STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and HALAU LOKAHI CHARTER SCHOOL, State of Hawaii; LOCAL SCHOOL BOARD, Halau Lokahi Charter School, State of Hawaii; JUNE NAGASAWA, Chair, Local School Board, Halau Lokahi Charter School, State of Hawaii; and LAARA ALLBRETT, Director, Halau Lokahi Charter School, State of Hawaii, Respondents.	CASE NO. CE-05-783 ORDER NO. 2825 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS JUNE NAGASAWA AND LAARA ALLBRETT, FILED ON OCTOBER 7, 2011; AND ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 13, 2011 AND DENYING HSTA'S CROSS MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 31, 2011

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS JUNE NAGASAWA AND LAARA ALLBRETT, FILED ON OCTOBER 7, 2011; AND ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 13, 2011 AND DENYING HSTA'S CROSS MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 31, 2011

On September 15, 2011, Complainant HAWAII STATE TEACHERS ASSOCIATION (Complainant or HSTA) filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleges, *inter alia*, that on June 17, 2011, the HSTA understood that Respondent HALAU LOKAHI CHARTER SCHOOL (School) privatized or contracted out bargaining unit work to Elite Element Academy, a local private school, which offered a cyber program without bargaining over the decision or the effects of its decision with the HSTA; on August 1, 2011 and again on August 17, 2011, the HSTA requested information about the cyber program from the School and Respondents failed to provide any information in response to the request. Complainant contends that Respondents committed prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(1), (5), (7), and (8) by, *inter alia*, interfering with the exercise of rights guaranteed under HRS chapters 89 and 302B; discriminating in regard to hiring, tenure and other terms and conditions of employment to discourage membership in an employee organization; refusing to bargain in good faith contrary to HRS §§ 89-1, 89-8(a), 89-9(a) and (d), 89-10.55(c), 302B-9(a)(1) and 302B-10; refusing to bargain in good faith by failing to provide information to HSTA contrary to HRS § 89-1, 89-8(a), and 89-9; or

failing or refusing to recognize HSTA as the exclusive bargaining representative of Unit 05 employees; refusing to comply with the provisions of HRS chapters 89 and 302B, without notice to HSTA and without bargaining or consultation; and refusing or failing to comply with the provisions of HRS chapter 89, including but not limited to HRS §§ 89-1, 89-3, 89-5(a), 89-6(e), 89-8(a), 89-9(c) and 89-10.55.

Motion to Dismiss

On October 7, 2011, the above-named Respondents filed a motion to dismiss JUNE NAGASAWA (Nagasawa) and LAARA ALLBRETT (Allbrett) as named Respondents in this matter. Respondents contend that there is no basis to name Nagasawa and Allbrett as Respondents because pursuant to HRS Chapter 302B, charter schools act through their local boards.

On October 14, 2011, Complainant HSTA filed its Memorandum in Opposition to Respondents' Motion to Dismiss June Nagasawa and Laara Allbrett, Filed October 7, 2011 with the Board. The HSTA contends, *inter alia*, that HRS § 89-2 provides that any individual who represents one of the employers under Chapter 89, HRS, or acts in their interest in dealing with public employers are themselves designated as a public employer; and Nagasawa and Allbrett are proper parties as they have a direct interest in the subject matter and have a right to defend the claims.

The Board conducted a hearing on the instant motion on November 14, 2011, and all parties had the opportunity to present argument and evidence to the Board. Based upon a review of the record and the arguments presented, the Board hereby grants Respondents' Motion to Dismiss Nagasawa and Allbrett as named Respondents.

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)).

In Doe v. Doe, 116 Hawai`i 323, 332, 172 P.3d 1067, 1076 (2007), the Supreme Court of Hawaii stated with regards to statutory interpretation:

> Inasmuch as the issue presented is one of statutory interpretation, our analysis must rest upon the plain language of the statute and any legitimate construction thereof. Honda v. Bd. of Trs. of the Employees' Ret. Sys. of the State, 108 Hawai'i 212, 233, 118 P.3d 1155, 1176 (2005) ("[O]ur foremost obligation is to ascertain and give effect to the

intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.") (Citations omitted.).

HRS § 89-2 provides the definition of employer and states in part as follows:

> "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. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

HRS § 89-2 specifically provides that any individual who represents one of these employers or acts in their interest, i.e., the interests of the governor, the mayors, the chief justice, the board of education, the board of regents and the Hawaii health systems corporation board, is an "employer." The section does not include or refer to the charter schools.

HRS § 89-10.55 refers to Charter school collective bargaining; bargaining unit; employer; exclusive representative and provides as follows:

> (a) Employees of charter schools shall be assigned to an appropriate bargaining unit as specified in section 89-6; provided that if a charter school employee's job description contains the duties and responsibilities of an employee that could be assigned to more than one bargaining unit, the duties and responsibilities that are performed by the employee for the majority of the time, based on the employee's average workweek, shall be the basis of bargaining unit assignment for the employee.
>
> (b) For the purpose of negotiating a collective bargaining agreement for charter school employees who are

assigned to an appropriate bargaining unit, the employer shall be determined as provided in section 89-6(d).

