

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

**EFiled: Aug 10 2015 04:24PM HAST**  
**Transaction ID 57688090**  
**Case No. CE-11-846**

In the Matter of

HAWAII FIRE FIGHTERS ASSOCIATION,  
IAFF, LOCAL 1463, AFL-CIO,

Complainant,

and

KIRK CALDWELL, Mayor, City and County  
of Honolulu, MANUEL P. NEVES, Fire  
Chief, Honolulu Fire Department, City and  
County of Honolulu; HONOLULU FIRE  
DEPARTMENT, City and County of  
Honolulu; WILLIAM P. KENOI, Mayor,  
County of Hawaii; DARREN ROSARIO, Fire  
Chief, Hawaii Fire Department; HAWAII  
FIRE DEPARTMENT, County of Hawaii;  
BERNARD P. CARVALHO, JR., Mayor,  
County of Kauai; ROBERT WESTERMAN,  
Fire Chief, Kauai Fire Department, County of  
Kauai; KAUAI FIRE DEPARTMENT,  
County of Kauai; ALAN ARAKAWA,  
Mayor, County of Maui; JEFFREY A.  
MURRAY, Fire Chief, Department of Fire and  
Public Safety, County of Maui; and  
DEPARTMENT OF FIRE AND PUBLIC  
SAFETY, County of Maui,

Respondents.

CASE NOS. CE-11-846

ORDER NO. 3084

ORDER DENYING CITY RESPONDENTS'  
MOTION TO DISMISS COMPLAINT OR,  
IN THE ALTERNATIVE, FOR SUMMARY  
JUDGMENT; NOTICE OF SECOND  
PREHEARING/SETTLEMENT  
CONFERENCE

**ORDER DENYING CITY RESPONDENTS' MOTION TO  
DISMISS COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY  
JUDGMENT; NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE**

## I. THE COMPLAINT

On September 5, 2014, Complainant HAWAII FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 1463, AFL-CIO (HFFA) filed with the Hawaii Labor Relations Board (Board) a Prohibited Practice Complaint (Complaint) against Respondents KIRK CALDWELL, Mayor, City and County of Honolulu (City); MANUEL P. NEVES, Fire Chief, Honolulu Fire Department, City and County of Honolulu; HONOLULU FIRE DEPARTMENT, City and County of Honolulu; WILLIAM P. KENOI, Mayor, County of Hawaii; DARREN ROSARIO, Fire Chief, Hawaii Fire Department; HAWAII FIRE DEPARTMENT, County of Hawaii; BERNARD P. CARVALHO, JR., Mayor, County of Kauai; ROBERT WESTERMAN, Fire Chief, Kauai Fire Department, County of Kauai; KAUAI FIRE DEPARTMENT, County of Kauai; ALAN ARAKAWA, Mayor, County of Maui; JEFFREY A. MURRAY, Fire Chief, Department of Fire and Public Safety, County of Maui and DEPARTMENT OF FIRE AND PUBLIC SAFETY, County of Maui (collectively Respondents). The Complaint involves HFD Fire Fighter I Chad Kaulukukui's (FF Kaulukukui) request for an intergovernmental movement (IGM) to the Department of Fire and Public Safety, County of Maui. FF Kaulukukui's IGM request was in writing and was sent to Respondent Jeffrey Murray, Maui Fire Chief, on July 7, 2014. Respondent Manuel P. Neves, the City's Fire Chief, denied FF Kaulukukui's request by letter dated August 21, 2014 (8/21/14 Neves Letter), and disclosed to FF Kaulukukui in that letter that "the county Fire Chiefs have agreed that personnel with less than five years of service will not be granted an IGM."

HFFA alleges in the Complaint, *inter alia*, that any change to policies regarding IGMs must be negotiated with HFFA and that the 8/21/14 Neves Letter evidences a failure and/or refusal to negotiate with HFFA pursuant to Hawaii Revised Statutes (HRS) §89-9(a) and Section 1C of the Unit 11 collective bargaining agreement (BU 11 Agreement or CBA), as well as collusion among the four fire chiefs to change the IGM policy without negotiations with HFFA. HFFA claims that Respondents circumvented their duties and responsibilities under Chapter 89 and the BU 11 Agreement. Pursuant to HRS § 89-9(a), the employer and the exclusive representative "shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment which are to be embodied in a written agreement[.]"

Alternatively, HFFA alleges that if the Board determines that IGMs are not the subject of negotiation, then it is a matter for consultation as it is a major policy affecting employee relations. Respondents' failure to consult with HFFA is, according to HFFA, a violation of Section 89-9(c), HRS, and Section 1B of the BU 11 Agreement. Pursuant to HRS § 89-9(c), "all matters affecting employee relations, including those that are, or may be, the subject of a rule

adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to affecting changes in any major policy affecting employee relations.”

Furthermore, HFFA argues that in failing to negotiate or consult with HFFA on the IGM issue, Respondents have violated their statutory and contractual duties to recognize the HFFA as the exclusive bargaining representative for FF Kaulukukui and other Unit 11 members.

