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Case No. 2016-CE-11-879

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 1463, AFL-CIO,

Complainant,

and

KIRK CALDWELL, Mayor, City and County
of Honolulu; MANUEL P. NEVES, Fire
Chief, City and County of Honolulu;
HONOLULU FIRE DEPARTMENT, City
and County of Honolulu; and CITY AND
COUNTY OF HONOLULU,

Respondents.

CASE NO. 2016 CE-11-879

DECISION NO. 482

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

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The question before the Hawaii Labor Relations Board (Board) is: Did the Honolulu Fire Department (HFD) commit a "prohibited practice" by adopting and implementing a program to train fire fighters to rescue trapped or disoriented fire fighters without negotiating or consulting with the Hawaii Fire Fighters Association (HFFA)? The Board's answer is: Under the circumstances of this case, no.

I. BACKGROUND.¹

This dispute involves the HFD's adoption of a program to train fire fighters to rescue fire fighters who are trapped or disoriented in the line-of-duty. HFD's overall program has three phases (all of which are related and build upon each other)²:

A. The first phase is the International Association of Fire Fighters (IAFF), HFFA's parent organization, Fire Ground Survival training program (FGS Program). The FGS Program "is a training course that helps out firefighters be able to learn skills, abilities, knowledges and practice these to help save themselves in the event of a situation where they would be unable to get out on their own, or be in a difficult situation. So it's about self -- self-survival, self reliance."³ For HFD, training is significant for a fire fighter -- it is for their safety. As Fire Chief Manuel Neves testified:

"It's to -- ensure that everybody goes home. Do our best, do what we can so we give our folks enough skills and knowledge that the ability -- for us to save people, but in the end, we also have to return to the station and go home every night."⁴

¹ To the extent that the discussion contained in this background section of this decision and order may be considered to be a finding of fact, conclusion of law and/or mixed finding and conclusion, the same shall be treated as such.

² Transcript of Proceedings (TR.) Page (P.) 34, Lines (L.) 6-9.

³ TR. P. 24, L. 8-14.

⁴ TR. P. 25, L. 5-17.

The FGS Program was adopted and implemented in 2014-2015 after conferring with HFFA.⁵ After HFD responded to HFFA's questions and inquires, the FGS Program was implemented, and it is not the subject of this case.

B. The second phase is the Rapid Intervention Team Training program (RIT Program).⁶ HFD incorporated the use of rapid intervention teams as a part of its current Policy and Procedures (HFD Policy).⁷ While HFFA does not challenge the use of rapid intervention teams to "rescue members operating at emergency incidents if the need arises,"⁸ it objects to the RIT Program which is intended to train fire fighters to (i) use rapid intervention teams and (ii) use rapid intervention team techniques (e.g., coordination) and equipment when rescue operations are necessary.⁹ The RIT Program is the subject of this case.

C. The third phase is the Blue Card Command Training program (BCCT Program) which is being considered for future implementation and is not the subject of the dispute in this case.

⁵ TR. P. 30, L. 25-TR. P. 31, L. 4. Chief Neves testified that consultation for training was not required but "[i]t did occur" for the FGS Program. *Id.*

⁶ The term "RIT" is also used to refer to "Rapid Intervention Team" or "Rapid Intervention Team Training" or similar. In addition, at times the terms "Rapid Intervention Crew" and "RIC" are also used. As used herein, RIT Program encompasses all of these uses and is used to refer to the program, and required training, for rapid intervention by HFD teams or crews to rescue or locate fellow fire fighters. *See*, TR. P. 90, L. 17-22.

As Chief Neves testified, the RIT Program is "part of our strategic plan. It's part of our strategic plan, Initiative 5.2, that says we're going to keep -- keep our people safe through all hazards response." TR. P. 33, L. 14-16.

⁷ Exhibit J-43 at p. 377 (Par. 4-03.02.300). Also, TR. P. 110, L. 2-17 and TR. P. 116, L. 2-9.

⁸ *Id.*

⁹ *See*, HFFA Complaint. HFFA does not challenge or object to the use of rapid intervention teams or the HFD Policy adopting the same. The HFFA Complaint alleges that the adoption and implementation of the *training program* for rapid intervention teams amounted to a prohibited practice.

On March 30, 2016, HFFA filed a Prohibited Practice Complaint (HFFA Complaint)¹⁰ with the Board alleging, among other things, that the Respondents committed prohibited practices when implementing the RIT Program because (i) Respondents failed to negotiate with HFFA as required by Section 89-9(a), Hawaii Revised Statutes (HRS),¹¹ (ii) Respondents failed to obtain the mutual consent of HFFA as required by Section 1C of the BU 11 collective bargaining agreement by and between the State of Hawaii, the City and County of Honolulu (City), the County of Hawaii, the County of Maui and the County of Kauai, as the employers, and HFFA, as the union for the period July 1, 2011 to June 30, 2017 (CBA),¹² and (iii) Respondents failed to consult with HFFA as required under Section 89-9(c), HRS, and Section 1B of the CBA.¹³

HFFA seeks both preliminary and permanent injunctive relief against HFD, specifically to enjoin HFD from implementing the RIT Program until HFD either negotiates or consults, as required by either the CBA or Chapter 89, with HFFA regarding its implementation.

On April 11, 2015, Respondents filed Respondents' Answer to Prohibited Practice Complaint (HFD Answer) and denied engaging in any wrongful acts as alleged in the HFFA

¹⁰ Both parties requested that the Board render a decision in this case. Respondents did not raise the defense of "exhaustion of contractual remedies." The Board adheres to "a consistent policy of dismissing prohibited practice charges alleging violations of Section 89-13(a)(8) based on a failure to exhaust available grievance/arbitration remedies under the collective bargaining agreement. (Cites omitted.)" *In the Matter of University of Hawaii Professional Assembly and Board of Regents and Neil Abercrombie*, Order No. 2329 at pp. 11-12 (August 22, 2013) (*UHPA Case*). However, in this case, where the parties requested a decision by the Board and HFFA alleged violations of HRS Chapter 89 other than HRS Section 89-13(a)(8) (violation of the collective bargaining agreement), the Board will exercise its jurisdiction because the exhaustion requirement is subject to exceptions. *See, for example, UHPA Case* at Endnote Nos. 3 and 4.

¹¹ *See*, Paragraph 9, HFFA Complaint.

¹² *See*, Paragraph 10, HFFA Complaint.

¹³ *See*, Paragraph 11, HFFA Complaint.

Complaint. On April 15, 2016, HFFA filed HFFA/IAFF's Motion for Interlocutory Relief, together with the Memorandum in Support of Motion, Exhibits 1-15, Declaration of Thomas Reppuhn, and Declaration of Irene L.A. Pu'uohau with Exhibits 1-2 (HFFA Motion). On April 27, 2016, Respondents filed Respondents' Supplemental Prehearing Statement and Memorandum in Opposition to Complainant HFFA/IAFF's Motion for Interlocutory Relief, together with Exhibits A through C (Respondents Opposition Memorandum).

At an April 21, 2016 status conference, based on the agreement of the parties, the Board scheduled a combined evidentiary hearing (Combined Hearing) on the HFFA Motion and on the merits. The Combined Hearing was scheduled for May 4, 5 and 6, 2016, and a schedule for the submission of pre-hearing briefs, exhibit lists, exhibits and final witness lists was established, all as set forth in the Notice of Amended Schedule of Hearings and Prehearing Submissions issued by the Board on April 21, 2016.¹⁴ At the joint request of the parties, the deadline for submission of Witness and Exhibit Lists and Exhibits was extended from April 29, 2016 to May 2, 2016.¹⁵ At the joint request of the parties, the Combined Hearing was continued to May 11, 12 and 13, 2016 and the schedule for prehearing submissions was adjusted accordingly.¹⁶

On June 8, 2016, HFFA filed its Post Hearing Brief (HFFA Brief) and Respondents filed their Post Hearing Brief (Respondents Brief) regarding the claims and defenses of the parties.

¹⁴ In addition, the parties agreed that (1) a certified court reporter would record the Combined Hearing, (2) the transcript(s) provided by the court reporter was deemed to be the office record for the Combined Hearing and (3) HFFA and the Respondents would equally bear the cost of the transcript(s) with a copy being filed with the Board.

¹⁵ See, Amendment to Notice of Amended Schedule of Hearings and Prehearing Submissions (Filed 04/21/2016) filed on April 28, 2016.

¹⁶ See, Second Amendment to Notice of Amended Schedule of Hearings and Prehearing Submissions (Filed 04/21/2016).

II. COMBINED HEARING ON THE MERITS.

A. The Combined Hearing was held on May 11, 12, 16, 18 and 19, 2016, and the parties agreed that the following exhibits were admitted into evidence:

(1) The exhibits attached to the HFFA Complaint (Exhibits 1-5).

(2) The exhibits attached to the HFFA Motion (i.e., Exhibits 1-15), the Declaration of Irene L.A. Pu'uohau with Exhibits 1-2 attached and the Declaration of Thomas Reppuhn.¹⁷

(3) The exhibits attached to the Respondents Opposition Memorandum (i.e., Exhibits A through C).

(4) Joint Exhibits: J-1 through J-48.¹⁸

B. Witnesses.

Six (6) witnesses were called and each party had an opportunity to cross-examine the witnesses called by the other party. The witnesses were: Fire Chief Manuel P. Neves (Chief Neves), Assistant Chief Scott R.K. Lawton (AC Lawton), Assistant Chief Socrates Demetrios Bratakos (AC Bratakos), Captain Joseph Charles Condlin (Captain Condlin), Robert H. Lee (Mr. Lee) and Captain Thomas Reppuhn (Captain Reppuhn).

III. FINDINGS OF FACT; CONCLUSIONS OF LAW.

Based on (1) all of the matters which are part of the record on this case (e.g., all transcripts, pleadings, declarations, exhibits, notices and orders filed with the Board), (2) all exhibits admitted

¹⁷ Attached to HFFA/IAFF's Motion for Interlocutory Relief; Memorandum in Support of Motion.

