

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

MERIT APPEALS BOARD, State of Hawaii,

Petitioner,

and

DEBORAH TAYLOR and STATE OF
HAWAII, DEPARTMENT OF PUBLIC
SAFETY,

Intervenors.

CASE NO. DR-00-103

ORDER NO. 2902

ORDER DISMISSING PETITIONS FOR
DECLARATORY RULING

In the Matter of

MERIT APPEALS BOARD, State of Hawaii,

Petitioner,

and

JACQUELINE MULLEITNER and STATE
OF HAWAII, DEPARTMENT OF PUBLIC
SAFETY,

Intervenors.

CASE NO. DR-00-104

ORDER DISMISSING PETITIONS FOR DECLARATORY RULINGS

On November 21, 2012, Petitioner MERIT APPEALS BOARD, State of Hawaii (MAB), by and through its counsel, filed a Petition for Declaratory Ruling (Petition) with the Hawaii Labor Relations Board (Board) in Case No. DR-00-103. MAB alleged in its petition, *inter alia*, that on November 24, 2008, the Department of Public Safety, State of Hawaii, (PSD) denied DEBORAH TAYLOR'S (Taylor) internal complaint regarding a Supplemental Agreement which was implemented for an ACO [Adult Corrections Officer] series; that on October 22, 2008 (sic), Ms. Taylor filed an appeal to the MAB regarding the classification of her position; that the MAB heard Ms. Taylor's appeal and issued its decision on April 29, 2011 (sic); that MAB took the position that it had authority to hear Ms. Taylor's claims pursuant to Hawaii Revised Statutes (HRS) §76-14(c)(2); that PSD appealed the MAB decision to the Circuit Court and that during the court hearing on August 31, 2012 and in its Decision and Order filed

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on October 9, 2012, the court cited HRS § 76-14(c)(2) and remanded the case “to the MAB for further referral to the Hawaii labor relations board for a resolution of the controversy over the MAB’s authority in this case.”¹

Also on November 21, 2012, the MAB filed a nearly identical Petition for Declaratory Ruling with the Board in Case No. DR-00-104 regarding a MAB appeal by JACQUELINE MULLEITNER (Mulleitner).

In each case, the Board issued a notice of the filing of the Petition for Declaratory Ruling which set December 10, 2012 as the deadline to file petitions for intervention in the matter and scheduled a Board conference on December 18, 2012.

On December 5, 2012, the UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW), by and through its counsel, filed Petitions for Intervention in Case Nos. DR-00-103 and DR-00-104, respectively. UPW alleged, *inter alia*, that it is the exclusive bargaining representative for employees in bargaining units 01 and 10 where questions of jurisdiction of the MAB have arisen and that it has five pending appeals involving other PSD employees before Circuit Court Judge Rhonda Nishimura where similar issues are presented. UPW also stated in its Petition for Intervention that UPW “will urge the HLRB to defer all disputes arising under chapter 89 and the collective bargaining agreement consistent with the deferral doctrine, and the requirements of Section 89-10.8, HRS, where appropriate.” UPW further stated in its petition that a ruling by the Board will probably affect the outcome of the pending appeals referred to above and may affect statutory and contractual rights of public employees represented by UPW. UPW attached appeals of ACO IV Bernard Kuamoo, included in bargaining unit 10 regarding a promotion to ACO V; ACO III Denise Gabriel, included in bargaining unit 10, regarding a non-selection to an ACO IV position; ACO III Arasi Mose, included in bargaining unit 10, regarding a non-selection to an ACO IV position; ACO III Kelii Lau, included in bargaining unit 10, regarding a non-selection to an ACO IV position; and ACO IV Fiafia Sataraka, included in bargaining unit 10, regarding a non-selection to an ACO V position.

On December 7, 2012, Ms. Taylor, by and through her counsel, filed a Petition to Intervene in Case No. DR-00-103 alleging, *inter alia*, that her interests will be directly affected by any decision made in these proceedings; that there are no other means to protect her interests; and that her interest cannot be represented by any existing party.

¹ Civil No. 11-1-1079, Decision and Order for Granting the Appeal and Remand, Hon. Rhonda A. Nishimura, filed on October 9, 2012.

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Also on December 7, 2012, Ms. Mulleitner, by and through her counsel, filed a Petition to Intervene in Case No. DR-00-104 alleging, *inter alia*, that her interests will be directly affected by any decision made in these proceedings; that there are no other means to protect her interests; and that her interest cannot be represented by any existing party.

