STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant(s), and DEREK KAWAKAMI, Mayor, County of Kaua‘i, Respondent(s).	CASE NO(S). 20-CE-03-946a 20-CE-04-946b 20-CE-13-946c DECISION NO. 505 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER; DISSENTING OPINION OF BOARD MEMBER J. N. MUSTO

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FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

At the heart of Hawai‘i Revised Statutes (HRS) § 89-9 is the premise that public sector employers must consult and negotiate with public sector unions over matters that affect public sector employees. Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) has consistently maintained that, in accordance with HRS § 89-9(c), "all matters affecting employee relations" are subject to consultation with the exclusive representatives of affected employees.

The Hawai‘i Labor Relations Board (Board) agrees that this principle is a fundamental piece of HRS Chapter 89 and its principles of harmonious and cooperative relations between government and its employees. Consultation and negotiation are an integral part of HRS Chapter 89 and serve as the foundation of this case.

In the midst of the Coronavirus Disease 2019 (COVID-19) pandemic, Respondent DEREK KAWAKAMI, Mayor, County of Kaua‘i (Kawakami or Respondent) sought to reduce movement on Kaua‘i to, hopefully, reduce the spread of COVID-19 by various measures. One of the steps Kawakami wanted to take was to temporarily adjust the County of Kaua‘i's (County) employees' schedules from a five day a week, eight hours per day schedule to a four day a week, ten hours per day schedule (4-10 Schedule).

Kawakami called HGEA's Executive Director, Randy Perreira (Perreira) to ask him who in HGEA he could work with on this temporary change to a 4-10 Schedule. This phone call began the process that led to Kawakami implementing the temporary change to a 4-10 Schedule over HGEA's objections.

HGEA argues, among other things, that by this implementation, Kawakami failed to fulfill his duties of consultation and negotiation with regard to the temporary change to a 4-10 Schedule prior to implementation.

1.1. Issues

Based on the Amended Complaint, the Answer, and the evidence presented in this case, the Board finds the relevant issues to be:

1. Whether Kawakami interfered with, restrained, or coerced HGEA or a member of Bargaining Units 3, 4, or 13 (BU 3, BU 4, or BU 13 respectively) when he implemented a temporary change to a 4-10 work schedule, committing an action that could give rise to a prohibited practice under HRS § 89-13(a)(1);

2. Whether Kawakami refused to bargain in good faith with HGEA, as required by HRS § 89-9, when he implemented a temporary change to a 4-10 work schedule, committing an action that could give rise to a prohibited practice under HRS §§ 89-13(a)(5) and (a)(7);

3. Whether Kawakami violated a collective bargaining agreement (CBAs) or agreements when he implemented a temporary change to a 4-10 work schedule, committing an action that could give rise to a prohibited practice under HRS § 89-13(a)(8); and

4. Whether Kawakami violated provisions of HRS §§ 89-1(b) and/or 89-3 when he implemented a temporary change to a 4-10 work schedule, committing an action that could give rise to a prohibited practice under HRS § 89-13(a)(7).

1.2. Statement of the Case

HGEA filed the Complaint and submitted a First Amended Prohibited Practice Complaint (First Amended Complaint). Kawakami filed his original answer to the First Amended Complaint[1], denying the alleged violations and raising various affirmative defenses. The Board allowed Kawakami to amend his answer to add an additional defense.

Prior to the HOM in this case, the Board considered and denied various motions brought by the parties including a motion for interlocutory relief, and dispositive motions (a motion to dismiss or in the alternative for summary judgment and a motion for judgment on the pleadings). The Board heard several of these motions at the pretrial conference and dismissed the others without requiring oral argument. The Board also considered and denied a total of five petitions for intervention. The Board stated that the grounds for the denials of all motions and petitions would be set forth in the final decision and order in the case.

The Board chose to bifurcate this case for efficiency, first hearing evidence on the factual issues surrounding the alleged HRS Chapter 89 violations, and second, if necessary, hearing evidence on the wilfullness of Kawakami's actions. The HOM for the first portion of the case proceeded as such on July 28-31, 2020 and August 17-18, 2020.

Based on the entire record, the Board Majority makes the below findings of fact and conclusions of law, and order, finding that HGEA failed to meet its burden of proof as to the first part of the bifurcated case, that Kawakami violated any section of HRS Chapter 89. Therefore, the Board does not need to consider whether Kawakami took his actions with the required wilfullness to sustain a prohibited practice complaint and makes no findings on that matter.

Any conclusion of law that is improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

2. Background and Findings of Fact

2.1. COVID-19 Pandemic

The COVID-19 pandemic spread across the world in 2020. Near the end of January 2020, the World Health Organization (WHO), the United States Secretary of Health and Human Services, and the President of the United States declared COVID-19 a public health emergency. The WHO urged countries to take "urgent and aggressive action" because of this "growing lethal threat."[2].

By late March 2020, this "unprecedented public health emergency" led to "lockdowns across the nation, [as] the death toll was rising."[3]

By May 2020, this "novel severe acute respiratory illness" had killed "more than 100,000 [people] nationwide."[4] Despite efforts to contain this highly contagious disease, COVID-19 rapidly continued and continues to spread through the state, the country, and the world, in part because "people may be infected but asymptomatic, [so] they may unwittingly infect others."[5]

To help stem this public health threat, the Centers for Disease Control and Prevention (CDC) issued guidance throughout 2020 and into 2021 as to how to best combat COVID-19. This guidance has changed as the understanding of COVID-19 grows. One of the CDC's early pronouncements to help combat this public health threat to human life suggested that people should stay at home whenever possible and reduce their movements.

2.1.1. State of Hawai‘i Response to COVID-19

Like many governors, the Governor of the State of Hawai‘i (Governor) saw the danger of COVID-19. Concerned about unmanageable strains on our healthcare system and other catastrophic impacts to the State, the Governor took preemptive and protective action to provide for the health, safety, and welfare of Hawai‘i by issuing an Emergency Proclamation (State Emergency Proclamation) on March 4, 2020.

Part of the State Emergency Proclamation suspend a variety of State laws, including HRS Chapter 89, to the extent necessary for county and state agencies to accomplish emergency management functions. The Governor issued several Supplementary Proclamations, which, among other things, include this same language regarding HRS Chapter 89.

Subsequent Supplemental Emergency Proclamations instituted a statewide stay-at-home order and "issued rules and orders restricting daily activities of residents and businesses" to "prevent the hyper-contagious virus from rampantly spreading from person to person."[6]

2.1.2. County of Kaua'i's Response to COVID-19

To protect health and safety on Kaua'i, Kawakami issued his own Emergency Proclamation (County Emergency Proclamation) on the same day that the Governor issued the State Emergency Proclamation. Kawakami took this preemptive action in part because of Kaua'i's unique situation.

Compared to the rest of the state of Hawai'i, Kaua'i's healthcare system is extremely fragile. With only nine intensive care unit (ICU) beds, Kaua'i is more likely than other counties to be overwhelmed by an outbreak of COVID-19. Further, the state-wide shortage of personal protective equipment (PPEs) severely restricted the use of PPEs for normal emergencies like motor vehicle accidents and other non-COVID related incidents.

Kawakami knew he would need to take incremental and small actions to manage the COVID-19 pandemic to ensure that Kaua'i would not be overwhelmed and turn into an unmanageable situation that cities such as New York City faced in the early months of the pandemic.

Because of COVID-19's highly contagious nature, Kawakami focused on ensuring that the curve of cases and hospitalizations on Kaua'i remained flattened to avoid overwhelming the healthcare system. At a time when there was "no known cure, no effective treatment, and no vaccine,"[7] Kawakami sought to reduce the risk of community spread of COVID-19 and flatten the curve.

To this end, Kawakami put together an incident management working group (IMG) to consider and develop a number of policies to "flatten the curve" during the COVID-19 pandemic. Based on the work of this group, Kawakami tooksome of the most extreme measures in the state to combat the COVID-19 pandemic. Some of these county-specific measures have included closing golf courses, instituting a user fee for beach parks, and openly discouraging visitors from coming to Kaua'i.

Kawakami enacted some of these measures as a series of Emergency Rules. In accordance with the CDC's guidance, some of Kawakami's Emergency Rules and policies have been targeted at limiting and reducing as much contact between people as possible, which includes movement reduction.

One Emergency Rule targeted at movement reduction implemented a county-wide curfew from 9:00 pm to 5:00 am, which began on March 20, 2020 and continued through May 6, 2020

(Emergency Rule No. 2). While this curfew has ended, several Emergency Rules remain in effect to this day on Kaua‘i.

To reduce movement on Kaua‘i, Kawakami also took the step of having County employees telework. Kawakami did not negotiate with HGEA over a telework policy during COVID-19.

2.1.3. HGEA's Response to COVID-19

During the COVID-19 pandemic, HGEA established meetings/standing conference calls between HGEA and HR Directors across the State (Standing Calls). HGEA tasks the Division Chiefs to manage the Standing Calls with their respective counties. A number of issues have come up due to the pandemic and, according to HGEA, each jurisdiction is handling issues differently.

These Standing Calls allowed HGEA to respond to the rapid changes due to the COVID-19 pandemic and to discuss issues that affect working conditions or work hours and have been used by HGEA and various HR directors across the state to discuss issues, including but not limited to telework, temperature screenings, and redeployments.

One issue that HGEA discussed with the Department of Human Resources Development, State of Hawai‘i (DHRD) was redeployment of certain HGEA bargaining unit members. This redeployment issue required a quick turnaround and was handled through an expedited consultation, despite the fact that DHRD and HGEA discussed the State Emergency Proclamation's language regarding HRS Chapter 89. DHRD and HGEA considered various issues when dealing with the redeployment issue, including considering personal hardships, employees' geography, and class of work. This consultation led to an understanding and agreement in principle, though the parties reached no written agreement.