(c) For the purpose of negotiating a memorandum of agreement or a supplemental agreement that only applies to employees of a charter school, the employer shall mean the local school board, subject to the conditions and requirements contained in the applicable sections of this chapter governing any memorandum of agreement or supplemental agreement.

(d) Negotiations over matters covered by this section shall be conducted between the employer and exclusive representative pursuant to this chapter. Cost items that are appropriated for and approved by the legislature and contained in a collective bargaining agreement, memorandum of agreement, or supplemental agreement covering, wholly or partially, employees in charter schools shall be allocated by the department of budget and finance to the charter school administrative office for distribution to charter schools. However, if the charter school administrative office deems it appropriate, the cost items may be funded from a charter school's existing allocation or other sources of revenue received by a charter school.

HRS § 302B-1 provides the definition of a local school board and states as follows:

"Local school board" means the autonomous governing body of a charter school that:

(1) Receives the charter and is responsible for the financial and academic viability of the charter school and implementation of the charter;
(2) Possesses the independent authority to determine the organization and management of the school, the curriculum, virtual education, and compliance with applicable federal and state laws; and
(3) Has the power to negotiate supplemental collective bargaining agreements with exclusive representatives of their employees.

HRS § 302B-7 provides for Charter school local school boards; powers and duties and states as follows:

(c) The local school board shall be the autonomous governing body of its charter school and shall be responsible

> for the financial and academic viability of the charter school, implementation of the charter, and the independent authority to determine the organization and management of the school, the curriculum, virtual education, and compliance with applicable federal and state laws. The local school board shall have the power to negotiate supplemental collective bargaining agreements with the exclusive representatives of their employees.

The foregoing provisions of HRS Chapter 302B provide that the local school board is the governing body of the charter school and is responsible for compliance with applicable laws and has the power to negotiate supplemental collective bargaining agreements that only apply to employees of the charter school. Thus, in the Board's view, the local school board of the charter school is the autonomous governing body of the charter school and is the "employer" for the charter school under HRS § 89-10.55(c) and Chapter 302B and has been named by Complainant as a Respondent in this proceeding. It may well have been an oversight by the Legislature not to include the local school board as an employer in HRS § 89-2, but given the plain language of the statute, the Board must conclude that individuals who represent local charter school boards or act in their interest are not included in the definition of an "employer" in HRS § 89-2. The Board therefore concludes that Nagasawa and Allbrett are not employers within the meaning of HRS § 89-2 and should be dismissed as named Respondents in this Complaint.

Motion for Summary Judgment

On October 13, 2011, Respondents filed a Motion for Summary Judgment with the Board contending, *inter alia*, that the restrictions on contracting out or privatization do not apply to Respondents and nothing requires Respondents to negotiate or consult with the HSTA about contracting out or privatization. Respondents contend that contracting out or privatization is prohibited only as to civil service employees and that teachers are excluded by statute from civil service laws citing HRS § 76-16(11). In addition, Respondents contend that HRS § 302B-10 applies only to conversion charter schools. Respondents claim that the contract with Elite Element Academy does not affect the wages, hours, or conditions of work of Unit 05 employees of Halau Lokahi Charter School and admit that although the Respondents declined to negotiate or consult with HSTA, they did not violate any provision in HRS Chapter 89. Further, Respondents have provided HSTA with the information requested which makes the allegations in the Complaint moot. Initially, the HSTA requested information from Respondents on August 1, 2011, and Respondents answered HSTA's letter on August 5, 2011 and informed HSTA they were consulting with the Department of the Attorney General. The HSTA wrote to Respondents again on August 17, 2011 and Respondents contend the two letters did not provide any deadline by which the information had to be produced. The Respondents contend they had the request under consideration and had not made a

decision regarding the request when it received the Complaint filed by the HSTA on September 17, 2011. Thus, Respondents claim they were unaware of any deadlines to produce the information. Respondents contend there are no issues of material fact in dispute and they are entitled to judgment as a matter of law.

On October 31, 2011, the HSTA filed its Memorandum in Opposition to Respondents' Motion for Summary Judgment Filed October 13, 2011 and HSTA's Cross Motion for Summary Judgment with the Board. The HSTA alleged that the HSTA and Halau Lokahi entered into a supplemental agreement wherein the employer agreed, in part, that Unit 05 positions at the school would not be subject to layoffs, contracting out (or privatization), and that the Employer would implement furloughs subject to certain terms and conditions. The HSTA contended, *inter alia*, that numerous material facts remain in dispute regarding Halau Lokahi's duty to bargain on the privatizing of Unit 05 work; that there is no question that the teaching now performed by Education Innovation Services LLC (formerly by Elite Element Academy) for Halau Lokahi students has been and is being provided by Unit 05 teachers; that Respondents failed to show there is a significant change in the qualifications for work; that the decision to replace bargaining unit employees and to outsource the work of educating approximately half of the students of Halau Lokahi results in the displacement of current or future Unit 05 employees; that there is a loss of approximately 12 bargaining unit positions because the bargaining unit was "half eliminated" and replaced through privatization; that the Respondents' delay in providing the HSTA with the requested information is in itself a violation and the matter is not moot; that Respondents proceeded to contract out the work during the term of the agreement not to privatize Unit 05 work; that the Respondents violated Articles I and XXIII of the Unit 05 master agreement and the Memorandum of Agreement mid-term; and that unilateral changes constitutes a refusal to bargain even absent bad faith intent.