¹⁸ On May 19, 2016, an "amended" Exhibit J-45 was filed with the permission of the Board to include an omitted page. References to Exhibit J-45 herein shall be to the "amended" Exhibit J-45.

into evidence at the Combined Hearing, (3) the testimony of each witness (whether elicited on direct, cross or redirect examination) and the Board's determination of the credibility, and the weight to be given to the testimony, of each witness, (4) the arguments of counsel (including the arguments made in their respective closing briefs), and (5) such other matters which the Board is allowed to consider, including any matters which the Board is allowed to take notice of pursuant to HRS Chapters 89, 91 and 377¹⁹, and in addition to any findings or conclusions contained in Parts I and II above (which are hereby incorporated herein by reference), the Board adopts and enters the following Findings of Fact and Conclusions of Law (if it should be determined that any finding of fact should be considered as a conclusion of law or any conclusion as a finding or as mixed findings and conclusions, then they shall be treated to be as such).

A. Findings of Fact. The Board adopts the following findings of fact:

(1) Parties.

(a) HFFA is, and was at all times relevant herein, (a) an employee organization within the meaning of HRS Section 89-2, and (b) the duly certified exclusive bargaining representative of fire fighters (bargaining unit 11 or BU 11).

(b) Each of the following Respondents is an "employer" within the meaning of HRS Section 89-2: Kirk Caldwell, Mayor, City and County of Honolulu; Chief Neves, Chief of HFD; HFD; and the City.

¹⁹ Pursuant to HRS Section 91-10(4), for example, the Board "may take notice of judicially recognized facts." The Board has not taken notice of any "generally recognized technical or scientific facts within [its] specialized knowledge", and therefore, the notice requirement of HRS Section 91-10(4) is not applicable.

(2) Collective Bargaining Agreement.

(a) The applicable collective bargaining agreement is the Unit 11 Collective Bargaining Agreement which is in effect for the period from July 1, 2011 to June 30, 2017 (CBA).²⁰

(b) CBA Section 1.B. (Consultation) provides that:

"All matters affecting Employee relations, including those that are, or may be, the subject of a regulation promulgated by the Employer or any Personnel Director, are subject to consultation with the Union. The Employer shall consult with the Union prior to effecting changes in any policy affecting Employee relations."

(c) CBA Section 1.C. (Mutual Consent) provides that:

"No changes in wages, hours or other conditions of employment contained herein may be made except by mutual consent."

(d) CBA Section 4 (Management Rights) provides that:

"The Employer reserves and retains, solely and exclusively, all rights, authority and prerogatives, including the rights of management to manage, control and direct its Employees and operations except as specifically abridges or modified by this Agreement."

(e) CBA Section 39 (Safety and Health) provides that:

"The parties agree to establish and maintain a Safety Committee within each jurisdiction composed of two (2) representatives appointed by the Union and two (2) representatives appointed by the Employer.

The responsibilities of the Safety Committees shall include reviewing existing safety equipment, supplies and procedures; reviewing accidents and recommending

²⁰ Relevant provisions of the CBA were admitted into evidence during the Combined Hearing as Exhibit J-2.

corrective or preventive safety measures; and recommending changes to Fire Department health and safety rules and practices. Safety Committees shall be entitled to attend post incident analysis sessions in their jurisdiction for major incidents or when injuries occur.

The Safety Committees shall meet as needed at the request of either party at mutually convenient times and dates. Employee-committee members shall be granted time off to attend such meetings without loss of pay or benefits and without requirement to make up such time.

The function of each Safety Committee shall be to make recommendations to the respective Fire Chief or Department Head concerning matters of occupational safety and health within the Fire Department. When Safety Committee recommendations are not implemented, either party may submit its findings and recommendations to the Chief Executive of the respective jurisdiction or its designee, provided that the final and binding determination shall be made by the Chief Executive.”²¹

(f) CBA Section 48.B. (Employer-Required Training) provides that:

“Whenever Employees are required by the Employer to attend training sessions during their normal work hours, they shall be given time off from work to attend such training sessions. The time spent by Employees who are required by Employer to attend training sessions on their days off shall be considered as time worked. Employees who drive their personal vehicles to and from such required training sessions

²¹ AC Lawton testified that he was a member of the Safety Committee, and that:

“The purpose of the safety committee is to make recommendations to the fire chief on occupational safety and health issues.

The responsibilities of the safety committee include reviewing existing equipment, supplies, and procedures. Review accidents and providing recommendations to stop them from occurring again, as well as provide recommendations to the fire chief on occupational safety and health issues.

TR. P. 182, L. 14-TR. P. 183, L. 9.

shall be entitled to mileage reimbursement as provided for in Section 49, AUTOMOBILE ALLOWANCES.”

(g) CBA Section 53 (Labor-Management Committee) provides that:

“There shall be established and maintained a Labor-Management Committee comprised of eight (8) members representing the Bargaining Unit and eight (8) members representing the Employer.

The purpose of the Committee is to facilitate improved labor-management relationships by providing a forum for the free discussion of mutual concerns and problems and also to work at finding resolutions outside of the grievance procedure to on-going problems.

1. The Committee shall meet at the request of either party, no more than four (4) times per year, except by mutual agreement.

2. The Chairperson of the Committee shall be rotated between the Union and the Employer. The members shall in advance of a meeting, provide the meeting's Chairperson with agenda items, and the Chairperson shall provide the members with the meeting agenda in advance of the meeting.

3. Representatives of the Union on the Committee shall be granted time off without loss of pay or benefits and without requirement to make up such time when meetings are mutually scheduled during their duty times.

4. The Committee shall have the authority to make recommendations to the Union and the Employer.

5. Participation in this Committee does not constitute a waiver, by any party, of collective bargaining and arbitration rights.

6. Participation by the Parties, through any designated representative, shall not be considered as consultation or mutual consent in bargaining.”

(3) Need for Training.

(a) Fighting fires is an inherently dangerous activity, and fire fighters must be properly trained in their jobs to minimize, as much as possible, loss of life or serious injury. As stated by Chief Neves:

"Every chief has probably faced this dilemma, is that you're sending your folks into a dangerous environment and dangerous situation. But you have to manage your risks as well. So did you give them enough training? Did you give them the right equipment? Do they have the right fire trucks? Do they have the right everything? So we can almost ensure we can reduce the risk and minimize the fact that our guys would get hurt or -- die.

So I think that's a balance that every chief would have. For me, I look at the RIT training. And you can see how -- you got examples in South Carolina. We have examples right here in Hawaii. We had a Woolworths fire in, I think it was, 1993. Thirty-seven hours for us to fight that fire in -- in Waikiki. Any that could have easily been an incident where we had lost somebody. I was at that fire myself. We had the First Interstate Building fire. I think that was in 2000, where we did have two of our firefighters get disoriented, two of my friends. And they -- they ran out of air. They got disoriented. And luckily a company was coming down and made the wrong turn, and they ended up saving them just by -- just by the grace of God.

So as a fire chief, we really want everybody to go home. And I feel that -- we thought that the firefighters -- because of this RIT program, like I said, was in place for decades. We had RIT. It was in -- it's in our procedures for decades. But we just assumed that our firefighters had enough training and skills that they could apply to help save their fellow firefighters. And once we got introduced to RIT and they said, well, you got to learn this, you're going to learn that, I said, wow, these are things that would enhance and improve our ability to save each other. So it's really not going in another direction but really just -- just kind of enhancing

what we -- we felt [we] knew already. So that's why I feel it's important.

And, you know, I have some personal feelings about everybody going home. 'Cause I -- I'm probably the only officer in the department that I had somebody on my crew die. So I'm adamant about us being safe and everybody goes home. That's -- that's really something that is very important to me as a chief. And I think it -- it has been with every chief before me. 'Cause you don't want to be that chief that has to go to that funeral or somebody that's in your department that passes away. (Italics added.)"²²

(b) Thus, for HFD, training its fire fighters is a crucial function to reduce line-of-duty deaths and injuries. As Chief Neves testified, training is "a continuous effort to -- to provide training to our folks to keep our people safe."²³ In addition, "*all the training, all the skills, all the abilities, they are perishable.* If you don't do it today and you don't do it for another six months, you get rusty, and you won't be able to perform. (Italics added.)"²⁴ As a result, in order to "stay close" to National Fire Protection Association (NFPA) Standard 1407 ("Training Fire Servicer Rapid Intervention Crews") and Standard 1410 ("Training for Emergency Scene Operations") and to implement the use of rapid intervention teams pursuant to Paragraph 4-03.02.300 of the HFD Policy, HFD initiated the FGS Program to be followed by the RIT Program (if the FGS Program was successful) and the BCCT Program.²⁵

²² TR. P. 152, L. 24-TR. P. 154, L. 18. *See also "Think F.A.S.T.: Firefighter Advanced Survival Techniques" (FAST Article) "Think F.A.S.T.: Firefighter Advanced Survival Techniques" (FAST Article), Exhibit J-38 at p. 266.*

²³ TR. P. 33, L.8-10.

²⁴ TR. P. 76, L. 6-11. *See also,* TR. P. 166, L. 20-TR. P. 167, L. 8.

²⁵ Exhibits J-39 and J-40. NFPA is a non-profit organization which sets fire protection standards. While HFD did not adopt HFPFA standards, it tries to "stay close" to them. TR. P. 104, L. 18-TR. P. 105, L. 8.

(c) Captain Condlin was a moving force behind HFD's adoption and implementation of the RIT Program, and is currently the "program manager" for the RIT Program. For Captain Condlin, the RIT Program is not advanced or specialized training -- it should be part of every fire fighter's basic training.²⁶ As Captain Condlin put it, each fire fighter should be trained to rescue his/her fellow fire fighter.²⁷

(d) In response to inquiries that he told the Honolulu Fire Commission that those who could not go through training should work at alternative places, e.g., the bureau, Chief Neves stated, when one of the commissioners visited or called a fire station:

"[S]ome of our firefighters shared with her that -- the concern about this training being difficult and that they only had a like one or two years left in the department, so they didn't want to take a chance on getting hurt by -- by going to this [RIT Program] training.