One of the most common issues that HGEA has dealt with during the COVID-19 pandemic has been telework for employees—a subject that HGEA supports, especially during the COVID-19 pandemic, even though teleworking requires employees to use their own electricity and internet connections. After HGEA receives proposed telework policies, it sends the policies to impacted members and sends any comments, questions, or other feedback to the respective employers. HGEA communicates with the various jurisdictions to modify these telework policies if necessary.

2.2. Parties and Agents

2.2.1. HGEA

As one of the public sector employee organizations[8], HGEA serves as the exclusive representative[9] for several bargaining units, including but not limited to BU 3, BU 4, and BU 13[10]. HGEA negotiates CBAs for each bargaining unit with the appropriate employer group.

Perreira has worked for HGEA for at least thirty-four years, and for at least twelve years, Perreira has led HGEA as its Executive Director. Perreira oversees the operations of the organization, including issues of bargaining, consultation, contract enforcement, and the administration of HGEA.

Prior to October 2018, Debra Kagawa-Yogi (Kagawa-Yogi), a licensed attorney, had a law firm that, in its later years, primarily practiced in the area of labor relations. Since October 2018, she has been the Deputy Executive Director of Field Services for HGEA, and, in that position, she is the only deputy director. She communicates with various jurisdictions on behalf of HGEA, including the counties and the State. During the COVID-19 pandemic, she has participated in the Standing Calls with most jurisdictions, but she does not usually participate in the Standing Calls with the various counties.

Kaulana Finn (Finn) works for HGEA as a HGEA Division Chief whose jurisdiction is Kauaʻi. She oversees union agents and the entire operations on Kauaʻi for HGEA. Her predecessor in this position was Gerald Ako.

Sanford Chun (Chun) is the Executive Assistant for Field Services for HGEA.

2.2.2. Kawakami

Kawakami has served as the Mayor of the County of Kauaʻi since December 2018[11]. As the Mayor, Kawakami takes the position that, when it comes to decision making, "usually the buck stops with the mayor." HGEA considers Kawakami to generally be friendly to employees, and, in turn, willing to work with the unions.

Michael Dahilig (Dahilig) has served as the Managing Director of the County of Kauaʻi since December 2018. Prior to that, Dahilig, a licensed inactive attorney, served as the Director for Planning and a Deputy County Attorney.

Annette Anderson (Anderson) has served as the Director of the Department of Human Resources (HR) since about February 2020. In that role, Anderson oversees all of the HR functions. Previously, Anderson served as the Negotiations Administrator for the Department of Education, State of Hawaiʻi (DOE).

Janine Rapozo (Rapozo) has served as a Human Resources Manager, since February 2020. Rapozo served as the Director of HR from January 2015 through November 2018, when she became the acting director of HR until Anderson became the Director of HR.

2.3. Collective Bargaining Agreements and Past Practices

HGEA and employer groups for BU 3, BU 4, and BU 13 (which include Kawakami) entered into CBAs for each listed BU for the period of July 1, 2017-June 30, 2019. Although the CBAs have expired, both HGEA and Kawakami have continued to operate under the "status quo" set forth in those CBAs.

Throughout their bargaining relationship, HGEA and Kawakami have consulted and negotiated on various policies and changes to CBAs. These consultations and negotiations have resulted in, among other things, letters of understanding, memoranda of understanding, memoranda of agreement, and supplemental agreements to CBAs.

2.3.1. Consultation Past Practices

HGEA has typically engaged in a consultation process that involves the relevant employer sending a letter to HGEA, outlining the proposed change or new policy that requires consultation. In this consultation letter, the employer describes the timeframe for implementation, requests comment from HGEA within that timeframe, and suggests a deadline for the consultation process to end. HGEA may disagree with the suggested deadline, which would result in discussion between the parties as to the deadline.

HGEA then reviews the proposal and, if it has concerns about the contents of the proposal or its effects on employees, or if it requires more information, HGEA will send questions and/or comments to the employer. Part of this process involves HGEA soliciting feedback from affected employees impacted by the proposed change.

After discussions between HGEA and the employer, HGEA sends a response to the employer, sometimes called a "closing letter," which states what HGEA can or cannot agree to the proposed change.

This typical consultation process is not included in CBAs but is a past practice between HGEA and employers.

2.3.2. Negotiation Past Practices

Consultations sometimes evolve into negotiations. HGEA has typically dealt with negotiations by having the party proposing any modification notifying the other party in writing. For dealings with HGEA, Kawakami's representative has generally been the Director of HR.

Negotiations may drag on for months or may be completed quickly, if HGEA is willing to agree to the proposal. Some negotiations have taken a week or less.

2.3.3. Mutual Consent

According to the CBAs, changes to CBAs cannot be made without mutual consent. Mutual consent requires agreement between HGEA and the employers.

Mutual consent typically is acknowledged in agreements between HGEA and employers by including a statement that "the Union and the Employer mutual agree" to the agreement.

The phrase "mutual consent" does not appear in HRS Chapter 89.

2.4. Proposed 9-80 Schedule in 2019

In 2019, some department heads in the County proposed shifting to a 4-10 Schedule, similar to certain members of the Kauaʻi Police Department (KPD). After conducting a survey, the County developed a proposal to implement a schedule where employees would work nine hours a day for two weeks, with the second Friday off, so the total hours worked for those employees would be 80 hours over the two weeks (9-80 Schedule).

In August 2019, Kauai County Managing Director Michael Dahilig (Dahilig) approached HGEA with a proposal regarding the 9-80 Schedule. Dahilig initiated the consultation with HGEA over this proposed 9-80 Schedule by sending a letter to Perreira. This consultation continued over a period of several months and evolved into a negotiation because it involved hours and other working conditions.

HGEA solicited feedback from its members on the 9-80 Schedule; overall, the feedback was negative. Based on this feedback, HGEA informed Dahilig that it could not agree to the 9-80 Schedule proposal.

Kawakami did not implement the 9-80 Schedule. The plan moving forward was to allow Kawakami to talk to the union stewards to answer some questions about the 9-80 Schedule, but as of the time of the HOM, the conversation had not happened.

2.5. Temporary Change to 4-10 Schedule in Response to the COVID-19 Pandemic

2.5.1. Initial Steps

In the latter part of March 2020, the IMG began to consider the possibility of temporarily adjusting some of the County's employees' work schedules to reduce movement and hopefully

reduce the spread of COVID-19 on Kauaʻi. These considerations eventually came together as a proposed temporary change to a 4-10 Schedule for certain County employees.

In mid-April 2020, Kawakami called Perreira to talk to him about implementing this temporary change to a 4-10 Schedule. While Kawakami did not provide Perreira with any data showing that the 4-10 Schedule would reduce movement, he believed that implementing a temporary 4-10 Schedule would help to limit contact between people by shutting down government offices on Fridays and would minimize movement because people would stay home on the fifth day given the Governor's stay-at-home order.

Perreira asked Kawakami what differentiated this proposed 4-10 Schedule from the 9-80 Schedule discussed the previous year; Kawakami informed him that this temporary 4-10 Schedule was in response to the COVID-19 pandemic. Perreira expressed his opinion that, for those individuals who were willing and able to do a 4-10 Schedule, a temporary change could be worked out; however, he had concerns about a mandatory 4-10 Schedule.

Kawakami asked Perreira who he could work with at HGEA on this issue, and Perreira suggested Kagawa-Yogi.

On April 16, 2020, Dahilig sent Perreira and Finn an email containing a "Movement Reduction with Flextime Policy" (Initial 4-10 Memo). The Initial 4-10 Memo did not include many details, did not indicate which employees would be affected, and did not represent a detailed policy change. Instead, the Initial 4-10 Memo represented an outline of what Kawakami was considering, including the purpose for the temporary shift to the 4-10 Schedule: "The reduction of movement is key in minimizing the spread of COVID-19. The County will be equalizing the increase of public movement by decreasing the amount of County employee movement thru the use of movement reduction scheduling."

On April 17, 2020, Perreira informed Kagawa-Yogi and Finn about the discussions hehad with Kawakami about the 4-10 Schedule. That same day, Finn contacted Dahilig and HR to request a detailed consult on the 4-10 Schedule, noting that the Initial 4-10 Memo did not provide enough information for HGEA to consider the proposal.

Kauai County Human Resources Director Annette Anderson (Anderson) replied to Finn's email and informed her that Anderson and others were working on drafting the advisory, identifying which offices and divisions would be impacted, and when the change would begin. Finn replied to Anderson's email and reminded her that a change to a 4-10 Schedule would be subject to consultation requirements.

Kawakami called Finn to discuss the status of moving forward with the implementation, and Finn expressed that it was important for HGEA to get feedback from its members. Based on the call with Kawakami, Finn understood that the parties would follow the consultation process

in an expedited fashion. Because of the expedited timing, HGEA wanted the information as soon as possible.

Although Anderson took the position that Kawakami had no duty to consult or negotiate, Finn and Kawakami agreed that they would follow a consultation process.

2.5.2. Draft Advisory and Discussions

In the afternoon of April 17, 2020, Anderson sent an email containing the initial draft of the advisory regarding the 4-10 Schedule (Draft Advisory) to Finn. Anderson requested that HGEA provide any member feedback by Tuesday, April 21, 2020, preferably before noon. The Draft Advisory contained a proposed implementation date of April 27, 2020, and it was estimated to affect a few hundred employees.

According to Kagawa-Yogi, HGEA considered receipt of the Draft Advisory to signal the beginning of the consultation process, although it did not follow the normal consultation procedures.

Finn acknowledged receipt of the Draft Advisory and requested an additional day to provide feedback on the proposal. HGEA sent the Draft Advisory to the affected members and solicited their feedback.

On April 18, 2020, Anderson agreed to extend the feedback date to April 22, 2020; however, because of the tight timeline, Kawakami decided that the proposed implementation date would be moved back to May 4, 2020.

On April 23, 2020, HGEA sent its received responses to Anderson. The bulk of the responses were negative. These responses included questions and concerns about the proposed 4-10 Schedule. For reference, HGEA also included the comments received regarding the proposed 9-80 Schedule.

