

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Petitioner,

and

STATE OF HAWAII, DEPARTMENT OF
EDUCATION,

Intervenor.

CASE NO. DR-05-106

ORDER NO. 3009

ORDER DISMISSING PETITION
FOR DECLARATORY RULING

ORDER DISMISSING PETITION FOR DECLARATORY RULING

On April 2, 2014, Petitioner HAWAII STATE TEACHERS ASSOCIATION (Petitioner or HSTA) filed the instant Petition for Declaratory Ruling (Petition), **seeking a declaratory ruling** concerning disputed arbitral fees and expenses; specifically, **that Arbitrator Martin Henner's (Arbitrator Henner) postponement and cancellation charge is a "fair and reasonable" "daily" rate at which he should be "compensated" under Hawaii Revised Statutes (HRS) § 89-5(i)(7).** (Emphases added).

On April 9, 2014, the STATE OF HAWAII, DEPARTMENT OF EDUCATION (DOE or employer) filed a Petition for Intervention, asserting, *inter alia*, that it is the named employer in the HSTA's grievance before Arbitrator Henner and therefore has a vested interest in the outcome of the HSTA's Petition before the Board; that its interests are not represented by any other party; that its participation will not broaden the issues or delay the proceedings; and that the DOE is a public entity run with public funds and it desires to decrease the costs associated with public sector arbitrations. The DOE considers cancellation fees as a penalty that inhibits the settlement of grievances, increases the expenses in public sector arbitrations and that the parties should not be precluded from objecting to an arbitrator's cancellation fees.

On April 15, 2014, the HSTA filed its Objections to Statements Contained in the Department of Education's Petition for Intervention as mischaracterizing the HSTA's position, role, and function, and the nature of the cancellation and postponement charges by Arbitrator Henner.

On April 21, 2014, the DOE filed its Reply to HSTA's Objections to Statements Contained in the Department of Education's Petition for Intervention, asserting that the Petition will not "resolve" the dispute over Arbitrator Henner's cancellation penalty; that the Arbitrator's penalty is triggered when something good, not bad, happens (i.e., settlement of the grievance); that the HSTA is willing to "squander" its member's money for no good reason; and that sanctifying cancellation penalties will attract more greedy arbitrators who punish parties for settling cases.

On April 25, 2014, the Board issued Order No. 2974, Order Granting in Part State of Hawaii, Department of Education's Petition for Intervention. The Board held that the DOE's interests may be affected by a Board ruling, and there are no other means to protect, or existing parties to represent, the DOE's interests. However, because Hawaii Administrative Rules (HAR) §§ 12-42(8)(g)(14) and 12-42-9(e) limit intervention to "averments which are reasonably pertinent to the issues already presented but do not unduly broaden them[.]" the Board granted the DOE's Petition for Intervention for the limited purpose of determining the issue before the Board of whether Arbitrator Henner's postponement and cancellation charge is a "fair and reasonable" "daily" rate at which he should be "compensated" under HRS § 89-5(i)(7).

In its Petition, the HSTA asserted the following facts, which are supported by exhibits attached to the Petition, and which the Board hereby incorporates as findings of fact for the purposes of this Declaratory Ruling:¹

The HSTA is the duly certified exclusive bargaining representative of employees in bargaining unit 5.

The HSTA and the State of Hawaii, Department of Education are parties to a collective bargaining agreement covering bargaining unit 5 employees from July 1, 2013, to June 30, 2017.

On August 19, 2013, the HSTA filed a class grievance in case number #M 14-01 on wages, hours of work, and bell schedules.

The parties were unable to resolve grievance #M-14-01 through the grievance steps and the HSTA submitted its request for arbitration pursuant to Article V of the agreement.

On October 21, 2013, the HSTA submitted a request for a list of 5 qualified arbitrators from the Board pursuant to Article V.I.(1) of the agreement.

On October 22, 2013, the Board provided a list of five qualified arbitrators which included Arbitrator Henner, from Eugene, Oregon.

Arbitrator Henner's resumeⁱⁱ and posted fee schedule includes the following provision regarding fees/expenses: "\$225 per hr (5 hr. minimum for in-person hearing) +hotel/meal, local transportation. Airfare to Honolulu waived. **If a scheduled hearing is postponed or canceled with notice of 15 business days or less, \$1,500 will be charged if another matter cannot be set in its place. If a scheduled hearing is postponed or canceled with more than 15 business days notice but less than 3 calendar months \$750 shall be charged if anyⁱⁱⁱ matter cannot be set in its place.**" (Emphasis added).