On December 10, 2012, PSD, by and through its counsel, filed Petitions to Intervene in Case Nos. DR-00-103 and DR-00-104, respectively. PSD's counsel stated in a declaration that PSD is the entity responsible for raising the jurisdiction question that is the subject of the instant petitions, and that PSD's participation will assist in the development of a sound and complete record before the Board.

On December 18, 2012, the Board conducted a conference and indicated that the Board would grant the petitions for intervention filed by Ms. Taylor, Ms. Mulleitner and PSD but would defer ruling on UPW's petition until the facts and issues were clarified. The parties indicated they would work on a Stipulation of Facts, and MAB's counsel indicated that he would file the records on appeal in the underlying cases with the Board.

On or about December 31, 2012, MAB's counsel submitted the records on appeal for the Taylor and Mulleitner cases to the Board.

On January 8, 2013, the Board issued Order No. 2872, Order Granting Intervention and Consolidating Cases for Disposition; and Notice of Rescheduled Status Conference. The Board found that the petitions from Ms. Taylor, Ms. Mulleitner and PSD involved substantially the same parties and issues and that the consolidation of the proceedings will be conducive to the proper dispatch of the Board's business and to the ends of justice and will not unduly delay the proceedings pursuant to HAR § 2-42-8(g)(13). The Board found that Ms. Taylor, Ms. Mulleitner and PSD alleged sufficient interests to intervene in the proceedings at that time and granted their petitions for intervention pursuant to HAR § 2-42-8(g)(14). The Board also reserved its ruling on UPW's Petitions for Intervention until further clarification of the underlying facts of these petitions.

On February 8, 2013, UPW filed a First Amended Petition for Intervention with the Board.

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On February 22, 2013, the Board conducted a status conference with the parties to discuss and clarify the issues presented by the instant Petitions for Declaratory Ruling. Also on February 22, 2013, the parties filed with the Board their Stipulated Facts.

After reviewing Judge Nishimura's Decision and Order, the record, the issues and the stipulated facts presented by the parties, the issue before the Board is whether the Board has jurisdiction over ACO VI (captains) under HRS chapter 89.

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

Appellant Jacqueline Mulleitner:

1. In late 2006 Mulleitner received a promotion from ACO V (Lieutenant) to ACO VI (Captain) which is a bargaining unit 90 position that is excluded from collective bargaining coverage. (Taylor ROA 00113). (Stipulated Fact (SF) #3)
2. As Mulleitner was promoted to ACO VI, she was no longer included in bargaining unit 10, as provided for in HRS Chapter 89, because ACO VI's are designated as top level managerial and administrative personal (sic) positions. (ROA 00114). (SF #4)

Appellant Deborah Taylor:

3. In late 2006 Taylor received a promotion from ACO V (Lieutenant) to ACO VI (Captain) which is a bargaining unit 90 position that is excluded from collective bargaining coverage. (ROA 00113). (SF #7)
4. As Taylor was promoted to ACO VI, she was no longer included in bargaining unit 10, as provided for in HRS Chapter 89, because ACO VI's are designated as top level managerial and administrative personal (sic) positions. (ROA 00114). (SF #8)

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MAB Appeal:

5. On October 19, 2010 PSD filed a motion to dismiss both Mulleitner and Taylor appeals based upon the MAB's lack of jurisdiction. (SF # 12)
6. On October 28, 2012, the MAB found that it had jurisdiction and considered both Mulleitner and Taylor's appeal. (SF #14)
7. On April 29, 2011 the [sic] MAB issued its Findings of Fact, Conclusions of Law, Decision and Order ("D&O") in favor of both Mulleitner and Taylor. (SF #15)

Circuit Court Appeal:

8. On August 31, 2012, PSD's appeal to the Circuit Court came on for oral argument before the Court on August 31, 2012, at 9:00 a.m., before the Honorable Rhonda A. Nishimura. (SF #19)
9. The Court cited to Hawai'i Revised Statutes, §76-14(c)(2) which provides as follows:

The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board. (SF #20)

10. The parties agreed that this was not done in this case. Accordingly the Court granted PSD's appeal and had the case remanded to the MAB for further referral to the Hawaii Labor Relations Board for a resolution of the controversy over the MAB's authority in this case. (SF #21)
11. There is no dispute that for all relevant times, Ms. Taylor and Ms. Mulleitner were ACO VI Captains and are excluded from Unit 10 as top-level managerial and administrative positions.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. Jurisdiction is a base requirement for the court [or board] to resolve a dispute, and the court [or board] has an obligation to determine that such jurisdiction exists. See, Price v. Obayashi Hawai'i Corp., 81 Hawai'i 171, 174-75, 914 P.2d 1364, 1367-68 (1996); Peterson v. Hawai'i Elec. Light Co., Inc., 85 Hawai'i 322, 326, 944 P.2d 1265, 1269 (1997). Without jurisdiction, a court is not in a position to consider the case further. Wong v. Wong, 79 Hawai'i 26, 29, 897 P.2d 953, 956 (1995) (citing Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 69 n. 10, 881 P.2d 1210, 1215 n. 10 (1994)); see also Housing Fin. & Dev. Corp. v. Castle, 79 Hawai'i 64, 76, 898 P.2d 576, 588 (1995).

