

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO

Petitioner,

and

TED H.S. HONG and CITY AND COUNTY  
OF HONOLULU,

Intervenors.

CASE NOS.: DR-01-100a  
DR-02-100b  
DR-03-100c  
DR-04-100d  
DR-05-100e  
DR-06-100f  
DR-07-100g  
DR-08-100h  
DR-09-100i  
DR-10-100j  
DR-11-100k  
DR-12-100l  
DR-13-100m

ORDER NO. 2723

ORDER DISMISSING PETITION FOR  
DECLARATORY RULING

ORDER DISMISSING PETITION FOR DECLARATORY RULING

On March 3, 2010, Petitioner UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Petitioner, UPW, or Union) filed a Petition for Declaratory Ruling (Petition) with the Hawaii Labor Relations Board (Board). Petitioner sought a determination whether Ted H.S. Hong, Esq. (Hong) should be removed from the Board's List of Mediators and Arbitrators (List) because Petitioner alleged, *inter alia*, that Hong filed a prohibited practice complaint against the UPW in November 2009; that Hong acted in concert with his clients and took adverse action against the UPW at its business premises in Hilo, Hawaii; that Hong was referred to the UPW and the City and County of Honolulu on a list of arbitrators from the Board by letter dated January 14, 2010; and that Hong was no longer neutral and unbiased and he appeared to be in a conflict of interest or biased against the UPW and any labor organization. Thus, Petitioner alleged Hong was not a qualified person within the meaning of Hawaii Revised Statutes (HRS) § 89-5(b)(6) and requested that Hong be removed from the List when any exclusive representative is a party or entirely from the List maintained by the Board.

On March 10, 2010, the Board issued a Notice of Filing of Petition for Declaratory Ruling; and Notice of Deadline for Filing Petitions for Intervention, which set March 29, 2010, as the deadline to file any petitions for intervention.

On March 25, 2010, Hong filed a Petition for Intervention with the Board.

On March 29, 2010, the CITY AND COUNTY OF HONOLULU (City), by and through its counsel, Deputy Corporation Counsel Duane W.H. Pang (Pang), filed a Petition for Intervention with the Board.

In Order No. 2695, dated April 1, 2010, the Board granted Hong's and the City's respective Petitions for Intervention, and scheduled a prehearing conference on April 15, 2010.

On April 7, 2010, Intervenor Hong filed a Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board with the Board. Intervenor Hong alleged, inter alia, that UPW's counsel, Charles K.Y. Khim, Esq. (Khim), intentionally and knowingly presented materially false statements of fact to the Board in violation of § 12-42-8(g)(9) of the Hawaii Administrative Rules (HAR), and Rule 3.3(a)(1) and (4) of the Hawaii Rules of Professional Conduct (HRPC). Hong also alleged the purpose of Khim's false representations was to gain an unfair advantage over Hong, adversely affecting Hong's professional reputation and infringing on his right to freely associate and contract.

On April 7, 2010, Intervenor Hong filed a Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment with the Board. Hong argued that the Board has no authority under HRS § 89-5(b)(6) to determine whether individuals should be removed from the List.

On April 12, 2010, Intervenor City filed its Prehearing Statement with the Board.

On April 13, 2010, Intervenor Hong filed his Prehearing Statement with the Board.

On April 13, 2010, Petitioner UPW filed its Motion for an Extension of Time in Which to Oppose Intervenor Ted H.S. Hong's: (1) Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board; and (2) Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment with the Board. Petitioner requested an eight-day extension to April 22, 2010 to file an opposition to Hong's motions.

On April 15, 2010, Petitioner filed its Prehearing Statement with the Board.

On April 15, 2010, the Board conducted a prehearing conference by conference call in this matter. Intervenors had no objection to the UPW's motion to extend time to respond to Hong's motions. Accordingly, the Board granted the UPW's motion for an extension of time within which to file its opposition to Hong's motions and set April 22, 2010 as the deadline for Petitioner to file its memoranda in opposition to

Hong's motions. The Board also set May 5, 2010 as the deadline for Intervenors to reply to UPW's opposition.

In Order No. 2698, dated April 16, 2010, the Board granted Petitioner UPW's Motion for an Extension of Time in Which to Oppose Intervenor Ted H.S. Hong's: (1) Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board; and (2) Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment. Additionally, in Order No. 2698, the Board issued a Notice of Deadline for Filing Responses, set for May 5, 2010; and a Notice of Hearing on Motions, which was set for May 17, 2010 at 10:00 a.m. in the Board's hearing room.

On April 21, 2010, Intervenor City filed its Joinder in Intervenor Ted H.S. Hong's Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment and its Statement of No Position Regarding Intervenor Ted H.S. Hong's Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board with the Board.

On April 22, 2010, Petitioner UPW filed its Motion to Amend the Petition for Declaratory Ruling and Motion to for (sic) Stay of Proceedings Pending Settlement Negotiations with the Board.

