

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Complainant,

and

LINDA LINGLE, Governor, State of Hawaii;
LILLIAN B. KOLLER, Director, Department
of Human Services, State of Hawaii;
RUSS K. SAITO, Comptroller, Department
of Accounting and General Services, State of
Hawaii; MARK J. BENNETT, Attorney
General, State of Hawaii; LAURA H.
THIELEN, Chairperson, Department of Land
and Natural Resources, State of Hawaii;
THEODORE E. LIU, Director, Department of
Business, Economic Development and
Tourism, State of Hawaii; SANDRA LEE
KUNIMOTO, Chairperson, Department of
Agriculture, State of Hawaii; GEORGINA K.
KAWAMURA, Director, Department of
Budget and Finance, State of Hawaii;
CHIYOME K. FUKINO, M.D., Director,
Department of Health, State of Hawaii;
DARWIN CHING, Director, Department of
Labor and Industrial Relations, State of
Hawaii; KURT KAWAFUCHI, Director,
Department of Taxation, State of Hawaii;
ROBERT G.F. LEE, Adjutant General,
Department of Defense, State of Hawaii; and
MARIE C. LADERTA, Director, Department
of Human Resources Development, State of
Hawaii,

Respondents.

CASE NOS: CE-02-723a
CE-03-723b
CE-04-723c
CE-09-723d
CE-13-723e

ORDER NO. 2641

ORDER GRANTING, IN PART,
COMPLAINANT'S MOTION FOR
INTERLOCUTORY RELIEF FILED ON
AUGUST 19, 2009 AND NOTICE OF
STATUS CONFERENCE AND
HEARING

ORDER GRANTING, IN PART, COMPLAINANT'S
MOTION FOR INTERLOCUTORY RELIEF FILED ON
AUGUST 19, 2009 AND NOTICE OF STATUS CONFERENCE AND HEARING

On August 12, 2009, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA, Complainant, Union) filed a Prohibited Practice Complaint (Complaint) against LINDA LINGLE (LINGLE), Governor, State of Hawaii; RUSS K. SAITO, Director, Department of Accounting and General Services (DAGS); MARK J. BENNETT, Attorney General; LAURA H. THIELEN, Director, Department of Land and Natural Resources (DLNR); LILLIAN B. KOLLER, Director, Department of Human Services (DHS); THEODORE E. LIU, Director, Department of Business Economic Development and Tourism (DBEDT); SANDRA LEE KUNIMOTO, Director Department of Agriculture (DOA); GEORGINA K. KAWAMURA, Director, Department of Budget and Finance (B&F); CHIYOME K. FUKINO, M.D., Director, Department of Health (DOH); DARWIN CHING, Director, Department of Labor and Industrial Relations (DLIR); ROBERT G.F. LEE, Director, Department of Defense (DOD); KURT KAWAFUCHI, Director Department of Taxation (DOTAX) and MARIE C. LADERTA, Director, Department of Human Resources Development (DHRD) (collectively, Respondents, State, or Employer), alleging, among other things, that all Respondents failed to consult with HGEA over an impending reduction-in-force (RIF).

On August 19, 2009 Complainant filed a Motion for Interlocutory relief with the Board seeking an order enjoining and restraining Respondents pending a final determination on the Complaint, from:

- (1) Unilaterally implementing the impending reduction in force of employees in bargaining units 2, 3, 4, 9 and 13; and
- (2) Refusing and failing to fully complete the consultation process with HGEA concerning the State's impending reduction in force.

On August 27, 2009 Respondents filed their opposition to Complainant's Motion for Interlocutory Relief.

On Wednesday September 16, 2009 at 8:30 a.m., the Board heard arguments on the Motion.

Based upon a careful review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting, in part, Complainant's Motion for Interlocutory Relief.

FINDINGS OF FACT

1. Complainant HGEA is an employee organization, as defined in Hawaii Revised Statutes (HRS) § 89-2¹, and the exclusive representative certified by the Board to represent the employees included in bargaining units (BU) 02, composed of supervisory employees in blue collar positions; 03, composed of nonsupervisory employees in white collar positions; 04, composed of supervisory employees in white collar positions; 09, composed of registered professional nurses, and 13, composed of professional and scientific employees, who cannot be included in any of the other units. HRS 89-6. The HGEA was certified by the Board's predecessor, the Hawaii Public Employment Relations Board, as the exclusive representative.
2. At all times relevant to the Complaint, Respondent LINDA LINGLE, Governor, State of Hawaii (Governor), was a public employer within the meaning of HRS § 89-2.²
3. At all times relevant to the Complaint, Respondents RUSS K. SAITO, Director, DAGS; MARK J. BENNETT, Attorney General; LAURA H. THIELEN, Director, DLNR; LILLIAN B. KOLLER, Director, DHS; THEODORE E. LIU, Director, DBEDT; SANDRA LEE KUNIMOTO, Director, DOA; GEORGINA K. KAWAMURA, Director, B&F; CHIYOME K. FUKINO, M.D., Director DOH; DARWIN CHING, Director,

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 § 89-2 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.