That same day, Perreira sent a letter to Kawakami, which Finn sent to Anderson (HGEA Response). The HGEA Response states that HGEA did not approve or wish to proceed with or approve the implementation of the proposed 4-10 Schedule, and that those terms needed to be negotiated and met with mutual consent.

The HGEA Response outlines HGEA's opinion that the temporary 4-10 Schedule would be subject to negotiation and mutual consent, not just consultation. However, the HGEA Response did not request negotiation or set forth a date or time when negotiations would begin. Through the HGEA Response, Perreira intended to advise Kawakami that HGEA had sought input from the affected employees, and that HGEA could not agree to the change because of the impact it would have on employees, including difficulties for those employees with multiple

jobs, childcare, eldercare, etc. HGEA hoped that the HGEA Response would cause Kawakami to think twice about moving forward with the 4-10 Schedule.

Also on April 23, 2020, Finn had a conference call with Kagawa-Yogi and Chun for HGEA and Anderson, Kauai County Human Resources Manager Janine Rapozo (Rapozo), and Jill Niitani from HR. Due to the issues surrounding the 4-10 and other issues that had come up, including an issue with KPD detailed below, Kagawa-Yogi and Chun joined the call. Kagawa-Yogi and Chun had not previously been part of any of the Standing Calls with HR. HGEA reiterated that it was important that the parties reach mutual agreement on the 4-10.

Anderson acknowledged receiving the HGEA Response, and the parties discussed it. Anderson took the position that there were not enough responses from the members, and Kagawa-Yogi asked if HGEA could solicit additional responses. Anderson agreed to allow HGEA to solicit more responses, and HR informed HGEA that Kawakami had not made a final decision as to whether the 4-10 Schedule would be implemented or not. Anderson and Rapozo further informed Finn that they would not enter into side MOUs or side agreements. Anderson and Rapozo refused to negotiate with HGEA during this call.

After the call on April 23, 2020, HGEA continued to ask members for more comments and feedback.

On April 28, 2020, HGEA sent another email to Anderson with additional comments. The email asked Anderson to consider the email a request for a response to the questions included in the comments.

On April 28, 2020, Perreira and Kawakami traded phone calls and text messages, culminating in a phone call that evening. Perreira told Kawakami that, based on the feedback HGEA received, employees had some serious concerns about how a temporary change to a 4-10 Schedule would affect them. Because of those concerns and the feedback, HGEA could agree to work something out for those employees who volunteered or agreed to go to a 4-10 Schedule, but HGEA could not agree to a mandatory change to a 4-10 Schedule.

Kawakami told Perreira that he cared about the employees, and there could be a way to potentially address employees' concerns. Kawakami informed Perreira that he intended to move forward with implementing the 4-10 Schedule.

2.5.3. Advisory #5

On April 29, 2020, Kawakami called Kagawa-Yogi to inform her that he would be implementing the 4-10. He reiterated that this change to the 4-10 Schedule was temporary. During the call, Kagawa-Yogi expressed that HGEA believed Kawakami should not implement

the 4-10 Schedule; however, it came down to that each side would do what it had to do. Kawakami told Kagawa-Yogi he had taken a look at the comments from the membership.

Kagawa-Yogi asked Kawakami to send a copy of what he would be implementing, and Kawakami agreed to do so. He also mentioned that he was going to put together a video for the members about the 4-10 Schedule and that he was going to inform the employees that there would be no pay cuts and no furloughs. This call was Kagawa-Yogi's first indication that Kawakami was going to go forward with the 4-10 Schedule.

Finn received a copy of Advisory #5 on April 29, 2020. HGEA had not seen Advisory #5 prior to receiving it on April 29, 2020.

Although similar to the Draft Advisory, Advisory #5 contains changes, including a mechanism for employees to ask for exemptions due to personal hardship, a change in the end date to include that the 4-10 Schedule ends when schools reopen if the County Emergency Proclamation was still in effect, and a statement that this 4-10 Schedule is separate and apart from the 9-80 Schedule negotiations. These changes were made in response to the feedback from HGEA and members.

After sending Advisory #5 to HGEA, HR sent Advisory #5 to employees, implementing the temporary change to the 4-10 Schedule.

HGEA had concerns regarding some of the changes made from the Draft Advisory to Advisory #5, namely the exemption mechanism. HGEA believed the procedure may require potential disclosure of medical or other personal reasons for requesting an exemption.

Kagawa-Yogi and Anderson had a conversation about the exemption policy in Advisory #5 and HGEA's concerns about privacy, the Health Insurance Portability and Accountability Act (HIPAA), and members having to disclose their personal reasons for asking for an exemption from the 4-10. Anderson informed Kagawa-Yogi that, if an employee had a qualifying disability, then the reasonable standards of accommodations under the ADA would apply. This means that an employee could request the accommodation without providing any reason disclosed. However, HGEA was concerned that employees would not understand that from the form contained in Advisory #5. Part of HGEA's concern arose from the fact that the form would go to multiple sources.

HGEA and HR participated in a conference call where HGEA asked HR to negotiate on the issues in Advisory #5. Rapozo said that HR would not and could not enter into any MOUs or MOAs or side agreements. Rapozo believed this because, at that time, HGEA and the Employer Groups for BU 2, BU 3, and BU 13 did not have active collective bargaining agreements, although the terms and conditions of the prior CBAs remained in effect.

HGEA brought up concerns about ensuring employees' interests were protected by making sure that the personal hardships were considered with no violations of confidentiality or privacy law. HGEA believed that these types of issues would typically be handled in a formal consultation or negotiations.

HGEA was never provided with any type of data or information to show how a 4-10 work schedule would reduce movement on the island, and Kagawa-Yogi believes this fact would have brought that up in a formal consultation.

2.6. Ending of the 4-10 Schedule

On July 14, 2020, Kawakami implemented Advisory #7, effective July 27, 2020. Advisory #7 terminates the 4-10 work schedule.

Some HGEA members, particularly those in the finance department, desired to continue to work a 4-10 schedule beyond July 27, 2020. Finn reached out to the HR Department to see if the 4-10 could be extended for those members who wanted to continue the 4-10. During the discussions, HR asserted the position that, because the State Emergency Proclamations suspended HRS Chapter 89, no MOAs or side Agreements could be entered into. However, HGEA negotiated with HR and various Department heads and entered into Letters of Understanding (LOUs).

2.7. Parties Requesting Intervention

Various public employee exclusive representatives, including Hawaii State Teachers Association (HSTA), University of Hawaii Professional Assembly (UHPA), United Public Workers (UPW), State of Hawaii Organization of Police Officers (SHOPO), and Hawaii Fire Fighters Association (HFFA) filed petitions for intervention (PFIs)in this case.

3. Analysis and Conclusions of Law

3.1. Witness Credibility

In assessing the witnesses' credibility, the Board Majority primarily relied on witness demeanor, the context and consistency of the testimony, and the quality of the witness' recollections. The Board Majority also considered whether any evidence corroborated or refuted testimony and the weight of such evidence. The Board Majority further looked at established or admitted facts, inherent probabilities, and reasonable inferences that can be drawn from the entire record. In making these assessments, the Board Majority notes that it may believe some, but not all, of a witness' testimony. The majority of the credibility determinations regarding the witnesses' testimony are incorporated into the findings of facts above.

HGEA called as its initial witnesses: Finn, Dahilig, Kagawa-Yogi, Perreira, Kawakami, and Rapozo. After Kawakami amended his complaint, HGEA recalled Finn, Kawakami, Dahilig, and Rapozo. Kawakami called one witness Anderson. Based on their observations at the HOM, the Board Majority credited these witnesses' testimony to the extent the testimony is consistent with the findings of fact.

Witness credibility mattered in this case on several issues. The most critical issue was the timeline and nature of the communications between HGEA and Kawakami regarding the temporary change to the 4-10 Schedule.

The Board Majority generally found most witnesses to be straightforward and credible and accepted their testimony to the extent their testimony is consistent with the findings of fact. However, the Board Majority found two witnesses' testimonies to be only partially credible.

Finn's testimony is partially credible and partially not credible, and her testimony is credited to the extent it is consistent with the findings of fact above. Finn directly contradicted herself on multiple occasions, and documentary evidence contradicts her on other points. The contradictions in Finn's testimony on multiple issues, including key points as to the timing and nature of communications between HGEA, Kawakami, and other County employees, leads the Board Majority to accept Finn's testimony where it is supported by other, more credible testimony and where it is supported by documentary evidence.

Rapozo's testimony is similarly partially credible and partially not credible, and her testimony is credited to the extent it is consistent with the findings of fact above. Rapozo showed a tendency to make broad, conclusory statements not supported by other evidence and to insert her opinion on questions of fact. Although Rapozo is employed by the Respondent Kawakami, her testimony was generally objective, and the Board Majority accepts her testimony where it is supported by other, more credible testimony and where it is supported by documentary evidence.

While several witnesses attempted to posit legal conclusions to the Board, the Board Majority does not credit any witness' legal conclusions presented during their testimony, except as consistent with the below conclusions of law. However, the Board Majority finds that presenting legal conclusions to the Board does not show a lack of credibility, merely the desire to express an opinion, which the Board Majority regards as only that.

Based on these determinations, the Board Majority considers the following issues.

3.2. Jurisdiction

For the Board to issue a valid judgment, it must have jurisdiction, Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees' Ret.

Sys., 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (Chun), and subject matter jurisdiction can never be waived by any party at any time. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 84, 222 P.3d 979, 1003 (2010) (citing Chun, 73 Hawai'i at 13, 828 P.2d at 263; In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986).

According to the Supreme Court of Hawai'i (Court), the Board can only use powers that statute expressly or implicitly grants. Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007) (Casupang). The Board has original jurisdiction over controversies involving prohibited practices, so the Board has both the "express" power over such controversies and the "implied" powers that are "reasonably necessary" to make that express power effective. Id. at 97, 170 P.3d at 348. The Board may apply sections outside of HRS Chapter 89 to prohibited practice complaints if it is "necessary and proper" to do so to determine whether a prohibited practice has been committed. *Id.* at 98, 170 P.3d at 349.

