EFiled: Mar 21 2017 08:49AM HAST
Transaction ID 60366874
Case No. CE-03-749ab

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and LINDA LINGLE, Governor, State of Hawaii; CLAYTON FRANK, Director, Department of Public Safety, State of Hawaii; DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; DR. CHIYOME FUKINO, Director, Department of Health, State of Hawaii; and DEPARTMENT OF HEALTH, State of Hawaii, Respondents.	CASE NOS.: CE-03-749a CE-04-749b ORDER NO. 3236 MINUTE ORDER DIRECTING PARTIES TO SUBMIT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING OR DENYING RESPONDENTS' FIRST AMENDED MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED FEBRUARY 2, 2010, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

MINUTE ORDER DIRECTING PARTIES TO SUBMIT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING OR DENYING RESPONDENTS' FIRST AMENDED MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED FEBRUARY 2, 2010, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

On February 2, 2010, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant or HGEA), filed with the Hawaii Labor Relations Board (Board) a Prohibited Practice Complaint (Complaint) against Respondents[1] LINDA LINGLE, Governor, State of Hawaii; CLAYTON FRANK, Director,

[1] Pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 25(d)(1), when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party; proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be

Department of Public Safety, State of Hawaii; DEPARTMENT OF PUBLIC SAFETY (PSD), State of Hawaii; DR. CHIYOME FUKINO, Director, Department of Health, State of Hawaii; and DEPARTMENT OF HEALTH (DOH), State of Hawaii, collectively "Respondents."

The Complaint alleges, *inter alia*, that on or about November 1, 2007, without prior bargaining with the HGEA, Respondents contracted with The Wackenhut Corporation (Wackenhut Corp.) to provide security guard services for the facilities and grounds of the Adult Mental Health Division, Hawaii State Hospital, which were previously provided by PSD; that on July 20, 2009, the Department of Human Resources Development (DHRD) requested consultation with the HGEA regarding "an impending reduction in force" (RIF); that PSD's list of proposed positions identified to be RIFed did not identify security officer positions; that on or about October 13, 2009, it was reported by the news that as part of its RIF effort, PSD decided not to provide security at the Department of Defense (DoD) facility inside Diamond Head Crater, the state laboratory in Pearl City, and the guard post at the Hawaii State Hospital; that DHRD confirmed that the DOH planned to hire private security guards for the state laboratory as well as the Hawaii State Hospital; that on October 21, 2009, the HGEA made a demand to Respondents for impact bargaining and that Respondents efforts to privatize the security guard positions cease and desist; that no response to the demand for bargaining was received from the Respondents; that on or about November 13, 2009, Respondents RIFed nineteen security guard positions, and failed to consult with the HGEA on the planned RIF of those positions; that by November 13, 2009, Respondents had privatized the security guard services; that on January 13, 2010, the DOH, for the first time, provided the HGEA with copies of a contract for private security services between Wackenhut Corp. and the DOH; that Respondents owed a duty to bargain the impact of contracting out security guard services before privatizing the services; that Respondents owed a duty to consult over the RIF of security guard services before doing so; that PSD violated the RIF Guidelines in the Unit 03 and Unit 04 collective bargaining agreements (CBAs); and that Respondents violated Hawaii Revised Statutes (HRS) § 89-9(a) and (c). The Complaint alleges prohibited practices pursuant to HRS § 89-13(a)(1), (5), (7), and (8).

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disregarded. Although the Board does not amend the caption in this matter, the Board, pursuant to HRCP Rule 25(d)(1), deems the successors to the named Respondents to be parties in this matter.

On February 16, 2010, Respondents filed Respondents' Motion to Dismiss Prohibited Practice Complaint Filed February 2, 2010 (Motion to Dismiss), asserting that the Complaint is time-barred, as the HGEA was fully aware of Respondents' plans on October 13, 2009, and the Complaint alleges the HGEA informed Respondents in writing on October 21, 2009, that Respondents' plan to privatize the security guard positions at issue violated the CBAs, HRS § 76-16, and the Hawaii Supreme Court's decision in Konno v. County of Hawaii, 85 Hawaii 61 (1997). The Motion to Dismiss further asserts that the HGEA failed to exhaust contractual remedies, as the Complaint admits it is premised upon violations of the Unit 3 and Unit 4 CBAs.

