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Case No. 16-DR-11-109

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

CASE NOS. 16-DR-11-109

DAVID Y. IGE, Governor, State of Hawaii;
ALAN ARAKAWA, Mayor, County of Maui;
BERNARD CARVALHO, JR., Mayor,
County of Kauai; BILLY KENOI, Mayor,
County of Hawaii; and KIRK CALDWELL,
Mayor, City and County of Honolulu,

Petitioners,

ORDER NO. 3194

ORDER GRANTING HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL
152, AFL-CIO'S PETITION FOR
INTERVENTION; NOTICE OF
DEADLINES AND HEARING ON
MOTION

ORDER GRANTING HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S PETITION FOR
INTERVENTION; NOTICE OF DEADLINES AND HEARING ON MOTION

On September 23, 2016, Petitioners DAVID Y. IGE, Governor, State of Hawaii; ALAN ARAKAWA, Mayor, County of Maui; BERNARD CARVALHO, JR., Mayor, County of Kauai; BILLY KENOI, Mayor, County of Hawaii; and KIRK CALDWELL, Mayor, City and County of Honolulu (collectively Public Employers), by and through their counsel, filed a Petition for Declaratory Ruling (DR Petition) with the Hawaii Labor Relations Board (Board), as the Public Employers under Hawaii Revised Statutes (HRS) § 89-6(d)(2)¹ for Bargaining Unit 11. The DR Petition raises issues regarding the submission of a Final Position for Interest Arbitration by the Exclusive Representative for Bargaining Unit 11, Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO, which contains certain proposals, which the Public Employers contend are permissive or prohibited subjects within the meaning of HRS § 89-9(d) and a new proposal not submitted during negotiations, which Employers allege is in violation of HRS § 89-11(e)(2)(B).

On September 26, 2016, the Board issued a Notice of the Petition for Declaratory Ruling; Notice of Deadline for Filing Petitions for Intervention; and Notice of Board Conference, pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(14) (Notice).² The Notice required that a Petition for Intervention be filed with the Board by 4:30 p.m. on October 4, 2016. The Notice

further stated that opposition to a Petition for Intervention was required to be filed with Board by October 11, 2016.

On October 4, 2016, at 2:20 p.m., the Hawaii Government Employees Association, Local 152, IAFF, AFL-CIO (HGEA), by and through its counsel, filed a Petition for Intervention (HGEA Petition) in the instant case.

On October 11, 2016, the Public Employers filed Petitioner's [sic] Memorandum in Opposition to HGEA's Petition for Intervention filed on October 4, 2016 (Public Employer's Opposition), citing HAR § 12-42-8(g)(14), and asserting that the HGEA, *inter alia*, does not have a sufficient interest to be allowed to intervene in these proceedings because HGEA: is not the exclusive representative for Unit 11; has not been involved in the negotiations for the Unit 11 collective bargaining agreement (Unit 11 CBA); and has not been privy to the facts regarding the specific proposals at issue in the DR Petition; and further, that allowing HGEA to intervene will unduly broaden the issues presented for declaratory ruling.

Hawaii Administrative Rules (HAR) § 12-42-9 **Declaratory rulings by the board**, subsection (e) provides that, "Any party may intervene subject to the provisions of section 12-42-8(g)(14) insofar as they are applicable."

Based on a review of the DR Petition and the HGEA's Petition considered in light of the criteria for intervention set forth in HAR § 12-42-8(g)(14),³ the Board makes the following findings and conclusions.

First, the Board finds that HGEA has timely filed its Petition by the October 4, 2016 deadline established by the September 26, 2016 Notice.

The Board further concludes that despite not being the exclusive representative for Unit 11, not negotiating the Unit 11 CBA, or being privy to the particular facts of the proposals, as asserted by the Public Employers, the HGEA Petition nonetheless establishes a sufficient interest to intervene in these proceedings based on its allegations that HGEA represents bargaining units 2, 3, 4, 6, 8, 9, 13, and 14 (collectively HGEA bargaining units), which are all subject to the same HRS § 89-11(e)(2)(B) interest arbitration procedures as HFFA; the Board's decision regarding its jurisdiction and authority over issues related to proposals included in a party's final position under HRS § 89-11(e)(2)(B) may affect HGEA and its bargaining units; HGEA's interest is to protect the collective bargaining rights of employees in its bargaining units and uphold the integrity of the HRS § 89-11 impasse procedures; and HGEA wants to ensure a complete record before the Board and have an opportunity to present its views on the jurisdictional issues raised in the DR Petition.

