



STATE OF HAWAII

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Transaction ID 58043792
Case No. DR-05-106

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. 3107

ORDER GRANTING INTERVENOR'S
MOTION TO DISMISS PETITION FOR
DECLARATORY RULING.

ORDER GRANTING INTERVENOR'S MOTION
TO DISMISS PETITION FOR DECLARATORY RULING

I. PROCEDURAL AND FACTUAL BACKGROUND

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.

A. Factual Background

On October 31, 2013, Petitioner HAWAII STATE TEACHERS ASSOCIATION (HSTA) and Intervenor STATE OF HAWAII, DEPARTMENT OF EDUCATION (DOE) selected Martin Henner (Henner) as an arbitrator in class grievance #M 14-01 from a list provided by the Hawaii Labor Relations Board (Board). Henner is a qualified arbitrator pursuant to HRS § 89-5(i)(6).

After Henner's selection as the arbitrator, a dispute arose between Henner and the DOE regarding a "postponement and cancellation charge" in the event the arbitration was postponed or cancelled (herein "Cancellation Fee"). DOE refused to agree to the Cancellation Fee, and Henner refused to proceed with the arbitration hearing until the dispute with the DOE was resolved.

**I do hereby certify that this is a full, true and
correct copy of the original on file in this office.**


Hawaii Labor Relations Board

On April 2, 104, HSTA filed a Petition for Declaratory Ruling (HSTA's Petition) with the Board seeking a declaratory ruling that the Cancellation Fee is allowed under HRS § 89-5(i)(7) as a "fair and reasonable" "daily" rate. HSTA argued that with this issue resolved with a declaratory ruling, the class grievance #M 14-01 could proceed forward with Henner serving as the arbitrator.

DOE filed on April 9, 2014, a Petition for Intervention in this case, claiming a vested interest in the outcome of HSTA's petition in this case. On April 25, 2014, the Board granted, in part, DOE's Petition for Intervention by Order No. 2974. Order No. 2974 granted the DOE Petition for Intervention for the limited purpose of determining the issue before the Board of whether the Cancellation Fee is a "fair and reasonable" "daily" rate at which Henner should be "compensated" under HRS § 89-5(i)(7).

On July 18, 2014 and by Order No. 3009, the Board dismissed HSTA's Petition. The Board found that the Cancellation Fee "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)."¹

B. Appeal to the 1st Circuit Court

On August 11, 2014, HSTA filed an appeal to the 1st Circuit Court of the State of Hawaii to challenge Order No. 3009. Oral arguments were presented to the Honorable Rhonda S. Nishimura on February 13, 2015, and on March 13, 2015, Judge Nishimura issued her order to "reverse the Board's conclusion of law that it lacked jurisdiction over the declaratory petition and remand the case with instructions for further proceedings pursuant to Section 91-14(g), Hawaii Revised Statutes."² Judge Nishimura's Order instructed the Board as follows:

The Board is to exercise its jurisdiction and develop a more complete record on which the Court can then review the Board's ruling on the merits as to whether the particular cancellation feature in the arbitrator's compensation constitutes a component that is within the legislative scope of a fair and reasonable range of daily or hourly rates pursuant to Section 89-5(i)(7). Upon remand, to assist the Court in its further review of the issue, the parties may but are not required to submit briefing to the Board on HRS 89-5(i)(7)'s legislative history.

¹ See, Order No. 3009 at page 4.

² See, Judge Nishimura's Order Reversing Order No. 3009 In Part and Remanding Case No. DR-05-106 to the Hawaii Labor Relations Board for Further Proceedings at page 2.

Subsequent to the issuance of Order No. 3009, Henner was removed as arbitrator in class grievance #M 14-0. Subsequent to the issuance of Judge Nishimura's Order, class grievance #M 14-0 was consolidated with a similar case and Mario Ramil was appointed as the arbitrator by mutual agreement of the parties. Ramil's arbitration contract does not have a provision similar to the Cancellation Fee which was disputed in Henner's contract. The parties currently are in dispute resolution discussions without the involvement of their respective attorneys or Arbitrator Ramil.