To determine prohibited practice complaints, the Board must decide whether respondents act "wilfully"; that is, with the "conscious, knowing, and deliberate intent to violate the provisions of" HRS Chapter 89. Casupang, 116 Hawai'i at 98, 170 P.3d at 350. This "wilfullness" inquiry may require the Board to apply other sections of the HRS to decide whether a prohibited practice occurred; however, this does not give the Board the ability to interpret those sections *sua sponte*. Id. at 101, 170 P.3d at 352.

Similarly, the Board has no jurisdiction to render a decision on constitutional issues. *See, e.g.*, Hawaii Gov't Emp. Ass'n, AFSCME Local 152 v. Lingle, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010) (Lingle). Constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints. Id. at 207, 239 P.3d at 11.

The parties have raised questions regarding HRS Chapter 127A, the State Emergency Proclamation (and its supplementary proclamation), the validity and scope of both, as well as articles of the Hawai'i State Constitution (Constitution). Kawakami has argued that the Board should not consider this case, and that Kawakami had no obligation to perform his duties under HRS Chapter 89 due to the State Emergency Proclamations. HGEA has argued that the Governor (who is not a party to this action) could not take certain actions under HRS Chapter 127A; that Kawakami violated various portions of the State's Sixth Supplemental Proclamation; and that Article XIII, Section 2 of the Constitution does not permit suspending HRS Chapter 89 in its entirety.

The Board, as required by law, has previously addressed this issue. The Board notified the parties of its position on ruling on anything outside of the Board's jurisdiction multiple times throughout this process. The first written Order containing the Board's position, Board Order No. 3633, issued on July 24, 2020, came before the beginning of the HOM, and the Board has not changed its position on this issue. Nonetheless, the Board will reiterate its position on the question of its jurisdiction as follows.

The Board cannot and will not address the validity or scope of HRS Chapter 127A or the State Emergency Proclamations and State Supplemental Proclamations. The Board's jurisdiction has been clearly defined by both the HRS and the courts, as expressed above. The Board is empowered to make inquiries as it deems "necessary and proper" with respect to the application of statutes outside of HRS Chapter 89 to prohibited practice complaints, but the Board has no authority to interpret those statutes outside of its jurisdiction. *See*, Casupang, 116 Hawai'i at 98, 170 P.3d at 349.

While the Board is aware that some individuals may have represented that the Board ruled that portions of emergency proclamations did or did not have certain effects. This representation is categorically false. The Board reiterates that it cannot and will not rule on the effects of an emergency proclamation that falls outside of the Board's jurisdiction. The Board defers to the proper authorities for interpretations of such proclamations. Therefore, the Board, in this decision, will further refrain from making determinations on certain questions raised by the parties that are outside the Board's jurisdiction.

The First Amended Complaint, on the other hand, alleges that the implementation of the temporary change to the 4-10 Schedule or wilfully violated the statute. Determining the answer to these questions does not require an analysis or interpretation of HRS Chapter 127A, the State Emergency Proclamations, the State Supplemental Proclamations, or the Constitution.

The Board may analyze and decide this case guided by rules of statutory construction or any other rule the Board deems appropriate. *See*, Lingle, 124 Hawai'i at 207-8, 239 P.3d at 11-12. Accordingly, the Board exercises its authority to determine whether Kawakami acted with conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89 in the context of the factual situation.

3.3. Bifurcation

As stated above, at the pretrial conference and in Order No. 3633, among other things, the Board bifurcated the case. The bifurcation, based on the statutory requirements of HRS § 89-13, allows the Board to first hear the facts surrounding Kawakami's actions and then, if the Board finds that Kawakami's actions may have violated a portion of HRS Chapter 89, turn to the "wilfullness" requirement of HRS § 89-13.

Hawai'i courts have stated that trial judges have discretion to bifurcate cases and, unless prejudice is shown, bifurcation will not be reversed on appeal. *See, e.g.*, Masaki v. General Motors Corp., 71 Haw. 1, 5 n.1, 780 P.2d 256, 570 n.1 (1989).

The plain language of HRS § 89-13(a) states that "It shall be a prohibited practice for a public employer wilfully to:…" and goes into a list of potential ways through which a public

employer may commit a prohibited practice. The statutory language in this section is clear and unambiguous: specific acts must be committed wilfully to constitute prohibited practices.

In Aio et al. v. Hawaii State Teachers Association, NEA, Board Case Nos. CU-05-22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34, Decision No. 129, *33 (1980) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-129.pdf) (*affirmed* by Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983)) the Board specifically separated out the issue of wilfullness to be determined separate and apart from the underlying violation.

In SHOPO v. Ballard, et al., Board Case No. 18-CE-12-910, Order No. 3442 (January 17, 2019) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3442.pdf) (SHOPO), the Board reiterated the fact that HRS § 89-13 contains two separate issues: first, the action alleged to have violated HRS Chapter 89, and second, the wilfullness behind the action. SHOPO, at *9, *13-15. The Board specifically stated that, "…Without a finding of an adverse action, the Board cannot consider whether the actions were wilfull or not and cannot find a violation…" Id., at *15. Until a violation of HRS Chapter 89 is determined, the Board cannot consider the wilfullness of the actions.

In this case, the Board exercised its discretion to determine that the most efficient way of conducting the hearings in this case would be to first focus on Kawakami's actions prior to determining wilfullness. If the Board does not find an action or actions that violate HRS Chapter 89, the Board does not need to determine wilfullness and does not need to hear evidence that goes solely to the issue of wilfullness. Therefore, efficiency suggests that the Board would be well served to hear only the evidence relevant to the Board's inquiries.

Accordingly, based on the statutory requirements of HRS § 89-13, the Board bifurcated the proceedings to permit the Board to hear the facts surrounding Kawakami's actions regarding the 4-10 Schedule. If the Board then found that such actions violated HRS Chapter 89, then it would address whether the action(s) met the "wilfullness" requirement of HRS § 89-13.

HGEA argues that the Board prejudiced it by not allowing it to present "wilfullness" evidence at the same time as the evidence regarding Kawakami's actions. The Board finds this argument inherently flawed. To prevail in a prohibited practice complaint, the HRS clearly requires that HGEA present evidence to meet both parts addressed in the bifurcation. Therefore, it defies logic to state that focusing on one part of the issue prejudices HGEA.

The only way that HGEA could have been prejudiced is if it mistakenly believed that it needed only to show wilfullness to succeed in a prohibited practice complaint. However, without identifying which action or actions were taken, the Board cannot determine whether Kawakami took that action or those actions "wilfully".

Accordingly, the Board properly exercised its discretion in bifurcating the case.

3.4. Burden of Proof

Under both HRS § 91-10(5)[12] and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16)[13], HGEA bears the burden of proof in this case. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be met by a preponderance of the evidence. HRS § 91-10(5).

Accordingly, in the instant case, HGEA must present both evidence and argument that show that it is more probable than not that Kawakami violated HRS Chapter 89. *See* Minnich v. Admin. Dir. of the Courts, 109 Hawai‘i 220, 229, 124 P.3d 965, 974 (2005) (Minnich) (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)). To put it another way, HGEA must produce sufficient evidence and support the evidence with arguments that apply the relevant legal principles. United Pub. Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-309.pdf). If Kawakami raises a subsequent issue, then he has the burden of proving that issue in the same manner. HAR § 12-42-8(g)(16).

As the Board has previously said, if the party who carries the burden of proof does not present sufficient evidence and legal arguments with respect to an issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, *25 (May 7, 2018) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3337F.pdf). *See also*: State of Hawaii Org. of Police Officers v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-161.pdf).

3.5. Petitions for Intervention

The Board's rules permit the Board to allow petitions for intervention in cases when the petitions are reasonably relevant to the issues already presented in the case and the petitions do not unduly broaden those issues.

In this case, the Board received PFIs from five public sector unions, namely HSTA, UHPA, UPW, SHOPO, and HFFA. After review of the PFIs, the Board denied all five.

When considering petitions for intervention, the Board looks at the factors laid out in HAR § 12-42-8(g)(14)[14], and the Board has discretion to grant or deny a request for permissive intervention. (*See, e.g.*, Merit Appeals Board v. Taylor, et. al, Board Case Nos. DR-00-103, DR-00-104, Order No. 2993, at *13 (June 2, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2993.pdf)).

To summarize the PFIs, none of the petitioners allege having members affected by the negotiation or consultation at issue in this case, and two of the petitioners (HSTA and UHPA) admit they have no CBA that includes Kawakami as a part of their employer group. Instead, all five petitioners are concerned by certain positions taken by Kawakami in his early filings, namely that the State Emergency Proclamation and subsequent supplementary proclamations suspended HRS Chapter 89 in its entirety. Several of the petitions specifically state, "the ultimate issue in this matter…is whether the governor's emergency proclamation suspended [HRS] Chapter 89 in its entirety…"

The Board acknowledges that the Petitioners have asserted a potential interest in this so-called "ultimate issue" to the extent that their bargaining units' collective bargaining rights could be affected by such an issue. However, as discussed above, this issue is not before and will not be resolved by this Board.

Based on the PFIs, all of the Petitioners fail to understand the Board's jurisdiction. The Board cannot make a decision on the Petitioners' so-called "ultimate issue."

Further, all of the Petitioners fail to understand that the facts of the Amended Complaint center on the issues of consultation and negotiation regarding the temporary 4-10 work schedule Kawakami enacted in the midst of the COVID-19 pandemic. The Petitioners seem to believe that the Amended Complaint seeks to contest the State's response to the COVID-19 pandemic. The State is not a party to this case, and the State's response to the COVID-19 pandemic is not an issue in this case.

Accordingly, addressing the Petitioners' so-called "ultimate issue" would broaden the scope of the case beyond the Board's jurisdiction. The Petitions are not reasonably pertinent to the case at hand and would unduly broaden the issues before the Board.

