

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

BOARD OF EDUCATION, Department of
Education, State of Hawaii; and ARTHUR F.
SOUZA, Complex Area Superintendent,
West Hawaii Complex Area, Department of
Education, State of Hawaii,

Respondents.

CASE NO.: CE-05-672

ORDER NO. 2541

ORDER DENYING HSTA'S MOTION
FOR SUMMARY JUDGMENT,
GRANTING SUMMARY JUDGMENT
IN THE DOE'S FAVOR, AND
DISMISSING COMPLAINT

ORDER DENYING HSTA'S MOTION FOR SUMMARY JUDGMENT, GRANTING
SUMMARY JUDGMENT IN THE DOE'S FAVOR, AND DISMISSING COMPLAINT

On June 10, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint (Complaint) against Respondents BOARD OF EDUCATION, Department of Education, State of Hawaii (BOE); and ARTHUR F. SOUZA, Complex Area Superintendent, West Hawaii Complex Area, Department of Education, State of Hawaii (collectively DOE or Employer), alleging the DOE committed a prohibited practice pursuant to Hawaii Revised Statutes (HRS) § 89-13(a)(5), by refusing to provide information requested by the HSTA relating to investigating, processing, and assessing the merits of a grievance.

On June 23, 2008, the HSTA filed its Motion for Summary Judgment; and on June 30, 2008, the DOE filed its Opposition to [HSTA's] Motion for Summary Judgment. The Board held a hearing on HSTA's Motion for Summary Judgment on July 9, 2008, pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order denying the HSTA's Motion for Summary Judgment, granting summary judgment in the DOE's favor, and dismissing the Complaint.

FINDINGS OF FACT

1. The HSTA was or is at all relevant times an employee organization within the meaning of HRS § 89-2¹ for employees belonging to Unit 05.²

2. Respondent BOARD OF EDUCATION, Department of Education, State of Hawaii; and ARTHUR F. SOUZA, Complex Area Superintendent, West Hawaii Complex Area, Department of Education, State of Hawaii (collectively referred to here as “DOE”) were or are at all relevant times a public employer within the meaning of HRS § 89-2 for purposes of this Complaint.³

¹HRS § 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.

²HRS §89-6 provides in relevant part:

Appropriate bargaining units.

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent;

³HRS § 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.

3. The HSTA and the BOE are parties to the Unit 05 collective bargaining agreement (Agreement).
4. Article II of the Agreement governs Non-Discrimination, and provides in relevant part in Section A:

The Employer agrees not to interfere with, restrain or coerce any employee of the Employer in the exercise of rights guaranteed in Chapter 89, HRS, including the right to refrain from joining or assisting any employee organization.

5. Section A of Article IV of the Agreement, governing Employer Information, provides in relevant part:

In addition to any obligation under Chapter 89, HRS, to furnish information in its possession, the Employer will furnish such other information in its possession, in response to reasonable requests by the [HSTA] which will assist the [HSTA] in effectively representing the teacher in the collective bargaining process and in the processing of grievances. Any information personal in nature and confidential to any particular teacher and which the Employer is not obligated to furnish under Chapter 89, HRS, may not be disclosed by the Employer unless written prior approval of the individual concerned has been given. The Employer need not perform compilation of facts or information for the purpose of responding to such [HSTA] requests.

6. Article V of the Agreement contains a grievance procedure governing any claim by the HSTA or a teacher that there has been a violation, misinterpretation, or misapplication of a specific term or terms of the Agreement. The grievance procedure includes provisions for informal discussion, Step 1 and Step 2 of a formal grievance, mediation, and arbitration.
7. On or about December 21, 2007, the HSTA filed a Step 1 grievance form (Grievance) on behalf of a teacher, asserting the following Agreement violations: Article X - Sec. D - Teacher Protection; Article IX - Sec. A - Personnel Information; Article II - Sec. A - Non-Discrimination; Article XX - Miscellaneous; and Article XXI - Maintenance of Benefits. The grievance alleged:

On or about Nov. 26, 2007 the principal sent the grievant a letter stating that she had received complaints about the

grievant from other teachers. The Principal required the grievant to sign a letter that was hearsay and derogatory to the grievant as grievant never had a chance to confront the complainants nor respond to the allegations. The grievant was told to sign the letter and that it would be placed in her personnel file. Principal also sent a copy to the District Office before speaking to the grievant about the issue. The grievant feels she is being harassed by the Principal since she became actively involved in the Association. The grievant is now concerned with a hostile work environment.