And my response to that is that, really, if you're in a fire station, you should be 100%. If you're already worried about yourself getting injured or hurt, then that's a personal decision that you should make. And you should -- if you're only one year away and you say, 'well, I don't want to be in a fire -- a dangerous situation anymore,' there are other opportunities in our department that -- and for me, even myself, I had to make that decision, and I felt I needed to move to a bureau, because I wasn't able to give 100 percent. So that's -- that's what I was saying, is that it's a personal choice."²⁸

²⁶ TR. P.543, L. 15-20; TR. P. 630, L. 13-16; TR. P. 629, L. 4-19 ("I think it is our general duties. And if a guy goes down, we should be trained to get that guy out"). The RIT Program is not be confused with "rescue training" or the "rescue squad. Members of the "rescue squad" are Fire Fighter II rescue specialists. The RIT Program is not to train "rescue squad" members. TR. P. 98, L. 24-TR. P. 100, L. 10.

²⁷ TR. 629, L. 4-19.

²⁸ TR. P. 155, L. 11-TR. P. 156, L. 3.

(4) RIT Program.

(a) The RIT Program is “a training program that is designed to create a highly disciplined operational capability to rescue fire fighter(s) who become lost, injured, trapped, incapacitated, or disoriented at an emergency scene or in the course of a training operation.”²⁹ In essence, RIT Program trains “fire fighters to use individual RIC [rapid intervention crew] skills *as part of a crew.* (Italics added.)”³⁰ A rapid intervention team or crew is a “dedicated crew of five fighters who are assigned for rapid deployment to rescue lost or trapped members.”³¹ Rapid intervention crews are also called “rapid intervention teams.” Regarding the deployment of a rapid intervention team or crew, Chief Neves explained:

“[I]t's really fluid. It's really incident driven how the RIT team is established, based upon what the incident commander sees, what he thinks, where he thinks the fire is going, if they're going to make an interior attack, a offensive attack, or they're just going to be defensive and stay back and shoot water from the outside. Then probably the RIT team would not be established.”³²

²⁹ National Fire Protection Association (NFPA) Standard 1407. *See*, Exhibit B to Respondents Opposition Memorandum.

³⁰ *Id.*, Section 4.2.4.

³¹ *Id.*, Section 3.3.8. Rather than a crew of five, HFD uses a crew of four for rapid intervention operations.

³² TR. P. 148, L. 3-9.

In essence, any time a company is dispatched to a fire, there is a potential that a fire fighter could be designated as part of a rapid intervention team or crew.³³ Thus, the necessity to train all Fire Operations (OPS) personnel in rapid intervention team techniques.³⁴

(b) HFD's RIT Program is based on NFPA's rapid intervention training program and is intended to provide HFD's fire fighters with life-saving skills in a profession that is both inherently dangerous (i.e., high risk work with the potential for death or serious injury) and physically demanding.³⁵ The RIT Program, in effect, implements the rapid intervention team requirement of the HFD Policy by making certain that all OPS personnel are properly trained in both personal survival techniques (i.e., the FGS Program) and in the use of a rapid intervention team to rescue trapped or disoriented fire fighters (i.e., the RIT Program).

(c) The RIT Program is HFD's first training course for rapid intervention teams.³⁶ Prior to the adoption of the RIT Program, HFD knew that rapid intervention training was completed in Maui County³⁷ and Hawaii County.³⁸ In addition, the Federal Fire

³³ TR. P. 149, L. 8-11.

³⁴ OPS personnel include "all the folks that work in the fire stations. TR. P. 161, L. 11-16. Non-OPS personnel (e.g., fire prevention or training) are not expected to participate in the RIT Program. TR. P. 162, L. 3-6.

³⁵ Exhibit J-38. In effect, the purpose of RIT training is to "ensure more favorable outcomes" and:

"Firefighter survival training begins by training on the basics so firefighters can become familiar enough with them to eliminate confusion on the fireground. In addition, members will be better prepared to initiate deployment; improve coordination and accountability; complement incident command; keep radio communications to a minimum; and, *most importantly, improve firefighter safety.* (Italics added.)" *Id.*

³⁶ TR. P. 91, L. 8-20.

³⁷ TR. 165, L. 3-17 and TR. P. 165, L. 20-24.

³⁸ *Id.*

Fighters adopted rapid intervention training a number of years ago, and the training continues.³⁹ Unlike the RIT Program, the Maui County and Federal Fire Fighters training programs are pass/fail (i.e., a fire fighter must pass the training program to continue in firefighting operations).⁴⁰ The RIT Program, although mandatory for all OPS personnel (including fire fighters returning to OPS, and will be mandatory for all new recruit classes beginning in August 2016), is participatory only (i.e., an OPS fire fighter need not "pass", but must complete the training).⁴¹ In effect, HFD wanted all OPS personnel to be properly trained in rapid intervention team techniques and operations. The RIT Program was not, however, intended to elevate a fire fighter's skill "beyond the normal fire fighter level of duty" or create a new minimum qualification.⁴² Therefore, it was not a pass/fail program, i.e., a fire fighter need not "pass" the RIT Program to continue in OPS.⁴³

(d) Captain Condlin was the RIT Program's lead instructor and testified that participants in the training can elect to sit out the physical portions of the training and just observe.⁴⁴ These "observers" will still receive their Certificate of Completion.⁴⁵ It is his

³⁹ See, Chief Neves' testimony at TR. P. 165, L. 20-24.

⁴⁰ TR. P. 79, L. 23-TR. P. 80, L. 4.

⁴¹ See, Chief Neves' testimony at TR. P. 157, L. 21-23. Chief Neves also testified that personnel returning to OPS must complete the RIT Program before returning or during a "grace period." TR. P. 151, L. 16-TR. P. 152, L. 17. Current OPS personnel must complete the training or "make up" the training at some later time. TR. P. 152, L. 5-18. From the August 2016 class, all new recruits will also have to go through the RIT Program. TR. P. 167, L. 9-17.

⁴² TR. P. 97, L. 20-TR. P. 98, L. 4.

⁴³ A fire fighter who *completed* (as opposed to passed) the RIT Program received an FDTN Certificate of Completion.

⁴⁴ TR. P. 652, L. 1-TR. P. 653, L. 7. Mr. Lee testified that the Maui Fire Department allowed fire fighters "not to participate in any exercise they didn't want to." TR. P. 500, L. 23-TR. P. 501, L. 8. This is the same as the RIT Program adopted by HFD.

⁴⁵ TR. P. 665, L. 13-TR.P. 666, L. 21; TR. P. 788, L. 2-17.

experience, however, most of the "observers" will elect to participate in the exercises after watching their fellow fire fighters go through the same.⁴⁶ In addition, many fire fighters who "tapped out" (i.e., could not complete the exercises) elected to re-do the exercises. It was his perception that the fire fighters knew this was important and they wanted to improve their knowledge and techniques in handling emergency situations.⁴⁷

(e) The skills developed in the RIT Program are not part of the minimum qualification for a fire fighter's job or specialized training, but are, instead, part of the basic fire fighter skills essential for worker safety for OPS personnel.⁴⁸ Hence, the Board finds that HFD's decision to make the RIT Program training mandatory for all OPS personnel was reasonable. OPS personnel are fire fighters on active duty for fire suppression and do not include HFD employees who are not required to perform fire suppression work.⁴⁹

(f) RIT Program training is held over two days, and because it is mandatory, is primarily scheduled for off-duty attendance with the fire fighters receiving overtime

⁴⁶ TR. P. 652, L. 1-TR. P. 653, L. 7.

⁴⁷ TR. P. 675, L. 25-TR .P. 676, L. 11.

⁴⁸ TR. P. 97, L. 20-TR. P. 98, L. 4. A fire fighter returning to OPS will have to complete the RIT Program. TR. P. 83, L. 1-8. However, the RIT program is not a pass/fail program and is participatory only. In essence, a fire fighter returning to OPS does not need "certification" that she/he passed the RIT Program.

Further, any one returning to OPS must undertake mandatory training which she/he did not complete. The RIT Program is just one of a number of such mandatory training sessions. Scheduling is done on an individual basis and "it is handled by our operations, to make sure that these guys had all the training that everybody else got and they're good to go once they get to their fire stations." TR. P. 151, L. 21-P. 152, L. 14.

⁴⁹ Because of the crucial nature of rapid intervention team training for safety purposes, the Board finds HFFA's suggestion that the RIT Program be made voluntary in order to alleviate any concerns that it may have, is not reasonable and was properly rejected by HFD. Since fire fighter safety is dependent on the presence of trained personnel on a rapid intervention team, and any OPS fire fighter may assigned to a team, all such personnel should be trained. Thus, the mandatory nature of the RIT Program is reasonable.

pay (as required by CBA Section 48.B). The fire fighters are given a choice of when they want to attend the training.⁵⁰ The CBA allows HFD to hold required training sessions, but must pay overtime for training that occurs on any fire fighter day off (CBA Section 48.A). There is nothing in the CBA that specifically requires HFD to negotiate with HFFA on required training programs.

(g) The cost of the RIT program is approximately \$1,300,000 and consists primarily of non-holiday overtime pay for the fire fighters who participate in the RIT Program. The Board recognizes that a material amount of money was committed by HFD to implement the RIT Program, which HFD deemed to be of critical importance to maximize the safety of its fire fighters in an increasingly dangerous profession. The Board also recognizes the need to implement the RIT Program, consistent with HFD's obligations pursuant to HRS Chapter 89 and the CBA, in a timely fashion because a portion of the funding for the RIT Program may lapse as of June 30, 2016.⁵¹

(h) Finally, the initial training held pursuant to the RIT Program would be followed by "refresher" sessions.⁵² The extent and content of the follow courses is yet to be determined, but is necessary to make certain that all OPS personnel are familiar with rapid intervention team techniques and skill.

⁵⁰ Exhibit J-20. Each battalion is given a choice of three 2-day periods to complete training.

⁵¹ See, Chief Neves' testimony at TR. P. 149, L. 12-18.

