STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii, Respondent.	CASE NO. CE-07-461 ORDER NO. 1998 ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT
In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii, Respondent.	CASE NO. CE-07-462
In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii, Respondent.	CASE NO. CE-07-463

ORDER DENYING RESPONDENT'S MOTION TO
DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT

On February 22, 2001, Respondent BOARD OF REGENTS, University of Hawaii, State of Hawaii (BOR) moved to dismiss the above-captioned prohibited practice complaints[1] brought by Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) and consolidated by the Hawaii Labor Relations Board (Board) pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(13).

On February 27, 2001, at the prehearing conference on the consolidated prohibited practice complaints, the Board scheduled oral arguments on Respondent's motion to dismiss and/or for summary judgment on March 6, 2001. The Board, sua sponte, also requested the parties to brief the applicability of Hawaii Revised Statutes (HRS) § 89-12(b)(2) as to whether the proceedings on UHPA's prohibited practice complaints filed during the impasse declared by the Board on October 17, 2000, must be exhausted before UHPA's Unit 07 members may participate in a strike.

The Board considered the BOR's Motion to Dismiss and/or Motion for Summary Judgment and Reply Memorandum Regarding HRS § 89-12(b)(2) filed on March 5, 2001; UHPA's Memorandum in Opposition to Respondent's Motion to Dismiss and Regarding HRS § 89-12(b)(2) filed on March 1, 2001; and gave the parties a full and fair opportunity to be heard on March 6, 2001 before rendering this decision.

BOR's Motion to Dismiss

The BOR contends that UHPA's complaints should be dismissed because the facts lack specificity to support allegations of prohibited practices. As such, the BOR argues that the complaints fail to comply with basic notice pleading requirements as set forth in Perry v. Planning Commission of the County of Hawaii, 62 Haw. 666, 686, 619 P.2d 95, 108 (1980). Therefore, the BOR argues that the complaints fail to provide sufficient and fair notice of prohibited practices based on the duty to consult and to bargain in good faith.

For example in Case No. CE-07-461, UHPA does not provide a complete statement of the facts supporting the complaint, including names, dates, times, and places involved in the acts alleged to be improper, as required on the Board's complaint form. While UHPA alleges that the community colleges are "proposing a major reorganization of the University of Hawaii without bargaining or even making a proposal; and without consultation with UHPA," the BOR correctly points out that there are seven community colleges and, as a management tool, reorganizations are constantly in the making -- both minor and major changes. Without more specific information, the BOR is placed in a position of having to engage in a fishing expedition of sorts.

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[1]A fourth prohibited practice complaint–Case No. CE-07-464–was withdrawn by stipulation of the parties and approved by the Board on March 6, 2001.

UHPA counters that the complaints are sufficient to put the BOR on notice of the charges. Indeed, the BOR filed answers to the prohibited practice complaints on February 22, 2001. Further, UHPA notes that HAR § 12-42-45(b) provides for the filing of a motion for particularization of the complaint, within five days of service, "if the charge is believed by a respondent to be so vague and indefinite that the respondent cannot reasonably be required to frame an answer." Therefore, UHPA argues, BOR's motion as brought, is not only moot, but also is untimely.

In Case No. CE-07-461, UHPA alleges that Respondent violated HRS §§ 89-13(a)(5) and (7) by implementing, planning, or proposing a reorganization of the community colleges without bargaining or consulting with the Union. In Case No. CE-07-462, UHPA alleges that the Respondent violated HRS §§ 89-13(a)(2), (5), and (7) by implementing a new wage schedule and classification for variable faculty at the community colleges without bargaining or consulting with the Union. And, in Case No. CE-07-463, UHPA alleges that the Respondent violated HRS §§ 89-13(a)(2),(5), and (7) by directly negotiating with employees regarding a "merit pay" proposal without bargaining or consulting with the Union.

The Board finds that UHPA's complaints do lack specificity as to the occurrence of violations alleged and as required in the Board's prohibited practice complaint form. However, a motion for particularization is the proper avenue by which to correct these deficiencies insofar as it is the procedure identified in our rules to redress an insufficiently specific complaint. Accordingly, the BOR's motion to dismiss is denied.

Interpretation and Application of HRS § 89-12(b)(2)

HRS § 89-12(b) provides that otherwise qualified employees may strike only after:

> (1) the requirements of section 89-11 relating to resolution of disputes have been complied with in good faith, **(2) the proceedings for the prevention of any prohibited practices have been exhausted**, 3) sixty days has elapsed since the fact-finding board has made public its findings and any recommendation, [and] (4) exclusive representative has given a ten-day notice of intent to strike to the board and to the employer. (Emphasis added.)

Because of the Board's concerns regarding possible unintended impacts resulting from UHPA's filing of the instant prohibited practice complaints, the Board requested that the parties herein brief the question of whether the above-quoted language precludes Unit 07 members from striking until the complaints have been disposed of.