8. On February 19, 2008, the HSTA filed a prohibited practice complaint against the DOE with the Board in Case No. CE-05-658 (-658 Complaint). The -658 Complaint alleged, inter alia, that the DOE wilfully interfered with, restrained, and coerced employees in the exercise of protected conduct in violation of HRS § 89-13(a)(1); unlawfully discriminated against an HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2⁴) in that employee's terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).
9. The HSTA representative, who is also a teacher, against whom the -658 Complaint asserts that discrimination allegedly occurred, is also the grievant in the HSTA Grievance filed on or about December 21, 2007.
10. On April 7, 2008, the DOE filed a Motion to Dismiss Prohibited Practice Complaint in Case No. CE-05-658 (-658 Motion to Dismiss), asserting a failure to state a claim upon which relief may be granted and failure to exhaust contractual remedies. The DOE argued, inter alia, that the allegations of both the Grievance and the -658 Complaint were the same, and that the HSTA did not exhaust available contractual remedies.

⁴HRS § 89-2 provides in relevant part:

“Employee” or “public employee” means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

(HRS § 89-6 governs appropriate bargaining units).

11. On April 8, 2008, the HSTA filed a Motion to Amend Complaint in Case No. CE-05-658.
12. On April 14, 2008, the HSTA filed its Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint in Case No. CE-05-658 (-658 Memorandum in Opposition), arguing, inter alia, that the HSTA's -658 Complaint asserts a statutory violation, over which the Board has exclusive original jurisdiction, and that deferral to the arbitration process is inappropriate.
13. At hearing held on April 16, 2008, the Board orally granted the HSTA's Motion to Amend Complaint in Case No. CE-05-658. In fairness to the Employer, the Board allowed the DOE to file supplemental arguments supporting its -658 Motion to Dismiss, due to the Board orally granting the HSTA's Motion to Amend Complaint, by noon on April 21, 2008. The Board also scheduled a hearing on April 23, 2008 at 8:30 a.m.
14. On April 16, 2008, the HSTA filed its First Amended Complaint in Case No. CE-05-658 (-658 First Amended Complaint). The -658 First Amended Complaint alleged, inter alia, that DOE wilfully interfered, restrained, and coerced employees for the exercise of protected conduct under HRS § 89-3, including, but not limited to engaging in retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1); unlawfully discriminated against two employees in the employees' terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7). One of the two employees against whom the -658 First Amended Complaint asserts discrimination occurred, is the grievant in the Grievance.
15. Specifically, the -658 First Amended Complaint asserts, inter, alia, that HSTA representatives actively participated in concerted activities to improve the terms and conditions of employment of bargaining unit 05 employees at the school; that one representative (a teacher at the school and public employee within the meaning of HRS § 89-2) attended a faculty meeting during which she raised questions over concerns of faculty members regarding the 2008 to 2009 academic plan for the school, and participated in a consultation process affecting employee-employer relations; that the school principal informed the representative that the principal had received complaints regarding the questions raised by the

representative and the principal would be investigating; that the representative exercised her right to union representation and an investigative meeting with an HSTA field representative present was scheduled for November 14, 2007; that when the HSTA field representative arrived for the meeting, the principal abruptly cancelled the meeting and prohibited the HSTA field representative from remaining on the school premises; that the principal refused to identify the source of the anonymous complaints; and that a memorandum was placed in the representative's personnel file and intended as a disciplinary action. The -658 First Amended Complaint also alleged that the principal reassigned another HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2) to teach fourth grade during the 2008 to 2009 school year instead of third grade, and that the actions taken against these representatives are part of an on-going pattern of adverse, discriminatory, and retaliatory actions against HSTA representatives at the school. The -658 First Amended Complaint further alleged that a former HSTA representative was previously reassigned from the fourth to the sixth grade in the prior school year by the principal, and reportedly called a trouble maker and union person when she sought transfer to another school.