The Board also determines that the HGEA's claims in the Petition are also adequate to support the effect of any decision in the proceeding on HGEA's interest based on the allegations that the Board ruling pertaining to its jurisdiction and authority will directly affect the

interpretation and application to employees in the HGEA bargaining units subject to the HRS § 89-11 impasse and interest arbitration procedures; and that the Board's decision could affect future negotiations of successor collective bargaining agreements between HGEA and the Employer (including but not limited to the Public Employers) for the HGEA bargaining units, and the statutory and contractual rights of employees in these bargaining units. The Board finally concludes that the claims made in the HGEA Petition establishes that the HGEA, as the exclusive representative for the HGEA units, is the only party that can adequately represent the interests of the employees in the bargaining units that HGEA represents and notes that it is significant that HGEA, by its representation of Units 2, 3, 4, 6, 8, 9, 13, and 14, represents a majority of the employees employed by the Public Employers.

In its opposition to the HGEA Petition, the Public Employers rely on HAR § 12-42-9(i) regarding the limited scope of a declaratory ruling petition and Board Order No. 3182 in Merit Appeals Board, State of Hawaii v. Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO (MAB Order), in which the Board granted a Petition for Intervention made by the HGEA, while also denying a Petition for Intervention made by the United Public Workers (UPW). The Public Employers argue that the Board's denial of the UPW's intervention in the MAB Order was based on the reasoning that, "[T]he scope of the Petition for Declaratory Ruling does not broadly encompass the statutory and contractual rights and remedies of other employees similarly situated." The Public Employers further argue that based on the DR Petition in this case that the Board is limited to resolving the controversy regarding HFFA's specific proposals attached to the DR Petition, which involves issues only relating to HFFA and Unit 11, which would not implicate any HGEA's collective bargaining agreements or impact or prejudice HGEA's collective bargaining relationship with the Public Employers. Accordingly, the Public Employers maintain that HGEA lacks a sufficient interest to intervene in the proceedings and HGEA's Petition should be rejected and denied. The Board does not agree and finds that the MAB Order is not controlling of the result in this case for the following reasons.

First, the Board finds that while the MAB Order sets forth general principles, which may equally be applicable to the present intervention petition before the Board, there is no question that permissive intervention is granted based on a case-by-case basis. United States v. City of Los Angeles, 288 F.3d 391, 403 (9th Cir. 2002).⁴ Second, the MAB Order involved a declaratory ruling petition arising out of a different statutory authority than the one in this case. The declaratory ruling petition under consideration in the MAB Order arose out of the Board's responsibility to resolve any controversy regarding the Merit Appeals Board's authority to hear an appeal under HRS § 76-14(c)(2), rather than its responsibility to issue declaratory rulings interpreting HRS Chapter 89 and the subject of interest arbitration,⁵ which is invoked in this case. Third, the issue in the MAB Order was distinguishable and unlike this case, very limited in scope. This issue in the MAB Order was whether MAB had jurisdiction to resolve an appeal from a DPS determination that an individual bargaining unit 14 (Unit 14) member was unsuitable to carry a

firearm and continue in his position as a Deputy Sheriff in light of the dispute also being the subject of a pending grievance. *See: United Public Workers, AFSCME, Local 646, AFL-CIO v. Merit Appeals Bd., State of Hawaii*, Civil No. 13-1-1108-04 (RAN) (1/2/2014) (Nishimura Order). The Board determined that HGEA had a sufficient interest based on its exclusive representation of Unit 14 and its representation of Pratt in the pending grievance. On the other hand, the Board determined that the UPW's interest based on negotiations over the subject matter of MAB's request for declaratory ruling and order (ruling on the federal Gun Control Act of 1968 and HRS § 76-14) insufficient because unlike HGEA, UPW was not involved in the MAB appeal or the pending grievance, nor did it represent Unit 14 or Pratt. In so ruling, the Board noted that its ruling would be confined to the particular parties (the individual employee Pratt, DPS, and HGEA) and the facts in that declaratory ruling petition (MAB appeal and grievance). In this case, however, the dispute is not limited to an individual employee's appeal or grievance. The present DR Petition is being brought by the major public employers, the Governor and all of the County mayors, requesting a determination regarding whether permissive subjects under HRS § 89-9(d) and a new proposal may be submitted to Interest Arbitration under HRS § 89-11(e)(2)(B). This DR Petition involves a much broader issue of statutory interpretation of HRS §§ 89-9(d) and 89-11(e)(2)(B) with much wider implications. While the Petitioners seek a Board decision, which will apply to the specific facts pertaining to the current negotiations and impasse between the employer, State of Hawaii and the various counties, and the HFFA pursuant to HRS § 89-11(e)(2)(B), which is now pending before an Arbitration Panel, the DR Petition nevertheless implicates a broader issue of the interpretation of HRS § 89-9(d). The DR Petition states, "*Petitioner seeks a declaratory ruling on whether the HFFA proposals are prohibited or permissive proposals within the meaning of HRS §89-9(d), and if so, whether any such proposals may be submitted to Interest Arbitration without the Public Employer's consent. A copy of the prohibited or permissive proposals in the HFFA's Final Position is attached hereto as Exhibit I.*" A Board's interpretation of HRS § 89-9-(d) would have a much broader impact than on simply the Public Employers and the HFFA, but would affect all bargaining units subject to the resolution of impasse during negotiations through submission of the final positions to an arbitration panel. In this case, involvement and participation of all of the major public employers, the HFFA, and the HGEA, the exclusive representative for a majority of the public employees employed by the State of Hawaii and the Counties, provides a fuller perspective and development of a sounder record on the issue.

