

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII,

Petitioner,

and

UNITED PUBLIC WORKERS, AFSCME
Local 646, AFL-CIO; and HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, Local 152, AFL-
CIO,

Intervenors.

CASE NOS.: DR-01-97
DR-02-97

ORDER NO. 2540

ORDER GRANTING INTERVENOR
UNITED PUBLIC WORKERS'
MOTION TO DISMISS, FILED ON
APRIL 21, 2008

ORDER GRANTING INTERVENOR UNITED PUBLIC
WORKERS' MOTION TO DISMISS, FILED ON APRIL 21, 2008

On April 3, 2008, Petitioner DEPARTMENT OF TRANSPORTATION, State of Hawaii (DOT), by and through its counsel, filed a Petition for Declaratory Ruling (Petition) and a Memorandum of Points and Authorities in Support of the Petition (Memorandum) with the Hawaii Labor Relations Board (Board). The DOT alleged that the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) and the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) filed respective grievances challenging the five-day suspension of the same employee for misconduct during his probationary period as a supervisor with the airports. The DOT alleged that the UPW was the employee's exclusive representative and so notified the UPW and the HGEA but the UPW later withdrew its grievance. The DOT alleges that the HGEA now seeks to arbitrate the grievance of the Unit 01 employee and thus the DOT seeks an interpretation of Hawaii Revised Statutes (HRS) Chapter 89, §§ 89-2, and 89-5(i)(1) and asks the Board to designate the UPW as the employee's exclusive representative and bar interference by any party which is not the exclusive representative.

On April 4, 2008, the Board issued a Notice of Filing of Petition for Declaratory Ruling; Notice of Deadline for Filing Petitions for Intervention; and Notice of Board Conference. The Board set April 23, 2008 as the deadline for filing Petitions for Intervention in this matter and scheduled a Board Conference on May 2, 2008.

On April 11, 2008, the UPW filed a Petition for Intervention alleging that it is the exclusive representative of bargaining unit (Unit) 01 employees and that a Board decision on the representational rights of a Unit 01 employee who is disciplined while on probation to a Unit 02 position may affect the terms and conditions of employment of Unit 01 employees. The UPW contends, inter alia, that the question of arbitrability of the HGEA grievance is for the arbitrator to decide.

On April 21, 2008, the UPW filed a Motion to Dismiss with the Board.

On April 23, 2008, the HGEA filed a Petition for Intervention with the Board. The HGEA alleged that it filed a grievance on behalf of an employee who was suspended for five days while serving a new probationary period in a Unit 02 position alleging various violations of the Unit 02 collective bargaining agreement. The HGEA also alleged that the grievance is pending at arbitration.

After considering the respective Petitions for Intervention and reviewing the record in this case, the Board found that the UPW and the HGEA had timely filed Petitions for Intervention and had alleged sufficient interests to intervene in the proceedings because a decision may affect the terms and conditions of employment of their respective bargaining unit members and concerns the unions' representational obligations. The Board therefore granted the respective Petitions for Intervention pursuant to Hawaii Administrative Rules (HAR) §§ 12-42-8(g)(14) and 12-42-9(e) in Order No. 2505, dated May 1, 2008.

After reviewing the record, the Board cancelled the conference previously scheduled on May 2, 2008 as the issues presented in the instant petition were clear. The Board set a briefing schedule to permit the parties to file additional arguments to the Board. The Board set May 12, 2008 as the deadline to file any position statements or additional arguments with the Board. The Board indicated that if the Board decided to hear oral argument on the instant petition, the Board would issue a further notice of hearing.

On May 1, 2008, the UPW filed a Motion to Grant its April 21, 2008 Motion to Dismiss for Lack of Timely Opposition with the Board. The UPW contends that more than five days had passed since the motion to dismiss was served on the DOT's counsel. Thus, the UPW sought a dismissal of the Petition for lack of opposition to the UPW's motion to dismiss. On May 5, 2008, Petitioner State of Hawaii Department of Transportation filed a Memorandum in Opposition to Intervenor UPW's Motion to Dismiss Employer's Petition for Declaratory Ruling. With regard to the timeliness of the filing of a response to UPW's motion to dismiss, the DOT argued that the Board granted the UPW's Petition for Intervention on May 1, 2008 and set a deadline for the filing of position statements. The DOT contended that since the UPW's petition for intervention was not granted until May 1, 2008, the April 21, 2008 motion to dismiss was premature.

On May 7, 2008, Intervenor HGEA filed a Joinder in Intervenor UPW's Motion to Dismiss and on May 12, 2008, UPW filed a Supplemental Memorandum in Support of Motion to Dismiss Petition for Declaratory Ruling and HGEA filed a Position Statement.

After careful consideration of the record and arguments presented, the Board grants the UPW's motion to dismiss, filed on April 21, 2008, for the following reasons.

FINDINGS OF FACT

1. The DOT is an agency of the State of Hawaii and represents the interests of the Governor, State of Hawaii with respect to DOT employees and is therefore an employer¹ within the meaning of HRS § 89-2.
2. The UPW is an employee organization² and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit) 01, composed of nonsupervisory employees in blue collar positions. HRS § 89-6(1).
3. The HGEA is an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in

¹HRS § 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.

