

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS  
ASSOCIATION,

Petitioner,

and

VALERIE BIVEN; FELICIA FRIEND-  
BETLACH; DIANE SCHWARTZ;  
WILLIAM SCHWARTZ; KRIS YOAKUM;  
LINDA LINGLE, Governor, State of Hawaii;  
BOARD OF EDUCATION, Department of  
Education, State of Hawaii; PATRICIA  
HAMAMOTO, Superintendent, Department  
of Education, State of Hawaii, and MARIE  
LADERTA, Chief Negotiator, Office of  
Collective Bargaining, State of Hawaii,

Intervenors.

CASE NO. DR-05-99

ORDER NO. 2554

ORDER DENYING PETITION FOR  
DECLARATORY RULING

ORDER DENYING PETITION FOR DECLARATORY RULING

On July 18, 2008, Petitioner HAWAII STATE TEACHER ASSOCIATION (Petitioner, HSTA, or Union) filed a Petition for Declaratory Ruling (Petition) with the Hawaii Labor Relations Board (Board). The HSTA alleged that it is the exclusive representative of bargaining unit (Unit) 05 employees and was currently engaged in negotiations with the Board of Education (BOE) over drug and alcohol testing procedures under Appendix II of a collective bargaining agreement for the period from July 1, 2007 to June 30, 2009 (CBA or Agreement). The HSTA alleged the Petition was being filed to determine the lawful scope of bargaining under applicable state and federal statutes and rules relating to random (or suspicionless) alcohol and drug testing as referenced in Appendix II and in negotiations. In light of the information provided by the BOE, the HSTA submits that random (or suspicionless) drug and alcohol testing of Unit 05 employees is an illegal subject of bargaining. The HSTA also filed a Memorandum in Support of its Petition for Declaratory Ruling with the Board (Memorandum).

On July 22, 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 which set August 4, 2008 as the deadline to file any petitions for intervention.

On August 4, 2008, VALERIE BIVEN, FELICIA FRIEND-BETLACH, DIANE SCHWARTZ, WILLIAM SCHWARTZ and KRIS YOAKUM (collectively, Employees), and LINDA LINGLE, Governor, State of Hawaii (LINGLE); BOE; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii (HAMAMOTO), and MARIE LADERTA, Chief Negotiator, Office of Collective Bargaining, State of Hawaii (LADERTA) (collectively, State or Employer), by and through their respective counsel, filed Petitions for Intervention with the Board. On August 5, 2008, the HSTA filed a Motion to Strike Petition for Intervention and/or to Deny Intervention (Motion to Strike) by the State Petitioners.

In Order No. 2542, dated August 8, 2008, the Board denied HSTA's Motion to Strike and granted the Employees' and State's respective Petitions for Intervention.

On August 8, 2008, the Board conducted a conference with the parties and set a deadline of August 26, 2008 for the submission of written arguments.

On August 26, 2008, the HSTA, the Employees and the State filed memoranda with the Board.

On September 2, 2008, the HSTA filed an Application for Appearance Pro Hac Vice of Fred H. Althshuler, Jonathan Weissglass and Rebecca Smullin, seeking authorization from the Board allowing the appearance of the law firm Althshuler Berzon LLP of San Francisco, California for the purpose of associating with the HSTA's counsel for the litigation of this case. In Order No. 2549, dated September 29, 2008, the Board denied the HSTA's application.

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

## FINDINGS OF FACT

1. At all times relevant to this Petition, the HSTA is or was an employee organization within the meaning of HRS § 89-2<sup>1</sup> and the exclusive representative of employees belonging to Unit 05.<sup>2</sup>
2. At all times relevant to this Petition, the Employees, respectively, are teachers and a librarian, employed by the Department of Education, State of Hawaii and public employees within the meaning of HRS § 89-2<sup>3</sup> and are included in Unit 05.
3. At all times relevant to this Petition, the BOE is or was the public employer of members of Unit 05 within the meaning of HRS § 89-2<sup>4</sup>, and

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<sup>1</sup>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 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.

<sup>2</sup>HRS § 89-6(5) provides in relevant part:

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

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(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; ....

<sup>3</sup>HRS § 89-2 provides in relevant part:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

<sup>4</sup>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

Respondents LINGLE, HAMAMOTO and LADERTA are or were public employers within the meaning of HRS § 89-2 as individuals who represent a public employer or act in the public employer's interest in dealing with public employees belonging to Unit 05.