On February 22, 2010, the HGEA filed HGEA/AFSCME's Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint File February 2, 2010, asserting that there was no deadline for a response from PSD regarding the HGEA's demand for bargaining, and that a reasonable response period was implied, making the Complaint timely; and, that deferral in inapplicable in this case because Respondents are aware that no grievance was filed and it would be futile to send contractual claims to arbitration when Respondents will not waive time limits under the Unit 3 and Unit 4 CBAs. The HGEA also asserts that deferral is limited to allegations under HRS § 89-13(a)(8), and is inappropriate where there are superseding matters of policy to uphold under HRS chapter 89.

On February 24, 2010, Respondents filed Respondents' Reply to HGEA's Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint Filed February 2, 2010, asserting the Complaint is still untimely, as the HGEA was aware of Respondents' plans on October 13, 2009, yet waited until October 21, 2009, and the HGEA "parses its words" by asserting it was merely seeking "confirmation" from Respondents; that the HGEA cannot unilaterally extend statutory filing deadlines; and that the HGEA cannot "skirt" the requirement of exhaustion merely by forgetting or refusing to comply with the grievance deadlines in its contracts.

On March 10, 2010, the Board held a hearing on Respondents' Motion to Dismiss. At the hearing, the parties agreed to continue the hearing on the motion to clarify the issues presented in the Complaint, with further motions due on or before April 16, 2010, and any oppositions due on or before April 26, 2010. The deadline for opposition was later extended to May 3, 2010.

On April 16, 2010, Respondents filed Respondents' First Amended Motion to Dismiss Prohibited Practice Complaint Filed February 2, 2010, or in the Alternative for Summary

Judgment (First Amended Motion to Dismiss or for Summary Judgment). The First Amended Motion to Dismiss or for Summary Judgment re-asserts Respondents' position that the Complaint is untimely and that the HGEA failed to exhaust remedies, and added assertions that the Board lacks jurisdiction to adjudicate claimed violations of HRS §§ 26-14.6 and 76-16; that PSD consulted with the HGEA over its RIF plan; and that HGEA's assertion that HRS § 26-14.6 imposes a duty by PSD to provide security is incorrect as a matter of law.

On April 26, 2010, Respondents filed an Errata to its First Amended Motion to Dismiss or for Summary Judgment.

On May 3, 2010, the HGEA filed Complainant's Memorandum in Opposition to Respondents' First Amended Motion to Dismiss Prohibited Practice Complaint Filed February 2, 2010, or in the Alternative for Summary Judgment Filed April 16, 2010. The HGEA reasserted its previous legal positions, and further asserted, *inter alia*, that the Respondents' alleged "consultation" consisted of a meeting on October 5, 2009, that dealt primarily with the RIFs at Kulani; that the Respondents never provided the HGEA with a complete list of all Security Unit employees or positions who were going to be RIFed; that Respondents did not inform the HGEA of their plan to privatize the security guard functions and the HGEA learned about the plan through the media; that no meaningful dialogue occurred between the parties regarding the RIF and privatization; and that the Board has jurisdiction over the Complaint, and the allegations regarding HRS § 26-14.6 and chapter 76 go to the issue of whether a prohibited practice occurred, citing to HGEA v. Casupang, 1116 Hawaii 73, 170 P.3d 324 (2007).

On May 10, 2010, the Board heard oral arguments on the First Amended Motion to Dismiss or for Summary Judgment. Following oral arguments, the Board took the matter under advisement.

Hawaii Administrative Rules (HAR) § 12-42-8(g)(17)(C) provides that the "[**B]oard may direct** oral argument or the filing of briefs or **proposed findings of facts, conclusions of law, or both**, when it deems the submission of briefs or proposed findings, or both, is warranted by the nature of the proceeding or the particular issues therein" (emphases added). In the present case, the Board finds that the submission of proposed findings of fact and conclusions of law by the parties is warranted based upon the nature of the proceeding and the status of the case which has been pending for years, as well as the change in the membership of the Board, and

the Board's oral ruling taking the First Amended Motion to Dismiss or for Summary Judgment under advisement.

Accordingly, this minute order directs the parties to submit to the Board for its consideration proposed findings of fact, conclusions of law, and order granting or denying the Respondents' First Amended Motion to Dismiss or for Summary Judgment. The proposed findings of fact, conclusions of law, and orders shall be filed with the Board and served on all other parties no later than **May 10, 2017**.

DATED: Honolulu, Hawaii, March 3, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

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