shutdown of operations; or be dispositive of any issue regarding rights under any statute based on employment status.

DATED: Honolulu, Hawaii, APR - 7 1992.



KEITH W. AHUE
Director of Labor and Industrial
Relations, State of Hawaii