4. The HSTA and Respondent BOE are parties to the Unit 05 Agreement effective July 1, 2007, through June 30, 2009.
5. Appendix II of the Unit 05 Agreement is a memorandum of understanding regarding drug and alcohol testing (MOU). The MOU provides as follows:

This Memorandum of Understanding is entered into this 1st day of July 2007, by and between the State of Hawaii, Board of Education and the Hawaii State Teachers Association.

The Federal Drug-Free Workplace Act of 1988, and the Drug-Free Schools and Communities Act Amendments of 1989, require that the Department of Education maintains a drug-free and alcohol-free school environment. In addition, teachers should be aware that the unlawful manufacture, distribution, dispensation, possession or use of illicit substances is prohibited on school premises or as a part of any school activity.

The Association and the Board of Education agree that the most conducive environment for learning is in a place free from the hazards of the use of controlled substances and alcohol.

Therefore, the Association and the Board of Education shall establish a reasonable suspicion and random Drug and Alcohol Testing (DAT) procedures applicable to all Unit 5 employees that are intended to keep the workplace free from the hazards of the use of alcohol and controlled substances.

In addition, the Association and the Board of Education agree to negotiate reasonable suspicion and random Drug and

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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.

Alcohol testing procedures which shall comply with the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health Rules on Substance Abuse Testing, and implement such a plan no later than June 30, 2008.

This Memorandum of Understanding shall expire on June 30, 2009.

6. The HSTA alleges in its Petition for Declaratory Ruling filed on July 18, 2008 that the U.S. Department of Transportation (U.S. DOT) Rules on Drugs and Alcohol Testing require, *inter alia*, reasonable suspicion and random drug and alcohol testing only of employees in safety sensitive positions who have commercial drivers licenses (CDLs) and who operate commercial vehicles regulated by the U.S. DOT. The HSTA also alleges that although the State Department of Health (DOH) Rules on Substance Abuse Testing establishes testing standards, the DOH rules do not require either reasonable suspicion or random drug testing of employees.
7. On November 15, 2007, the BOE submitted an initial proposal on alcohol and drug testing pursuant to Appendix II of the Agreement.
8. On or about January 24, 2008, the BOE voted against funding a drug testing program for public school teachers.
9. In order to prepare its response to the initial November 15, 2007 proposal, the HSTA submitted several requests for information to the BOE. On February 28, 2008, the HSTA submitted its first request for information. On April 11, 2008, the BOE provided a partial response to the HSTA's request. On May 9, 2008, the HSTA submitted a supplemental request for information to the BOE. On May 20, 2008, the BOE provided a partial response to HSTA's supplemental request of May 9, 2008 and on June 12, 2008, the BOE provided an additional response to the HSTA's supplemental request.
10. In its Petition, the HSTA alleges the preliminary information provided indicated that the BOE employed only two employees in Unit 05 who fell within the scope of the U.S. DOT Rules on Drug and Alcohol Testing. The HSTA alleges that during subsequent bargaining, the BOE indicated that the U.S. DOT Rules were inapplicable to any Unit 05 employees.
11. In its Petition, the HSTA asserts that the information provided by the BOE further indicated that the BOE lacked evidence to support or justify random alcohol or drug testing of Unit 05 employees consistent with 42 U.S.C.

§ 1983,<sup>5</sup> i.e., BOE admitted it had no evidence of any illegal use of drugs and alcohol by teachers since 1988 to present and no incidents, occurrences, or reports substantiating suspicions held by the employer of illegal use of drugs or alcohol at the workplace from January 1, 2000 to present.

12. On June 7, 2008, the HSTA submitted a proposal for alcohol and drug testing which allegedly complies with constitutional standards and 42 U.S.C. § 1983.
13. The HSTA alleges that on and after June 7, 2008, the BOE and HSTA, through their representatives, negotiated in good faith over the June 7, 2008 proposal and reached a tentative resolution for all issues on or about July 8, 2008, except for random drug and alcohol testing of Unit 05 employees and the privacy of testing information.
14. The HSTA alleges that during the bargaining process, the HSTA informed the BOE that it could not agree to random drug and alcohol testing as initially proposed by the Employer because it exceeded the scope of permissive bargaining under Appendix II of the Agreement; based on the information provided by the BOE; random testing would violate the constitutional rights of Unit 05 employees and contravenes 42 U.S.C. § 1983; and agreeing to an across the board random alcohol and drug testing of teachers would expose members of the BOE, the State of Hawaii and the HSTA directors to personal liability for constitutional torts.
15. The HSTA alleges that it is currently engaged in negotiations with the BOE and a declaratory ruling by the Board regarding the lawful scope of bargaining under state and federal statutes and rules is essential if progress is to be made in bargaining.
16. The HSTA contends, inter alia, that Appendix II of the CBA does not mandate the creation of a random, suspicionless alcohol and drug testing program applicable to every teacher given the reference to the specific federal and state rules (which do not require random drug and alcohol