DLIR, ROBERT G.F. LEE, Director DOD; KURT KAWAFUCHI, Director DOTAX; and MARIE C. LADERTA (Laderta), Director, DHRD were or are individuals who represent the Governor or act in the Governor's interest in dealing with employees of their respective departments and are deemed to be public employers within the meaning of HRS § 89-2.

4. On July 20, 2009, Respondent Laderta in her capacity as Director of DHRD forwarded a written request to HGEA to consult regarding the impending RIF and attached a list of permanent civil service positions in Units 02, 03, 04, 09 and 13 within the State Executive Branch that were identified as part of the "proposed impending reduction in force." The list contained the names of one hundred and eleven (111) HGEA members from the DOA, sixty nine (69) HGEA members from DAGS, thirteen (13) HGEA members from the Department of the Attorney General, twenty-three (23) HGEA members from DBEDT, one (1) HGEA member from B&F, seven (7) HGEA members from DOD, two hundred forty one (241) HGEA members from the DHS, two hundred and twelve (212) HGEA members from the DOH, fifty-one (51) HGEA members from DLIR, fifteen (15) HGEA members from DLNR, eighteen (18) HGEA members from PSD and nine-eight (98) HGEA members from DOTAX.
5. HGEA responded on July 21, 2009, indicating its desire to consult on the matter.
6. By letter dated July 28, 2009, Randy Perreira (Perreira), Executive Director, HGEA responded to Respondent Laderta's request to consult on the impending RIF, and identified 17 paragraphs of information necessary for HGEA to properly and adequately assess the State's proposed RIF, dated July 20, 2009.
7. By letter dated August 3, 2009, Nora Nomura (Nomura), HGEA Deputy Executive Director, reminded Laderta of HGEA's July 28, 2009, written response to the State's request to consult with questions and requests for additional information about the proposed RIF and that HGEA was awaiting a response. Nomura pointed out that the July 20, 2009 list of employees that would be subject to RIF included names of employees who have retired and names of other employees that are not HGEA members.
8. On August 4, 2009, Respondents began delivering written layoff notices to the approximately 1,100 State employees who were previously notified their positions could be eliminated. (August 4, 2009 News Release - Governor's Office). The notices state the positions will be eliminated as of November 13, 2009.

9. On August 5, 2009, Renee K. Tarumoto (Tarumoto), Personnel Program Administrator, Employee Staffing Division, DHRD, forwarded to HGEA a copy of the updated (July 30, 2009)³ State of Hawaii Reduction-in-Force Policy Guidelines. Employer's Policy Guidelines state in part:

2.0 PURPOSE

These Guidelines are intended to assist departments in applying the RIF provisions set forth in bargaining unit (BU) contracts and executive orders in a consistent and compassionate manner.

* * *

5.0 RESPONSIBILITIES

5.1 The Director of Department of Human Resources Development (HRD) shall:

- (a) Ensure departments adhere to contractual provisions, executive orders, federal and state mandates and Policies and Guidelines pertaining to the placement process.
- (b) Develop, establish, and review the RIF Guidelines in consultation with employee organizations.
- (c) Provide technical support, advice, leadership, and training to State departments in conducting a reduction-in-force. (Emphasis added.)

* * *

5.2 The Department Head, in consultation with the departmental personnel officer, shall:

- (a) Plan and organize the department's work force to meet departmental objectives within available resources;
- (b) Identify positions to be abolished or left unfunded to meet budget allotment and planned services;
- (c) Ensure departmental RIF actions comply with appropriate contract provisions and executive orders;
- (d) Ensure department managers are trained to properly conduct the RIF process; be sensitive to employee morale and concerns by:
 - (1) Ensuring, to the extent possible, all program employees are well informed in

³The 2009 updated RIF Guidelines were not the subject of consultation with the HGEA prior to August 5, 2009.

advance of the department's plans and action taken; and,

- (2) Assisting, to the extent possible, in resolving employee's special problems arising out of the RIF;

* * *

7.1 Departmental RIF Process

Step 1

The department develops and submits a proposed RIF plan to the Governor for approval. Upon approval, the department coordinates and notifies the Departments of Budget and Finance and HRD, appropriate exclusive representatives, and the employee's union as soon as possible of an impending reduction-in-force and consults with the employee's union as required by contract.

