

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

MARIE LADERTA, Chief Negotiator, State of
Hawaii,

Respondent.

CASE NO. CE-10-718 (ON REMAND)

ORDER NO. 2756

ORDER DENYING RESPONDENT'S
MOTION TO DISMISS AND/OR FOR
SUMMARY JUDGMENT; AND NOTICE
OF PREHEARING CONFERENCE AND
HEARING

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DISMISS AND/OR FOR SUMMARY JUDGMENT; AND
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FINDINGS OF FACT

1. On October 1, 2010, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant or UPW) filed its Second Amended Prohibited Practice Complaint (Second Amended Complaint). The Second Amended Complaint alleges, *inter alia*, that on July 13, 2009, Respondent MARIE LADERTA (Respondent or Laderta) unilaterally designated Georgina Kawamura as an arbitrator contrary to the terms of the March 3, 2009, memorandum of agreement (MOA) setting forth an alternative impasse procedure pursuant to Hawaii Revised Statutes (HRS) § 89-11(a); that on July 29, 2009, Respondent on behalf of the "State of Hawaii" designated Stanley Shiraki to serve as the employer panelist; that the selections by Respondent were untimely and constituted a refusal to participate in good faith in the arbitration procedures set for in HRS § 89-11. The Second Amended Complaint asserts that Respondent's conduct constitutes prohibited practices contrary to HRS § 89-13(a)(1) (interfered, restrained, and coerced employees in the exercise of their rights as guaranteed under chapter 89); § 89-13(a)(6) (refused to participate in good faith in the arbitration procedures set for in section 89-11, HRS); § 89-13(a)(7) (refused and failed to comply with the provisions of Section 89-3,

89-6(d), and 89-11(a), HRS); and § 89-13(a)(8) (violated the terms of a collective bargaining agreement dated March 3, 2009). The Second Amended Complaint requests (a) declaratory relief in favor of Complainant; (b) make whole relief for public employees in the form of back pay, with interest, costs and attorney's fees; (c) civil penalties of \$10,000 per violation for the willful and repeated interference with employee rights; (d) injunctive relief and a cease and desist order prohibiting further commission of prohibited practices of a similar nature; and (e) other appropriate relief.

2. On October 14, 2010, Respondent filed a Motion to Dismiss and/or for Summary Judgment, asserting (a) the Second Amended Complaint is an impermissible collateral attack on the bargaining unit (BU) 10 interest arbitration award; (b) the Second Amended Complaint is moot; and (c) Hawaii Rules of Civil Procedure (HRCP) Rule 11 sanctions should be imposed.
3. On October 21, 2010, Complainant filed a Memorandum in Opposition to Respondent Marie Laderta's Motion to Dismiss and/or for Summary Judgment Filed on October 14, 2010, asserting that Respondent failed to meet the burden of proof on a motion to dismiss for failure to state a claim for relief and/or for summary judgment; that the Second Amended Complaint does not represent a collateral attack because there is no final judgment in court and the proceedings before the Board commenced prior to the court proceedings on the Unit 10 award; that the dispute is not moot because there are remedial issues to be decided under the court's remand order and the case falls within the exception to matter of public interest which are recurrent and evading review; and that Rules 11 of the HRCP is inapplicable to board proceedings and even if the rule applied Respondent is not entitled to any sanctions because of failure to comply with safe harbor provision.
4. On November 1, 2010, Respondent filed a Reply to UPW's Memorandum in Opposition to Respondent's Motion to Dismiss and/or for Summary Judgment Filed on October 14, 2010, asserting that a final judgment exists on the BU 10 interest arbitration award; and that the Second Amended Complaint was rendered moot by the Final Judgment issued in S.P. No. 09-1-0305.
5. On November 16, 2010, Complainant filed a Supplemental Memorandum in Opposition to Motion to Dismiss and/or for Summary Judgment Filed 10/14/10, asserting the Board is bound by the remand decision and order of the circuit court regarding mootness and other issues.