C. DOE's Motion to Dismiss

On August 20, 2015, DOE filed Intervenor's Motion to Dismiss Petition for Declaratory Ruling, together with its Memorandum in Support of Motion, Declaration of Richard H. Thomason and Exhibit "A" (DOE's Motion to Dismiss).

On October 6, 2015, HSTA filed HSTA's Memorandum in Opposition to Intervenor's Motion to Dismiss Petition for Declaratory Ruling, together with the Affidavit of Rebecca L. Covert, Exhibits 1 – 42 and Appendix 1 (HSTA's Opposition).

Oral arguments were heard by the Board on October 20, 2015.

II. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

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.

A. Legal Standards

Pursuant to Hawaii Administrative Rules (HAR) § 12-42-9, any 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. However, HAR § 12-42-9(f) provides that the Board may, for good cause, refuse to issue a declaratory order, for example, such as situations where (1) **where the question is speculative or purely hypothetical and does not involved existing facts 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; or (4) the matter is not within the jurisdiction of the Board (emphasis added).

In Citizens Against Reckless Development v. Zoning Board of Appeals, 114 Hawaii 184, 159 P.3d 143 (2007), the Hawaii Supreme Court recognized that administrative agencies have

discretion in deciding whether to refuse to issue a declaratory ruling. “By empowering agencies generally with the authority to adopt rules regarding the manner in which declaratory ruling petitions shall be considered and disposed of, the legislature has granted agencies discretion with regard to the consideration of declaratory rulings.” 114 Hawaii at 194-95, 159 P.3d at 153-54.

Furthermore, in Lingle v. Hawaii Government Employees Association, 107 Hawaii 178, 111 P.3d 587 (2005), the Hawaii Supreme Court recognized that an agency’s consideration of a petition for declaratory ruling may be challenged under the mootness doctrine (“to the extent that the circuit court’s ruling and the record support a determination that the issues presented . . . fell within an exception to the mootness doctrine, we hold the circuit court did no err”). 107 Hawaii at 197, 111 P.3d at 596.

In the case In re Application of Thomas, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992), the Hawaii Supreme Court held:

A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance found in concern about the proper – and properly limited – role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar.

Additionally, mootness is an issue of subject matter jurisdiction (Hamilton ex rel. Lethem v. Lethem, 119 Hawaii 1, 4, 193 P.3d 839, 842 (2008)). “It is well-established . . . that lack of subject matter jurisdiction can never be waived by any party at any time” (Williams v. Aona, 121 Hawaii 1, 210 P.3d 501 (2009), *citing* In re Application of Rice, 68 Haw. 334, 713 P.2d 426 (1986)); and, subject matter jurisdiction “can be challenged at any time” (Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaii 425, 903 P.2d 1246 (1995), *citing* Bush v. Hawaiian Homes Commission, 76 Hawaii 128, 133, 870 P.2d 1272, 1277 (1994)).

However, the courts recognize exceptions to the mootness doctrine in cases involving questions that affect the public interest and are capable of repetition yet evading review (Okada Trucking Co. v. Board of Water Supply, 99 Hawaii 191, 196, 53 P.3d 799, 804 (2002)), and cases involving the “public interest” exception (Doe v. Doe, 116 Hawaii 323, 327, 172 P.3d 1067, 1071 (2007)). In evaluating the “public interest” exception, 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” (*id.*, *citing* Kahoohanohano, 114 Hawaii 302, 333, 162 P.3d 696, 727 (2007)).

B. Discussion, Conclusions and Order

1. The controversy is moot.

The Board finds and concludes that the issue involved in HSTA's Petition has lost its character as a present, live controversy. Henner was replaced as arbitrator by mutual agreement of the parties. Any question of whether the Cancellation Fee imposed by Henner would have been "fair and reasonable" and within the scope of HRS § 89-5(i)(7) is no longer a live controversy. There is no evidence that a postponement or cancellation charge imposed by Henner is expected to exist in the near future. Thus, this case is moot.

