STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO, Complainant, and DIANA M. NILES-HANSEN, Assistant Superintendent, Department of Education, State of Hawaii; and ANNETTE ANDERSON, Negotiations Administrator, Department of Education, State of Hawaii, Respondents.	CASE NOS. CE-01-762a CE-10-762b ORDER NO. 2738 ORDER DISMISSING PROHIBITED PRACTICE COMPLAINT

ORDER DISMISSING PROHIBITED PRACTICE COMPLAINT

On July 1, 2010, Complainant UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Complainant) filed a prohibited practice complaint (Complaint) against Respondents DIANA M. NILES-HANSEN, Assistant Superintendent, Department of Education, State of Hawaii (Niles-Hansen or Assistant Superintendent), and ANNETTE ANDERSON, Negotiations Administrator, Department of Education, State of Hawaii (Anderson or Negotiations Administrator), collectively "Respondents."

The Complaint alleges, inter alia, that Respondent Niles-Hansen submitted to the UPW for review and comment a proposal for procedures to be followed in the event of future reductions in force in the Department of Education (DOE or Department) which would be applicable to all civil service employees of the DOE; that the UPW requested Respondent Niles-Hansen to negotiate over the reduction in force policies and procedures, submitted a counter-proposal, and requested information in connection with negotiations; that Respondent Anderson declined to negotiate, questioned the need for information, indicated the DOE was undergoing a review of budget reductions and potential impact upon personnel, and asked the UPW to indicate how the proposed procedures would modify and change the Bargaining Unit (Unit) 1 and 10 collective bargaining agreements (Agreements); that Respondents failed to provide information to the UPW; and that the Board of Education (BOE) decided to proceed with the elimination of approximately 400 jobs (or positions) some of which are in Unit 1 and/or 10, and unilaterally implemented the proposed reduction in force procedures without bargaining in good faith with the UPW.

The Complaint alleges that Respondents unlawfully interfered with, restrained, and coerced employees in the exercise of employee rights in violation of Hawaii Revised Statutes (HRS) §§ 89-3, 89-9(a), and 89-13(a)(1); breached its duty to bargain in good faith in violation of HRS §§ 89-9(a) and 89-13(a)(5); refused to comply with the provisions of chapter 89 in violation of HRS § 89-13(a)(7); and violated the Unit 1 and Unit 10 Agreements contrary to HRS § 89-13(a)(8).

On August 10, 2010, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed on July 1, 2010, or in the Alternative for Summary Judgment (Motion to Dismiss), arguing that the Complaint fails to state a claim because the DOE had no intention of changing any previously negotiated reduction in force procedures for any union or bargaining unit, and that the failure to provide for "bumping" rights outside of the DOE was due to the sunset of Act 221, Session Laws of Hawaii, 2005, which gave civil service employees within the DOE continued reduction in force benefits as if they were still executive branch civil servants.

On August 17, 2010, the UPW filed a Memorandum in Opposition to Respondents' Motion to Dismiss Complaint or in the Alternative for Summary Judgment, arguing that Respondents' contention that the reduction in force procedures make no changes to the existing terms and conditions of employment is untrue and incorrect; that Respondents failed to meet their burden of establishing the Complaint fails to state a claim for relief; that there are numerous genuine issues of material fact in dispute which preclude summary judgment; and that Respondents have not established in their motion and supporting memoranda that there are entitled to summary judgment.

The Board heard oral argument on Respondents' Motion to Dismiss on August 18, 2010, at 9:00 a.m. in the Board's hearing room.

After careful consideration of the record and arguments presented, the Board makes the following findings of fact, conclusions of law, and order dismissing the Complaint.

FINDINGS OF FACT

1. For purposes of this Order and for consideration of the Motion to Dismiss, the Board accepts the following factual allegations in the Complaint as true:

   a. The UPW is at all relevant times herein an employee organization within the meaning of HRS § 89-2.[1]

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[1]HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary

b. Respondent Niles-Hansen is an assistant superintendent of the DOE and as an individual who represents the BOE and the Superintendent of Education, is an employer within the meaning of HRS § 89-2.[2]

c. Respondent Anderson is the negotiations administrator of the DOE and as an individual who represents the BOE and the Superintendent of Education, is an employer within the meaning of HRS § 89-2.

d. The UPW is the duly certified exclusive bargaining representative of blue collar non-supervisory employees of the State of Hawaii and the Counties in Bargaining Unit 1.