16. On April 21, 2008, the DOE filed its Additional Argument in Respondents' -658 Motion to Dismiss Prohibited Practice Complaint. On April 22, 2008, the HSTA filed its Supplemental Submission.
17. At hearing on April 23, 2008, the Board granted the parties until April 30, 2008, to submit further supplemental briefing on the -658 Motion to Dismiss. On April 30, 2008, the HSTA filed its Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint. On May 1, 2008, the DOE filed its Supplemental Briefing in Support of its Motion to Dismiss Prohibited Practice Complaint.
18. The Board held further hearing on the -658 Motion to Dismiss on May 1, 2008.
19. On May 13, 2008, the HSTA and the DOE held a Step 1 meeting regarding the Grievance, at which the HSTA made a proposal to resolve the Grievance.
20. On May 21, 2008, the Board denied the DOE's -658 Motion to Dismiss, as part of Board Order No. 2509. In denying the -658 Motion to Dismiss, the Board held in pertinent part, paragraph 15:

In the present case, the Board exercises its discretion to retain jurisdiction over the prohibited practice claims,

including claims involving discrimination that may otherwise have constituted a violation of provision(s) of the CBA. In addition to the allegations of discrimination, the [-658] First Amended Complaint also alleges retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1), and violation of the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7). Accordingly, viewing the [-658] First Amended Complaint in the light most favorable to HSTA, it is not clear to the Board that these remaining issues would constitute a violation of the CBA subject to the grievance procedure contained therein. The Board, therefore, concludes that deferral of such claims is not warranted. Because the factual issues (including testimony of key witnesses) surrounding the non-discrimination claims are likely to overlap with the factual issues surrounding the discrimination claims, and because claims of discrimination based upon union activity appear similar in nature to the other anti-union animus claims in the First Amended Complaint over which the Board has jurisdiction, the Board also exercises its discretion to not defer the discrimination claims to the grievance process.

21. On May 23, 2008, the DOE submitted a counter-proposal to the HSTA to resolve the Grievance.
22. On May 29, 2008, the HSTA declined the counter-proposal and requested the Grievance proceed to Step 2. The HSTA also submitted to the DOE a request for information “needed to investigate and process” the Grievance.
23. On June 2, 2008, the DOE denied the Grievance at Step 1.
24. On June 4, 2008, counsel for the DOE responded to the HSTA’s information request, stating in part (emphases original):

As you know, this grievance is also the subject of a prohibited practice complaint filed on behalf of HSTA. As you also know, DOE made a motion to the [Board] to defer the prohibited practice complaint on this subject to the grievance/arbitration process (specifically to the grievance/arbitration process for *this* very grievance). As you further know, HSTA opposed that motion and argued that the Board should refuse deferral and accept jurisdiction over this labor dispute.

The Board denied DOE's motion and specifically ruled that it was exercising jurisdiction to adjudicate both the statutory *and* contractual claims (See Paragraph 15 of HLRB Order 2509). In accordance with that decision, and per HSTA's choice, this matter will be adjudicated by the Board. Thus, all discovery "requests" will need to be made through the Board.