On May 3, 2010, Intervenor Hong filed his Memorandum in Opposition to Petitioner's Motion to Amend the Petition for Declaratory Ruling and Motion for Stay of Proceedings Pending Settlement Negotiations; his Reply Memorandum in Support of Intervenor Ted H.S. Hong's Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board Filed on April 7, 2010; and his Reply Memorandum in Support of Intervenor Ted H.S. Hong's Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment Filed on April 7, 2010 with the Board.

On May 17, 2010, the Board conducted a hearing via telephone conference on the above-referenced motions. Intervenor Hong participated via telephone, and Petitioner UPW, represented by Khim, and Intervenor City, represented by Deputy Corporation Counsel Pang, appeared in person before the Board. After hearing arguments from all parties for the respective motions, the Board took the matter under advisement.

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, Petitioner UPW is or was an employee organization within the meaning of HRS § 89-2<sup>1</sup> and the exclusive representative of employees belonging to bargaining Units 01 and 10.<sup>2</sup>
2. At all times relevant to this Petition, Intervenor Hong is or was a “qualified person” on the list of arbitrators within the meaning of HRS § 89-5(i)(6).<sup>3</sup>

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<sup>1</sup>HRS § 89-2 provides in pertinent 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(a) provides in pertinent part:

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

(1) Nonsupervisory employees in blue collar positions;

\* \* \*

(10) Institutional, health, and correctional workers; ....

<sup>3</sup>HRS § 89-5 provides in pertinent part:

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

\* \* \*

(6) Determine qualifications and establish, after reviewing nominations submitted by the public employers and employee organizations, lists of qualified persons, broadly representative of the public, to be available to serve as mediators or arbitrators[.]

3. At all times relevant to this Petition, Intervenor City is or was an “Employer” or “public employer” as defined in HRS § 89-2.<sup>4</sup>
4. The UPW alleges in its Petition for Declaratory Ruling filed on March 3, 2010, Hong should be removed from the Board’s List because, *inter alia*, Hong filed a prohibited practice complaint against the UPW in November 2009; that Hong acted in concert with his clients and took adverse action against the UPW at its business premises in Hilo, Hawaii; that Hong was referred to the UPW and the City and County of Honolulu on a list of arbitrators from the Board by letter dated January 14, 2010; and that Hong was no longer neutral and unbiased and he appeared to be in a conflict of interest or biased against the UPW and any labor organization.
5. On November 13, 2009, Hong, representing Unit 10 employees at the Hawaii Community Correctional Center, filed a prohibited practice complaint against the UPW and the State of Hawaii.
6. By letter dated January 14, 2010, the Board sent a list of arbitrators to Khim and Pang, which included Hong’s name.
7. After reviewing the record and the arguments presented, the Board finds that the primary issue presented in this Petition is whether Hong is a “qualified person,” pursuant to HRS § 89-5(i)(6), because Petitioner UPW alleges that Hong is no longer neutral or unbiased; or he no longer appears to be neutral or unbiased because Hong had filed a prohibited practice complaint against the UPW on behalf of clients. This issue involves a matter purely determined by contract interpretation, requiring the Board to interpret the relevant provisions of the UPW Units 01<sup>5</sup> and 10<sup>6</sup> CBAs

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<sup>4</sup>HRS § 89-2 provides in pertinent 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.

<sup>5</sup>The Unit 01 CBA, provides, in pertinent part as follows, to wit:

15.17      **SELECTION OF THE ARBITRATOR**

respectively, regarding the selection of an arbitrator. The relevant provisions in both Unit 01 and Unit 10 CBAs, that is to say Section 15.17 in both CBAs, are identical and essentially provide that in the event the parties

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Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

- 15.17 a. By mutual agreement from names suggested by the parties.
- 15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:
  - 15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.
  - 15.17 b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

<sup>6</sup>The Unit 10 CBA, provides, in pertinent part as follows, to wit:

15.17     **SELECTION OF THE ARBITRATOR**

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

- 15.17 a. By mutual agreement from names suggested by the parties.
- 15.17 b. In the event the parties fail to select an Arbitrator by mutual agreement either party shall request a list of five (5) names from the Hawaii Labor Relations Board from which the Arbitrator shall be selected as follows:
  - 15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.
  - 15.17 b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

fail to select an arbitrator by mutual agreement, either party shall request a list of five names from the Board; that the parties by lot shall determine who shall have first choice in deleting a name from the list of arbitrators; and that subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the arbitrator. 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 and alternatively, that the Petition seeks relief which is not appropriate for disposition in a declaratory ruling proceeding.

10. After reviewing the record and the arguments presented, the Board finds that the primary issue presented in Intervenor Hong's (1) Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Hawaii Labor Relations Board; and (2) Motion to Dismiss Petition for Declaratory Ruling Filed on March 3, 2010 and/or for Summary Judgment with the Board involves an interpretation of HAR § 12-42-8(g)(9)(a).<sup>7</sup> This issue is within the Board's statutory jurisdiction. However, the Board concludes that the "contemptuous conduct" contemplated in HAR § 12-42-8(g)(9)(a) is primarily intended as a mechanism for the Board to ensure that civility and propriety are maintained in proceedings before the Board by, *inter alia*, controlling the conduct and behavior of all persons appearing before the Board. In this case, the Board finds that Khim's conduct did not rise to the level such that it warrants his disbarment before the Board.