⁵² See, Chief Neves's testimony at TR. P. 166, L. 20-TR. P. 167, L. 8.

(5) Adoption and Implementation of RIT Program.

(a) The Board notes that the FGS Program was adopted and implemented without the filing of a prohibited practice claim by HFFA. HFD then followed the FGS Program "model" in implementing the RIT Program. There were many similarities: (1) like the RIT Program, the FGS Program was mandatory,⁵³ (2) the FGS Program had a computerized "academic" component (a certificate of completion must be given to the battalion chiefs) and (3) the RIT had a rigorous "three-day field training course that encompasses self-survival procedures, panic management, communications, wall breach with low/reduced profile, disentanglement maneuvers, a self-contained breathing apparatus confidence maze, and upper floor escape techniques."⁵⁴ The FGS Program was started by requesting volunteers for a "train-the-trainer" qualification.⁵⁵

(b) HFFA had concerns regarding the FGS Program and these concerns were communicated to HFD on November 24, 2014, when HFFA advised HFD that "[i]n light of the numerous concerns and questions which requires HFD's response, a *consultation* meeting is in order. (Italics added)."⁵⁶ HFD responded on December 18, 2014, and after answering HFFA's questions, advised that "we would like to meet and discuss any outstanding issues during the week of January 5, 2015" because HFD wanted to start training on February 4, 2015.⁵⁷ HFD and HFFA

⁵³ Exhibit J-3 at p. 38 ("completion is mandatory for uniformed personnel").

⁵⁴ Exhibit J-3 at p. 39.

⁵⁵ Exhibit J-4.

⁵⁶ Exhibit J-5.

⁵⁷ Exhibit J-7.

met on January 21, 2015, and apparently, all of HFFA's concerns were discussed and resolved.⁵⁸

The Board notes that Chief Neves assured HFFA that:

"The FGS Program is *not* administered on a pass/fail basis and is not a prerequisite for a suppression assignment, however, *attendance and active participation (to the extent possible) in the entire program is mandatory.* (Italics added.)"⁵⁹

(c) Prior to adopting and implementing the RIT Program, Captain Condlin testified that he spoke to Mr. Lee (HFFA) and advised that the RIT Program would be mandatory (like the FGS Program).⁶⁰ Mr. Lee advised Captain Condlin that it was acceptable but that HFD needed to err on the side of safety.⁶¹

(d) Akin to the FGS Program, the RIT Program was started with a request for volunteers to qualify as trainers. HFD issued its October 16, 2015 Special Notice 15-179 which invited all interested personnel to submit an application to attend a "Rapid Intervention Team (RIT) Train-the-Trainer" course which was held on December 7-11, 2015.⁶² HFD received about one hundred fourteen (114) applicants for the train-the-trainer session⁶³, and selected thirty-

⁵⁸ Exhibit J-9.

⁵⁹ *Id.* It appeared to Chief Neves that HFFA and HFD collaborated on the FGS Program. TR. P. 143, L. 1-11. In addition, Mr. Lee testified that he did not object to the FGS Program. TR. P. 474, L. 14-16.

⁶⁰ TR. P. 574, L. 17-25. *See, also*, Exhibit J-8 (special notice for FGS Program) and Exhibit J-20 (special notice for the RIT Program). Both are similar in that the training is mandatory for OPS personnel and/or personnel returning to OPS.

⁶¹ *Id.* Also, TR. P. 578, L. 20-23 ("[b]ecause I followed the -- prior Fire Ground Survival one. And after asking him if he was okay with it, him stating that he was okay with it, I followed the prior one, which seemed like that's -- he just okayed it").

⁶² Exhibit J-10.

⁶³ TR P. 676, L. 24-TR. P. 677, L. 2.

three (33) to take the course,⁶⁴ and on or about November 20, 2015, HFD issued Special Notice 15-201 which identified the selected fire fighters attending the "train-the-trainer" course. Eventually, 32 or 33 became trainers.⁶⁵

(e) There was no assurance that the RIT Program would be implemented even with the start of the "train-the-trainer" sessions for a number of reasons, including the possible lack of sufficient funding.⁶⁶ HFD, however, started discussions with HFFA about the RIT Program in early January 2016, and the use of a working group to discuss and workout the details. AC Bratakos spoke to Andy Fukuda (Fukuda), HFFA's Oahu representative on the Labor Management Committee, and Fukuda stated that it "sounded like a good idea."⁶⁷ By letter dated January 7, 2016, Chief Neves advised HFFA (Mr. Lee) that:

"The Honolulu Fire Department (HFD) would like to form a working group for the above-mentioned subject as discussed at the January 4, 2016, meeting between the HFD and the Hawaii Fire Fighters Association. Please let us know who your representatives for the working group will be by January 15, 2016, so we can make arrangements to schedule an initial meeting."⁶⁸

In effect, Chief Neves was inviting HFFA to have a "seat at the table" in discussing the details of planning and implementing the RIT Program. Although Chief

⁶⁴ TR. P. 677, L. 3-5.

⁶⁵ *Id.*

⁶⁶ TR. P. 248, L. 3-10.

⁶⁷ *See*, AC Bratakos' testimony at TR. P. 294, L. 2-23.

⁶⁸ Exhibit J-12. Chief Neves also testified that he initiated an effort to have weekly Monday meetings with HFFA as a communication tool. Discussion topics could include proposed actions which may or may not be adopted. TR. P. 37, L. 19-TR. P. 38, L. 1-8. In January 2016, Chief Neves raised the use of a working group to allow HFFA to be involved early on in determining the details of the implementation of the RIT Program. *Id.*

Neves took the position that training was not a subject for consultation (much like the position taken by the Maui Fire Department), he invited HFFA to discuss the RIT Program implementation. Chief Neves explained the working group concept as follows:

"We -- we started -- we went through several iterations as to meeting with the unions on a regular basis. Back in October of 2015, we reinstated monthly meetings with the Oahu board. And the intent of the meeting is to try to identify areas that we could both improve on so our relationship would improve. So we started work -- meeting the first Monday of every month, and we went on for several meetings.

During those meetings, the Oahu board indicated that they wanted more presence, they wanted to be more involved. So we felt -- and we -- expressed this and involved at the January 4th monthly meeting to say, *'Look, we got this training coming up. you guys want to be in a working group. in a working group and help. help plan this. open it up. It doesn't require consultation. But, you know, we'll open it up. You guys can be part of the planning for this.'* And we used this concept before. We have this other project, this rank for rank, where somebody of one rank works for the other of the same rank. We used this working group concept, and that went fairly smoothly. We got things done and ironed out any differences we had. So we thought this would be an olive branch that we could put out and say, 'look, you guys be involved in this from the get-go.'

So as far as January, we said let's -- let's be a part of this group and help us, help us put this together, so that was the intent of the working group. (Italics added.)"⁶⁹

Without deciding the correctness of HFD's position and based on the foregoing, the Board finds that HFD did, in fact, initiate and fulfill its duty to consult.

⁶⁹ TR. P. 38, L. 1-TR. P. 39, L. 2. Chief Neves also testified that the "working group" concept was not a substitute for consultation or negotiations. TR. P. 39, L. 13-24.

(f) On January 11, 2016, rather than welcoming the opportunity to participate in a working group to discuss the RIT Program (i.e., have a "seat at the table" from the inception of the process to implement the RIT Program), HFFA responded by questioning the reason for forming a working group, and the guidelines to be used to "develop recommendations" and "remuneration" for HFFA members who participate in the working group.⁷⁰ It was HFD's position that a working group was not a substitute for consultation or negotiation in the context of collective bargaining.⁷¹

(g) On January 15, 2016, Mr. Lee, on behalf of HFFA, advised HFD that "[a] 'working group' meeting is premature in light of the absence of additional information needed in order to thoroughly discuss all aspects of the Rapid Intervention Team (RIT) Training working group."⁷² Again, HFFA requested "*consultation* on both the RIT Training Program and its curriculum After receipt of the requested information, HFFA will contact your office to schedule a *consultation* meeting. (Italic added.)"⁷³

⁷⁰ Exhibit J-13. Chief Neves' reaction to HFFA's position was "I'd say, 'Really, here we go again. Is this another example of -- the union has used this, this tactic before. When we try to pen up and try to make some progress in closing the gap, they start with these questions. Five, five is just a little. We got -- sometimes we get 22 questions." TR. P. 41, L. 19-24. In effect, Chief Neves "was disappointed. I thought that, okay, we're opening it up to them. Meet with us, work with us, get in on the ground floor, help out guys plan this thing, and then we get this letter on working group, when in fact we have used working groups before to success." TR. P. 42, L. 6-11.

Further, in the HFFA Brief, HFFA took the position that it "accepted the opportunity to be involved and engaged, but had questions of the purpose, intent, and authority of a 'Working Group' generally," citing to Exhibit J-13. HFFA Brief at p. 5. In reviewing Exhibit J-13, there is nothing therein which indicates that HFFA "accepted the opportunity."

⁷¹ TR. P. 39, L. 13-24.

⁷² Exhibit J-14.

⁷³ Exhibit J-14.

(h) On January 20, 2016, HFD responded to HFFA's January 11, 2016

letter and advised, among other things, that:

"A working group is a group appointed to study and report on a particular question and make recommendations based on its findings. In the case of the Rapid Intervention Team (RIT) working group, they will conduct a study and report on the *best way* to conduct RIT training for HFD.

The policy, guidelines, and criteria are determined and provided by the Assistant Chief (AC) in charge of the working group. In the case of the RIT group, they will be asked to look at the curriculum, schedule, instructor oversight, equipment, *safety measures*, and costs of the program.

Personnel are compensated according to the collective bargaining agreement. (Italics added.)"⁷⁴

Based on HFD's letter, the purpose of the RIT working group was to study all aspects of the RIT Program and make recommendations as to how to best implement the RIT Program, which included developing a curriculum, schedule, instructor oversight, equipment, safety measures and costs. In other words, the RIT program was at its formative stage, and HFFA was being asked to participate in, and collaboratively develop, the implementation procedures and protocols for the RIT Program. Thus, there was no detailed documentation for the implementation of the RIT Program at the time of this exchange of letters -- the RIT working group (which was to include HFFA) was to draft/develop the same.