25. On June 10, 2008, the HSTA filed the present Complaint against the DOE, alleging the DOE committed a prohibited practice pursuant to HRS § 89-13(a)(5), by refusing to provide information requested by the HSTA relating to investigating, processing, and assessing the merits of the Grievance.
26. On June 23, 2008, the HSTA filed its Motion for Summary Judgment in the present case. On June 30, 2008, the DOE filed its Opposition to [HSTA's] Motion for Summary Judgment, arguing that jurisdiction over the underlying dispute now rests with the Board and not the grievance process.
27. On July 9, 2008, the Board held a hearing on HSTA's Motion for Summary Judgment in the present case, pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).
28. Also on July 9, 2008, the DOE filed a Second Motion to Dismiss Prohibited Practice Complaint in Case No. CE-05-658 (-658 Second Motion to Dismiss).
29. On July 11, 2008, the HSTA filed its Opposition to the DOE's -658 Second Motion to Dismiss.
30. On July 14, 2008, at hearing in Case No. CE-05-658, the Board orally ruled to deny the DOE's -658 Second Motion to Dismiss.
31. On August 4, 2008, the Board issued its written order denying the DOE's -658 Second Motion to Dismiss, Order No. 2539. In Order No. 2539, the

Board held, in pertinent part, that it would retain jurisdiction over the prohibited practice in Case No. CE-05-658, and that as a condition of the Board exercising its discretion to retain jurisdiction, the Board was staying the related Grievance process. The Board would entertain a motion to lift the stay after proceedings in CE-05-658 are concluded, to address residual issues, if any, left in the Grievance that were not raised or considered during the proceedings of CE-05-658.

32. The factual issues asserted in the Grievance are subsumed within the factual issues asserted in prohibited practice proceeding CE-05-658. The issue of discrimination asserted in the Grievance is subsumed within prohibited practice proceeding CE-05-658. It is likely that any other contractual claims that may be asserted in the Grievance will be addressed, or considered, by the Board in prohibited practice proceeding CE-05-658.
33. The Board finds that the issue of “wilfulness” does not require further hearing, and there are no other genuine facts in dispute requiring further hearing. The parties have had full and fair opportunity to establish the existence of facts with respect to the issue of wilfulness through the summary judgment proceeding. The Board finds that the DOE did not wilfully refuse to bargain collectively in good faith with the exclusive representative as required by HRS § 89-9. The DOE’s expectation that the Grievance was superceded by the prohibited practice was reasonable in light of the Board’s refusal to defer to the Grievance procedure and the issuance of Order No. 2509. The facts do not indicate a conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89; rather, the DOE relied upon the Board’s Order No. 2509. To the extent that the Board’s conclusion in Order No. 2509 may not have been clear or may have been ambiguous to any party, Board Order No. 2539 clarifies the Board’s position.
34. The Board also finds that the Complaint is moot in that the Grievance has been stayed by Board Order No. 2539. The information request made by the HSTA on May 29, 2008, is no longer necessary to “investigate and process” the Grievance due to the stay. Furthermore, what residual issues remaining in the Grievance, if any, will not be determined until the proceedings in CE-05-658 are concluded and any motion to lift the stay is considered by the Board; as such, the question of which documents are relevant and necessary for HSTA’s performance of its duties relating to the Grievance cannot be answered. Finally, the parties in CE-05-658 have the opportunity to obtain information relevant to the prohibited practice proceeding (which subsumes the factual assertions in the Grievance) through the discovery, if permitted, or by subpoena and witness testimony.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. 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.
3. 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.
4. 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.
5. The issue of mootness can be raised sua sponte by a tribunal. See Wiginton v. Pacific Credit Corp., 2 Haw. App. 435, 634 P.2d 111 (1981). The duty of the tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987).
6. The HSTA alleges prohibited practice in violation of HRS § 89-13(a)(5), which provides in relevant part:

It shall be a prohibited practice for a public employer
or its designated representative wilfully to:

* * *

(5) Refuse to bargain collectively in good faith with the
exclusive representative as required in section 89-9[.]
7. This Board may use parallel federal case law as guidance when interpreting Hawaii labor laws. See Hokama v. University of Hawai‘i, 92 Hawa‘ii 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999) (although federal law did not govern the case, the Hawaii Supreme Court consulted federal precedent to guide its interpretation of Hawaii’s public employment laws).