For all the foregoing reasons, the Board grants the HGEA's Petition for Intervention.

NOTICE OF DEADLINES AND HEARING ON MOTION

On October 12, 2016, Hawaii Fire Fighters Association (HFFA) filed Hawaii Fire Fighters Association Motion to Dismiss or, in the Alternative to Defer Consideration (HFFA Motion).

Accordingly, **NOTICE IS HEREBY GIVEN** that the Board sets a deadline of on or before January 12, 2017 at 4:30 p.m. for any party to file a response to the HFFA Motion and the Board

will hold oral argument on the HFFA Motion on **January 25, 2017 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street; Honolulu, Hawaii.

Any party may appear on his or her own behalf, retain counsel, or obtain a representative if the party so desires.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata of the Board at (808) 586-8616, (808) 586-8847 (TTY), or (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, October 20, 2016.

HAWAII LABOR RELATIONS BOARD

 Sesnita A.D. Moepono
SESNITA A.D. MOEPONO, Member


J.N. MUSTO, Member

CONCURRING STATEMENT BY KERRY M. KOMATSUBARA

I concur with the majority of the members (Majority) of the Hawaii Labor Relations Board (Board) in granting the Hawaii Government Employees Association Petition for Intervention (HGEA Petition), however, I do not agree with some of the reasoning of the Majority as stated in Order No. 3194.

I believe that intervention into these proceedings should be liberally granted and the showing required of any party seeking intervenor status under HAR § 12-42-8(g)(14) should be

minimal.¹ In my opinion, HGEA has met this minimal showing, but I do not agree with the Majority's explanation to distinguish its ruling in the MAB Order.


KERRY M. KOMATSUBARA, Chair

Copies sent to:

Robert S. Katz, Esq., Kendra K. Kawai, Esq.,
Alan C. Davis, Esq., Peter L. Trask, Esq.
Debra A. Kagawa, Esq.

¹ HRS § 89-6(d)(2) states:

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

(2) For bargaining units (11) and (12), the governor shall have four votes and the mayors shall each have one vote[.]

² On September 27, 2016, the Board issued an Errata to the Notice noting an erroneous reference to "Board Conference," instead of the correct "Oral Argument." However, the Errata specifically stated that all other information in the Notice was correct and remained in effect.

³ HAR § 12-42-8(g)(14) Hawaii Administrative Rules (HAR) § 12-42-9 **Declaratory rulings by the board**, subsection (e) provides that, "Any party may intervene subject to the provisions of section 12-42-8(g)(14).

HAR § 12-42-8 (g)(14) provides:

§ 12-42-8 Proceedings before the board.

(14) Intervention in proceeding:

(A) In any proceeding other than representation proceedings, a petition to intervene and become a party thereto shall be submitted in writing to the board.

(B) The petition shall contain the following:

(i) Nature of petitioner's statutory or other right.

(ii) Nature and extent of petitioner's interest.

(iii) Effect of any decision in the proceeding on petitioner's interest.

(iv) Other means available whereby petitioner's interest may be protected.

(v) Extent petitioner's interest may be represented by existing parties.

(vi) Extent petitioner's participation can assist in development of a sound record.

¹ See, *In re Merit Appeals Board (Pratt)*, Case No. DR-00-108, Order No. 3182 (MAB Order) at pages 8 and 9 (Aug. 15, 2016).

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- (vii) Extent petitioner's participation will broaden the issue or delay the proceeding.
 - (viii) Extent petitioner's interest in the proceeding differs from that of the general public.
 - (ix) How the petitioner's intervention would serve the public interest.

(D) Intervention shall not be granted except on averments which are reasonably pertinent to the issues already presented but do not unduly broaden them. If intervention is granted, the petitioner thereby becomes an intervenor and a party to the proceeding to the degree indicated by the order allowing intervention.

⁴ The Board notes that HAR Rule § 12-42-8(g)(14) pertaining to intervention is very different from both the Federal Rules of Civil Procedure Rule 24(b) and the Hawaii Rules of Civil Procedure Rule 24(b) (which more closely tracks the Federal Rule 24(b)) regarding permissive intervention. However, because HAR § 12-42-8(g)(14) sets forth a consideration of factors in determining the intervention issue, the Board finds that the case-by-case approach taken by the federal courts to intervention under albeit different factors is equally applicable to an intervention determination under its rules.

⁵ HRS § 91-8 states:

§ 91-8 Declaratory rulings by agencies. Any 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. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