Further, to the extent that the Board would be able to consider the Petitioners' so-called "ultimate issue" under Casupang, the Petitioners all argue that their concerns apply to all public sector unions. The Board cannot agree with this argument. Even if the Board considered this so-called "ultimate issue," the Board would consider it only as pertains to Kawakami's wilfullness, the conscious, knowing, and deliberate intent. The Petitioners are all primarily concerned with the Governor's intent.

As UHPA and HSTA have no CBA that include Kawakami as a member of their employer group, they have no interest in any potential wilfullness from Kawakami. Further, as UPW, SHOPO, and HFFA have not shown that Advisory #5 impacted their bargaining unit members, they too have no interest in any potential wilfullness from Kawakami in this case. Therefore, to the extent that Kawakami's potential wilfullness must be considered, HGEA is better suited to represent such concerns.

The Board, accordingly, did not permit the Petitioners to intervene in the proceedings.

3.6. Motion for Interlocutory Relief

The Board may issue interlocutory orders prior to issuing a case's final determination. *See* HRS § 377-9; HAR § 12-42-48. HGEA's Motion for Interlocutory Relief asks the Board to order Kawakami to cease and desist from implementing the temporary change to the 4-10 Schedule.

The three-part test for such injunctive relief requires the Board to consider 1) if HGEA is likely to prevail on the merits; 2) whether the balance of irreparable damage favors the Board issuing such an injunction; and 3) whether the public interest supports the Board granting an injunction. Office of Hawaiian Affairs, et al. v. Housing and Community Development Corp., et al., 117 Hawai'i 174, 211, 177 P.3d 884, 921 (2008) (OHA) (*rev'd and remanded on other grounds*); *see also* Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). Further, the stronger HGEA's argument of irreparable damage, the less it needs to show the likelihood of success on the merits. OHA, 117 Hawai'i at 211-12, 117 P.3d at 922.

HGEA claims in its Motion for Interlocutory Relief that it meets all three parts of the OHA test. The Board is not persuaded that either of the first two parts of the test are met and therefore is not required to review the third.

HGEA fails to show that it has the likelihood of success on the merits. Unproven, conclusory statements litter HGEA's argument regarding likelihood of success on the merits. The Board notes that simply because HGEA believes a statement to be true, it does not make it so. Several of these conclusory statements are obviously false based on prior filings. Without those conclusory statements taken as fact, HGEA's argument of likelihood of success on the merits vanishes.

For example, HGEA claims, "[i]t is indisputable that Respondent failed to consult and/or bargain with HGEA/AFSCME before implementing its proposed 4-10 work week…" However, in Kawakami's Answer, Kawakami denies the allegation that it did not consult with HGEA. Thus, HGEA's claim is in dispute and, indeed, disputable.

HGEA continues its argument by claiming, "Respondent ha[s] unilaterally implemented the 4-10 work week schedule. Such action by the Respondent invalidates HRS Chapter 89 and the respective collective bargaining agreements." Given that Kawakami denies that he did not consult with HGEA, unilateral implementation cannot be assumed. Further, the Board does not agree that an action by Kawakami could or would, in and of itself, invalidate an entire chapter of the HRS or an entire CBA.

In its argument, HGEA cites to two prior Board cases that involved consultation as evidence that the Board should issue an interlocutory order. However, despite citing to these cases, HGEA fails to demonstrate how the facts of the instant case mirror those in the cited cases or how the tests used in those cases are met in this case.

Accordingly, in its Motion for Interlocutory Relief, HGEA did not meet its burden of showing a likelihood of success on the merits.

Similarly, HGEA fails to show an irreparable injury that would compensate for its failure to show a likelihood of success on the merits. HGEA argues its case that it has demonstrated irreparable harm through conclusory statements. The Board cannot accept HGEA's conclusions without evidence.

The Court has stated that, when it comes to considering injunctions, injuries are irreparable if the injury is such that a court of law could not provide a fair and reasonable remedy for the injury; therefore, an "irreparable" injury is one that cannot be readily compensated for with money. The 7's Enterprises, Inc. v. Rosario, 111 Hawai'i 484, 496 n. 17, 143 P.3d 23, 35, n.17 (2006). The "irreparable" nature refers to the difficulty of measuring the amount of damages inflicted. Id.

In its Motion for Interlocutory Relief, HGEA provides no evidence that employees were irreparably deprived of any rights, stating only that the implementation of the temporary 4-10 work schedule "will irreparably deprive approximately 364 bargaining unit employees of their employment, statutory, contractual, and constitutional rights and circumvent fundamental principles of collective bargaining established by law." The Board has seen no evidence that this claim is accurate. In its Motion for Interlocutory Relief, HGEA submitted no evidence that any employment right has been violated, and, to the extent that any contractual or constitutional rights have been violated, HGEA fails to show how those injuries are not redressable[15].

HGEA did not meet its burden of showing an irreparable injury that may have compensated for its lack of showing a likelihood of success on the merits. Therefore, the Board denies the Motion for Interlocutory Relief.

3.7. Dispositive Motions

3.7.1. Motion to Dismiss and Motion for Summary Judgment

Kawakami styled his motion to dismiss or summary judgment as a motion brought under Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b)(1) or HRCP Rule 56(b)[16]. Although the Board has not adopted the HRCP into its rules, HAR § 12-42-8(g)(3)(A) provide that motions made during a hearing shall be made part of the proceedings, and HAR § 12-42-8(g)(3)(C) provides that written motions shall briefly state the relief sought and accompanied by affidavits

or memoranda setting forth the grounds upon which they are based and must be served on all parties and filed with the Board along with the certificate of service within three days.

Under the standard applied to HRCP Rule 12(b)(1) motions to dismiss, the contents of the complaint form the basis for motions to dismiss for lack of subject matter jurisdiction. The Board must accept the allegations of the complaint as true and construe those allegations in the light most favorable to the complainant. However, HRCP Rule 12(b)(1) does not require the Board to accept conclusory allegations on the legal effect of the events alleged in the complaint. Paysek v. Sandvold, 127 Hawai'i 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)). The Board may only dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Hawaii State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

The Board may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

In Thomas v. Kidani, 126 Hawai'i 125, 129-30, 267 P.3d 1230, 1234-35 (2011), the court stated that summary judgment is appropriate if the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The evidence must be reviewed in the light most favorable to the party opposing the motion for summary judgment. Id. Additionally, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 473, 99 P.3d 1046, 1057 (2004) (French).

As in this case, where the non-movant bears the burden of proof at trial, the Court has adopted the burden shifting paradigm. Therefore, the moving party has the initial burden of proof and must show the absence of genuine issues of material facts and prove that it is entitled to judgment as a matter of law. French, id. at 470, 99 P.3d at 1054. After the moving party satisfies both of those points, the burden shifts to the non-moving party to respond and demonstrate specific facts—not general allegations—to present a genuine issue worthy of trial. Id. The moving party also bears the burden of persuasion, and this burden always remains with the moving party. Id.

If the non-moving party bears the burden of proof at trial, the moving party may show there is no genuine issue of material fact either by presenting evidence that negates a required element of the non-movant's claim or by showing that the non-movant cannot carry their burden of proof at trial. Ralston, 129 Hawai'i at 56-57, 292 P.3d at 1286-1287; French, 105 Hawai'i at 471-472, 99 P.3d at 1055-1056.

If the moving party tries to meet their burden by showing that the non-moving party cannot carry their burden of proof at trial, the moving party must show that the non-moving party cannot offer evidence or proof at trial that could entitle them to succeed. Ralston, 129 Hawai‘i at 60-61, 292 P.3d at 1290-1291. Accordingly, in general, a mere assertion that the non-moving party has not come forward with evidence to support its claim is not enough for a summary judgment movant to carry its burden. Id. at 61, 292 P.3d at 1291.

The Board issued Board Order No. 3607, a minute order, which, among other things, granted, in part, and denied, in part, the motion to dismiss or for summary judgment. Order No. 3607 stated that the findings of facts and conclusions of law related to this ruling would be incorporated into the final decision and order.

Kawakami's most persuasive argument in his Motion to Dismiss relies upon HGEA's failure to exhaust administrative remedies prior to filing this case. The Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile. *See, e.g.*, Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, Case No. CE-07-804, Board Order No. 2939 (August 22, 2013) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2939.pdf). The Court has held that a complainant must exhaust any grievance procedures provided for in a collective bargaining agreement before bringing an action regarding an alleged breach of the collective bargaining agreement. Poe v. Hawaii Labor Relations Board, 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004) (Poe II).

HGEA admits that it filed a grievance regarding the temporary change to the 4-10 Schedule and that this grievance is working through the appropriate process. HGEA is aware that its claims that Kawakami violated the CBAs have an appropriate process and is utilizing that process. Based on these facts, HGEA does not believe that attempting to exhaust this process is futile, and the Board must dismiss HGEA's HRS § 89-13(a)(8) claims, as they properly belong before an arbitrator.

All of Kawakami's other arguments contained in the Motion to Dismiss rely upon HRS Chapter 127A, a chapter which, as discussed above, the Board has no jurisdiction over. Accordingly, the Board cannot make a ruling based on that chapter, and the Board must deny all of the remaining arguments.

3.7.2. Motion for Judgment on the Pleadings

Kawakami styled his motion for judgment on the pleadings as a motion brought under HRCP Rule 7 or HRCP Rule 12(c)[17], and HGEA responded to the motion as motions brought under those rules.

Similar to a motion for summary judgment, motions for judgment on the pleadings are appropriate when the material facts are not in dispute and a judgment on the merits can be reached based on the pleadings and other facts that the court can take judicial notice of. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.3d 175, 186 (1985).

Kawakami's motion for judgment on the pleadings, similar to his motion to dismiss, relies on issues outside of the Board's jurisdiction. Accordingly, the Board must deny the arguments.

3.8. Whether Kawakami Violated HRS §§89-1(b)

The Court has stated that HRS § 89-1, as a statement of policy, does not impose rights or duties that can be enforced. Poe v. Hawaii Labor Relations Board, 97 Hawai'i 528, 540, 40 P.3d 930, 942 (2002). Rather, the broad policy statement of HRS § 89-1 provides a guide to aid in determining legislative intent and purpose and cannot be used to claim a prohibited practice complaint under HRS § 89-13(a)(7). Id. at 540-41, 40 P.3d at 942-43.