(Emphasis added.)

10. On August 5, 2009, Nomura attempted to communicate with and request consultation with Tarumoto. Nomura was informed that Ms. Tarumoto was instructed not to talk to the Union.
11. On August 6, 2009, Respondent Laderta in her capacity as DHRD Director wrote a memorandum to Ferreira informing him that she had been informed that HGEA was directing its membership not to fill out any RIF forms. Laderta warned HGEA that the employer had established deadlines for the completion of the RIF forms and employees who failed to fill out these forms "do so at their peril." Laderta wrote in part:

It is our intention to meaningfully consult with HGEA regarding impending layoff, and we are currently formulating a response to your July 28, 2009 letter. We have already hand-delivered and e-mailed our Reduction-In-Force Policy Guidelines, on August 5, 2009. (Emphasis added.)

12. On August 6, 2009, Nomura sent another written communication to Respondent Laderta concerning the State's impending reduction in force, and reminded Respondent Laderta of the State's statutory obligation to consult on all matters affecting employee relations prior to effecting changes in any major policy affecting employee relations. Nomura explained that the lack of consultation over the RIF Guidelines is allowing for unequal and inconsistent treatment of employees during the RIF process and is also hampering HGEA's ability to assist employees seeking help from their Union, despite the fact that employees were being told by their employer to contact the Union for

assistance. Nomura pointed out that there have been numerous questions and problems thus far concerning the implementation of the RIF. Names were misspelled on the July 20, 2009 list, employees who were not even on the list have subsequently received RIF notification and there were differences between the workforce reduction placement questionnaire that appears on the DHRD website as compared to the hard copy questionnaire that affected employees were provided. Nomura demanded immediate consultation consistent with the CBAs and Chapter 89, HRS, and that the State cease and desist from proceeding with the RIF until there has been meaningful consultation.

14. By letter dated August 10, 2009, Nomura informed Respondent Laderta of other related issues that demonstrated the lack of adequate consultation between the HGEA and the State of Hawaii regarding the RIF. Nomura also requested additional information necessary for HGEA to properly and adequately assess the State's proposed reduction in force.
15. By e-mail dated August 10, 2009, Kevin Mulligan (Mulligan), HGEA Public Policy Specialist, wrote to Tarumoto that "there were several urgent issues that need to be clarified as soon as possible." HGEA had concerns over changes to Workforce Reduction Placement Questionnaire. The hard copy was the same as the one used in 1995 and 1998 and the online version was quite different. HGEA also did not agree with the State's Reduction-in-Force Application and recommended the use of the previously used Application for Non-Competitive Appointment. HGEA raised additional concerns regarding language in the Layoff Application and concerns over the calculation of retention points and the need to provide employees with an accurate figure of their retention points before requiring them to complete the workforce reduction placement questionnaire.
16. On August 11, 2009, Tarumoto responded to Mulligan's e-mail acknowledging receipt of his questions and their urgency and forwarded Mulligan's e-mail to Laderta and Cindy Inouye (Inouye), DHRD Deputy Director.
17. By letter dated August 11, 2009, Laderta in response to HGEA's July 28, 2009, August 3, 2009, and August 6, 2009 letters regarding consultation over the impending RIF wrote that the current RIF guidelines, "are substantially identical to the guidelines over which the State and HGEA engaged in extensive consultations in 1995 and 2004. Only non-substantive revisions have been made to comply with statutory changes in order to keep the guidelines legally current (e.g., the sunset Act 253 (2000), Part V., etc.)." Laderta also included its responses to the HGEA's July 28, 2009, request for information.