There is no question that the procedures identified in HRS § 89-11 have been satisfied. On October 17, 2000, the Board issued Order No. 1943 declaring an impasse in the negotiations between UHPA, on behalf of the University of Hawaii (UH) faculty in bargaining unit 07, and the BOR, and appointing a mediator to assist the parties based upon the Notice of Impasse and Request for Board Assistance filed by UHPA on October 11, 2000. The issues at impasse encompass 27 proposed topics listed by UHPA ranging from salaries and leaves, to distance learning and multimedia presentations, for inclusion in the collective bargaining agreement.

Both the BOR and UHPA have fulfilled the requirements set forth in HRS § 89-11. In addition, on November 29, 2000 the Board published the Report and Recommendations of the Fact-Finding Panel appointed by the Board pursuant to HRS § 89-11(b)(2). The 60-day cooling-off period required by HRS § 89-11(c) thus began on November 30, 2000, and ended on January 28, 2001.

On January 16, 2001, pursuant to HRS § 89-12(c)(1), the BOR filed a Petition Relating to Strike Occurring or About to Occur Endangering Public Health or Safety with the Board for the designation of essential positions. The Board conducted an investigation pursuant to HRS § 89-12 on January 31, 2001. On March 8, 2001, the Board issued Decision No. 419 approving 160 essential positions stipulated to by the parties, and one essential position on a conditional basis disputed by the parties.

HRS § 89-12(b)(2) permits a lawful strike only after " (2) the proceedings for the prevention of any prohibited practices have been exhausted." Pursuant to the literal language of the statute, a lawful strike by UHPA would appear to be barred until "any" prohibited practice proceedings effecting the parties are "exhausted." The BOR argues that the instant complaints preclude UHPA from conducting a lawful strike; UHPA argues that a lawful strike is not barred by the instant complaints.

This is a case of first impression for the Board. A review of the legislative history of Act 171, SLH 1970 reveals a legislative intent in setting four conditions outlined in HRS § 89-12(b), to provide a means "to protect the public from hasty strikes and to encourage the parties to utilize every available means to resolve the dispute."[2] Standing

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[2]The Senate Committee on Public Employment reported that:

> 2) **Strikes**. Your Committee is aware of the near universal prohibition against strikes by public employees in various jurisdictions throughout the country, but experience has shown that such prohibitions are ineffective in preventing, and at times have been the cause of, strikes. In many instances, strike penalties have been modified or waived in order to bring striking employees back to work, oftentimes fostering disrespect and disregarding of the law. Your Committee is of the opinion, that the right to strike should be granted, provided that certain requirements are complied with to protect the public from hasty strikes and to encourage the parties to

Committee Report (SCR) No. 745-70, Public Employment, on S.B. No. 1696-70, Senate Journal 1970 at 1333.

The parties agree that a literal reading of the phrase "proceedings for the prevention of any prohibited practices have been exhausted" could lead to absurd results. For example, if exhausting the proceedings included an appeal of the Board's decision, a strike could be delayed for a number of years. The Board finds, and the parties agree, that "proceedings" mean an evidentiary hearing before the Board and the issuance of a decision. This is a reasonable interpretation given the statutory scheme for prohibited practice complaints which requires the Board to hold a hearing not later than 40 days from the filing of the complaint.

The question for the Board in interpreting HRS § 89-12(b)(2) is how broadly or narrowly to construe "any prohibited practices." UHPA submits a reading that includes "germane to compliance with the requirements of § 89-11." UHPA contends that without some restriction, the Board invites "abuse of the impasse procedure" either by employees free to file complaints before, during, and after the impasse procedure, or on the eve of a strike, even if the charges have no conceivable connection to the process of collective bargaining or by the employer filing a complaint as a delaying tactic.[3]

> utilize every available means to resolve the disputes. The procedures for the resolution of impasses, the proceedings to remedy prohibited practices and violations of the agreement, a sixty-day cooling off period, and a ten-day notification of intent to strike are deemed by the Committee to be adequate requirements to protect the public. The Committee feels that granting the right of public employees to strike will not increase strikes, but on the other hand, would be effective deterring strikes because genuine collective bargaining would result thereby. Employee organizations have continued to seek the right to strike, not because they are eager to exercise this right, but because they feel that public employers would come to the bargaining table on equal terms. Employee organizations feel that the threat to strike is just as effective as exercising the right to strike, and in many instances, the threat, in and of itself, may not require that employees exercise this right to inform public employers of their desire. The public will be informed at least sixty days prior to any impending strike and may react, by public coercion, or otherwise, to encourage the settlement of an impasse. What is oftentimes over looked in any discussion over the strike issue are: the awareness of both public employers and employee organizations of their responsibilities to the public and the continuing efforts of the legislative bodies to protect the interests of the public. Standing Committee Report No. 745-70, Public Employment, on S.B. No. 1696-70, Senate Journal 1970 at 1333. (Emphasis added.)