On October 31, 2013, Arbitrator Henner was selected to serve as the arbitrator in grievance #M 14-01.

On or about January 10, 2014, Arbitrator Henner convened a pre-hearing conference during which he, *inter alia*, set hearings for March 31 and April 1, 2014, and referred to his postponement and cancellation charges, and requested the parties to confirm that the arrangement is acceptable.

On or about January 30, 2014, the HSTA notified Arbitrator Henner that the arrangement was acceptable.

On or about January 30, 2014, Arbitrator Henner indicated that he was awaiting confirmation of the employer's acceptance of the terms proposed on January 10, 2012.

On or about January 31, 2014, the DOE declined to agree to a cancellation or postponement charge.

On February 7, 2014, Arbitrator Henner submitted an e-mail to the parties indicating his position regarding the matter of the cancellation and postponement charge.

Article V. I. (4) of the collective bargaining agreement states:

The fees and expenses of the arbitrator shall be shared equally by the Employer and the Association, including the cost of the arbitrator's transcript if one is requested by the arbitrator. Each party will pay the cost of presenting its own case.

In view of the dispute between the employer and Arbitrator Henner over the cancellation or postponement charge the Arbitrator has declined to proceed with arbitral hearings in grievance #M 14-01.

The Board further adopts as a finding of fact the assertion by the DOE in its Petition for Intervention that Arbitrator Henner was selected for this grievance as the result of the parties exercising their alternate strikes from the list of five names provided by the Board.

Pursuant to HRS § 91-8, governing declaratory rulings by agencies, “[a]ny 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**” (emphasis added). Pursuant to HAR § 12-42-9, governing declaratory rulings by the Board, “[a]ny 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** (emphasis added)”

Here, the Petition seeks a declaratory ruling that Arbitrator Henner's postponement and cancellation charge is a “fair and reasonable” “daily” rate at which he should be “compensated” under HRS § 89-5(i)(7). However, the Board instead must dismiss the Petition because Arbitrator Henner's postponement and cancellation charge is not within the scope of the Board's authority to “establish a fair and reasonable range of daily or hourly rates” pursuant to HRS § 89-5(i)(7), as discussed below.^{iv}

Pursuant to HRS § 89-5(i). the Board shall “[d]etermine 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” (§ 89-5(i)(6)); and shall “[e]stablish a fair and reasonable range of daily or hourly rates at which mediators and arbitrators on the lists established under paragraph (6) are to be compensated” (§ 89-5(i)(7)).

The fundamental starting point for statutory interpretation is the language of the statute itself. State v. Bayly, 118 Hawaii 1, 6, 185 P.3d 186, 191 (2008). Where the language of the statute is plain and unambiguous, the Board must give effect to its plain and obvious meaning. Id.

By its plain and unambiguous language, HRS § 89-5(i)(7) authorizes the Board to establish a fair and reasonable range of “daily or hourly rates” at which mediators and arbitrators on the lists established under paragraph (6) are to be compensated. The word “daily” has several definitions, the most relevant of which are “reckoned by the day” and “covering the period of a day : based on a day[.]” Webster’s Third New International Dictionary 570 (1981). The definition of “hourly” most relevant to this discussion is “using an hour as the unit for determining an amount[.]” Id., 1096. Thus, the Board concludes that Arbitrator Henner’s postponement and cancellation charge does not fall within the scope of HRS § 89-5(i)(7) regarding “daily or hourly” rates for which the Board may establish a fair and reasonable range, because the postponement and cancellation charge is not expressly based upon the “period of a day” nor does it expressly use “an hour as the unit” for determining the charge.

An administrative agency can only wield powers expressly or implicitly granted to it by statute, and implied powers are limited to those reasonably necessary to make an *express* power effective (TIG Insurance Co. v. Kauhane, 101 Hawaii 311, 327, 67 P.3d 810, 826 (App. 2003). In TIG Insurance Co., the Intermediate Court of Appeals cited to D.A.B.E., Inc. v. Toledo-Lucas County Board of Health, 773 N.E. 2d 536, 545-46 (Ohio 2002), and quoted the Supreme Court of Ohio, “the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.” 101 Hawaii at 327-28, 67 P.3d at 826-27. Furthermore, pursuant to HAR § 12-42-9, which governs declaratory rulings by the Board, the Board “may, for good cause, refuse to issue a declaratory order” including, but not limited to, instances where “[t]he matter is not within the jurisdiction of the [B]oard.” HAR § 12-42-9(f)(4).