3.9. Whether Kawakami Fulfilled His Obligation to Consult with HGEA Over the Temporary Change to a 4-10 Schedule

HRS § 89-9(c) requires Kawakami to consult with HGEA over the temporary change to the 4-10 Schedule. The Board Majority finds this requirement is not a question—the language of HRS § 89-9 is straightforward: HRS § 89-9(c) requires consulation over "all matters affecting employee relations...prior to effecting changes in any major policy affecting employee relations."

Regardless of whether the subject of the consultation is a mandatory or permissive subject of bargaining, HRS § 89-9(c) requires consultation. The "management right" exclusions in HRS § 89-9(d) do not alter the employer's duty to consult with the exclusive representative over the effects of employers exercising those rights. Kawakami has generally conceded this point.

The actual question before the Board then, is whether Kawakami fulfilled the requirement to consult with HGEA over the temporary change to the 4-10 Schedule. The Board Majority finds that he did.

3.9.1. Consultation Requirements

To begin with, the Board Majority must define what HRS § 89-9(c) requires for Kawakami to fulfill the consultation requirement.

Unlike with negotiations, HRS § 89-9(c) does not set out a process that must occur for a consultation to be valid. HRS § 89-9(c) speaks only to when consultations must occur, not how. Therefore, the Board defined the requirements for a valid consultation in HGEA v. Cayetano, et

al., Board Case Nos. CE-02-387a; CE-03-387b; CE-04-387c; CE-09-387d; CE-13-387e, Decision No. 394, *32-33 (1998) (https://labor.hawaii.gov/hlrb/files/2020/10/Decision-No-394.pdf) (Kapolei). In Kapolei, the Board accepted the test crafted by Arbitrator Ted T. Tsukiyama, which states that the requirement for management to consult includes:

> …(1) notice to the union, (2) of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advise or input of the Union thereto, (5) listening to, comparing views and deliberating together there on (i.e., "meaningful dialog"), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

Id., *32-33.

The Board has not adopted any other requirements for a consultation to be valid. Accordingly, these six requirements are the only requirements for a valid consultation. HGEA pointed to the Kapolei standard multiple times throughout the course of the hearing; HGEA does not dispute that Kapolei provides the applicable standard.

3.9.2. "Formal Consultation"

Despite agreeing that the Kapolei standard is appropriate, HGEA argues that a "formal consultation" must occur, following the past practices it has established with the employer groups. As discussed above in Section 2.3.1, HGEA's "formal consultation" process begins with a "consultation letter" sent from the employer to HGEA, with discussions following, ending with a "closing letter" sent from HGEA to the employer.

The Board Majority finds that this premise of "formal consultation" is not based on any applicable law because this "past practice" does not alter the statutory requirements (or lack thereof).

Despite admitting that during the pandemic, not all employers have followed this formal consultation process[18], HGEA asserts that this "formal consultation" past practice must be followed. The Board Majority finds this argument inherently flawed because the principles of past practices do not apply to statutory requirements.

The Board has previously defined the principles of past practices—however, these principles apply to contracts, not to statutes. State of Hawaii Org. of Police Officers (SHOPO) et al. v. Fasi, et al., Board Case No. CE-12-63, Decision No. 162, *31 (1982). (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-162.pdf)

There are, therefore, two types of past practices: one, past practices related to statutes, which do not alter the actual requirements but provide a framework that the parties typically use, and two, past practices related to contracts and CBAs, which may alter or define aspects of the contracts and CBAs.

Missing in HGEA's arguments is evidence of a statutory requirement for a "formal consultation" process. Without any evidence of such a statutory requirement, when considering a potential statutory violation, evidence of a past practice is irrelevant. Therefore, the Board Majority agrees with the Dissent that "the meaning of consultation within HRS § 89-9(c) *is not controlled* by the language or the past practices between the matters as a matter of contract interpretation. The issue before the Board is confined to the statute…"

Because the issue before the Board focuses on potential statutory violations, the Board Majority does not need to consider and takes no position as to whether this past practice may apply when considering consultation requirements set forth in a CBA.

Based on the above, the requirements of a "formal consultation" are not applicable to the consideration of whether Kawakami fulfilled the statutory requirements of consultation.

Further, the Board Majority finds that, to the extent that a 'formal consultation' may have been expected, HGEA waived those expectations. HGEA, through Kagawa-Yogi, admitted that it considered receipt of the Draft Advisory to be the start of the consultation process, even though Kawakami sent no formal consultation letter[19].

To clarify for the Dissent, the Board Majority is not saying that HGEA waived the consultation requirements—only that HGEA waived any "formal consultation" process. Based on Kagawa-Yogi's comments, even HGEA admits that this "formal consultation" process was not applicable to these proceedings. Accordingly, the only requirements for consultation remain the statutory requirements and those set forth in the Kapolei test.

3.9.3. Consultation over the Temporary Change to the 4-10 Schedule

Based on the above, describing consultation as either "formal" or "informal" is a distinction without meaning under the law. What matters is whether consultation, as required by HRS § 89-9, occurred. Therefore, the question that the Board must consider is whether Kawakami fulfilled the Kapolei test.

While the Initial 4-10 Memo did not contain the sufficient completeness or detail required by the Kapolei test, the Draft Advisory certainly did. There is no dispute that Kawakami asked for HGEA's opinion and input on the temporary change to the 4-10 Schedule.

Therefore, Kawakami's consultation with HGEA over the Temporary Change to the 4-10 Schedule began with sending the Draft Advisory to HGEA.

Going through the six elements of the Kapolei test, the Draft Advisory contained the proposed policy in reasonable completeness and detail. Kawakami asked for HGEA's opinion, advice, or input on the Draft Advisory. The Board Majority finds that Kawakami sending the Draft Advisory meets elements (1) through (4) of the Kapolei test.

With elements (1) through (4) met, and (6) being that neither party must concede, the question is whether Kawakami's consultation with HGEA was "meaningful." The Board Majority finds that it was.

Kawakami requested HGEA's feedback and extended the deadline for feedback multiple times. Kawakami even made alterations to the policy behind the 4-10 Schedule based on that feedback. Those alterations directly addressed some of the most common concerns raised by the feedback.

Meaningful dialog does not require either party to concede to the other. However, Kawakami did concede, in part, to HGEA. Kawakami made alterations to the policy after consideration of HGEA's feedback. These concessions led to employees being able to "opt out" of the 4-10 Schedule if they requested and provided information.

Accordingly, to clarify for the Dissent, the Board Majority finds that Kawakami did consult with HGEA, that Kawakami's consultation with HGEA was meaningful, and that he adequately fulfilled his duty to consult with HGEA over the temporary change to a 4-10 Schedule.

3.9.4. Bad Faith

The Dissent suggests adding "an element of 'good faith' on the part of all parties in the consultation process as a criterion." The Board Majority does not disagree that "good faith" is an important part of considering whether a prohibited practice has been committed, especially given that the explicit language of HRS § 89-13(a)(5) states that it is a prohibited practice for a public employer wilfully to "refuse to bargain collectively in good faith with the exclusive representative as required by section 89-9." The Board Majority did include this element when framing its relevant issue for this section, namely:

> Whether Kawakami refused to bargain in good faith with HGEA, as required by HRS § 89-9, when he implemented a temporary change to a 4-10 work schedule, committing an action that could give rise to a prohibited practice under HRS §§ 89-13(a)(5) and (a)(7);

However, on its face, HRS § 89-9(c) contains no similar requirement that the consultation be in good faith. Moreover, the Board Majority finds that neither HGEA nor the Dissent appear to argue that Kawakami acted in bad faith. Such a finding would require the presentation of

evidence that Kawakami's conduct indicated that he did not have a sincere effort to reach a common ground with HGEA over the temporary change to the 4-10 Schedule. See, e.g., Del Monte Fresh Produce (Hawaii) v. ILWU, 112 Hawai'i 489, 500-501, 146 P.3d 1066, 1077-1078 (2006).

As discussed above, Kawakami requested HGEA's feedback and extended that deadline multiple times to receive more feedback. Kawakami took the concerns raised by HGEA and attempted to address them in the final Advisory #5. By attempting to address those concerns, Kawakami clearly showed a sincere effort to reach a common ground with HGEA.

Accordingly, the Board Majority finds that, regardless of the absence of a good faith requirement in HRS § 89-9(c), that Kawakami did, in fact, act in good faith in the consultation over the temporary change to the 4-10 Schedule.

3.9.5. Statements by Kawakami and Dahilig

In considering additional arguments raised by the Dissent and HGEA, the Board considers the statements by Kawakami and Dahilig.

Despite the Dissent's assertions, the Board Majority cannot find anywhere where Dahilig stated that no consultation occurred. HGEA questioned Dahilig as follows:

> HGEA: So based upon that understanding then, would it be fair to say that there was no consultation between the County of Kaua'i and HGEA concerning [Advisory #5]?
>
> Dahilig: I'm not sure if there was or was not consultation.

This statement by Dahilig is not that no consultation occurred, rather only that he was not sure whether or not there was consultation.

The Dissent makes much of Kawakami's statements as to consultation. The statements at issue are:

> HGEA: At that point when you informed Mr. Perreira that you were moving forward, again, up to that point there had been no formal consultation letter from the County to HGEA, correct?
>
> Kawakami: Correct.
>
> HGEA: And had there been any completion of the consultation process to your knowledge

Kawakami: No.

When considered in context, Kawakami admits that no formal consultation occurred, and that the formal consultation was not complete when he spoke to Perreira about moving forward with the temporary change to the 4-10 Schedule. No formal consultation could have been completed, as none was actually initiated.

However, as discussed above, the question that the Board must consider is not whether a formal consultation was initiated or ended. The question is not even whether Kawakami believed the consultation that did occur between the parties to have been completed when he spoke to Perreira. The question is whether Kawakami fulfilled his obligation to consult with HGEA over the temporary change to the 4-10 Schedule.