#### CONCLUSIONS OF LAW

1. The UPW requests a declaratory order seeking a determination whether Intervenor Hong should be removed from the Board's List of Mediators and Arbitrators (List) because Petitioner alleged, *inter alia*, that Hong filed a prohibited practice complaint against the UPW in November 2009; that Hong acted in concert with his clients and took adverse action against the UPW at its business premises in Hilo, Hawaii; that Hong was referred to the

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<sup>7</sup>HAR § 12-42-8(g)(9) provides, with respect to Contemptuous conduct:

(a) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board after due notice and hearing.

UPW and the City and County of Honolulu on a list of arbitrators from the Board by letter dated January 14, 2010; that Hong was no longer neutral and unbiased and he appeared to be in a conflict of interest or biased against the UPW and any labor organization. Thus, Petitioner alleged Hong was not a qualified person within the meaning of HRS § 89-5(b)(6) and requested that Hong be removed from the List when the UPW is a party or entirely from the List maintained by the Board.

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.

\* \* \*

(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. HRS § 89-5(i)(6) provides as follows:

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

(6) Determine qualifications and establish, after reviewing nominations submitted by the public employers and employee organizations, lists of qualified persons, broadly representative of the public, to be available to serve as mediators or arbitrators[.].

5. With regard to all issues raised in this Petition, the Board concludes that since these issues involve purely contractual interpretation of the process of the selection of an arbitrator contained in Section 15.17 of the CBAs for both Unit 01 and Unit 10 respectively, the instant Petition is not within the scope of a declaratory ruling because the issues raised therein do not involve the applicability of a statute, rule or order of the Board.

6. HRS § 658A-11 of the Uniform Arbitration Act, provides, as follows:

§ 658-11 Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

7. HRS § 658A-12 provides as follows:

§ 658A-12 Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

- (1) A financial or personal interest in the outcome of the arbitration proceeding; and
- (2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section 658A-23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under section 658A-23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 658A-23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 658A-23(a)(2).

The foregoing provisions requires the disclosure of information of possible partiality by a potential arbitrator after being asked to serve and prior to accepting appointment. If an arbitrator fails to disclose information or a party objects to the disclosure, the objection may be grounds to have the award vacated pursuant to arbitrator HRS § 658A-23(a)(2).

8. For the purposes of this Petition, the Board does not find that Section 15.17 of the respective CBAs has failed, only that Petitioner UPW has not exhausted the provisions.
9. 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) and alternatively, that the Petition seeks relief which is not appropriate for disposition in a declaratory ruling proceeding.
10. The Board denies Petitioner's Motion to Amend the Petition for Declaratory Ruling and Motion for Stay of Proceedings Pending Settlement Negotiations, which was filed with the Board on April 22, 2010. In its motion, the UPW requested that typographical errors be corrected; that the intent of the Petition was to set forth a uniform procedure to address conflicts of interest; and to clarify that the Petition was not brought for punitive purposes. The UPW also requested that the Board re-notice each individual employer and employee organization of the amendment to the Petition and invite them to intervene again and to further stay the proceedings so that the parties could meet to settle the issues with a mediating Board member. As the UPW seeks to formulate a uniform procedure to address conflicts of interest which appears to be purely contractual issue or a matter governed by HRS Chapter 658A, the Board finds that the Board's declaratory ruling process is not the appropriate vehicle to resolve the issue.

#### ORDER

Based on the foregoing, the Board hereby dismisses the instant Petition for Declaratory Ruling and denies Petitioner's Motion to Amend the Petition for Declaratory Ruling and Motion for Stay of Proceedings Pending Settlement Negotiations, pursuant to HAR § 12-42-9(f). The Board also hereby denies Intervenor Hong's Motion for Order Finding Charles K.Y. Khim, Esq., in Contempt and Suspension or Disbarment from Practice Before the Board, as the Board does not find that Khim's conduct rose to the level of "contemptuous conduct" contemplated in HAR § 12-42-8(g)(9)(a).

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and TED H.S. HONG, et al.  
CASE NOS.: DR-01-100a; DR-02-100b; DR-03-100c; DR-04-100d; DR-05-100e; DR-06-100f;  
DR-07-100g; DR-08-100h; DR-09-100i; DR-10-100j; DR-11-100k; DR-12-100l; DR-13-100m  
ORDER NO. 2723  
ORDER DISMISSING PETITION FOR DECLARATORY RULING

DATED: Honolulu, Hawaii, July 13, 2010.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



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SARAH R. HIRAKAMI, Member



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NORMAN K. KATO II, Member

Copies sent to:

Charles K.Y. Khim, Esq.  
Ted H.S. Hong, Esq.  
Duane W.H. Pang, Deputy Corporation Counsel