6. On November 16, 2010, the Board heard oral argument on Respondent's Motion to Dismiss and/or for Summary Judgment.
7. At the hearing on the motion, Respondent objected to Complainant's Supplemental Memorandum in Opposition to Dismiss and/or for Summary Judgment Filed 10/14/10, and asked that the document be stricken, as there is no authority that allows filing of a reply memorandum in response to a reply memorandum. Respondent also withdrew the request for HRCP Rule 11 sanctions that was contained in Respondent's Motion to Dismiss and/or for Summary Judgment.
8. On February 2, 2009, the Board issued Order No. 2576, Order Declaring an Impasse and Appointing a Mediator, in Case No. I-10-122.
9. On March 3, 2009, the UPW and the public employers entered into a Memorandum of Agreement (MOA) where the parties agreed to an impasse procedure that would lead up to interest arbitration, in accordance with HRS § 89-11(a). The MOA was executed by Laderta and Dayton Nakanelua, the State Director of the UPW.
10. On January 14, 2010, the interest arbitration panel issued its decision concerning the Unit 10 interest arbitration.
11. On February 19, 2010, the UPW filed a Motion to Confirm and Enforce Arbitration Award, Entry of Judgment, and Order Allowing Costs and/or Fees in S.P. No. 09-1-0305 in the circuit court.
12. On May 17, 2010, the circuit court issued an Order Granting UPW's Motion to Confirm and Enforce Arbitration Award, Entry of Judgment, and Order Allowing Costs and/or Attorney's Fees, filed May 18, 2010. The circuit court issued a Final Judgment and Notice of Entry of Final Judgment, filed May 18, 2010.
13. The Board finds that the controversy in the Second Amended Complaint involves alleged prohibited practices of unilaterally or untimely selecting the employer's representative to serve on the interest arbitration panel. The Board finds that the prohibited practice need not be a collateral attack on the interest arbitration award itself, as the Board can hear the prohibited practice complaint and, if necessary, issue relief the Board deems proper that does not infringe on the circuit court's confirmation of the interest arbitration award.
14. Accordingly, the Board finds that the Second Amended Complaint is not an impermissible collateral attack on a judgment because there is no evidence

that the prohibited practice proceeding is an attempt to avoid, defeat, evade, or deny the force and effect of the circuit court's judgment regarding confirmation of the interest arbitration award.

15. The Board finds that the controversy at issue here is a matter of public interest, that an authoritative determination for future guidance of public officers is desirable, and that future recurrence of the question is possible. The issue is capable of repetition yet evading review, as the timelines provided for in a memorandum of agreement regarding the impasse and/or interest arbitration procedure(s) may evade review before the Board.
16. The Board therefore finds that the Second Amended Complaint falls under an exception to the mootness doctrine.
17. Respondent withdrew the request for HRCP Rule 11 sanctions at hearing on November 16, 2010.
18. Accordingly, the Board denies Respondent's Motion to Dismiss and/or for Summary Judgment.
19. With respect to the request to strike Complainant's reply memorandum, the Board denies the request as there is no evidence Respondent was prejudiced by the filing. The legal arguments made in Complainant's reply memorandum could have been made orally at the hearing on November 16, 2010, whether the reply memorandum was filed or not; additionally, the exhibits attached to Complainant's reply memorandum consisted solely of documents that are already in the Board's official records. Accordingly, the request to strike is denied.

CONCLUSIONS OF LAW

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the Complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
2. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th

Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

3. 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.
4. 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. 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. A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment or decree. A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. Smallwood v. City and County of Honolulu, 118 Hawai'i 139, 147, 185 P.3d 887, 895 (Haw. App. 2008) (citing Kapiolani Estate, Ltd. v. Atcherly, 14 Haw. 651, 661 (1903)).
6. The party asserting that an action constitutes an impermissible collateral attack on a judgment must establish that: (1) a party in the present action seeks to avoid, defeat, evade, or deny the force and effect of the prior final judgment, order, or decree in some manner other than a direct post-judgment motion, writ, or appeal; (2) the present action has an independent purpose and contemplates some other relief or result than the prior adjudication; (3) there was a final judgment on the merits in the prior adjudication; and (4) the party against whom the collateral attack doctrine is raised was a party or is in privity with a party in the prior action. Collateral attacks may be allowed under limited circumstances, such as when there is an allegation that the prior court lacked subject matter jurisdiction or that fraud was committed in the prior proceeding. Id. at 150, 185 P.3d at 898.
7. With respect to the issue of collateral attack, the Board denies Respondent's Motion to Dismiss and/or for Summary Judgment because there is no evidence that the prohibited practice proceeding is an attempt to avoid, defeat, evade, or deny the force and effect of the circuit court's judgment regarding confirmation of the interest arbitration award. The prohibited