⁷⁴ Exhibit J-15.

(i) On January 27, 2016, HFD responded to HFFA's January 15, 2016 letter, and after referring to its January 20 letter and responses, advised, among other things, that:

"Due to the *time sensitive nature of this necessary training to improve the safety of our personnel*, we would like to schedule a *consultation* meeting the week beginning February 16, 2016. Please contact Ms. Jennifer Chun to confirm the date and time of this meeting. (Italics added.)"⁷⁵

Subsequently, on February 3, 2016, HFD provided HFFA with three documents for its review, i.e., a draft calendar, curriculum and list of instructors.⁷⁶ Given the status of the RIT Program in early 2016, and HFD's invitation to HFFA to help develop the procedures for implementing the RIT Program, the rudimentary nature of the materials provided to HFFA is understandable.

(j) At this point, rather than cooperating with HFD and collaboratively developing the procedures and protocols for the RIT Program, by letter dated February 4, 2016, HFFA (through Mr. Lee) asked a series of questions and took the technical position that "while we support the inclusion of our members in processes that allow for their input, that the process does not supersede the legal obligation of the Employer to consult/negotiate with the HFFA."⁷⁷ Although HFFA mentions the obligation of the "Employer to consult/negotiate," its only demand was for HFD to "immediately engage in *consultation* on the purpose and function of *HFD Working Groups*. (Italics added)"⁷⁸ This response ignores the primary purpose of the exchange of

⁷⁵ Exhibit J-16. Chief Neves testified that HFD "had offered" a "consultation meeting" regarding the RIT Program. TR. P. 48, L. 12-21.

⁷⁶ Exhibit J-17.

⁷⁷ Exhibit J-18.

⁷⁸ *Id.*

correspondence (the implementation of the RIT Program), the explanations provided by HFD regarding the purpose of the proposed RIT Program working group, HFD's request to consult with HFFA on the RIT Program, and most importantly, HFD's request that HFFA keep in mind the "time sensitive nature of this necessary training." In effect, HFFA wanted to consult over the issue of working groups rather than proceeding to the merits of the RIT Program.⁷⁹

(k) On February 11, 2016, after engaging in a discussion of, among other things, the RIT Program, AC Bratakos accompanied Mr. Lee, Aaron Lenchenko (member of the HFFA board) and others on a walkthrough of the facilities where the RIT Program would be conducted. It did not appear that HFFA raised any issues with HFD at that time.

(l) On February 24, 2016, HFD responded to HFFA's February 4, 2016 letter, responded to each of the questions posed by HFFA, advised that consultation will be requested "when the RIT Working Group discovers issues that significantly affect wages, benefits, or working conditions" and inviting HFFA, again, "to participate in this process as we finalize preparations for delivery" with assurances that the RIT working group would "meet as frequently as necessary and as long as needed to ensure the delivery of this program will be performed in a professional, safe, and responsible manner."⁸⁰ In substance, HFD consistently maintained the position that the RIT working group's task was to develop the procedures and protocols for the

⁷⁹ As Chief Neves testified, "[s]o we're trying to get the RIT. The focus is being shifted to, okay, what is a working group. And at that time, I think it is a detriment. We're trying to get this training that is needed for everybody. But we get this -- I don't want to call it a game, but it's the strategy. *If there's something that they want to hold up, they use consultation as a means for us to delay, stop, whatever the -- the case may be.* (Italics added)." TR. P. 53, L. 23-TR. P. 54, L. 5.

⁸⁰ Exhibit J-19.

implementation of the RIT Program and that HFFA was invited to participate. HFFA, on the other hand, while not explicitly rejecting the invitation to participate in the RIT working group, raised technical "road blocks" to, in effect, stop the process.⁸¹

(m) At this point, HFD determined that it could not wait for HFFA to participate in the formulation of the RIT Program protocols (there were issues with the lapse of funding by June 30, 2016, and more importantly, starting training was crucial for the safety of the OPS personnel), and HFD started to implement the RIT Program.⁸² Accordingly, on March 1, 2016, HFD issued Special Notice SN-16-044 (SN-16-044) which announced the two-day course for training in Fire Ground Survival and Rapid Intervention Team. A schedule for the RIT Training was attached and incorporated into the terms and conditions of SN-16-044.⁸³ In effect, after attempting to initiate meaningful dialog and discussions (and to comply with the requirement to consult), HFD had no alternative but to take action. As Chief Neves testified:

"The main factor is that this is needed. It's to keep our people safe. Every day we don't have this training, somebody has the risk that they may get injured and not be able to save themselves or be saved by others. That's the -- that's the

⁸¹ An internal working group was formed by HFD to address issues regarding the implementation of the RIT Program. However, a working group involving HFFA was never formed. TR. P. 61, L. 15-TR. P. 62, L. 11.

⁸² Chief Neves' testified that "we had given sufficient opportunity for not only being part of the planning, but even offering that consultation day, and then the discussions turned right back to working group And at this point, we were of the opinion that enough is enough and we have to move forward with this." TR. P. 65, L.8-16.

In addition to concerns regarding training OPS personnel in team rescue techniques, Chief Neves was concerned about having to initiate the RIT Program before the end of the fiscal year (June 30). As he testified, "You have to have the monies available, because it entails training the entire department. *The monies were budgeted for one fiscal year that ends June 30th. We had to spend the money.* The plan was actually to start the class in March. We didn't start till April. So we were already one -- one month behind This is necessary training. *We have it budgeted, and we give them -- we felt we gave enough opportunity to be a part of this.* (Italics added.)" TR. P. 67, L. 5-19.

⁸³ Exhibit J-20.

primary reason. *It's not the money. It's not all of this other stuff. But the primary reason is to keep our people safe.* (Italics added.)"⁸⁴

(n) If and to the extent that HFFA had any safety concerns, rather than discussing them directly with HFD, on March 11, 2016 Captain Reppuhn, an HFFA representative on the Safety Committee, visited the training site on the first day of training "to evaluate the safety aspects of this training," and advised AC Lawton that:

"Today I visited the training center to review the RIT program. Since HFFA has not [been] consulted on this program and this was the first day of activities, I went down to evaluate the safety aspects of this training. From what I saw, just on the first day, firefighters are going to get hurt. This needs to be addressed immediately before serious bodily injury occurs. I advise this program be suspended immediately."⁸⁵

In response, AC Lawton responded on the same day and advised Captain Reppuhn:

"If you feel there is something that is being done that affects the safety of participating Firefighters, please let me know what it is so we can address it immediately. *Did you notify anyone at training of this issue?* (Italics added.)"⁸⁶

In addition, AC Lawton advised that a Safety Committee meeting could be held on March 15, 2016, and asked Reppuhn to acknowledge his intention to attend.⁸⁷ It

⁸⁴ TR. P. 68, L. 19-25.

⁸⁵ Exhibit J-21.

⁸⁶ *Id.*

⁸⁷ *Id.*

It appears that Captain Reppuhn did not advise the training staff on March 11 that he had safety concerns so that they could be immediately rectified.⁸⁸

At the March 15, 2016 Safety Committee meeting, Captain Lawton advised that:

"His main concern, he [Reppuhn]-- was that there were safety concerns and that the RIT training was going to get firefighters hurt. And just like in his e-mail, I requested some specific information on how these firefighters.....were going to get hurt.....*He said he had a list, but he declined to share it with the committee.....*We asked why; he didn't give us a reason why. He did not feel that he could share those specific reasons. Battalion Chief Ryan Young [BC Young], who is the other representative from the Honolulu Fire Department on the safety committee, he provided his evaluation, because he had gone down to review the RIT class. And he had a number of recommendations. But -- and he shared them with us. *And again we asked Mr. Reppuhn to share his, but he declined to. His only basic statement was that 'We need to stop this training' and 'You need to consult.'* And I can't recall anything else. (Italics added.)"⁸⁹

(o) After attending the March 15 Safety Committee meeting, Captain Reppuhn sent a brief summary of the safety issues he observed on March 11 regarding the RIT Program and what happened at the Safety Committee meeting to HFFA (Mr. Lee). He also advised Mr. Lee that (1) AC Lawton scheduled a "complete walk through of the RIT training program" on March 28 and (2) "Irene has the HIOSH portion going as well, let me know if you need any other

⁸⁸ Captain Reppuhn testified that HFD, when faced with suggestions to improve safety in the implementation of the RIT Program, did consider and adopt these suggestions. Captain Reppuhn specifically testified as to BC Young's efforts to review the safety aspects of the RIT Program and the adoption of BC Young's recommendations. TR. P. 456, L. 3-TR. P. 457, L. 3 (BC Young helped to improve the RIT Program). Thus, this is not a situation where the employer (HFD) was intractable and would not consider recommendations regarding improvement of a training program (in this case, the RIT Program).

⁸⁹ TR. P. 188, L. 22-P. 189, L. 19.

info."⁹⁰ Captain Reppuhn also advised that he attended the March 15, 2016 Safety Committee and that BC Young had addressed certain safety related issues raised by HFFA. Captain Reppuhn refused to discuss the list of safety issues he gave to Mr. Lee with the Safety Committee. Instead, HFFA, after rebuffing HFD's invitations to join the RIT Program working group, was now seeking to engage HFD in discussions *after* HFFA did not participate in the development of the protocols to implement the RIT Program, but refused to provide the Safety Committee with Captain Reppuhn's list of safety issues at the March 11 meeting.

(p) Subsequently, rather than engaging in meaningful dialog or discussions with HFD, on March 21, 2016, HFFA submitted a complaint to the Hawaii Occupational Safety and Health Division, Department of Labor and Industrial Relations (HIOSH) regarding alleged violations of HRS Chapter 396, and subsequently, requested that HIOSH recommend that the RIT Program be voluntary rather than mandatory. In effect, HFFA sought the "assistance" of HIOSH to "force" HFD to make the RIT Program voluntary rather than mandatory.

