

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS⁹²

STATE OF HAWAII

In the Matter of) P.C. NO. 92-1
CORPORATION "C",)
)
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 (hereinafter "Rule"), is made in response to a petition for declaratory ruling filed by the Petitioner on February 11, 1992. The Petitioner has been designated as "Corporation C."

FACTS AS PRESENTED BY THE PETITIONER

A corporation covered by Chapter 394B, H.R.S., will sell its assets to a buyer, and the buyer will continue the same business activities and operations with all of the same employees. The employees will be technically transferred from the seller's payroll to the buyer's payroll. They will continue working in the same business activities and operations and not become actually unemployed as a result of the sale.

ISSUES AS PRESENTED BY THE PETITIONER

When business assets are sold by a corporation, and all of its employees are transferred to and immediately rehired by the buyer so that they do not experience any actual

unemployment, whether there is an obligation to provide the advance written notice described in §394B-9, H.R.S., and Rule §12-506-7.

DECLARATORY RULING

Based on the facts as stated above, the Director believes notification pursuant to §394B-9, H.R.S., and Rule §12-506-7 would be required.

Section 394B-9, H.R.S., provides as follows:

An employer in a covered establishment shall provide to each employee and the director written notification of a closing, partial closing, or relocation at least forty-five days prior to its occurrence.

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Assuming that the above facts involve a "closing" situation, it appears that the three requirements of a "closing" under Rule §12-506-4(a) will have been met. Rule §12-506-4(a) provides as follows:

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 the employer as a result of paragraph (2).

The first requirement of a closing will have been met under the above facts.

The second requirement of a "permanent shutting down" will also have been met under the above facts. The definition of "permanent shutting down" in Rule §12-506-2 states in

relevant part:

If the covered establishment or portion thereof continues operations with a different owner or different employees, the act of a lay-off or termination of employees constitutes a permanent shutting down.

This definition clearly provides that a "permanent shutting down" can occur even if the operations of a covered establishment continue. This definition is consistent with the legislative history of Act 377, SLH 1987. See Standing Committee Report No. 247, 1987 House Journal, at 1208-1209, Conference Committee Report 122, 1987 House Journal, at 1071-1073, and Conference Committee Report 122, 1987 Senate Journal, at 888-890. These reports contain virtually identical statements to the effect that:

[W]here an establishment is sold and the seller continues to operate on a franchise basis with the new owner, such a sale would be considered a closing if it results in the actual or potential lay off or termination of employees. Any change in ownership which has the net effect of an actual or potential displacement of workers should come within the purview of this enactment.

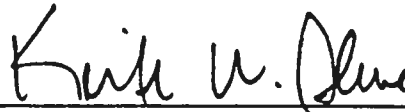
The third requirement of "[a]n actual or potential lay-off or termination of employees of a covered establishment by the employer as a result of paragraph (2)" will also have been met. The facts indicate that the employees will be terminated by the selling employer. The Director believes that, even though in this case the employees will fortunately be hired by the buying employer, the Legislature intended to cover this type of situation. The Petitioner argues that the following example under Rule §12-506-5 shows that the third

requirement of a closing will not have been met:

Corporation A has branch operations in various cities throughout the country. Corporation A sells the Hawaii branch with 80 employees to a Honolulu hui. As a result of the sale, 30 employees of the Corporation A Hawaii branch are laid off. For the purposes of chapter 394B, there has been a partial closing of Corporation A and a lay-off of a portion of the employees.

The Director does not agree. Although there may be some possible ambiguity in this example with respect to how the phrase, "a lay-off of a portion of the employees," relates to "an actual or potential termination of a portion of the employees" for the purposes of the third requirement, this example should be read consistently with this declaratory ruling in order to best effectuate the intent of the statute.

DATED: Honolulu, Hawaii, APR 28 1992



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

RIGHT TO JUDICIAL REVIEW

Any party aggrieved by this declaratory ruling of the Director of Labor and Industrial Relations, State of Hawaii, shall be entitled to judicial review as provided by Section 91-14 of the Hawaii Revised Statutes.