²HRS § 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 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.

Bargaining Unit 02, composed of supervisory employees in blue collar positions. HRS § 89-6(2).

4. The UPW and the HGEA are parties to collective bargaining agreements with the public employers for 2003-2005 and 2005-2007 for Units 01 and 02, respectively.
5. A DOT employee, an Airport Operations Maintenance Worker I included in Unit 01, was promoted to Airport Operations Maintenance Worker III, a supervisory position in Unit 02 with the DOT airports, effective February 1, 2005. On June 9, 2005, the employee allegedly directed a subordinate to fill a five gallon container with gasoline from the DOT fuel tanks for his personal use.
6. The DOT investigated the incident which led to an Employee Incident Report which was presented to the employee on June 28, 2005. Ex. 4 to Intervenor HGEA's Position Statement. The employee was a member of Unit 02 when he received the Employee Incident Report and requested union representation from the HGEA. Id.
7. By letter dated August 1, 2005, the DOT informed the employee that he did not meet the performance expectations of the position and would be returned to his former nonsupervisory Airport Operations Maintenance Worker I position on August 8, 2005. Ex. 2 to Intervenor HGEA's Position Statement.
8. By letter dated August 29, 2005, the DOT suspended the employee for five days effective September 19, 2005 for alleged misconduct in the June 9, 2005 incident because of his personal use of State fuel. Ex. 2 to Petition. The UPW was sent a copy of the letter of suspension. Id.
9. On October 3, 2005, the UPW filed a grievance contesting the employee's five-day suspension. Ex. 2 to UPW's Motion to Dismiss.
10. On October 13, 2005, the HGEA filed a grievance contesting the same suspension. Ex. 6 to Intervenor HGEA's Position Statement. By letter dated February 16, 2006, the DOT notified the HGEA that the grievance would be handled through the UPW because the employee was disciplined while he was a member of that union. Ex. 3 to Petition. By letter dated March 9, 2006, the HGEA notified the employer of its intent to arbitrate. Ex. 7 to Petition.
11. By letter dated May 10, 2006, the UPW notified the employer of its intent to submit the grievance to arbitration. Ex. 6 to Petition. By letter dated

August 3, 2007, the UPW withdrew its grievance from arbitration. Id. The UPW's decision to withdraw the grievance was based on the fact that the incident which caused the suspension occurred after the employee had been promoted to the Unit 02 position and the employee was acting as a blue collar supervisor in Unit 02 and not as a Unit 01 employee. Declaration of Dayton Nakanelua attached to UPW's Motion to Dismiss. In addition, the UPW was aware that the HGEA is pursuing the arbitration of the grievance. Id.

12. Article 11, Paragraph H of the Unit 02 Agreement provides, in part:

If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds that the Arbitrator has no such power, the grievance shall be referred back to the parties without any decision or recommendation on its merits.

13. The Board finds that the DOT employee was disciplined for an incident occurring while serving his probationary appointment in a Unit 02 position. By the time the discipline was imposed, the DOT employee had returned to his Unit 01 position.

DISCUSSION AND CONCLUSIONS OF LAW

1. On May 1, 2008, the UPW filed a motion to grant its April 21, 2008 motion to dismiss for lack of timely opposition by DOT. The UPW contended that the Board should grant its motion to dismiss the petition because the DOT failed to file its opposition to the motion within five days after service of the April 21, 2008 as required by HAR § 12-42-8(g)(3)(C)(iii).³
2. The DOT argues that on April 4, 2008, the Board issued a Notice of Filing of Petition for Declaratory Ruling setting the deadline for intervention and scheduling a May 2, 2008 initial conference to determine the positions of the parties and to schedule the briefing of issues and a hearing, if any. On May 1, 2008, the Board granted the HGEA's and UPW's petitions for

³HAR § 12-42-8(g)(3)(C)(iii) provides as follows:

Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

intervention; cancelled the May 2, 2008 date and set a May 12, 2008 date for any position statements or additional arguments. The DOT argues that UPW filed its motion to dismiss prematurely, prior to being granted intervention in this matter and that the Board indicated in its initial notice that the briefing schedule would be discussed at the May 2, 2008 conference.