[3]The Board will not speculate about facts not before it. The only facts before the Board are UHPA's prohibited practice complaints charging violations of the employer's duty to consult and to bargain in good faith, filed while at an impasse with the employer over its collective bargaining agreement for Unit 07 faculty.

The BOR agrees with UHPA that "any" ought not to be construed to mean that all prohibited practice complaints would bar a strike. The BOR further agrees that in order to prevent a strike, the prohibited practice "should bear a relationship, or be 'germane' to the dispute between the parties." Therefore, the BOR would construe the provision "to mean that before a Unit 07 faculty member can participate in a lawful strike, the process for any prohibited practice complaint related to the dispute between the parties must be completed," i.e., a Board hearing is conducted and decision rendered. The Board agrees.

In adopting such a construction, the BOR makes convincing arguments that UHPA's prohibited practice complaints are germane to the dispute between the parties. First, UHPA filed for impasse on 27 topics, including distance learning and merit pay. The face of the pleadings in the instant cases also establishes a connection between the issues of reorganizations, hiring of temporary faculty, merit pay and distance learning personnel and allegations of refusing to bargain in good faith in violation of HRS § 89-13(a)(5).

Second, by their own actions UHPA's strike campaign in news reports appearing in the Honolulu Star-Bulletin and the Honolulu Advertiser on January 29, 2001 – the first day after the end of the 60-day cooling-off period -- referred to the instant prohibited practice complaints as further examples of the University's undermining of the collective bargaining process. In short, the BOR argues, the subject matter of the prohibited practices, the underlying allegations, and the remedies sought, all framed by UHPA, are in fact germane to the dispute between the parties.

The Board thus concludes that the instant prohibited practice complaints filed by UHPA are germane to the impasse declared by the Board pursuant to HRS § 89-11, and fall within the prohibition of HRS § 89-12(b)(2). Therefore, UHPA's Unit 07 members involved in the impasse are prohibited from participating in a strike until the proceedings in the instant prohibited practice complaints have been exhausted.

The Board appreciates that the barring of an otherwise lawful strike is perhaps a disproportionately substantial consequence to flow from the good faith filing of prohibited practice complaints. We are constrained, however, to give effect to the express language of the law, In Re City and County of Honolulu, 54 Haw. 356 (1973) (a statute ought to be construed so that, if possible, no clause, sentence or word shall be superfluous, void, or insignificant), and while in doing so, giving expression to the intent of the legislature. See, HRS § 1-15(2) (legislative intent may be considered in construing ambiguous statutory language). It is clear that the legislature intended that the parties to a possible strike "utilize every available means to resolve the disputes," SCR No. 745-70, supra, prior to the commencement of a strike. Since prohibited practice proceedings are specifically identified as among the means to resolve the disputes, we have no alternative than to give the language effect.

This is not to say that the Board will permit parties to indefinitely forestall otherwise legal strikes simply by filing germane prohibited practice complaints. Any attempts to do so will be summarily dismissed and subsequently prosecuted to the full extent of the law. See, HRS § 92-16 (false swearing before boards and commissions punishable as perjury).

Our interpretation of HRS § 89-12(b)(2) also does not leave the parties without recourse to adjudicate alleged prohibited practices which occur just prior to the initiation of a strike. The statutory language requires only the "prohibited practices proceedings" to be exhausted. An alternative means of identifying alleged violations of collective bargaining agreements or Chapter 89 is by the issuance of declaratory rulings. HAR § 12-42-9. While such rulings may not, in themselves, provide the desired relief, such filings will have the effect of tolling the applicable limitations period and the Board will take full notice of the proceeding in the event that prohibited practice complaints are filed after the initiation of a lawful strike.

Based on the foregoing, IT IS HEREBY ORDERED that Respondent BOR's Motion to Dismiss and/or Motion for Summary Judgment is hereby denied; and

IT IS FURTHER ORDERED, that until the proceedings in the instant prohibited practice complaints are exhausted, members of Unit 07 are prohibited from participating in a strike.

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS § 89-5(b)(4) and HAR §12-42-47, will conduct a second prehearing conference on the consolidated prohibited practice complaints on March 28, 2001 at 10:00 a.m., in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to **specify the issues that focus on the occurrence of any alleged violations**, identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Second Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

NOTICE IS ALSO GIVEN that the Board will conduct a hearing, pursuant to HRS §§ 89-5(b)(4) and 89-14, and HAR §§ 12-42-49 and 12-42-8(g) on the consolidated complaints on April 2, 2001 at 9:30 a.m. in the above-mentioned hearing room. The purpose of the hearing is to receive evidence and arguments on whether Respondent committed prohibited practices as alleged by the Complainant. The hearing may continue from day-to-day until completed.

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY v. BOARD OF REGENTS, University of Hawaii, State of Hawaii
CASE NOS.: CE-07-461; CE-07-462; CE-07-463
ORDER NO. 1998
ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT

DATED: Honolulu, Hawaii, March 15, 2001.

HAWAII LABOR RELATIONS BOARD

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