e. The UPW is the duly certified exclusive bargaining representative of institutional, health, and correctional workers in Bargaining Unit 10.

f. There are approximately 2,355 Bargaining Unit 1 employees and 25 Bargaining Unit 10 employees in the DOE, who have historically and customarily been part of the merit system pursuant to Article XVI, Section 1, of the Hawaii State Constitution and chapter 76, HRS.

g. The terms and provisions of the Unit 1 and Unit 10 Agreements are substantially the same in certain provisions, including those relating to union recognition (section 1), discipline for just cause only (section 11), layoffs (section 12), recall from layoffs (section 13), prior rights (section 14), seniority (section 16), compensation adjustments (section 23A), leaves of absence to delay a reduction in

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purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[2]HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

force (section 38), and adequate staffing essential to public health and safety (section 64).

h. On or about May 19, 2010,[3] Respondent Niles-Hansen submitted to the UPW for review and comment (by June 19, 2010) a proposal for procedures to be followed in the event of future reductions in force in the DOE which would be applicable to all civil service employees of the DOE.

i. Section 76-1(4), HRS, requires the DOE to establish and maintain a separately administered civil service system based on the merit principle which includes as part of a basic policy reasonable job security for competent employees and to discharge unnecessary or inefficient employees.

j. Section 89-9(d), HRS, provides in relevant part, that an employer and the exclusive representative shall not agree to any proposal that would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to Section 76-1, HRS.

k. Upon review of the proposed procedures submitted by Respondent Niles-Hansen, the UPW on May 26, 2010, requested Respondent to negotiate over the reduction in force policies and procedures, submitted a counter-proposal to protect the rights of civil service employees in Units 1 and 10, and requested information needed in connection with negotiations consisting of four items to be submitted by June 18, 2010.

l. On June 10, 2010, Respondent Anderson declined to negotiate over the proposed procedures submitted on May 26, 2010, questioned the need for information, indicated that the DOE was undergoing a review of budget reductions and potential impact upon personnel, and asked the UPW to indicate how the proposed procedures would modify and change the Unit 1 and 10 Agreements.

m. On June 21, 2010, the UPW responded to Anderson's request, restated its need for information, and requested and asked for compliance with the duty to bargain in good faith.

n. Respondents failed to provide information to the UPW by June 18, 2010.

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[3]In the Complaint, the alleged date is May 19, 2009; however, based upon Exhibit B attached to Respondents' Motion to Dismiss, it appears the correct date should be May 19, 2010.

o. On or about June 25, 2010, the BOE decided to proceed with the elimination of approximately 400 jobs (or positions) some of which are in Bargaining Unit 1 and/or 10, and implemented the proposed reduction in force procedures without bargaining in good faith with the UPW.

2. Bargaining Unit 1 consists of nonsupervisory employees in blue collar positions.

3. Bargaining Unit 10 consists of institutional, health, and correctional workers.

4. On July 1, 2010, the UPW filed the instant Complaint, alleging that Respondents unlawfully interfered with, restrained, and coerced employees in the exercise of employee rights in violation of HRS §§ 89-3, 89-9(a), and 89-13(a)(1); breached their duty to bargain in good faith in violation of HRS §§ 89-9(a) and 89-13(a)(5); refused to comply with the provisions of chapter 89 in violation of HRS § 89-13(a)(7); and violated the Unit 1 and Unit 10 Agreements contrary to HRS § 89-13(a)(8).

5. On August 10, 2010, Respondents filed their Motion to Dismiss, arguing that the Complaint fails to state a claim because the DOE had no intention of changing any previously negotiated reduction in force procedures for any union or bargaining unit, and that the failure to provide for "bumping" rights outside of the DOE was due to the sunset of Act 221, Session Laws of Hawaii, 2005, which gave civil service employees within the DOE continued reduction in force benefits as if they were still executive branch civil servants.

6. On August 17, 2010, the UPW filed its Memorandum in Opposition to Respondents' Motion to Dismiss Complaint or in the Alternative for Summary Judgment, arguing that Respondents' contention that the reduction in force procedures make no changes to the existing terms and conditions of employment is untrue and incorrect; that Respondents failed to meet their burden of establishing the Complaint fails to state a claim for relief; that there are numerous genuine issues of material fact in dispute which preclude summary judgment; and that Respondents have not established in their motion and supporting memoranda that there are entitled to summary judgment.