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<sup>5</sup>42 U.S.C. § 1983 provides in part:

Section 1913. The Statute. Section 1983 of Title 42 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

testing across the board to teachers in Unit 05) and such a program is beyond the scope of bargaining of the specific rules; that random drug and alcohol testing of teachers in the absence of a reasonable basis to suspect illicit drug and alcohol use violates 42 U.S.C. § 1983 and the Fourth Amendment to the U.S. Constitution's prohibition of unreasonable searches and seizures and is therefore an illegal subject of bargaining under HRS § 89-9(a)<sup>6</sup>; and that the HSTA is concerned that its Board of Directors would be liable for committing a constitutional tort. In its Additional Memorandum of Points and Authorities in Support of Petition for Declaratory Ruling, filed on August 28, 2008, the HSTA contends that random, suspicionless drug testing of every teacher also violates Article I, Section 7 of the Hawaii Constitution, which prohibits "unreasonable searches, seizures and invasions of privacy." Article I, Section 7 provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

The HSTA also contends that the random suspicionless testing violates Article I, Section 6 of the Hawaii Constitution which provides as follows:

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<sup>6</sup>HRS § 89-9(a), Scope of negotiations, consultation, provides as follows:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1, impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund 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.

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

17. The HSTA requests a declaratory order that random drug and alcohol testing for other than CDL drivers is beyond the scope of the U.S. DOT Rules on Drug and Alcohol Testing and State DOH Rules on Substance Abuse Testing as referred to in Appendix II of the current Unit 05 Agreement and random drug and alcohol testing of Unit 05 employees is contrary to duly enacted laws, including 42 U.S.C. § 1983 and provisions of the U.S. and Hawaii Constitutions and constitutes an illegal subject of collective bargaining under Section HRS § 89-9(a).
18. Intervenor Employees allege that the Union is asking the Board to issue a declaratory ruling on a purely constitutional question: whether suspicionless drug testing violates the Fourth Amendment of the United States Constitution and the privacy provisions of the Hawaii Constitution. Intervenor Employees contend that the constitutional question falls outside of the Board's jurisdiction to consider the "applicability of any statutory provision or of any rule or order of the Board" under HAR § 12-42-9(a). Intervenor Employees also contend that the constitutional question presented is "speculative" and "hypothetical" and not appropriate for resolution by the Board under HAR § 12-42-9(f)(1), because the State has withheld funding to implement a random drug testing program that it now concedes is unneeded.<sup>7</sup> Intervenor Employees contend that if the Board were to reach the merits of the constitutional dispute in order to address the contractual issue presented in the instant petition, the random drug testing envisioned by the State, even as limited by the Union, would violate the teachers' constitutional rights, i.e., their privacy rights guaranteed by the Hawaii Constitution and the U.S. Constitution's Fourth Amendment guaranteeing freedom from unreasonable government search and seizure.
19. The State or the Employer Group contends that the Board lacks jurisdiction to rule on either issue presented by the HSTA in this Petition since Appendix II of the Agreement as well as the U.S. DOT and DOH Rules are not statutes or rules of the Board to be interpreted in a declaratory ruling

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<sup>7</sup>Intervenor Employees allege that the State has refused to commit funding to implement random drug testing and even if protocols are developed for the program, the testing would not occur; i.e., on January 24, 2008, the BOE voted not to fund the random drug testing program; LINGLE excluded any funding for the drug testing in her 2008 budget; the Legislature failed to appropriate any money in the 2008 state budget to implement the random drug testing program.



petition and the actual question concerns contract interpretation as to the scope and intent of Appendix II as negotiated. The State contends that the HSTA executed the MOU as a tentative agreement on April 17, 2007 in conjunction with its acceptance of the Employer's Last, Best and Final Offer and the HSTA seeks an interpretation of the MOU. The State contends that if the Board concludes that it has jurisdiction over the first issue, it should find that Appendix II does not limit random drug and alcohol testing to CDL drivers and the HSTA is obligated to negotiate testing procedures that will be applicable to "all" Unit 05 members. The State also contends that the Board lacks subject matter jurisdiction to rule on the HSTA's second issue which presents a purely constitutional issue. The State contends however, if the Board finds that it has jurisdiction over the second issue, the requirements set forth in Appendix II obligating the HSTA to negotiate procedures for random drug and alcohol testing applicable to all unit 05 members are not contrary to duly enacted laws and do not constitute an illegal subject of collective bargaining, and HSTA remains obligated to negotiate testing procedures that will be applicable to all Unit 05 members.