Accordingly, the Board holds that the Petition must be dismissed because Arbitrator Henner's postponement and cancellation charge is not within the scope of the daily or hourly rates over which the Board has authority pursuant to the plain and unambiguous language of HRS § 89-5(i)(7).

Even assuming, *arguendo*, that the language of HRS § 89-5(i)(7) is not plain and unambiguous, a review of the statute's legislative history does not compel a different conclusion.

When first enacted in 1970, via Act 171, S.B. No. 1696-70, 1970 Session Laws of Hawaii, the pertinent language of HRS § 89-5 was similar to its present language. The pertinent language read:

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

* * *

- (6) 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, members of fact-finding board, or arbitrators; [and]
- (7) Establish daily or hourly rates at which mediators, members of fact-finding boards, and arbitrators are to be compensated and apportion the costs of arbitration to the parties involved[.]

1970 Haw. Sess. Laws. at 312-13. The committee reports accompanying S.B. No. 1696-70 did not discuss the scope of paragraph (7) regarding "daily or hourly" rates, and accordingly did not indicate any intent by the legislature to extend such language beyond its normal and ordinary meaning or understanding.

In 1978, the Legislature amended § 89-5, via Act 196, § 1, H.B. No. 1994-78, such that paragraph (b)(7) read:

- (7) Establish daily or hourly rates at which mediators, members of fact-finding board, and arbitrators serving pursuant to paragraph 3 of subsection 89-11(b)^v are to be compensated and apportion the costs of arbitration to the parties involved[.]”

1978 Haw. Sess. Laws at 403. The House Committee on Public Employment and Government Operations expressed the intent of H.B. No. 1994-78 as follows:

Presently, Section 89-5(b) authorizes the HPERB^{vi} to set the rates at which all mediators, members of fact-finding boards, and arbitrators who provide services for public sector collective bargaining are to be compensated. Testimony received by your Committee indicated that the established rate of compensation for arbitrators was found to be excessively high by both the public employers and exclusive representatives who share in the cost of the arbitrator’s pay. Your Committee believes that the compensation of the arbitrator should be determined by the party or parties who employ the arbitrator and therefore, recommends passage of this bill which would allow the public employer and the union to negotiate the rate of compensation for each prospective arbitrator they select and employ. Negotiation of fees would not only lower the cost of arbitration, but may also encourage the selection of newcomers to the field, thus expanding the numbers of experienced arbitrators in Hawaii.

Stand. Com. Rep. No. 467-78, 1978 House Journal at 1603. Similarly, the Senate Committee on Human Resources indicated that:

The purpose of this bill is to amend the existing statutory provisions relating to establishment of rates of compensation for arbitrators appointed under Chapter 89 (collective bargaining law). Under this bill, the [Board] would be authorized to establish the compensation rate for only those arbitrators selected and appointed by the Board pursuant to Section 89-11(b) (impasse resolution).

* * *

. . . This bill allows the employer and the union to negotiate the rate of compensation for those arbitrators whom they select and employ by

restricting the rate-setting authority of the HPERB to only those arbitrators who serve pursuant to paragraph 3 of section 89-11(b)[.]

Stand. Com. Rep. No. 633-78, 1978 Senate Journal at 1034 (emphases original).

Accordingly, while the statutory change in 1978 removed the compensation rates for grievance arbitrators from the scope of the statute and left only interest arbitrators, and that specific issue is not at issue in this proceeding, the legislative history does, nevertheless, support a conclusion that the Legislature intended only compensation *specifically enumerated* in the current § 89-5(i)(7), as being within the Board's jurisdiction, and that any other compensation or charges are left to be negotiated between the parties and the arbitrator.

The relevant language of the statute was again amended in 1985, to correct the reference to "section 89-11(b)(3)" (Act 251, § 4, H.B. No. 174, 1985 Haw. Sess. Laws at 478).