On November 7, 2011, Respondents filed a Reply Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to HSTA's Cross Motion for Summary Judgment with the Board. Respondents argued, *inter alia*, Complainant failed to present any evidence that services provided by the private contracted providers who operate the on-line program for Halau Lokahi are "teaching" any students and that the Declaration of Laara Allbrett, dated November 4, 2011, Ms. Allbrett states that the private contracted providers are providing technical support only and are not "teaching" students; that the law is clear and unambiguous that any prohibition against contracting out or privatization do not apply to Respondents or Unit 05 employees; that there is nothing to indicate how long a period is unreasonable or protracted to provide information; and that the Board should not grant summary judgment in favor of Respondents because there are no tenured teachers at the charter school and that the language prohibiting contracting out is not applicable; that the language of the Supplemental Agreement, dated January 14, 2010 addressed tenured teachers and furloughs being imposed and that the Halau Lokahi was already using an on-line program; and that if the Board does not grant Respondent summary judgment, the Board

should deny Complainant summary judgment because there is a factual dispute regarding the application and effect of the Supplemental Agreement, dated January 14, 2010.

These summary judgment motions also came on for hearing before the Board on November 14, 2011 and all parties had the opportunity to present argument on the instant motion.

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.

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.

Based upon a review of the record and the arguments presented, the Board finds that summary judgment is not appropriate because there are genuine issues of material fact in dispute, including, *inter alia,* whether the on-line service providers are performing services within Unit 05's scope of work; whether the contract with Elite Element Academy affects the wages, hours, or conditions of work of Unit 05 employees at Halau Lokahi Charter School; the application and effect of the Supplemental Agreement, dated January 14, 2010; and whether Respondents' delay in responding to HSTA's information request constitutes a prohibited practice.

Mootness

Lastly, Respondents contend that the HSTA's allegation that Respondents failed or refused to provide information to the HSTA is moot. Respondents argue, *inter alia,* that Respondents never refused to provide the information requested by HSTA's letter dated August 1, 2011; Respondents provided the information by October 13, 2011; and there is no evidence that the HSTA sustained any harm or prejudice by not getting the requested information until October 13, 2011.

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).

In Diamond v. State of Hawai`i, Bd. of Land & Natural Res., 112 Hawai`i 161, 145 P.3d 704 (2006), the Hawai`i Supreme Court stated that it has "repeatedly recognized an exception to the mootness doctrine in cases involving questions that affect the public interest and are 'capable of repetition yet evading review.'" Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai`i 191, 196, 53 P.3d 799, 804 (2002) (citations omitted). In Okada, [the supreme court] stated:

> Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. 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 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.

Id., at 196-97, 145 P.3d 704, 53 P.3d at 804-05 (citations, quotation signals, and block quotation format omitted). Id., at 170, 145 P.3d 704, 145 P.3d 713; see also McCabe Hamilton & Renny Co. v. Chung, 98 Hawai`i 107, 43 P.3d 244 (Haw. App. 2002).

While it appears that the information requested by the HSTA was provided during the pendency of the instant Complaint, the Board finds that the issue is not moot as it falls within the foregoing exception to the mootness doctrine. Respondent Halau Lokahi is a public charter school and the issues presented deal with a request for information by the union representing the teachers at the school regarding the outsourcing of bargaining unit work. Thus, the Board concludes the facts regarding the information request involve the public interest. Moreover, the charge of failure or refusal to provide information by its nature, is capable of repetition and yet would evade review if the information was subsequently provided, rendering the issue moot. Thus, the Board concludes that the issue is not moot.

Based on the foregoing, the Board hereby dismisses Nagasawa and Allbrett as named Respondents in this Complaint and denies without prejudice Respondents' motion for summary judgment as well as Complainant's cross motion for summary judgment.

HAWAII STATE TEACHERS ASSOCIATION v. HALAU LOKAHI CHARTER SCHOOL, State of Hawaii; et al.
CASE NO. CE-05-783
ORDER NO. 2825
ORDER GRANTING RESPONDENTS' MOTION TO DISMISS JUNE NAGASAWA AND LAARA ALLBRETT, FILED ON OCTOBER 7, 2011; AND ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 13, 2011 AND DENYING HSTA'S CROSS MOTION FOR SUMMARY JUDGMENT, FILED ON OCTOBER 31, 2011

DATED: Honolulu, Hawaii, December 2, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Rebecca L. Covert, Esq.
Steve K. Miyasaka, Deputy Attorney General