18. Likelihood of success on the merits. The Board finds based on the pleadings, exhibits and declarations that there is a strong likelihood that Complainant will prevail on the merits of its case that Respondents have failed to fully consult with the Union over the impending layoffs of its bargaining unit members. HRS § 89-9(c) provides for consultation on all matters affecting employee relations. That section provides, in part, that “the employer shall make every reasonable effort to consult with the exclusive representatives and consider their input, along with the input of other affected parties effecting changes in any major policy affecting employee relations.” There is no doubt that the impending layoff of hundreds of bargaining unit members is a matter of such magnitude which requires the sharing of information and reasoned consideration. While Respondents offered to consult over the layoffs, the record indicates that meaningful consultation has not fully occurred. In 1994 and 2004, the State and the HGEA engaged in extensive consultation over RIF procedures. On August 6, 2009, Laderta wrote to HGEA informing them that it was the State’s intention to meaningfully consult with HGEA regarding impending layoff. Laderta admitted that changes were made to the RIF procedures but indicated they were substantially identical to the guidelines over which the State and HGEA engaged in extensive consultation in 1994 and 2004. The Employer’s RIF policies indicate as part of its procedure that the employer would consult with the Union. It is undisputed that changes were made to RIF procedures which were not consulted over with the Union. In addition, some information requested by the HGEA has not been provided to the Union by the Respondents.
19. Whether the balance of irreparable harm favors the temporary injunctive relief. The Board concludes that there may be irreparable harm to Employees that have been notified of their layoffs if meaningful consultation does not occur immediately. Information as to how the positions were selected for the layoffs will permit the Union to evaluate that the selection process was fair and objective and did not unfairly target Union stewards or was otherwise discriminatory. Employees should be given, inter alia, the reasons they were selected for the RIF as well as other relevant information necessary for the Union to properly assist its members to understand the Employer’s RIF procedures. On balance, there is no irreparable injury to the Respondents, as the Board is not at this time ordering a halt or delay of the layoffs.
20. Whether the public interest supports granting the temporary injunctive relief. As cited by HGEA, in its prior decision of UPW v. Cayetano, et al., Order No. 1277 (January 12, 1996), the Board held that the integrity of the bargaining process is a relevant “public interest” factor which favors a party seeking injunctive relief when a public employer has failed to comply with its duty to bargain. In that decision, the Board wrote:

With regard to the public interest, the Board finds, in keeping with congressional intent, that the safety of the driving public is paramount. By its legislation, Congress attempted to ensure that holders of commercial driver's licenses are free from drugs and alcohol by requiring testing and the removal of the employee from the safety sensitive position if the test result is positive. This objective will not be affected by the Board's order.

However, the board finds that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government, is furthered by the issuance of the subject order. Additionally, another policy underlying Chapter 89, HRS, is the uniformity of employment practices for public employees across jurisdictional lines. Therefore, Chapter 89, HRS, creates multi-employer bargaining and are attempting to negotiate a statewide policy regarding drug and alcohol testing pursuant to the DOT rules. The issuance of this interlocutory order will assure that Respondents' employees will be treated in the same manner across jurisdictional lines. . . .

* * *

Thus, the Board finds the public interest supports issuance of this order to preserve the integrity of the bargaining process and the uniformity of employment practices. The Respondents should not be permitted to keep in place its unilaterally implemented policies which are subject to negotiations pending final decision in this case. (Emphasis added).

Based on a review of the record, the Board concludes that the public interest supports the granting of an interlocutory order, in part, to preserve the integrity of the bargaining process. The Board finds that the policy underlying HRS Chapter 89, that joint decision-making in the collective bargaining process promotes effectiveness in government is furthered by the issuance of the subject order.

21. For all the reasons discussed, the Board concludes based on the record and the arguments presented that partial injunctive relief is warranted at this time to give the parties an opportunity to begin meaningful consultation over the RIF and to prevent irreparable harm to Employees notified of their layoffs and HGEA's ability to service its members.

22. Accordingly, the Board grants in part the HGEA's Motion for Interlocutory Relief to enjoin Respondents from failing to consult with the HGEA over layoffs.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. HRS § 377-9(d) made applicable to the Board by HRS § 89-14,⁴ provides:

After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the termination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order.

3. Similarly, HAR § 12-42-48, Interlocutory order, provides:

Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders.

4. HRS § 89-13(a) provides in part:

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

⁴HRS § 89-14, Prevention of Prohibited Practices, provides in part, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9;"

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
* * *
- (7) Refuse or fail to comply with any provision of this chapter;

5. HRS § 89-1(a) Statement of findings and policy states:

The legislature finds that joint-decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have the voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.

(b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:

- (1) Recognizing the right of public employees to organize for the purpose of collective bargaining,
- (2) Requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to section 76-1; and

- (3) creating a labor relations board to administer the provisions of chapter 89 and 377.