In 2000, the statute was amended via Act 253, § 95, S.B. No. 2859, to read in relevant part:

- (6) Determine qualification 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, members of fact-finding panels, or arbitrators;
- (7) Establish a fair and reasonable range of daily or hourly rates at which mediators, members of fact-finding panels, and arbitrators on the lists established under paragraph (6) are to be compensated[.]

2000 Haw. Sess. Laws. at 891. Thus, the statute was amended to remove reference to interest arbitrations. Act 253 was commonly known as the "civil service reform act" and amended, among others, HRS chapters 76 (governing civil service), 78 (governing public service), and 89 (governing collective bargaining). Accordingly, the committee

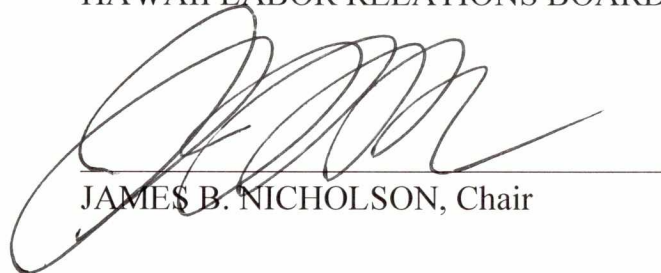
reports reveal discussions of many topics, but the specific revision to HRS § 89-5(i) is not among them. However, given the 1978 committee reports discussing H.B. No. 1994-78, the amendment in 2000 appears to indicate the Legislature's intent to broaden the scope of § 89-5(i)(7) to include grievance arbitrators. The Legislature did not, however, expressly broaden the scope of the statute to reach beyond "daily or hourly rates[.]"

Finally, in 2002, the Legislature amended HRS § 89-5(i)(6) and (7) to remove reference to "members of fact-finding panels," bringing the relevant language of the statute to its current state.

For the reasons discussed above, the Board concludes that Arbitrator Henner's postponement and cancellation charge is not within the plain and unambiguous language of HRS § 89-5(i)(7), which grants the Board authority to establish a fair and reasonable range "of daily or hourly rates[.]" Furthermore, the statute's legislative history, and particularly Act 196 of 1978, supports a conclusion that the Legislature intended only compensation specifically enumerated in the statute as being within the Board's jurisdiction, and that any other compensation or charges are left to be negotiated between the parties and the arbitrator. Because Arbitrator Henner's postponement and cancellation charge is not within the Board's jurisdiction, the Board finds good cause to refuse to issue a declaratory ruling pursuant to HAR § 12-42-9(f)(4). Accordingly, the Board hereby dismisses the Petition.

DATED: Honolulu, Hawaii, July 18, 2014.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member

Copies sent to:
Herbert R. Takahashi, Esq.
Richard H. Thomason, Deputy Attorney General

ⁱ Pursuant to HAR § 12-42-9, which governs “Declaratory rulings by the board[,]” an “order disposing of a petition shall be applicable only to the factual situation alleged in the petition or set forth in the order. The order shall not be applicable to different factual situations or where additional facts not considered in the order exist.” § 12-42-9(i).

ⁱⁱ The resumes of persons available to serve as arbitrators or mediators are made available on the Board’s website merely for the convenience of the parties.

ⁱⁱⁱ Pursuant to Exhibit 7 attached to the Petition, the language should read “if *another* matter cannot be set in its place” (emphasis added).

^{iv} Petitioner also asserted in its Petition:

Accordingly, HSTA requests HLRB to issue a declaratory order that the postponement and cancellation charge by Martin Henner is a fair and reasonable daily rate of compensation under Section 89-5 (i) (7), HRS, **for a qualified arbitrator as determined by the Board under Section 89-5 (i) (6), HRS** (emphasis added).

As discussed in this Order, Arbitrator Henner’s postponement and cancellation charge is not within the Board’s jurisdiction under HRS § 89-5(i)(7) and the Petition is accordingly dismissed. However, in dismissing the Petition, the Board does not intend to imply that Arbitrator Henner is not “qualified” under HRS § 89-5(i)(6).

^v At that time, HRS § 89-11(b)(3) governed Interest Arbitration, the three-member arbitration panel which may be invoked during impasse in negotiations over an initial or renewed collective bargaining agreement.

^{vi} The Hawaii Public Employment Relations Board (HPERB) is the predecessor to the Board.