(q) On March 22, 2016, HFD (Mr. Lee) wrote to HFD (Chief Neves) and demanded that HFD cease and desist from implementing the mandatory RIT training.⁹¹ Mr. Lee suggested that HFD implement the RIT training as a voluntary program for those fire fighters who want specialized training, and postpone the "mandatory" aspect of the RIT Program until HFFA and HFD could *negotiate* the details of this new training program.⁹² This is the first

⁹⁰ Exhibit J-22. "Irene" is Irene Pu'uohau, HFFA employee.

⁹¹ Exhibit J-24.

⁹² *Id.* The Board notes that the FGS Program (which proceeded) was also a mandatory training program without a "pass" requirement -- it was participatory only. HFFA, when addressing the FGS Program, requested consultation only, did not demand negotiations and allowed HFD to proceed after receiving responses to HFFA's inquiries regarding issues which were similar to HFFA's initial inquiries to HFD regarding the RIT Program.

indication that HFFA treated the adoption and implementation of RIT training as a subject of mandatory bargaining.

(r) After submitting its March 21, 2016 complaint to HIOSH (HIOSH Complaint)⁹³ claiming that the RIT Program violated pertinent provisions of HRS Chapter 396, on March 24, 2016 Mr. Lee wrote to Mr. Clayton Chun (HIOSH) about HFFA's "concerns regarding the health and safety of fire fighters" and requested HIOSH issue "an immediate recommendation to HFD to make the RIT training 'voluntary.'"⁹⁴ The following, among other things, then occurred:

(1) On March 28, 2016, HIOSH wrote to Chief Neves regarding the HIOSH Complaint and asked HFD to assist HIOSH in conducting an investigation of HFFA's allegations. Specifically, HIOSH asked HFD to investigate and report on the worker safety conditions of HFD's Charles H. Thurston Fire Training Center where the RIT training would be conducted.⁹⁵

(2) On April 4, 2016, HFD responded to the HIOSH Complaint, denying the allegations therein and responding the specific concerns raised by HFFA.⁹⁶ On April 7, 2016, HFD transmitted to HFFA a copy of the HIOSH Complaint and HFD's response to HIOSH's March 28, 2016 request for information.⁹⁷ By letter dated April 13, 2016⁹⁸, HFD (Chief

⁹³ Exhibit J-23. The HIOSH Complaint is identified as Complaint No. 1075186.

⁹⁴ Exhibit J-27, at page 1.

⁹⁵ Exhibit J-28.

⁹⁶ Exhibit J-30.

⁹⁷ Exhibit J-31.

⁹⁸ Exhibit J-33.

Neves) responded to HFFA's (Captain Reppuhn) March 23, 2016 letter⁹⁹ regarding the RIT Program. In his April 13 letter, Chief Neves advised that:

"It is my understanding that Battalion Chief Ryan Young of our Occupational Safety and Health Office conducted a safety review of the class and recommended several changes to enhance participant safety. We realize that the RIT training program is labor intensive and physically/mentally challenging; however, the premise behind it is undeniable. Safety is our priority and one we take seriously. If necessary, we will continue to make adjustments to the RIT training program. *However, please understand that it would be counterproductive to eliminate every aspect of physical effort requirements and potential hazards during the simulation of this training, as it can result in a false sense of security.* (Italics added.)"¹⁰⁰

(3) Captain Reppuhn testified that the changes recommended by Battalion Chief Young were good changes and improved the RIT Program.¹⁰¹ Mr. Lee testified that he also believed Battalion Chief Young's involvement was good and he promoted good

⁹⁹ Exhibit J-26. In his letter, Captain Reppuhn represented that he was a member of the Safety Committee, and included a listing of his "findings" regarding the RIT Program. TR. P. 123, L. 24-TR. P. 126, L. 3. After assigning AC Lawton and BC Young to follow up regarding Captain Reppuhn's allegations of "dangerous functions, occurrences," Chief Neves received "a verbal report that they tried to extract the specifics on the safety issues from this individual [Captain Reppuhn], and they were unable to." TR. P. 126, L. 15-TR. P. 127, L. 5; *see, also*, TR. P. 216, L. 13-17.

¹⁰⁰ Exhibit J-33. The Board notes that the RIT Program was conducted in controlled circumstances without an actual fire. Thus, fire fighters, like the fire fighter who fainted during training could be attended to in a safe and controlled manner. If the RIT Program was not implemented, how would the fire fighters receive appropriate rapid intervention team training? This is not the type of training that should be done "one the job."

In addition, AC Lawton also testified that BC Young was asked to "continually check to ensure that the required or requested changes to the RIT program or props are addressed (as addressed in Chief Neves' April 13, 2016 letter, Exhibit J-33) to Captain Reppuhn. All HFD personnel, including BC Young, have the authority to "stop any safety issues that are immediately dangerous to the life and health or safety of our personnel." TR. P. 225, L. 4-19.

¹⁰¹ TR. P. 456, L. 3-TR. P. 457, L. 3.

discussions regarding the RIT Program.¹⁰² The Board also notes that training to respond to an emergency situation is potentially dangerous, but it must be to prepare fire fighters to conduct their jobs which are infinitely more dangerous and filled with unknowns.

(4) On April 20, 2016, HIOSH wrote to HFD stating that HIOSH found HFD's response to the HIOSH Complaint to be "satisfactory" and closed the HIOSH Complaint.¹⁰³ HFFA did not seek a redetermination by the Director of the Department of Labor and Industrial Relations pursuant to Hawaii Administrative Rules (HAR) § 12-51-12.

(s) During the pendency of the HIOSH Complaint, on March 28, 2016, HFD held a walk-through with the HFD Safety Committee at the Thurston Fire Training Center located at 890 Valkenburgh Street. Representatives of HFFA were present, including Captain Reppuhn (HFFA's representative to the Safety Committee) and Ms. Irene Pu'uohau (HFFA's Labor Relations Specialist).¹⁰⁴ The walk-through addressed the issues brought up by Captain Reppuhn and "provided an opportunity for an interaction between the instructions, and the questions from the safety committee as well at the other people who attended this walk-through, to provide them information on every aspect of the [RIT Program] training."¹⁰⁵

After the walk-through, a meeting was held among the walk-through participants, and HFFA (primarily Mr. Lee) "declined to share it [identification of safety issues].

¹⁰² TR. P. 746, L. 2-10.

¹⁰³ Exhibit J-34.

¹⁰⁴ TR. P. 197, L. 14-P. 198, L. 2.

¹⁰⁵ TR. P. 193, L. 6-15. AC Lawton also testified that Captain Conklin was the lead instructor and he would have specific knowledge of the props and facilities used in the RIT Program. TR. P. 194, L. 6-10.

The discussion was mainly on that that [sic] the fire department did not consult, that this is a -- some type of specialized training that the rescue company should be doing."¹⁰⁶ AC Lawton testified that the RIT Program was not specialized training but "is standard training. It's a standard tactic that is employed for all building fires. We normally assign a RIT team. And this training actually provides the training so our personnel can be more effective and efficient and safe in carrying out the assignment."¹⁰⁷

Since there was no listing of specific safety concerns provided by Captain Reppuhn and/or HFFA, BC Young provided "his recommendations to the fire chief in a document, and he sent that up. And that was meant to address -- have the training bureau address those safety concerns."¹⁰⁸ BC Young's recommendations were implemented.¹⁰⁹

(t) There was no evidence showing that the RIT Program resulted in serious injuries to the participating fire fighters or that the training facilities and procedures violated HRS Chapter 396. First, no action was taken on the HIOSH Complaint and HFFA did not seek a redetermination of HIOSH's decision. Second, safety related changes were made by HFD based on Battalion Chief Young's recommendations. Third, the only reported incidents during the implementation of the RIT Program were (1) a fire fighter fainting (possibly because of a pre-existing irregular heartbeat)¹¹⁰, (2) fire fighters who had to be rescued because they had

¹⁰⁶ TR. P. 204, L. 23-TR. P. 205, L. 10. AC Lawton also testified that HFFA did not provide "any specific safety issues." *Id.*

¹⁰⁷ TR. P. 206, L. 24-TR. P. 207, L. 4.

¹⁰⁸ TR. P. 212, L. 21-TR. P. 213, L. 1.

¹⁰⁹ TR. P. 214, L. 25-TR. P. 215, L. 3.

¹¹⁰ TR. P. 678, L. 3-24.

panicked (the firefighters eventually indicated they wanted to redo the training)¹¹¹, (3) strains and bruises and (4) one company having to take a day off after training.¹¹² There was no reports of serious injury or death or similar complaints from the trainees.

(u) While over-exertion was the primary HFFA complaint,¹¹³ it is clear to the Board that responding in an actual emergency will result in maximum exertion which highlights the necessity of proper training. The Board agrees that training in a "controlled" situation is much safer than "on the job" training. Moreover, how can a fire fighter prepare for over exertion in an emergency situation? The Board agrees with HFD's answer: Proper training. As Captain Reppuhn testified: "I would imagine exercise, eating healthy, *train* -- you know, controlled exercise."¹¹⁴

(6) Board's Factual Conclusions.

Based on the foregoing, the Board finds that:

(a) The RIT Program is not specialized training, but instead is standard training for OPS personnel. The RIT Program is subject to the consultation requirement, and not the negotiation or mutual consent requirement. First, the CBA provides in CBA Section 48.B that HFD may require training as long as the fire fighters are compensated for working their days off. There is no requirement for mutual consent or negotiation. Second, and more important, HFFA

¹¹¹ TR. P. 678, L. 25-TR. P. 680, L. 6.

¹¹² See, Chief Neves' testimony at TR. P. 164, L. 4-P. 165, L. 2.

¹¹³ Exhibit J-22.

¹¹⁴ TR. P. 457, L. 18-20. In fact, Captain Reppuhn thought that "RIT training is an *excellent idea* and that is actually a real -- a real situation on the fireground that we need to be able to handle." TR. P. 457, L. 11-18.

treated the RIT Program as a subject of consultation and not negotiation. Finally, and most importantly, HFFA failed in its burden of showing, factually and legally, that the RIT Program was subject to the negotiation requirement.