The HSTA argues that the action is not moot because arbitrators still include cancellation fees as a feature of their compensation. However, although the Board recognizes that some potential arbitrators may include cancellation charges in their posted information, the Petition at issue *here* involved specific charges of Henner, and not the charges of any other arbitrator. The Petition itself stated that, "[t]he specific issue is whether a cancellation and postponement charge for an arbitrator from Eugene, Oregon is a fair and reasonable daily rate for arbitral compensation." Additionally, the circuit court's remand similarly directed the Board to consider "whether *the particular cancellation feature* in the arbitrator's compensation constitutes a component that is within the legislative scope of a fair and reasonable range of daily or hourly rates" (emphasis added).

With respect to the "public interest" exception to the mootness doctrine, the Board finds that there is little desirability in the determination of the Petition for future guidance of public officers, and little likelihood of future recurrence of the question. As discussed above, HSTA's Petition involves the specific issue of whether the particular cancellation feature of an arbitrator from Eugene, Oregon, constitutes a component that is within the legislative scope of a fair and reasonable range of daily or hourly rates. The likelihood of this issue recurring, and therefore the future guidance a ruling on HSTA's Petition would provide, is slim.

Additionally, the Board notes that the applicability of its declaratory rulings is limited by law. "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." HAR § 12-42-9(i).

With respect to the "capable of repetition yet evading review" exception, the Board finds that there is little chance of the specific issue of the particular cancellation feature repeating itself. The Board is unaware of this issue ever being presented to the Board prior to the present Petition. By contrast, the petition for declaratory ruling in Lingle v. Hawaii Government Employees Association, 107 Hawaii 178, 111 P.3d 587 (2005), involving a dispute over vacant Bargaining Unit 02 positions, indicated a recurring problem, where the issue presented in the petition had arisen in the past and would likely recur in the future. In that situation, the court was able to apply the mootness exception of "capable of repetition yet evading review." Those circumstances are

absent in the present case. Lastly on this point, the DOE and its legal counsel have been placed on notice to scrutinize and object to arbitrator cancellation fees prior to selection, thus making it unlikely that this situation would arise again.³

Furthermore, even if there is a recurrence, the Board finds that it would not necessarily evade review. In the present case, the issue ceased to be a live controversy simply because the parties mutually agreed to replace Henner with another arbitrator. If the parties in the future do not remove the arbitrator with a cancellation fee and seek the Board's declaratory ruling on this issue, the case would not evade review. In the case at hand, the Board proceeded forward with HSTA's Petition, conducted hearings and issued Order No. 3009, and only after the parties substituted Henner with Ramil, who did not have a cancellation fee in his contract, did the issue of mootness arise.

Accordingly, the Board finds that HSTA's Petition is moot, and that the exceptions to the mootness doctrine do not apply.

2. The Board exercises its discretion

In the alternative, assuming the controversy is not moot, or that an exception to mootness applies in this instance, the Board nevertheless dismisses the Petition. The Board finds that HSTA's Petition no longer involves existing facts or facts which can reasonably be expected to exist in the near future. Henner was replaced as arbitrator by mutual agreement of the parties and the parties are in settlement negotiations without the involvement of their lawyers or Arbitrator Ramil. Any question of whether the Cancellation Fee imposed by Henner would have been "fair and reasonable" and within the scope of HRS § 89-5(i)(7) is speculative and hypothetical at this point. There is no evidence that a postponement or cancellation charge imposed by Henner is expected to exist in the near future. Accordingly, the Board exercises its discretion pursuant to HAR § 12-42-9(f), and dismisses HSTA's Petition.

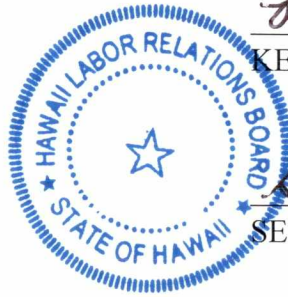
III. CONCLUSION

For the reasons discussed above, HSTA's Petition is hereby dismissed.

DATED: Honolulu, Hawaii, October 20, 2015.

³ DOE cites HLRB Order No. 2944 and acknowledges that a party, including DOE, in the future may be subject to a prohibited practice complaint if the party waits until after selection before lodging objections to an arbitrator's cancellation fees.

HAWAII LABOR RELATIONS BOARD



Kerry M. Komatsubara

KERRY M. KOMATSUBARA, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

EXCUSED

ROCK B. LEY, Member

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