practice proceeding need not be a collateral attack on the interest arbitration award itself, as the Board can hear the prohibited practice complaint and, if necessary, issue relief the Board deems proper that does not infringe on the circuit court's confirmation of the interest arbitration award.

8. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. See Doe v. Doe, 116 Hawai'i 323, 326, 172 P.3d 1067, 1070 (2007).
9. However, there are exceptions to the mootness doctrine. One exception is an action that is capable of repetition, yet evading review. The phrase, "capable of repetition, yet evading review" means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because of the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit. Clark v. Arakaki, 118 Hawai'i, 355, 360, 191 P.3d 176, 181 (2008).
10. When analyzing the public interest exception to the mootness doctrine, the courts look to (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination for future guidance of public officers; and (3) the likelihood of future recurrence of the question. Doe v. Doe, 116 Hawai'i 323, 327, 172 P.3d 1067, 1071 (2007).
11. In the present case, the Board finds that the controversy at issue here is a matter of public interest, that an authoritative determination for future guidance of public officers is desirable, and that future recurrence of the question is possible. The issue is capable of repetition yet evading review, as the timelines provided for in a memorandum of agreement regarding the impasse and/or interest arbitration procedure(s) may evade review before the Board.
12. Accordingly, the Board denies Respondent's Motion to Dismiss and/or for Summary Judgment.
13. The Board's rules do not specifically address the issue of a respondent filing a motion to dismiss in lieu of an answer. Historically, the Board has relied upon the HRCP in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000).

14. The issue of a party filing a motion to dismiss in lieu of an answer to a prohibited practice complaint was specifically addressed by the Board in UPW/HGEA and Cayetano, Case Nos. CE-01-378a, CE-03-378b, CE-10-378c, and CE-13-378d, Order No. 2014 (June 6, 2001). In that case, the Board found that its rules are not inconsistent with the HRCP, and relied upon the provisions of HRCP Rule 12(b) to conclude that a respondent's motion to dismiss the complaint filed in lieu of its answer "extends the time for filing of the answer until such time after the Board rules on the motion." (Order No. 2014 at 7).

ORDER

For the reasons discussed above, the Board hereby denies Respondent's Motion to Dismiss and/or for Summary Judgment. Respondents shall forthwith file their answer to Complainant's Second Amended Prohibited Practice Complaint.

NOTICE OF PREHEARING CONFERENCE AND HEARING

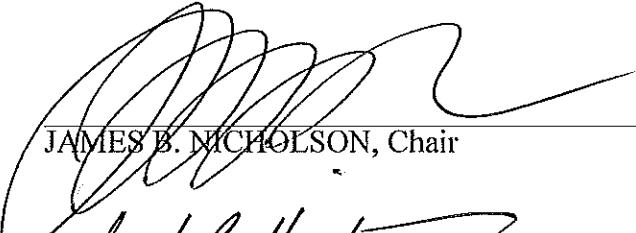
NOTICE IS HEREBY GIVEN that pursuant to HRS § 377-9 and/or §§ 89-5(i)(4) and (i)(5) and Hawaii Administrative Rules (HAR) § 12-42-47, the Board will conduct a prehearing/settlement conference in this matter on **January 20, 2011 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. **The Board encourages the parties to have a representative with settlement authority and/or is familiar with the dispute appear at the prehearing/settlement conference. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.**

NOTICE IS FURTHER GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4), 89-5(i)(5), and 89-14, and HAR § 12-42-8(g), will conduct a hearing on the instant complaint on **February 8, 2011 at 9:00 a.m.** in the Board's hearing room. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

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JUDGMENT

DATED: Honolulu, Hawaii, January 4, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

Copies sent to:

Herbert Takahashi, Esq.
Claire W. S. Chinn, Deputy Attorney General