(b) On January 7, 2016, HFD invited HFFA "to form a working group for the [RIT Program]."¹¹⁵ As outlined above, HFFA did not accept HFD's invitation to discuss the RIT Program at its inception. Subsequently, HFD did, in fact, request consultation in its January 27, 2016 letter to HFFA.¹¹⁶ However, rather than engaging in consultation over the implementation of the RIT Program, HFFA changed tactics and requested consultation on the issue of working groups.¹¹⁷ Thus, although HFD attempted to engage HFFA in discussions over the RIT Program in January 2016, HFFA did not consult and engaged in efforts to stop implementation of the RIT Program.¹¹⁸

Moreover, the Board finds that HFD's repeated efforts to have HFFA participate in the RIT Program working group, even though not called "consultation," amounted to a request to engage in meaningful discussions or dialog regarding implementation of the RIT Program. In substance, if not form, HFD asked HFFA to be involved in the formulation of the procedures and protocols for the implementation of the RIT Program. For reasons not clear to the Board, HFFA refused to participate. Therefore, in substance, HFD did, in good faith, initiate

¹¹⁵ Exhibit J-12.

¹¹⁶ Exhibit J-16.

¹¹⁷ Exhibit J-18.

¹¹⁸ HFFA also refused to provide HFD with specific safety concerns as evidenced by Reppuhn's refusal to provide a listing of concern at the March 15, 2016 Safety Committee meeting. Mr. Lee then refused to provide a listing of safety concerns at the March 28, 2016 walk-through.

the consultation process. HFFA, by engaging in efforts to question the legitimacy of the working group concept, was undermining the very purpose of the consultation requirement -- to have the parties meaningfully discuss issues to avoid disputes. For the Board to rule otherwise and to accept the position taken by HFFA (i.e., the use of a working group did not amount to consultation) would undermine the utility of the consultation process by "elevating form over substance,"¹¹⁹ and the Board refuses to do so.

(c) HFD did not violate its obligation to consult with HFFA. Consultation does not require the agreement of the parties. As stated by the Board in *In the matter of HGEA, AFSCME, Local 152, AFL-CIO, Complainant, and Linda Lingle, et al., Respondents*, Decision 468 (June 13, 2007) at p. 9 (adopting the position taken in, and quoting from, *Hawaii Nurses Association*, 2 HPERB 218 (1979)):

"Matters of consultation do not require a resolution of differences. 'All that is required is that the employer inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or policy change take place.' Cites omitted."

The Board, then confirmed its adoption of the test articulated in Decision No. 394, *Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO*, VI HLRB 1 (1978). Decision No. 394 requires management to comply with the following factors:

"(1) [N]otice to the union, (2) on 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, advice or input of the Union thereto, (5) listening

¹¹⁹ *City & County of Honolulu v. Ing*, 100 Hawaii 182, 195 (2002); and *Sussel v. Civil Serv. Comm'n*, 74 Haw. 599, 615 (1993).

to, comparing views and deliberating together thereon (i.e., 'meaningful dialog'), and (6) without requirement of either side to concede or agreement on any differences or conflicts arising or resulting from such consultation."

Here, HFD, in fact, complied with the Decision 394 factors because:

(1) HFFA was notified (orally and in writing) in January 2016 that, as part of its new training program, HFD was contemplating the adoption of the RIT Program to better equip OPS personnel to engage in fire fighter rescue. This was early in the process. In addition, HFD proposed the formation and use of the RIT working group to foster discussions over the RIT Program. While the RIT working group was not intended to supplant consultation, it was the start -- it was an opportunity to identify those issues which required either consultation or negotiation and then begin the appropriate process.

Furthermore, on March 11, 2016, when Captain Reppuhn advised AC Lawton that he had serious safety concerns regarding the RIT Program, HFFA did not disclose those concerns to HFD, HFFA did not discuss those concerns with HFD, and was, as of March 15, 2016, already preparing to file the HIOSH complaint. If any party did not engage in consultation, it would have been HFFA.

(2) While not subject to the negotiation requirement, the RIT Program involved proposed training which was "major, substantial and critical" to the safety of OPS personnel.

(3) Since the RIT Program was in its infancy, HFD provided as much material as it could to HFFA. In addition, HFFA and its members were well aware of the RIT Program because of the initiation of the "train-the-trainer" program initiated and completed

in October or December 2015.¹²⁰ Thus, in its response to various inquiries from HFFA and by initiating the "train-the-trainer" program, HFD provided HFFA with available information with reasonable detail and completeness.

(4) By proposing the RIT working group, HFD was "requesting the opinion, advice or input of" HFFA. Again, in substance, HFD was inviting HFFA to participate meaningfully in the process of finalizing the implementation of the RIT Program.

(5) There was no "meaningful dialog" because HFFA, rather than engaging in discussions, sought to delay or otherwise prevent the initiation of discussions.

(6) Finally, HFD never stated that the RIT working group required that either side needed to agree. HFD understood that consultation meant exactly that, i.e., seeking the input from HFFA on a crucially important safety program.

Based on the foregoing, the Board finds that HFD fulfilled its obligation to consult with HFFA over the RIT Program implementation.¹²¹

¹²⁰ HFFA alleges that HFD was not, in fact, interested in consultation because there was a lack of "reasonable detail" and the necessity of HFD to have more than a "work in progress" when initiating a consultation. HFFA Brief at p. 24. Neither argument gets HFFA very far. In effect, the train-the-trainer sessions provided HFFA with sufficient detail regarding the contents of the RIT Program (i.e., what could be expected in actual training). What was to be discussed was the implementation of the training. HFFA, rather than seeking to engage HFD in meaningful discussions, engaged in efforts to discuss details of what a working group would be and gathering more information regarding the implementation protocols -- the very thing that HFD wanted to discuss in the working group. In essence, the duty of consultation requires both parties to collaborate. Here, HFD sought to collaborate with HFFA, but was met with resistance.

¹²¹ HFFA alleged that HFD attempted, "by its March 1, 2016, Special Notice, SN-16-044, and subsequent conduct, to trivialize, marginalize, or otherwise deprive [HFFA] of any involvement, through the consultation process, under Section 89-9(c), HRS and Section 1 of the BU 11 Agreement." HFFA Brief at p. 19. As discussed above, HFD provided HFFA with ample opportunity to have meaningful dialog regarding the RIT Program. In response, HFFA embarked on an effort to make the "working group" concept a subject for consultation rather than taking a "seat at the table" and working out the details of the RIT Program. In short, HFFA failed to prove that HFD attempted to "trivialize, marginalize, or otherwise deprive [HFFA] of any involvement."

(d) HFFA failed to provide any factual basis for a finding that HFD

violated the CBA. Other than point to Mr. Lee's testimony that there may be:

"potential violations of Section 1. Recognition, consult, negotiate; Section 4. Management Rights, Respondents abuse their management rights; Section 6. Prior Rights, Benefits and Perquisites, because according to the Special Notice, the training can impact where you are assigned; Section 12. Promotions, because failing to attend or participate in the full two days of the training could impact a promotion, or future promotional opportunity; Section 14. Duties, because the RIT training changes the duties of a firefighter; Section 20. Hours of Work, because Respondents are compelling employees to come in or work on their scheduled days off; Section 21. Overtime, clearly may be impacted; Section 30. Meals, because the Special Notice requires employees to bring in their own lunch; when it should be provided by the Employer; Section 39. Safety and Health, because of the misinterpretation by Scott Lawton; Section 43. Equipment, could be impacted based on the employees being provided the proper safety equipment during the RIT training; Section 14. Employer Required Training, because Respondents are misinterpreting what an employer-required training is. (Italics added.)"

There are no facts to support a showing that there was an *actual* violation of the CBA by HFD. Further, as addressed above in detail, although the RIT Program was mandatory, it was not "pass/fail" (as was the Maui training) and was participatory only. The RIT Program was part of OPS personnel regular training and was not a new minimum requirement. Finally, all of the issues raised by Mr. Lee could have been discussed in detail in the working group suggested by HFD in January 7, 2016. Thus, the Board finds that there is simply no violation of the CBA.

(e) There are no facts showing that HFD acted wilfully, which is a required element to prove a prohibited practice pursuant to HRS Chapter 89.¹²² Although there was much evidence regarding the circumstances surrounding the implementation of the RIT Program, there was no evidence to show that HFD consciously, knowingly, and deliberately intended to violate the provisions of HRS Chapter 89 or the CBA. In fact, the whole intent of adopting and implementing the RIT Program was to adequately train OPS personnel in rapid intervention team techniques, procedures and equipment to save lives and prevent serious injuries -- to help HFFA's members when they become trapped or disoriented while fighting a fire. This was prompted by, among other things, Chief Neves losing a fire fighter, national efforts to improve fire fighter safety, the implementation of rapid intervention team training by Maui and Hawaii Counties (without, apparently, objection by HFFA) and the Hawaii based Federal Fire Fighters and the need to train fire fighters in an operation required by HFD Policy -- rapid intervention teams. In other words, OPS personnel need to be properly and continuously trained because worker safety in an inherently dangerous profession is a constant concern. Thus, to make its rapid intervention teams effective in emergency situations was HFD's motivation for training all OPS personnel and HFD's motivation to adopt and implement the RIT Program, and HFFA provided no evidence to the contrary.¹²³

¹²² The Board notes, without deciding, that HFFA, if it had put the same amount of time and effort into the RIT working group as it has in pursuing this prohibited practice case (especially in light of HFFA's recognition that consultation, rather than negotiation, applied), the implementation of the RIT Program would have been smoother and more timely with the benefit of the input of the HFFA. If HFFA had worked collaboratively with HFD, there would have a tremendous savings of potentially wasted time, effort and money.