3. After reviewing the record and the arguments of counsel, the Board denies the UPW's Motion to Dismiss for Lack of Timely Opposition. The Board agrees with the DOT that the UPW was an applicant for intervention and not a party to the case when the motion to dismiss was filed. Moreover, the Board indicated in its initial notice that the briefing schedule in this matter would be discussed at the May 2, 2008 conference and although the Board later canceled the conference, in Order No. 2505, the Board also set May 12, 2008 as the deadline to file further arguments in this matter. As the DOT filed its memorandum in opposition to the UPW's motion to dismiss on May 5, 2008, the Board finds the memorandum to be timely.
4. In the instant petition, the DOT alleges that two labor organizations sought to arbitrate the same five-day suspension grievance and the DOT believes that UPW is the correct exclusive representative since the five-day suspension was imposed when the employee was a member of Unit 01. The DOT requests that the Board identify the appropriate representative and which collective bargaining agreement controls.
5. The UPW submits that good cause exists for the Board to refuse to issue a declaratory order because 1) the question regarding the arbitrability of the HGEA grievance falls within the jurisdiction of the arbitrator; 2) the question of the appropriate bargaining unit is irrelevant to the dispute in the present case since no jurisdictional dispute exists between the two unions on work assignments, and 3) there is prior precedent regarding promotions of Unit 01 employees to positions outside the bargaining unit, and who has the right to arbitrate the grievances.
6. The threshold issue raised by the UPW's motion to dismiss, is whether there is good cause to refuse to issue a declaratory ruling pursuant to HAR § 12-42-9(f).⁴ Although the UPW initially filed a grievance over the five-

⁴HAR § 12-42-9 provides in part as follows:

§ 12-42-9 Declaratory rulings by the board. (a) Any public employee, employee organization, public employer, or interested person or organization may petition the board for a declaratory order as to the applicability of any statutory provision or of any rule or

day suspension, the union withdrew the grievance because the incident which caused the suspension occurred while the employee was appointed to a Unit 02 position and while the employee was acting in the course and scope of his work as a blue collar supervisor. In addition, the UPW was aware that the disciplinary suspension was being challenged by the HGEA through the Unit 02 grievance procedure. The UPW contends that under Article 11 of the Unit 02 agreement, if the employer disputes the arbitrability of a grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act. The UPW contends that the Board lacks jurisdiction over the enforcement of an arbitration agreement or a dispute as to arbitrability. In addition, the UPW argues that there is no conflicting claims between the two unions because the UPW withdrew its grievance on August 3, 2007 and only the HGEA is pursuing the arbitration of the employee's grievance.

7. The HGEA joins the UPW's motion to dismiss contending that the issues raised are not within the jurisdiction of the Board as they are issues that the parties have agreed to have an arbitrator decide. The HGEA contends that the parties to the Unit 02 Agreement negotiated and agreed to have an arbitrator decide disputes regarding the arbitrability of a grievance. The HGEA argues that Article 11, Paragraph H, provides that if the employer disputes the arbitrability of a grievance, the Arbitrator shall determine whether he or she has jurisdiction to act. Thus the DOT's request that the Board designate the UPW as the correct exclusive representative for the employee's five day suspension and bar interference by any party which is not the exclusive representative is an attempt by the DOT to sidestep its bargained for process for determining arbitrability, and preclude the HGEA from pursuing its grievance to arbitration.

order of the board.

* * *

- (f) The board, may for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:
 - (1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future.
 - (2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.
 - (3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.
 - (4) The matter is not within the jurisdiction of the board.

8. After reviewing the record and the arguments presented, the Board finds there is no actual conflict between the UPW and the HGEA as the HGEA is pursuing the arbitration challenging the discipline imposed and the UPW has withdrawn its grievance from arbitration. The Board also finds no dispute as to the bargaining unit designation of the employee, i.e., that he was a Unit 02 employee when the incident occurred and a Unit 01 employee when the discipline was imposed. The Board views DOT's petition for the Board to designate the correct exclusive representative to pursue the grievance and the applicable collective bargaining agreement in the arbitration context as addressing the propriety or arbitrability of the grievance being pursued by the HGEA. While the DOT believes that the UPW should be pursuing the grievance rather than the HGEA, the issue presented in DOT's petition goes to the jurisdiction of the arbitrator over the HGEA's grievance and thus should be resolved by the arbitrator pursuant to the agreement which provides that the arbitrator should determine arbitrability issues. State of Hawaii Organization of Police Officers, 3 HPERB 25 (1982) (Where the agreement provides that all disputes over arbitrability are to be submitted to the arbitrator, the issue of substantive arbitrability shall be properly raised before and resolved by the arbitrator.). Thus, the Board finds good cause to refuse to issue a declaratory ruling in this matter because the issue of substantive or procedural arbitrability is to be determined by the arbitrator according to the applicable collective bargaining provision, and therefore is not within the jurisdiction of the Board.

ORDER

Based on the foregoing, the Board hereby refuses to issue a declaratory ruling in this matter and grants the UPW's motion to dismiss the instant petition. This case is closed.

DATED: Honolulu, Hawaii, August 5, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, Petitioner, and UNITED
PUBLIC WORKERS, AFSCME Local 646, AFL-CIO; and HAWAII GOVERNMENT
EMPLOYEES ASSOCIATION, AFSCME, Local 152, AFL-CIO, Intervenor

CASE NOS.: DR-01-97, DR-02-97

ORDER NO. 2540

ORDER GRANTING INTERVENOR UNITED PUBLIC WORKERS' MOTION TO DISMISS,
FILED ON APRIL 21, 2008



SARAH R. HIRAKAMI, Member

Copies sent to:

David Fitzpatrick, Deputy Attorney General
Debra A. Kagawa, Esq.
Herbert R. Takahashi, Esq.