6. HRS § 89-3, Rights of employees, states:

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.

7. HRS § 89-5(i)(4) states in part:

In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

- (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

8. HRS § 89-9(c) provides:

Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

9. Employer's RIF Policy Guidelines states in part :

2.0 PURPOSE

These Guidelines are intended to assist departments in applying the RIF provisions set forth in bargaining unit (BU) contracts and executive orders in a consistent and compassionate manner.

* * *

5.0 RESPONSIBILITIES

5.1 The Director of Department of Human Resources Development (HRD) shall:

- (a) Ensure departments adhere to contractual provisions, executive orders, federal and state mandates and Policies and Guidelines pertaining to the placement process.
- (b) Develop, establish, and review the RIF Guidelines in consultation with employee organizations.
- (c) Provide technical support, advice, leadership, and training to State departments in conducting a reduction-in-force.

* * *

5.2 The Department Head, in consultation with the departmental personnel officer, shall:

- (a) Plan and organize the department's work force to meet departmental objectives within available resources;
- (b) Identify positions to be abolished or left unfunded to meet budget allotment and planned services;
- (c) Ensure departmental RIF actions comply with appropriate contract provisions and executive orders;
- (d) Ensure department managers are trained to properly conduct the RIF process; be sensitive to employee morale and concerns by:
 - (1) Ensuring, to the extent possible, all program employees are well informed in advance of the department's plans and action taken; and,
 - (2) Assisting, to the extent possible, in resolving employee's special problems arising out of the RIF

* * *

7.1 Departmental RIF Process

Step 1

The department develops and submits a proposed RIF plan to the Governor for approval. Upon approval, the

department coordinates and notifies the Departments of Budget and Finance and HRD, appropriate exclusive representatives, and the employee's union as soon as possible of an impending reduction-in-force and consults with the employee's union as required by contract. (Emphasis added.)

10. Complainant argued that Respondents failed to consult with HGEA before implementing its reduction in force action. Prior to consulting with the HGEA, Respondents delivered written layoff notices to approximately 1,100 State employees on August 4, 2009, informing them that their positions will be eliminated as of November 13, 2009. On July 28, 2009 and August 10, 2009, HGEA submitted written requests for information necessary for HGEA to assess the State's proposed reduction-in-force.
11. HGEA asserts that without the information requested they cannot adequately and properly assess the State's impending reduction-in-force action and carry out its duties and responsibilities as the exclusive representative of members in bargaining units 02, 03, 04, 09 and 13. It is HGEA's contention that Respondents' failure to provide requested information to the Union in a timely manner also prevents the Union from providing input and from participating in the consultation process in any meaningful way, and from being able to assist and advise members who are or may be affected by the reduction-in-force action. It is HGEA's position that the information requested should be readily available, since Respondents evaluated their options and decided on which employees they were going to layoff well before July 20, 2009.
12. HGEA asserts that Respondents' failure to consult violates HRS §§ 89-9(c), and 89-13(a)(5), (7) and (8).
13. Respondents argued that both our Supreme Court and the U.S. Supreme Court concur that, "An injunction is an extraordinary remedy." Morgan v. Planning Dept., County of Kauai, 104 Haw. 173, 188 (2004); see also Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (observing that, "a preliminary injunction is an extraordinary and drastic remedy"). Thus it is incumbent upon this Board to entertain such requests in only the most extreme circumstances where virtually no other option is possible without truly irreparable harm imminently taking place.
14. Respondents assert that they have provided information sufficient to meaningfully commence the consultation process regarding the announced layoffs.