8. As a general rule, an employer must provide a union with relevant information necessary for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 567-68 (1967). The failure to provide relevant information may support a finding of a failure to bargain in good faith. See, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753 (1956).
9. The Board looks to the Hawaii Supreme Court's evolving guidance in interpreting provisions of HRS chapter 89. Recently, the Hawaii Supreme Court reiterated that in assessing a violation of HRS § 89-13, the Board is required to determine whether the respondent acted with "conscious, knowing, and deliberate intent to violate the provisions" of HRS chapter 89. In re Hawaii Government Employees Ass'n., AFSCME, Local 152, AFL-CIO, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007) ("With respect to HRS chapter 89, this court has said that 'wilfully' means 'conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89' . . . Thus, in assessing a violation of HRS § 89-13, the Board was required to determine whether Respondents acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89 when it removed the campaign materials"). Accordingly, when assessing an alleged prohibited practice under HRS § 89-13, the Board will determine whether the respondent acted with "conscious, knowing, and deliberate intent" to violate the provisions of HRS chapter 89.
10. In the present case, the Board issued its written order denying the DOE's -658 Second Motion to Dismiss, Order No. 2539. In Order No. 2539, the Board held, in pertinent part, that it would retain jurisdiction over the prohibited practice in Case No. CE-05-658, and that as a condition of the Board exercising its discretion to retain jurisdiction, the Board was staying the related Grievance process. The Board would entertain a motion to lift the stay after proceedings in CE-05-658 are concluded, to address residual issues, if any, left in the Grievance that were not raised or considered during the proceedings of CE-05-658.
11. The factual issues asserted in the Grievance are subsumed within the factual issues asserted in prohibited practice proceeding CE-05-658. The issue of discrimination asserted in the Grievance is subsumed within prohibited practice proceeding CE-05-658. It is likely that any other contractual claims that may be asserted in the Grievance will be addressed, or considered, by the Board in prohibited practice proceeding CE-05-658.

12. The Board finds that the issue of “wilfulness” does not require further hearing, and there are no other genuine facts in dispute requiring further hearing. The Board finds that the DOE did not wilfully refuse to bargain collectively in good faith with the exclusive representative as required by HRS § 89-9. The DOE’s expectation that the Grievance was superceded by the prohibited practice was reasonable in light of the Board’s refusal to defer to the Grievance procedure and the issuance of Order No. 2509. The facts do not indicate a conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89; rather, the DOE relied upon the Board’s Order No. 2509. To the extent that the Board’s conclusion in Order No. 2509 may not have been clear or may have been ambiguous to any party, Board Order No. 2539 clarifies the Board’s position.
13. The Board also finds that the Complaint is moot in that the Grievance has been stayed by Board Order No. 2539. The information request made by the HSTA on May 29, 2008, is no longer necessary to “investigate and process” the Grievance due to the stay. Furthermore, what residual issues remaining in the Grievance, if any, will not be determined until the proceedings in CE-05-658 are concluded and any motion to lift the stay is considered by the Board; as such, the question of which documents are relevant and necessary for HSTA’s performance of its duties relating to the Grievance cannot be answered. Finally, the parties in CE-05-658 have the opportunity to obtain information relevant to the prohibited practice proceeding (which subsumes the factual assertions in the Grievance) through the discovery, if permitted, or by subpoena and witness testimony.
14. The Board therefore denies the HSTA’s Motion for Summary Judgment, grants summary judgment in the DOE’s favor, and in the alternative dismisses the Complaint as moot.

ORDER

For the reasons discussed above, the Board denies the HSTA’s Motion for Summary Judgment, grants summary judgment in the DOE’s favor, and dismisses the Complaint.

DATED: Honolulu, Hawaii, August 6, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BOARD OF EDUCATION,
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EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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