7. The Board heard oral argument on Respondents' Motion to Dismiss on August 18, 2010, at 9:00 a.m. in the Board's hearing room.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over prohibited practice complaints pursuant to HRS §§ 89-5 and 89-14.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

3. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 350, at 213 (1990)).

4. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624.

5. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

6. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

7. HRS § 89-3 provides:

> 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, including retiree health benefit contributions, 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.

8. HRS § 89-9(a) provides:

> 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 or a voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement as specified in section 89-10, but the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

9. HRS § 89-13(a) provides in relevant part:

> 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;
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> * * *
>
> (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[.]

10. HRS § 89-2, entitled "Definitions," provides in relevant part:

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

11. However, HRS § 89-6, entitled "Appropriate bargaining units" and which specifically governs negotiations of collective bargaining agreements, provides in relevant part (emphases added):

> (d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:
>
> (1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit[.]

* * *

Any decision to be reached by the applicable employer group shall be on the basis of simple majority, except when a bargaining unit includes county employees from more than one county. In such case, the simple majority shall include at least one county.

(e) In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

12. Thus, while the BOE is an "employer" of public employees as provided in HRS § 89-2 (governing definitions), neither the BOE nor the DOE is named as an "employer" for Unit 1 and Unit 10 by HRS § 89-6[4], which specifically governs negotiations of collective bargaining agreements and supplemental agreements.[5]

13. The Board therefore concludes that the BOE and any individual who represents it or acts in its interest in dealing with public employees would be an "employer" pursuant to HRS § 89-2 for operational purposes; however, for purposes of negotiating a collective bargaining agreement or supplemental agreement, the "employer" is defined by HRS § 89-6. In the present case, dealing with Unit 1 and Unit 10 employees, the employers for purposes of negotiating collective bargaining agreements or supplemental agreements are the governor, the mayors, the chief justice, and the Hawaii health systems corporation board.

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[4]It is possible that the failure to include the BOE as part of the employer group for purposes of negotiations for Unit 1 and Unit 10 pursuant to HRS § 89-6 was an oversight by the Legislature.

[5]The Board notes that HRS § 89-6(d) does define the BOE and the DOE as public employers for purposes of negotiating collective bargaining agreements involving Unit 5 and Unit 6, which generally are teachers and educational officers of the Department of Education, respectively.

14. HRS § 89-6 is the more specific statute over HRS § 89-2, and thus would control in the event of conflict. Richardson v. City and County of Honolulu, 76 Hawai`i 46, 55, 868 P.2d 1193, 1202 (1994).

15. The DOE is therefore not a statutory "employer" for purposes of negotiating a collective bargaining agreement or supplemental agreement for Unit 1 or Unit 10, pursuant to HRS § 89-6. Further, the Complaint does not allege, and the parties have not alleged or argued, that the DOE or the named respondents were delegated authority to negotiate the subject matter of this Complaint by the governor.[6]

16. Accordingly, the Board dismisses the Complaint against the DOE and its named employees with respect to allegations of prohibited practice in violation of HRS § 89-13(a)(5), refusal to bargain collectively in good faith with the exclusive representative.

17. With respect to allegations of prohibited practice in violation of HRS § 89-13(a)(1) (interfere, restrain, or coerce any employee in the exercise of any right guaranteed under chapter 89), the Board concludes that the Complaint does not sufficiently allege a claim of interference, restraint, or coercion of employees in the exercise of rights under chapter 89. The UPW argues in its Memorandum in Opposition to Respondents' Motion to Dismiss Complaint or in the Alternative for Summary Judgment that "when an employer violates its statutory duty to bargain, the refusal to bargain in violation of the law derivatively violates the law by interfering with employees' rights." However, if a prohibited practice pursuant to HRS § 89-13(a)(5) (refuse to bargain collectively in good faith) automatically constitutes a prohibited practice pursuant to § 89-13(a)(1), then the statutory provisions would merely be redundant or superfluous, which is to be avoided (see State v. Cummings, 101 Hawai`i 139, 148 n.4, 63 P.3d 1109, 1114 n.4 (2003)); furthermore, even if the UPW's argument is correct, the Board dismisses the § 89-13(a)(1) claim for the same reasons as the § 89-13(a)(5) claim.