15. Respondents argued that on August 4, 2009, Governor LINGLE issued a press release stating that the State would begin the lengthy RIF process, which commences with notices being issued to each of the identified employees that their positions were slated to be eliminated and that the bumping process for individuals would commence. Not one single employee has actually been terminated as of this date. On the contrary, no terminations will be effective until November 13, 2009, leaving plenty of time to complete the consultation process before anyone actually loses a job.
16. The power to issue an injunction is discretionary. Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272, 275, 630 P.2d 646, 649 (1981) (citing 42 Am. Jur. 2d Injunctions § 24 (1959)) (Penn).
17. In deciding whether to issue injunctive relief, a court balances three considerations (1) whether a plaintiff is likely to succeed on the merits; (2) whether the balance of irreparable harm favors the temporary injunctive relief; and (3) whether the public interest supports granting the temporary injunctive relief. Penn at 276, 630 P.2d at 649-50; Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits. Penn at 276, 630 P.2d at 650; Office of Hawaiian Affairs, et al. v. Housing and Community Development Corp., et al., 117 Hawaii 174, 211, 177 P.3d 884, 921 (2008).
18. Likelihood of success on the merits. The Board finds based on the pleadings, exhibits and declarations that there is a strong likelihood that Complainant will prevail on the merits. Laderta admitted that changes were made to the RIF procedures but indicated they were substantially identical to the guidelines over which the State and HGEA engaged in extensive consultation in 1994 and 2004. The Employer's RIF policies indicate as part of its procedure they would consult with the Union. On August 6, 2009, Laderta wrote to HGEA informing them that it was the State's intention to meaningfully consult with HGEA regarding impending layoff.
19. Whether the balance of irreparable harm favors the temporary injunctive relief. The Board concludes that there may be irreparable harm to Employees that have been notified of their layoffs if meaningful consultation does not occur immediately. Employees should be given, inter alia, the reasons they were selected for the RIF as well as other relevant information necessary for the Union to properly assist its members to understand the Employer's RIF procedures.
20. Whether the public interest supports granting the temporary injunctive relief

As cited by HGEA, in its prior decision of UPW v. Cayetano, et al., Order No. 1277 (January 12, 1996), the Board held that the integrity of the bargaining process is a relevant “public interest” factor which favors a party seeking injunctive relief when a public employer has failed to comply with its duty to bargain. In that decision, the Board wrote:

With regard to the public interest, the Board finds, in keeping with congressional intent, that the safety of the driving public is paramount. By its legislation, Congress attempted to ensure that holders of commercial driver’s licenses are free from drugs and alcohol by requiring testing and the removal of the employee from the safety sensitive position if the test result is positive. This objective will not be affected by the Board’s order.

However, the board finds that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promote effectiveness in government, is furthered by the issuance of the subject order. Additionally, another policy underlying Chapter 89, HRS, is the uniformity of employment practices for public employees across jurisdictional lines. Therefore, Chapter 89, HRS, creates multi-employer bargaining and are attempting to negotiate a statewide policy regarding drug and alcohol testing pursuant to the DOT rules. The issuance of this interlocutory order will assure that Respondents’ employees will be treated in the same manner across jurisdictional lines. . . .

* * *

Thus, the Board finds the public interest supports issuance of this order to preserve the integrity of the bargaining process and the uniformity of employment practices. The Respondents should not be permitted to keep in place its unilaterally implemented policies which are subject to negotiations pending final decision in this case. (Emphasis added).

21. For all the reasons discussed, the Board concludes based on the record and the arguments presented that partial injunctive relief is warranted at this time to give the parties an opportunity to begin meaningful consultation over the RIF and to prevent irreparable harm to Employees notified of their layoffs and HGEA’s ability to service its members.
22. Accordingly, the Board grants, in part, the HGEA’s Motion for Interlocutory Relief to enjoin Respondents from failing to consult with the HGEA over layoffs.

ORDER

Based on a review of the pleadings, exhibits, declarations and oral argument at the hearing on the motion for interlocutory relief, the Board grants, in part, HGEA's Motion for Interlocutory Relief. The parties are ordered to consult over the layoffs forthwith. Each of the twelve (12) named Respondents shall provide the HGEA the following documents on or before September 30, 2009 (with a copy to the Board): the procedures and guidelines followed and the factors and criteria considered by each named Respondent in making the determination of which positions/employees would be subject to RIF. This information should include information gathered pursuant to 7.1 Departmental RIF Process Step 1, of Employer's RIF Policy guidelines.

Notice of Status Conference

YOU ARE HEREBY NOTIFIED that the Board will conduct a status conference on **October 6, 2009 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The status conference will be held to determine if the parties are engaged in meaningful dialogue. If the Board determines that the parties are not adhering to the Board's order, then the Board will take appropriate action.

Notice of Hearing

YOU ARE HEREBY NOTIFIED that the Board will conduct a further hearing on Complainant's Motion for Interlocutory relief to hear testimony and receive evidence regarding the RIF on **October 14, 2009 at 9:00 a.m.** in the above-referenced hearing room.

DATED: Honolulu, Hawaii, _____ September 29, 2009 _____.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:
Peter Liholiho Trask, Esq.
Richard H. Thomason, Deputy Attorney General