The Complaint alleges a prohibited practice by Respondents pursuant to HRS § 89-13(a)(1), (2), (5), (7) and (8), which provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative willfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

\* \* \*

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

\* \* \*

- (7) Refuse or fail to comply with any provision of this chapter;  
[or]
- (8) Violate the terms of a collective bargaining agreement[.]



II. MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

1. On January 6, 2015, Respondents Kirk Caldwell (Mayor Caldwell), Manuel P. Neves (Chief Neves), and the Honolulu Fire Department (HFD) (collectively City Respondents) filed a Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment (City's Motion). The City Respondents assert, *inter alia*, that the Board should dismiss the claims in the Complaint because the Board does not have jurisdiction in this matter. City Respondents argue that HFFA's complaint is "limited to whether Respondents violated Hawaii Revised Statutes ('HRS') Section 89-9(a) as well as the CBA 'relating to intergovernmental movements'"<sup>1</sup> and that there is nothing in the BU 11 Agreement regarding IGMs. City Respondents claim that the applicable rule on IGMs is a civil service rule, Rule 3-29, which provides as follows:

§3-29 Transfers.

- (a) Intra-departmental, inter-departmental, and inter-governmental transfers may be made when the following conditions are met:
  - (1) The employee meets the minimum qualification requirements for the position to which the employee seeks movement;
  - (2) A qualified service-injured employee is not available in the department or on the civil service priority placement list;
  - (3) The employee is an initial probationary or a regular employee; and
  - (4) The transfer shall require the prior approval of the director and the appointing authorities concerned.
- (b) For inter-governmental transfers there is an additional requirement that an appropriate promotional eligible list does not exist for the vacancy.

- (c) The director may require an employee seeking transfer to qualify by examination if the position to which the employee seeks transfer requires knowledge, skills and abilities not required in the employee's current position.

City Respondents argue that the Civil Service Commission, specifically the Merit Appeals Board, is the proper vehicle to resolve disputes regarding IGMs, and they cite Civil Service Rule 1-34(a), Rule 10-2 of the Director of Human Resources, HRS § 76-47(a), HRS § 76-14, and HRS § 76-22.5 in support of their position.

Additionally, City Respondents argue that an IGM “is nothing more than a means for filling civil service positions and therefore is an issue of recruitment,” and therefore in accordance with HRS § 76-47, exclusive jurisdiction over issues regarding IGMs lies with the Civil Service Commission.

On March 20, 2015, HFFA filed HFFA/IAFF Memorandum in Opposition to City Respondents [sic] Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, together with Exhibits 1-5 (Memo in Opposition). HFFA points out that the denial of FF Kaulukukui’s IGM request was based solely on the agreement among the county fire chiefs that personnel with less than five years of service will not be granted an IGM. Nothing in the 8/21/14 Neves Letter referred to any Civil Service Rule, Policy, or Procedure as the authority for denial of FF Kaulukukui’s request. Also noted by HFFA were the stipulations for the dismissal of the Complaint against the Kauai, Maui, and Hawaii Respondents,<sup>2</sup> which all included statements that the Kauai, Maui, and Hawaii Respondents disapprove the basis of the IGM denial by Chief Neves in the 8/21/14 Neves Letter.

HFFA clarified in its Memo in Opposition that the issue in this prohibited practice complaint is not about the interpretation or application of IGMs. Instead, the gravamen of the Complaint is about Chief Neves’s unilateral creation and implementation of a “condition of work” that requires either consultation or negotiation with HFFA as required by Chapter 89 and the BU 11 Agreement.

HFFA noted that from November 10, 2014 – November 20, 2014, Respondents County of Kauai, County of Maui, and County of Hawaii signed stipulations filed with the Board stating, *inter alia*, that each county’s fire department does not have an intergovernmental movement



policy nor is there any agreement establishing eligibility requirements for intergovernmental movements among the several county fire departments in the State of Hawaii.

On April 6, 2015, the City Respondents filed City Respondents' Reply Memorandum in Support of its Motion to Dismiss Complaint or, in the Alternative, for Summary Judgement filed on January 6, 2015, together with the Declaration of John S. Mukai and Exhibit B (Reply Memo). In the Reply Memo, City Respondents argue that ". . . there is nothing to support the Union's contention that Section 1 of the Unit 11 CBA has been violated." Also argued was their contention that the 5-year service requirement for eligibility to receive an IGM is not a "condition of work" since FF Kaulukukui's hours of work, rest periods, and work schedules have not been changed by the 8/21/14 Neves Letter. Furthermore, City Respondents contend that Chief Neves's denial of FF Kaulukukui's IGM request and the issuance of the 8/21/14 Neves Letter is a protected management right of the employer.

Lastly and interestingly, City Respondents bring attention to the recent memorandum dated March 4, 2015, to FF Kaulukukui from Chief Neves (3/4/15 Neves Memo). In the 3/4/15 Neves Memo, City Respondents rescinded the action taken in the 8/21/14 Neves Letter. Although it is not clear, it seems that Chief Neves and City Respondents have reversed Chief Neves's prior denial of FF Kaulukukui's IGM request and have approved his transfer to the Maui Fire Department. Thus, City Respondents claim that the instant case is moot because there is no case or controversy over which this Board can retain jurisdiction under the mootness doctrine.