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[6]By way of contrast, the Board notes that HRS § 89-10.55(c) authorizes the local school boards of charter schools – who are not named as employers pursuant to HRS § 89-6 – to negotiate memoranda of agreements or supplemental agreements that only apply to employees of a charter school. There is no similar statutory authority for the BOE or DOE (who are not named as employers pursuant to HRS § 89-6) to negotiate memoranda of agreements or supplemental agreements for Unit 1 or Unit 10; again, it is possible that this was oversight by the Legislature.

18. With respect to the allegation of prohibited practice pursuant to HRS § 89-13(a)(7) (refuse or fail to comply with any provisions of chapter 89), the Board concludes that the Complaint does not sufficiently allege a claim of refusal or failure to comply with any provisions of chapter 89 except as relating to the alleged refusal to bargain in good faith, which the Board addressed above. For those same reasons, and for the reasons articulated in conclusion of law no. 17, the Board dismisses the HRS § 89-13(a)(7) claim.

19. With respect to the allegation of prohibited practice pursuant to HRS § 89-13(a)(8) (violate the terms of a collective bargaining agreement), the Board holds that while the BOE and DOE are not "employers" for purposes of negotiating collective bargaining agreements or supplemental agreements for Unit 1 or Unit 10, the BOE, as well as any individual who represents it or acts in its interest in dealing with public employees, is an "employer" under the definition provided in HRS § 89-2, and thus is an "employer" for operational purposes. The BOE, therefore, is bound by the collective bargaining agreements negotiated by the employer group for Unit 1 and Unit 10. An allegation of breach of the Unit 1 or Unit 10 collective bargaining agreement may be made against the BOE or any individual who represents it or acts in its interest in dealing with public employees.

20. In the present case, the Board dismisses the prohibited practice claims alleged pursuant to HRS §§ 89-13(a)(1), (5), and (7), and thus only the § 89-13(a)(8) (violation of collective bargaining agreement) remains. However, a complainant alleging a prohibited practice based upon breach of contract must first exhaust any grievance procedure in the collective bargaining agreement. Accordingly, the Board dismisses the § 89-13(a)(8) claim as well.

21. The Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment law. Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Based upon federal precedent, the Hawaii Supreme Court has held that it is "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." Id., at 272, 990 P.2d at 1154. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. Id. See, also, HSTA v. Department of Education, 1 HPERB 253, 261 (1972) (Case No. CE-05-41;

Decision No. 22) (the Board has discretion to require the parties to utilize the contractual arbitration procedure); Poe v. Cayetano, 6 HLRB 55, 56 (1999) (Case No. CE-03-283; Decision No. 402) (the complainant must exhaust available contractual remedies prior to bringing a prohibited practice complaint against the employer alleging a violation of the collective bargaining agreement).

22. Pursuant to HRS § 89-10.8, the public employer and exclusive representative shall enter into a written agreement setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement (emphasis added). The legislative purpose of HRS § 89-10.8, as well as the exhaustion doctrine, would be frustrated if the grievance process can be defeated by characterizing claims that fall within the scope of the grievance process as prohibited practices and then addressing them directly to the Board.

ORDER

In summary, the Board holds that the DOE is not a statutory "employer" for purposes of negotiating a collective bargaining agreement or supplemental agreement for Unit 1 or Unit 10, pursuant to HRS § 89-6, and further, the Complaint does not allege, and the parties have not alleged or argued, that the DOE or the named respondents were delegated authority to negotiate the subject matter of this Complaint by the Governor; accordingly, the Board dismisses the claims of prohibited practice pursuant to HRS § 89-13(a)(1), (5), and (7).

The Board further holds that the DOE and BOE are bound by the terms of the collective bargaining agreements negotiated by the employer group for Unit 1 and Unit 10, and that an allegation of breach of those collective bargaining agreements may be made against the BOE or any individual who represents it or acts in its interest in dealing with public employees; however, the grievance process must be exhausted before such a prohibited practice pursuant to HRS § 89-13(a)(8) may be brought before the Board.

For the reasons discussed above, the Board hereby dismisses the Complaint.

UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO v. DIANA M. NILES-HANSEN, et al.
CASE NOS. CE-01-762a; CE-10-762b
ORDER NO. 2738
ORDER DISMISSING PROHIBITED PRACTICE COMPLAINT

DATED: Honolulu, Hawaii, September 23, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

NORMAN K. KATO II, Member

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