The Dissent states that Kawakami assumed that no statutory consultation was required. However, even if Kawakami may have believed no statutory consultation was required, Kawakami made efforts to and, in fact, did consult with HGEA. Kawakami's subjective beliefs are not at issue at this point in the prohibited practice analysis.

A consultation begins when sufficient notice is given to the union, as laid out in Kapolei. Meaningful dialogue must occur, as required by Kapolei. Although the Kapolei standards do not explicitly set out when a consultation ends, a plain reading of the sixth requirement ("without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation") shows that a consultation ends when the employer takes that meaningful dialogue and decides to move forward (or not) with the proposed policy, conceding or not to the union's concerns and differences.

The consultation that occurred between the parties as to the temporary change to the 4-10 Schedule ended when Kawakami notified HGEA that he was going to move forward with the temporary change to the 4-10 Schedule. Kawakami notified Perreira of this the day before issuing Advisory #5, and he notified Kagawa-Yogi of this in the morning before Advisory #5 was issued. These notifications clearly ended the consultation because HGEA knew that Kawakami was moving forward with the temporary change to the 4-10 Schedule.

Accordingly, the consultation over the temporary change to the 4-10 Schedule ended before Kawakami issued Advisory #5.

3.9.6. Draft Advisory Versus Advisory #5

HGEA and the Dissent argue that because the Draft Advisory and Advisory #5 are different documents, Kawakami failed to consult with HGEA. The Board Majority disagrees.

Certainly, there is no dispute that the Draft Advisory and Advisory #5 are different documents. However, the question before the Board is not whether Kawakami consulted over a

particular document. The question before the Board is whether Kawakami consulted over a "proposed personnel practice[] and polic[y] of a major, substantial and critical nature"—namely, the temporary change to the 4-10 Schedule—in reasonable completeness and detail.

The Draft Advisory contained the proposal of the temporary change to the 4-10 Schedule in reasonable completeness and detail. Advisory #5 dealt with the exact same issue: the temporary change to the 4-10 Schedule. The modifications between the Draft Advisory and Advisory #5 arose specifically from the consultation between Kawakami and HGEA.

Nothing in HRS Chapter 89 requires consultation over every draft of every policy change. If HRS Chapter 89 required consultation over every draft of every policy change, employers could not make any alterations to those policies based on the consultation unless the consultation completely restarted. If the Employer then failed to make any changes to the proposed policy based on the consultation, the Employer could face accusations that consultation was not meaningful because nothing changed, unless the union agreed with the entirety of the proposed policy.

Accordingly, Board Majority finds this argument is nothing more than a roundabout way to try to enforce the CBA's requirements of mutual consent onto the statutory requirements of consultation. As discussed above, "mutual consent" does not appear in HRS Chapter 89 and is not a statutory requirement.

Employers may, and should, be encouraged to make changes to proposed policies based on feedback from employee organizations. Preventing employers from this undermines the core principle of consultation: to give employees, through their employee organizations, the right to be heard and considered regarding policies that the employer has the management right to enact.

Therefore, the Board Majority rejects the argument that Kawakami needed to consult with HGEA over every draft of the temporary change to the 4-10 Schedule and, instead, follows the statutory requirements to find that Kawakami did sufficiently consult with HGEA over the temporary change to the 4-10 Schedule.

3.10. Whether Kawakami Had a Duty to Negotiate with HGEA Over the Temporary Change to a 4-10 Schedule

The next question the Board must consider in this phase of the case is whether Kawakami had a duty to negotiate with HGEA over the temporary change to a 4-10 Schedule.

HRS § 89-9(b) sets forth the process through which a party can initiate or request to initiate negotiations. The party who wishes to initiate negotiations must notify the other party in a writing that sets forth the time and place of the meeting desired, as well as the nature of the business to be discussed, and this writing must be sent sufficiently in advance of the meeting.

With the facts before the Board, it is clear that HGEA is the party who wished to initiate negotiations. Anderson and HR held the opinion that negotiations were not required because of the State Emergency Proclamation, and they advised Kawakami on the same. Therefore, it is clear that Kawakami was not the party who wished to initiate negotiations.

HGEA admits that the Perreira Letter did not set forth a time and place of a meeting to discuss the temporary change to the 4-10 Schedule. Therefore, HGEA did not demand negotiations over the temporary change to the 4-10 Schedule.

HGEA argues that the past practice between the parties is that the party proposing any modification to the CBAs notifies the other party in writing and that the parties do not follow the requirements of HRS § 89-9(b) to set forth a time and place because of availability issues. The Board finds this argument unpersuasive for the same reasons as HGEA's other past practice argument previously discussed.

If HGEA and the employers wish to modify the negotiation process, they cannot do so through an established past practice—because the requirements are statutory, only the Legislature has the power to alter those requirements. The Board rejects the premise that statutory requirements can simply be ignored by parties if they so choose. If the Legislature wishes to change the requirements to inititate a negotiation, it must take action to do so. The parties' prior failures to comply with the law do not change the law. To hold otherwise would be to state that the Legislature's acts and intentions have only the meaning that the parties want, which would both undermine the Legislature's authority and, indeed, the authority of any body who derives its power from the laws passed by the Legislature.

Based on the above, Kawakami had no duty to negotiate with HGEA over the temporary change to the 4-10 Schedule.

3.11. Conclusion

Based on the Board's findings and conclusions discussed fully above, the Board Majority finds, concludes, and holds that Kawakami committed no violations of HRS Chapter 89, including HRS §§ 89-1, 89-3. 89-8, 89-9, and 89-13(a)(1), (5), (7), and (8), as alleged in the Amended Complaint.

4. Order

The Complaint in Case Nos. 20-CE-03-946a, 20-CE-04-946b, and 20-CE-13-946c is dismissed, and this case is closed.

DATED: Honolulu, Hawai‘i, June 23, 2021.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

[1] Generally, the First Amended Complaint would be considered procedurally defective because HGEA neither asked for nor received leave to amend the Complaint prior to filing the First Amended Complaint. Accordingly, the Board did not issue a Notice of the First Amended Complaint. However, when Kawakami filed an Answer to the First Amended Complaint, he acknowledged receipt of the First Amended Complaint. Therefore, the Board has allowed the First Amended Complaint to serve as the charging document in this case.

[2] Office of the Pub. Defender v. Connors, Nos. SCPW-20-0000200, SCPW-20-0000213, at *1 (June 5, 2020) (Wilson, J., dissenting) (OPD Wilson).

[3] Office of the Pub. Defender v. Connors, Nos. SCPW-20-0000200, SCPW-20-0000213, at *1 (June 5, 2020).

[4] S. Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (Newsom).

[5] Id.

[6] OPD Wilson, at *4.

[7] Newsom, at 1613.

[8] HRS § 89-2 Definitions defines “employee organization” as:

> “Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

[9] HRS § 89-2 Definitions defines “exclusive representative” as:

> “Exclusive representative” means the employee organization certified by the Board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[10] HRS § 89-6 defines BU 3 as "Nonsupervisory employees in white collar positions;" BU 4 as "Supervisory employees in white collar positions;" and BU 13 as "Professional and scientific employees, who cannot be included in any of the other bargaining units…"

[11] In that capacity, Kawakami is an Employer within the definition found in HRS § 89-2:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[12] HRS § 91-10(5) states:

> (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

[13] HAR § 12-42-8(g)(16) of the Board's rules states:

> (16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

[14] HAR § 12-42-8(g)(14) permits intervention into proceedings before the Board, excepting representation proceedings, under certain circumstances. In considering a Petition for Intervention, the Board looks at the issues required by such a petition, namely:

> (i) Nature of petitioner's statutory or other right.
>
> (ii) Nature and extent of petitioner's interest.
>
> (iii) Effect of any decision in the proceeding on petitioner's interest.
>
> (iv) Other means available whereby petitioner's interest may be protected.
>
> (v) Extent petitioner's interest may be represented by existing parties.
>
> (vi) Extent petitioner's participation can assist in development of a sound record.
>
> (vii) Extent petitioner's participation will broaden the issue or delay the proceeding.
>
> (viii) Extent petitioner's interest in the proceeding differs from that of the general public.
>
> (ix) How the petitioner's intervention would serve the public interest.

[15] Additionally, to the extent that HGEA believes that an irreparable injury actually occurred, HGEA does not address why it waited fifteen days after the implementation of the temporary 4-10 work schedule and twenty days after HGEA received notification that Kawakami intended to implement the temporary 4-10 work schedule to file a motion for interlocutory relief. HGEA filed its motion on May 19, 2020, waiting eighteen days from when it filed its initial prohibited practice complaint to file such motion.

[16] A review of HAR § 12-42-8(g)(3) shows that there are no provisions analogous to Rule 12(b) or Rule 56(b). However, the Board is generally guided by the analogous court rules when Board rules are silent or ambiguous on procedural matters. *See*, *e.g.*, Parker v. PSD and UPW, Board Case Nos. 18-CU-10-370; 19-CE-10-923, Decision No. 502, at *39 (March 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-502.pdf) (Parker).

[17] Similarly, HAR § 12-42-8(g)(3) contains no provisions analogous to Rule 7 or Rule 12(c). However, as previously noted, the Board is generally guided by the analogous court rules when Board rules are silent or ambiguous on procedural matters. *See*, *e.g.*, Parker, at *39

[18] Kagawa-Yogi stated that, during the pandemic, with regard to the issue of redeployment of certain HGEA members, "…there was never any written agreement reach, but I would say more of an expedited consultation with agreements and understandings about the redeployment." She further stated that, with regard to teleworking, she did not "know if the County requested consultation…[but] [she] [didn't] think [HGEA] would have been in a position to—unless employees were—an employee was complaining about teleworking or had a dispute regarding teleworking…"

[19] Kagawa-Yogi stated that "…it was a modified consultation" and that she "considered this, what happened in this particular case, as a consultation, but it was not the typical formal consultation that occurs."