¹²³ HFFA argues that HFD failed to provide information regarding the RIT Program, and that Chief Neves showed his "contempt for HFFA/IAFF in this dispute." HFFA Brief at pp. 27-29. However, as discussed in detail herein, HFD offered to work with HFFA in developing the protocols for the implementation of the RIT program in January 2016. It was only after about two months of delay (HFD was concerned about, among other things, the

(f) With respect to HFFA's request for injunctive relief, the Board finds that:

(1) The Board, based on the foregoing, finds and holds that HFFA does not prevail on the merits. Thus, since HFFA cannot prevail on the merits, it is not entitled to injunctive relief, whether preliminary or permanent.

(2) Further, there has been no showing of irreparable harm. There are no worker safety issues extant with respect to the HFD's Charles H. Thurston Fire Training Center where the RIT training is conducted. There is no showing that the OPS personnel, who must meet certain minimum fitness and training requirements separate and apart from the RIT Program, would be subject to any unreasonable risk of harm.

(3) Finally, it is clear that the public interest overwhelmingly tips in favor of HFD. The purpose of the RIT Program is to train HFD's OPS personnel (the personnel actually fighting fires and who are the most at risk) in rescue techniques and preparation to rescue their fellow fire fighters. The purpose of the RIT Program is not to set different or additional minimum qualifications but to prepare HFD's personnel to save fire fighters who get into trouble, i.e., to prevent or minimize the risk of line-of-duty deaths and serious injuries.

HFFA was given the opportunity to comment upon and actually be involved in developing protocols for the implementation of the RIT Program through the RIT working group. HFFA failed to cooperate and collaborate with HFD. It cannot now be heard to complain.

lapsing of funding) and questions regarding working groups that HFD decided that it would proceed. HFD responded to all of the HFFA information requests. HFD provided whatever materials it could regarding the implementation of the RIT Program after inviting HFFA to be involved in the process. Thus, there was no failure to provide information.

B. Conclusions of Law. Based on the foregoing findings, the Board adopts the following conclusions of law:

(1) Jurisdiction.

The Board has jurisdiction over the claims asserted in the HFFA Complaint.

(2) Burden of Proof

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."

HAR § 12-42-8(g)(16) 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."

Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990). The Board further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

(3) Relevant Statutory Provisions

HRS § 89-3 states:

"§89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4."

HRS § 89-13(a) states in relevant part:

"§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

- (7) Refuse or fail to comply with any provision of this chapter;
[or]
- (8) Violate the terms of a collective bargaining agreement[.]"

HRS § 89-9 states in pertinent part:

"§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms

and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining

negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement."

HRS § 89-10(d) provides:

"(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d)."

(4) Injunctive Relief.

(a) HFFA requested, as part of its relief, "that an order issue from the Hawaii Labor Relations Board prohibiting Respondents from engaging in any conduct that interferes, restrains, or coerces BU 11 employees in the exercise of any right guaranteed under Chapter 89, HRS." In effect, HFFA requested that the Board grant a permanent injunction. In addition, in the HFFA Motion, the Board was requested to issue a preliminary injunction prohibiting HFD from implementing the RIT program.

(b) In addressing the requests for a preliminary and permanent injunctive relief, the Board notes that "the granting or denying of injunctive relief rests with the sound discretion of the trial court and the trial court's decision will be sustained absent a showing of a manifest abuse of discretion. (Cites omitted.) Abuse of discretion may be found where the trial court lacked jurisdiction to grant the relief (cites omitted) or where the trial court based its decision on an unsound proposition of law (cites omitted)." *Hawaii Pub. Employment Relations Board v. United Pub. Workers. Local 646*, 66 Haw. 461, 467 (1983).

(c) The standard for a preliminary injunction is as follows:

"The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issues of a temporary injunction; and (3) whether the public interest supports granting an injunction.' (Cites omitted.) '[T]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits.' (Cite omitted.)"¹²⁴

(d) The standard for a permanent injunction is as follows:

"The appropriate test in this jurisdiction for determination whether a permanent injunction is proper is: (1) the plaintiff has prevailed on the merits of the claim; (2) the balance of irreparable damage favors the issuance of a permanent injunction and (3) the public interest supports granting such an injunction. (Cites omitted.)"¹²⁵

(5) Here, the Board, based on the factual findings and legal authorities outlined above, concludes as follows:

(a) The adoption and implementation of the RIT Program, and the mandatory training required to implement the RIT Program, are not topics subject to mandatory bargaining. This is because:

(1) The CBA does not require negotiation over employer required training so long as overtime is paid when training occurs on employees' days off. HFFA could not identify any CBA provision which required negotiations over required training.

¹²⁴ *Nuuanu Valley Ass'n v. City and County of Honolulu*, 119 Hawaii 90, 106 (2008).

¹²⁵ *Pofolk Aviation Haw., Inc. v. DOT*, 134 Hawaii 255, 339 P. 3d 1056, 1062-1063 (App. 2014).

(2) Pursuant to HRS § 89-9(d), by requiring OPS personnel to attend required training sessions (with the payment of overtime), HFD was exercising its management rights. HFD retained the right to direct its employees,¹²⁶ maintain efficiency and productivity,¹²⁷ and determine the means, methods and personnel by which its operations were to be conducted.¹²⁸ Clearly, the adoption of the RIT Program and its implementation through the mandatory RIT Program training for OPS personnel was the exercise of a management right (i.e., directing HFD's OPS personnel to attend training, maintaining the efficiency of its personnel in rescue operation and determining how rescue operations were to be conducted and how its personnel were to be trained in rescue techniques).¹²⁹

(b) The adoption and implementation of the RIT Program was, however, subject to the "consultation" requirement.¹³⁰ As outlined in detail above, HFD did not violate its obligation to consult with HFFA. In fact, the Board found that HFD attempted, early on, to engage (through, for example, the proposed RIT working group) HFFA in meaningful dialog

¹²⁶ HRS § 89-9(d)(1).

¹²⁷ HRS § 89-9(d)(6).

¹²⁸ HRS § 89-9(d)(7).

¹²⁹ "Under Hanneman, the scope of topics subject to negotiation 'cannot infringe upon an employer's management rights [under § 89-9(d)].' (Cites omitted.)" Rodrigues v. Cnty. of Kaua'i, 135 Hawaii 456, 466 (2015). In this case, the right to determine the training its employees must undergo is a management right in the context of this case even though the same may have an impact on hours. Clearly, there is no balancing test used in determining whether a topic is subject to mandatory bargaining, and in this case, the CBA unambiguously provides for employer required training subject to the obligation to pay overtime for training occurring on days off. Thus, there is no doubt that the adoption and implementation of the RIT Program by HFD was the exercise of its management rights.

¹³⁰ See, CBA § 1.B.

or discussions regarding the RIT Program. However, HFFA was not willing to participate, listen and have meaningful dialog with HFD over the RIT Program.

(c) Based on the foregoing, the Board concludes that HFD, in implementing the RIT Program did not violate its obligations under the CBA or HRS Chapter 89. There was simply no showing of any violation by HFD.

(d) Further, there was no showing the HFD acted wilfully. In *Aio v. Hamada*, 66 Haw. 401, 409 (1966), where the Hawaii Supreme Court stated:

"Turning to appellant's assertion that HPERB incorrectly interpreted 'wilfully' as it is employed in Section 89-13(b), we observe at the outset that the related legislative history is devoid of any reference thereto. HPERB thus logically sought aid from a dictionary, and relying on the discussion of the pertinent term in *Black's Law Dictionary*, ruled 'that to make out a prohibited practice under Subsection 89-13(b), HRS, conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven. We have no reason to reject the construction."

Here, there is no showing that HFD had a "conscious, knowing and deliberate intent to violate the provisions of Chapter 89, HRS." *Id.* Even if the Board were to hold that HFD violated its obligation to consult, HFFA proffered no evidence to show that HFD acted wilfully. Without more, HFFA failed to prove that HFD wilfully committed a prohibited practice.

(e) Finally, HFFA failed to meet the requirements for injunctive relief. First, it is clear that HFFA did not prevail on the merits.¹³¹ Second, there was no showing of irreparable harm.¹³² Finally, clearly the public interest does not support the granting of injunctive

¹³¹ See, *Pofolk Aviation Haw., Inc. v. DOT*, *supra*, 339 P. 3d at 1062-1063 (App. 2014).

¹³² *Id.*

relief. When weighed against the need to train and protect its fire fighters, HFFA's concerns are overwhelmingly outweighed. Thus, both the HFFA Motion and HFFA's prayer for permanent injunctive relief are denied.

(5) Based on the foregoing, the Board finds and concludes that HFD did not commit a prohibited practice, and HFFA is not entitled to any relief, including the injunctive relief requested.

IV. DECISION AND ORDER.

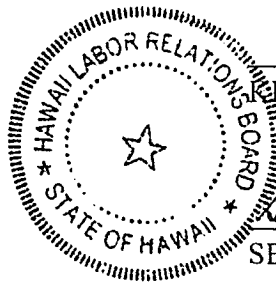
Based on the foregoing findings of fact and conclusions of law, the Board holds and orders that:

- A. The Board has jurisdiction over the subject matter of this case.
- B. The HFFA Motion is hereby denied.
- C. Respondents did not wilfully commit a prohibited practice. Therefore, the HFFA Complaint is hereby dismissed in its entirety.
- D. With respect to the ongoing RIT Program, the parties shall implement the RIT working group to discuss any issues arising with regard to the RIT Program (i.e., engage in meet and confer). Any future unresolved dispute regarding the RIT Program shall be submitted to the grievance process outlined in the CBA.
- E. This Decision and Order shall be posted by HFD and HFFA for publication in all locations where Bargaining Union 11 employees may review and gather for sixty (60) days with proof of compliance being made to the Board.

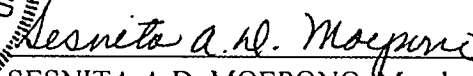
HFFA v. KIRK CALDWELL, Mayor, City and County of Honolulu, et al.
CASE NO. CE-11-879
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
DECISION NO. 482

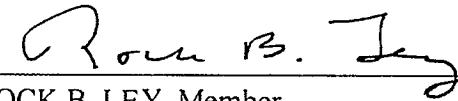
DATED: Honolulu, Hawaii, June 21, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

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