On April 13, 2015, the Board heard oral arguments on the City's Motion and took the matter under advisement.

### III. LEGAL STANDARDS

#### A. Motion to Dismiss

The Board adheres to the legal standards used by the courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. In considering a motion to dismiss for lack of subject matter jurisdiction,

a court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCF Rule 12(b)(6) for failure to state a claim, “[d]ismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.” Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (citing Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiffs complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory.” Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008).

#### B. Motions for Summary Judgment

Under HRCF Rule 56(b), a party “may move with or without supporting affidavits for a summary judgment in the party’s favor[.]” Ralston v. Yim, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013). “Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any 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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.” Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court has adopted the burden shifting paradigm: first, the moving party has the burden of



producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 472, 99 P.3d at 1056.

However, “[w]hen a motion for summary judgment is made and supported as provided in [HRCF Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her].” Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

#### IV. DISCUSSION AND CONCLUSIONS

In seeking summary disposition of this case on the ground that the Board lacks subject matter jurisdiction over this matter, the City Respondents characterize the incidents complained of in this case as involving the employer's control and oversight of an intergovernmental movement which “is nothing more than a means for filling civil service positions and therefore is an issue of recruitment.” On the other hand, HFFA characterizes the incidences as being about the City Respondents “unilateral creation and implementation of eligibility requirements for inter-governmental movements” which affect, according to HFFA, the working conditions of Unit 11 employees and therefore require City Respondents under the BU 11 Agreement and HRS chapter 89 to negotiate or, at the very least, consult with HFFA prior to making the change in policy. The Board finds the events surrounding the denial of FF Kaulukukui's IGM request and



the 8/21/14 Neves Letter to be in dispute. The Board denies the City Motion for the following reasons:

The Board denies the City Motion for the following reasons:

1. With respect to City Respondents' argument that any potential remedy lies exclusively with the Civil Service Commission, the Board holds that it has exclusive original jurisdiction pursuant to HRS §§ 89-5 and 89-14 ("the board shall have exclusive original jurisdiction over such a controversy") over alleged failure to bargaining in good faith or to consult in good faith. The complaint alleges, *inter alia*, that the employer willfully violated HRS §§ 89-9(a), (c), 89-13(a)(1), (2), (5), (7) and (8) by unilaterally creating and implementing an intergovernmental movement policy affecting the wages, hours and other conditions of employment."
2. Pursuant to HRS § 89-9, the employer and exclusive representative are required to negotiate in good faith with respect to wages, hours, contributions to health benefits trust funds, and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement. Additionally, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.
3. The obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154, 159, 900 P.2d 161, 166 (1995).
4. The Board concludes that there are material facts that preclude dismissal or summary judgment. What effect or impact does the policy have on terms and conditions of employment? Did the employer "willfully" unilaterally create and implement a policy that under the collective bargaining agreement should have been negotiated or consulted?

5. Lastly, this case is not moot and the questions of the motive and propriety of the 8/21/14 Neves Letter should not escape scrutiny by this Board. Also, there is no evidence in the record that FF Kaulukukui's request for an IGM to Maui has been approved, and even if so, this approval comes with a delay of at least several months. Thus, this Board cannot find this matter to be moot as claimed by City Respondents.

In summary and based on the above, the Board must view the allegations of the Complaint and the evidence submitted thus far in a light most favorable to HFFA, which is the non-moving party. HFFA raises sufficient material facts in dispute to avoid both dismissal of its prohibited practice claims and summary judgment against it.

#### **NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE**

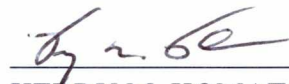
NOTICE IS HEREBY GIVEN that pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-47, the Board will conduct a second prehearing/settlement conference in this matter on **August 19, 2015, at 9:30 a.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 343, Honolulu, Hawaii, 96813. All parties have the right to appear in person and to be represented by counsel or a representative.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten days prior to the prehearing/settlement conference.

Auxiliary aids and services are available upon request by calling Ms. Ebata at the above-listed telephone numbers. A request for reasonable accommodations shall be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii August 10, 2015.

HAWAII LABOR RELATIONS BOARD



KERRY M. KOMATSUBARA, Chair



  
SESNITA A.D. MOEPONO, Member

  
ROCK B. LEY, Member

Copies sent to:

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John S. Mukai, Deputy Corporation Counsel, City & County of Honolulu

William Brilhante, Deputy Corporation Counsel, County of Hawaii

Stephen F. Hall, Deputy County Attorney, County of Kauai

Thomas Kolbe, Deputy Corporation Counsel, County of Maui

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<sup>1</sup> At page 4 of the Memorandum in Support of Motion filed together with the City's Motion.

<sup>2</sup> The Kauai Stipulation is dated November 17, 2014; the Maui Stipulation is dated November 10, 2014; and Hawaii Stipulation is dated November 19, 2014.