DISSENTING OPINION OF BOARD MEMBER J. N. MUSTO

I respectfully dissent from the Board's Majority Decision and Order (Majority Decision) in this case. However, I do concur with the Majority Decision's Introduction and Statement of the Case that, "At the heart of Hawai'i Revised Statutes (HRS) § 89-9 is the premise that public sector employers must consult and negotiate with public sector unions over matters that effect public sector employees." Further, I concur with the Majority Decision's finding that "Consultation and negotiation are an integral part of HRS Chapter 89 and serve as the foundation of this case."

The essential questions in this case are:

> Did the Mayor of Kaua'i, as the public employer for bargaining units 03, 04, and 13, have the duty to consult with the exclusive representative, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) over the implementation of a change in the working conditions for those respective bargaining unit members pursuant to HRS § 89-9(c)? I would answer yes.
>
> And if so, was that duty to consult met? I would answer no.

The State of Hawai'i is unique because the public sector collective bargaining law constructed by the Hawai'i State Legislature is provided by Article XIII, Section 2. of the Constitution of the State of Hawai'i. Beyond the authorization of negotiations, HRS Chapter 89 includes a consultation provision HRS § 89-9(c), that requires public employers to consult over the policy changes that go far beyond the scope of negotiations required under § 89-9(a), including subjects that are specifically excluded from bargaining. The requirement to consult is triggered when the subject matter concerns days and hours per day of work which are at issue in the Complaint. The unfortunate circumstance which caused these issues to arise, as Mayor Kawakami indicated in his testimony, was a response to the pandemic. Even under these extreme conditions, the Board member finds that it was possible to make the necessary changes that the Mayor of Kaua'i deemed essential while still fulfilling the duty to complete consultation with the exclusive representative, the HGEA.

The facts in this case are not in dispute, and the testimony of the witnesses is not in contention. HRS § 89-9(a) sets forth the mandatory subjects of negotiations required between the public employer and the exclusive representative. Two subsections later, HRS § 89-9(c), establishes the obligation of the employer to consult over "…all *matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer* or any director, with the exclusive representatives of the employees concerned" (emphasis added). The witnesses from the Mayor's Office and the Human Resources Department testified that they were not consulting over the change in the work schedule from five days a week with eight hours

of work to four days with ten hours of work per day. However, all of them, including ultimately the Mayor of the County of Kaua'i, proceeded to consult with various agents of the HGEA. Was it *de facto* consultation with the exclusive representative? The statute makes no distinction. And the testimony on the record of Mayor Kawakami confirms that he understood the obligation set forth in HRS § 89-9(c). To the degree that consultation is required *de jure*, the denials by the County of Kaua'i's officials and employees only confirm that a prohibited practice should have been issued by the Board.

HRS § 89- 9(c) provides no procedural requirements for a consultation process. Therefore, prior Board decisions have relied on evaluating the facts of the individual cases in the context of the statute to determine whether the consultation process has been met. The substantive meaning of "consultation" pursuant to HRS § 89-9(c) has been the subject of numerous prohibited practice complaints brought before this Board and its predecessor, the Hawaii Public Employment Relations Board, over the decades. Statutory consultation has its own meaning, but the use of the term "consult" can appear in a wide variety of organizational and personal interchanges. Suffice it to say that this unique obligation for consultation over any substantive policy change affecting public employment is as important, if not more important, in some cases, than the right of the exclusive representative to negotiate a contract for the respective bargaining units.

HRS § 89- 9(c) does establish how consultation is to occur and when consultation must be initiated, and by whom. More specifically, HRS § 89-9(c) does provide that if initiated, consultation must be concluded. Further, the exclusive representative has the right to the expectation to be informed of the action to be taken by the employer within a reasonable amount of time prior to the employer distributing the new rule or policy being to the bargaining unit. This is especially true, when the employer seeks to make a unilateral, significant change to the work schedule. In this case, the unilateral change included workload conditions with respect to hours and days of work that were provided for in the collective bargaining agreement (CBA.)

With respect to the CBA, if there is a violation of the terms of the contract, then the grievance and arbitration provisions must be exhausted prior to the filing of any complaint under HRS § 89-13(a). Poe v. Hawaii Lab. Rels. Bd., 105 Hawai'i 97, 100-01, 94 P.3d 652, 655-56 (2004). However, the failure of the employer to consult does not stem from the violation of the CBA. Therefore, even though the conditions of work are set forth in the CBA, it is not necessary to exhaust the contractual remedies for there to be a finding of a violation of § 89-9(c).

The Majority Decision in Sections 3.8 and 3.9, considers whether Mayor Kawakami violated HRS §§89-1(b) and whether he fulfilled his obligation to consult with HGEA over the temporary change to a 4-10 schedule (Decision No. 505, p. 24-30).

The Mayor's Managing Director Michael Dahilig stated that there was no consultation. This position is repeated in the statements made by other county staff in the Human Resources

Department. I found Mayor Kawakami be a very creditable witness. He was honest, forthright, and made no attempt to obfuscate. When asked, the Mayor said that the consultation had not been completed.

The Mayor's testimony indicates that he understood that he needed to consult with HGEA. The Majority Decision finds and concludes that, "To the extent that a 'formal consultation' may have been expected, HGEA waived those expectations." The change in working conditions proposed by the Mayor affected both hours and days of work, and is subject to consultation, even if the Mayor had the right to unilaterally change those conditions because of an external emergency. I do not find, by the very words that follow, that the HGEA waived the employer's obligation to engage in consultation as acknowledged in the Majority Decision.

The Majority Decision states:

> …to the extent that a 'formal consultation' may have been expected, HGEA waived those expectations. HGEA, through Kagawa-Yogi, admitted that it considered receipt of the Draft Advisory to be the start of the consultation process, even though Kawakami sent no formal consultation letter…While the Initial 4-10 Memo did not contain sufficient completeness or detail required by the Kapolei test, the Draft Advisory certainly did. There is no dispute that Kawakami asked for HGEA's opinion and input on the temporary change to the 4-10 Schedule.

Decision No. 505, pg. 25-26.

The argument and conclusion are internally contradictory with respect to whether there was, or was required to be, a consultation between the employer and the exclusive representative. How can HGEA's assertion that the Draft Advisory was the start of the consultation process be considered as a waiver from the exclusive representative against the employer's statutory obligation to engage in consultation? Yes, Mayor Kawakami did receive the "opinion and input" of HGEA. However, the exclusive representative's reply to the Draft Advisory does not waive consultation. Therefore, it is unclear whether the Board Majority is then asserting that *consultation had taken place.*

Part of the confusion in the finding and conclusion stems from differentiating the obligation to consult as a statutory matter, versus consultation as a topic negotiated by the parties into a CBA. The CBAs controlling these bargaining units all have provisions for consultation with the expectation that "past practices" would arise out of the four decades of implementation of the successive contracts. However, the meaning of consultation within § 89-9(c) *is not controlled* by the language or the past practices between the parties as a matter of contract interpretation. The issue before the Board is confined to the statute, and a dispute regarding the

meaning of the consultation requirement contained in the contract is confined to the grievance and arbitration articles of the CBA.

The Board Majority found:

> Kawakami admits that no formal consultation occurred, and that the formal consultation was not complete when he issued Advisory #5. No formal consultation could have been completed, as none was actually initiated.

Decision No. 505, pg. 27.

The Draft Advisory that the parties had been discussing was not the same as the final Advisory #5. The Majority Decision found that "HGEA had not seen Advisory #5 prior to receiving it on April 29, 2020." The testimony indicated that the exclusive representative was sent Advisory #5 less than a half hour before the Advisory #5 was emailed to the entire bargaining unit.

The Majority Decision's finding and conclusion that there was no formal procedure for consultation set forth in HRS Chapter 89 is true. The Majority Decision relies upon a description of consultation described in Decision No. 394, *32-33 (1998) (Kapolei).

> In Kapolei, the Board accepted the test crafted by Arbitrator Ted T. Tsukiyama, which states that the requirement for management to consult includes:
>
> > …(1) notice to the union, (2) of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advise or input of the Union thereto, (5) listening to, comparing views and deliberating together there on (i.e., "meaningful dialog"), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

Arbitrator Tsukiyama crafted these criteria for evaluating the meaning of the term "consultation" under a collective bargaining agreement. As previously noted, the Majority Decision noted HRS § 89- 9(c) does not provide any set of standards. Although the undersigned would not disagree with the six elements set forth by Arbitrator Tsukiyama, these requirements do not preclude the imposition of additional elements to the consultation standard.

With respect to the consultation requirement contained in HRS § 89- 9(c), this Board member would include an element of "good faith" on the part of all parties in the consultation process as a criterion. A failure to conduct a consultation in good faith should be a violation of the meaning within HRS § 89- 9(c).

Mayor Kawakami, in asserting that his exchange with HGEA over the language in the Draft Advisory was not consultation, honestly testified that no formal consultation was completed. His explanation is based on an assumption that no statutory consultation was required. However, based on the Mayor's assertion and assumption, it is clear that no formal consultation was concluded. If there was no consultation, then the Board should have found that a) there was an obligation to consult, and b) the failure of the public employer to consult was a violation of § 89-9(c).

Based on the Finding of Facts and for the reasons thus stated, I respectfully dissent from the Majority Decision.

DATED: Honolulu, Hawai'i, June 23, 2021.

HAWAI'I LABOR RELATIONS BOARD

J N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
Mark Bradbury, Deputy County Attorney

STATE OF HAWAIʻI

HAWAIʻI LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant(s), and DEREK KAWAKAMI, Mayor, County of Kauaʻi, Respondent(s).	CASE NO(S). 20-CE-03-946a 20-CE-04-946b 20-CE-13-946c ERRATA

ERRATA

The Hawaiʻi Labor Relations Board (Board) filed the final decision in this case as Decision No. 505; however, it should have been numbered Decision No. 506. All references to Decision No. 505 should appear as Decision No. 506.

The Board apologizes for any inconvenience.

DATED: Honolulu, Hawaiʻi, June 23, 2021.

HAWAIʻI LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
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