2. In Paul's Elec. Service, Inc. v. Befitel, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2004), the court stated:

Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority. See Morgan v. Planning Dept., County of Kauai, 104 Hawai'i 173, 184m 86 P.3d 982, 993 (2004) ("An administrative agency can only wield powers expressly or implicitly granted to it by statute." (Quoting TIG Ins. Co. v. Kauhane, 101 Hawai'i 311, 327, 67 P.3d 810, 826 (App. 2003))).

3. The Board's administrative rule regarding declaratory ruling petitions, HAR § 12-42-9, provides in part as follows:

(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

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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. [Emphasis added.]

Pursuant to HAR § 12-42-9(f)(4), the Board may for good cause refuse to issue a declaratory order where the matter is not within the jurisdiction of the Board.

- 4. Prison guards with rank of sergeant through captain were initially included in Unit 10. In Decision No. 9, dated February 11, 1972, United Public Workers, Local 646, UPW/AFSCME, Case No. R-10-6, the Board initially certified UPW as the exclusive representative of Unit 10 which was composed of:

Included: All SUPERVISORY Hospital and Institutional Workers, jail and prison guards of rank Sergeant through Captain, ambulance driver II, all paramedical assistant V and above except positions #3884, 14513, and 2142.

All NON-SUPERVISORY Hospital and Institutional Workers employed as jail and prison guards, houseparents, juvenile detention officers, ambulance drivers and para-medical assistants including positions #3884, 14513 and 2142.

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Excluded: All others.

5. Thereafter, in Decision No. 215, dated May 22, 1986, George R. Ariyoshi, after reviewing the administrative/managerial duties and responsibilities of the Adult Corrections Officer VIs, the Board found, *inter alia*, that each position is the responsible employee for the organizational unit or correctional facilities at assigned times and each position was near the top of an on-going complex agency. Accordingly, the Board concluded that the positions were top-level managerial positions and should be, under the provisions of Subsection 89-6(c), HRS and previous Board decisions, excluded from bargaining unit 10 and coverage under HRS Chapter 89.
6. The parties agreed in the Stipulated Facts that Ms. Taylor and Ms. Mulleitner are ACO VI (Captains) and are excluded from Unit 10 because ACO VI's are designated as top-level managerial and administrative positions.
7. Based on Ms. Taylor and Ms. Mulleitner's exclusions from the coverage of HRS Chapter 89, the Board concludes that it lacks jurisdiction over the positions and the instant declaratory ruling petitions. Pursuant to HAR § 12-42-9(f)(4), the Board therefore finds good cause not to issue a declaratory ruling in this matter and dismisses the instant petitions.
8. As the Board lacks jurisdiction over the instant declaratory petitions, the Board find it unnecessary to address UPW's Petition for Intervention, filed on December 5, 2012 and UPW's First Amended Petition for Intervention, filed on February 8, 2013.

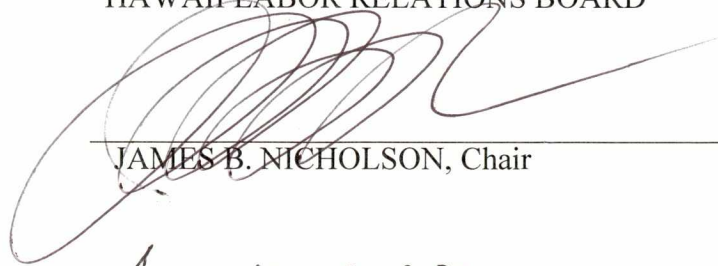
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The Board hereby dismisses the instant petitions for lack of jurisdiction.

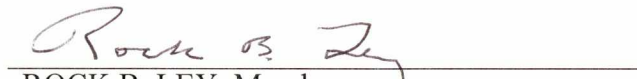
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DATED: Honolulu, Hawaii, March 15, 2013.

HAWAII LABOR RELATIONS BOARD



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SESNITA A.D. MOEPONO, Member
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