20. After reviewing the record and the arguments presented, the Board finds that the first issue presented in this Petition involves a matter of purely contract interpretation, requiring the Board to interpret Appendix II of the Agreement, which may include determining the intent of the negotiators which is in dispute. The Board finds that this issue falls outside of the Board's declaratory ruling jurisdiction which is limited to considering the applicability of any statutory provision or of any rule or order of the Board. Similarly, the second issue presented, whether random suspicionless drug and alcohol testing of Unit 05 employees violates the Hawaii Constitution's protections regarding privacy and U.S. Constitution's prohibitions against unreasonable searches and seizures involves constitutional issues which are beyond the Board's declaratory ruling jurisdiction.

#### CONCLUSIONS OF LAW

1. The HSTA requests a declaratory order that random drug and alcohol testing for other than CDL drivers is beyond the scope of the U.S. DOT Rules on Drug and Alcohol Testing and State DOH Rules on Substance Abuse Testing as referred to in Appendix II of the current Unit 05 Agreement and random drug and alcohol testing of Unit 05 employees is contrary to duly enacted laws, including 42 U.S.C. § 1983 and provisions of the U.S. and Hawaii Constitutions, and constitutes an illegal subject of collective bargaining under Section HRS § 89-9(a).

2. HRS § 91-8, Declaratory rulings by agencies, provides as follows:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

3. The Board's administrative rules, HAR § 12-42-9, Declaratory rulings by the board, provides, in part, as follows:

(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 order of the board.

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(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.

4. In In re Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 116 Hawai'i 73, 170 P.3d 324 (2007) discussed whether the Board acted in excess of its authority in applying HRS Chapter 84, Ethics Code, in its decision in a prohibited practice proceeding at p. 97:

...[T]he Intermediate Court of Appeals has observed that "[a]n administrative agency can only wield powers expressly or implicitly granted to it by statute. Implied powers are limited to those reasonably necessary to make an express power

effective.” *TIG Ins. Co. v. Kauhane*, 101 Hawai‘i 311, 327, 67 P.3d 810, 826 (App.2003) (internal quotation marks, brackets, and citations omitted). The Board has “exclusive original jurisdiction” over “[a]ny controversy concerning prohibited practices[.]” (footnote omitted.) HRS § 89-14. Thus, the Board has express power over “[a]ny controversy concerning prohibited practices[.]” *id.* (emphasis added), and also those powers which are “*reasonably necessary* to make [this] express power effective[.]” *Kauhane*, 101 Hawai‘i at 327, 67 P.3d at 826 (emphasis added) (internal quotation marks, brackets, and citations omitted).

4. With regard to the first issue raised in this Petition, the Board concludes that it lacks jurisdiction over the purely contractual interpretation of Appendix II of the Agreement in the context of a declaratory ruling petition proceeding because the issue does not involve the applicability of a statute, rule or order of the Board.<sup>8</sup>
5. With regard to the second issue raised in the Petition, the Board similarly concludes that it lacks jurisdiction to determine whether random drug and alcohol testing of Unit 05 employees is contrary to provisions of the U.S. and Hawaii Constitutions and 42 U.S.C. § 1983 because the issue presents constitutional questions which the Board lacks authority to resolve. In *HOH Corp. v. Motor Vehicle Indus. Licensing Bd.*, 69 Haw. 135, 141, 736 P.2d 1271 (1987), the Hawaii Supreme Court held that while an agency can determine questions of its jurisdiction, it generally lacks power to pass on the constitutionality of its governing statute. Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate for an administrative board. *Downen v. Warren*, 481 F.2d 642 (9th Cir. 1973).
6. The Board finds good cause not to issue a declaratory ruling on the issues presented in the instant petition pursuant to HAR § 12-42-9(f)(4).

### ORDER

Based on the foregoing, the Board hereby dismisses the instant Petition for Declaratory Ruling for lack of jurisdiction.

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<sup>8</sup>The Board takes notice that LINGLE, et al. filed a prohibited practice complaint in Case No. CU-05-267 contending, *inter alia*, that the HSTA is repudiating the Agreement requiring negotiations over random drug and alcohol testing of Unit 05 teachers. The interpretation of Article II of the Agreement is also presented in that case.

HAWAII STATE TEACHERS ASSOCIATION and VALERIE BIVEN, et al.  
CASE NO. DR-05-99  
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ORDER DENYING PETITION FOR DECLARATORY RULING

DATED: Honolulu, Hawaii, October 6, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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