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Case No. CE-11-864

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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; and HONOLULU FIRE DEPARTMENT, City and County of Honolulu, Respondents.	CASE NO. CE-11-864 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER.

Pursuant to Hawaii Revised Statutes (HRS) § 91-11, the Hawaii Labor Relations Board (Board) issues the following Proposed Findings of Fact, Discussion, Conclusions of Law, and Decision and Order.[1] A party adversely affect may file exceptions with the Board no later than **February 3, 2017**. Should a party file exceptions, the Board will hear oral arguments thereon on **February 10, 2017 at 10:00 a.m.**, at the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii.

[1] HRS § 91-11, states in pertinent part:

> Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or portions thereof as may be cited by the parties.

Board Member J N. Musto did not participate in the hearing on the merits. However, Board Member Musto has thoroughly reviewed the record in this matter, including all files, transcripts, and exhibits. Accordingly, the Board issues these Proposed Findings of Fact, Discussion, Conclusions of Law, and Decision and Order.

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER

The question before the Board is: Did the Honolulu Fire Department (HFD) commit a "prohibited practice" when Manuel P. Neves (Chief Neves) as the Fire Chief of the Honolulu Fire Department (HFD), in May 2015 distributed a video message to all HFD employees, including those in bargaining unit 11 (BU 11), thus interfering with the rights of Complainant Hawaii Fire Fighters Association (HFFA/IAFF or Complainant) as the exclusive bargaining unit representative under HRS Section 89-3 and in violation of HRS Section 89-13(a)(1), (2), and (7)? The Board's answer is: Under the circumstances of this case, no.

I. BACKGROUND[2]

On July 31, 2015, the HFFA/IAFF filed the instant Prohibited Practice Complaint (Complaint). The Complaint asserts that Kirk Caldwell, Mayor, City and County of Honolulu, Chief Neves, and the Honolulu Fire Department, City and County of Honolulu, (collectively Respondents) violated HRS Section 89-13(a)(1), (2) and (7). Specifically, the HFFA Complaint alleges, *inter alia*, that Chief Neves, in a May 2015 video message to all HFD employees, criticized and ridiculed the Union by showing a single page of the Union's PowerPoint video on "Gripes vs. Grievances;" "*Respondent Neves's May 2015 Chief's Video is an attempt to discredit the HFFA/IAFF by misinterpreting HFFA orientation material."*

The Complaint continues "…*statements by Neves that imply that HFFA/IAFF does not respect BU 11 employee concerns that are 'gripes' unlike HFD, which treats all questions and concerns as serious*."

The HFFA asserts in the instant Complaint that the statements made by Chief Neves in the May 2015 video are critical of the HFFA/IAFF: "*Respondent Neves's criticism intentionally and by design, willfully attempted to discourage BU 11 employees from joining and/or maintaining their membership in HFFA/IAFF, by involving himself, his HFD administration, and the current City administration in the internal communications between HFFA/IAFF and its membership.*"

On August 4, 2015, the Board issued Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint.[3]

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[2] To the extent that the discussion contained in this background section of this decision and order may be considered to be a finding of fact, conclusion of law and/or mixed finding and conclusion, the same shall be treated as such.

[3] On August 7, 2015, the Board issued Errata Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint. On Thursday, August 6, 2015, Respondents called to inform the Board that page 2 and 4 of the NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; NOTICE OF PREHEARING/ SETTLEMENT CONFERENCE AND NOTICE OF HEARING ON THE PROHIBITED PRACTICE COMPLAINT were missing. The dates of the hearing and the prehearing/settlement conference were not changed.

On August 13, 2015, Respondents' Answer to the Prohibited Practice Complaint was filed with the Board denying any all legal conclusions set forth in the complaint, and any and all allegations in the complaint not specifically admitted to.

On August 17, 2015, Complainant filed with the Board HFFA/IAFF's Prehearing Settlement Conference Statement. Respondents filed with the Board Respondents' Prehearing Conference Statement.

On August 19, 2015, the Board held a Prehearing/Settlement Conference on the Complaint, and the parties agreed to waive the requirements of HRS § 377-9(b) and § 12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules (HAR) mandating that the hearing on the Complaint "be held no less than ten and nor more than forty days after the filing of the Complaint or amendment thereof."

On August 20, 2015, the Board issued NOTICE OF WAIVER OF §377- 9(b), HAWAII REVISED STATUTES AND § 12-42-46(b), SUBCHAPTER 3, CHAPTER 42, TITLE 12, HAWAII ADMINISTRATIVE RULES; NOTICE OF HEARING AND DEADLINES. The Notice set a hearing on the merits to commence at 9:00 a.m. on October 19, 2015 in the Board's hearing room located at Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

The Board held the hearing on the merits on October 19, 2015. At the close of the hearing, the Board Chair Kerry M. Komatsubara (Chair Komatsubara) established a deadline for post-hearing briefs of 30 days after completion of the transcript.

On November 9, 2015, Chair Komatsubara received a communication from the Complainant's attorney, Peter Liholiho Trask, stating in pertinent part,

> "The parties, by and through their respective attorneys, have acknowledged receipt of the transcript of October 19, 2015, evidentiary hearing in the above-captioned matter, and have mutually agreed to submit simultaneous written post hearing briefs by the close of business, Monday, December 14, 2015.
>
> By copy of this letter to Ms. Contrades, attorney for the Respondents, I am confirming our agreement in this matter. Should you have any questions, please do not hesitate to contact either Ms. Contrades or I and [sic] at your convenience."

On December 7, 2015, Chair Komatsubara issued a NOTICE OF STATUS CONFERENCE and EXHIBIT "1". The Notice stated that the parties had agreed to a stay in the proceedings pending the completion of a settlement agreement, Exhibit 1. An informal status conference was scheduled to be held in the Board's hearing room at 1:30 pm on December 14, 2015.

Between December, 2015 and March, 2016, the parties attempted to settle both Case Nos. CE-11-864 and CE-11-845. No final settlement or settlements were reached, and the Board did not take any action to consolidate the two cases.

On March 23, 2016, the Complainants filed HFFA/IAFF MOTION TO RESCHEDULE HEARING ON MERITS IN CE-11-845 and RESCHEDULE SUBMISSION OF POST HEARING BRIEFS IN CE-11-864.

On March 31, 2016, the RESPONDENTS filed a MEMORANDUM IN OPPOSITION TO HFFA/IAFF'S MOTION TO RESCHEDULE HEARING ON MERITS IN CE-11-845 and RESCHEDULE SUBMISSION OF POSTHEARING BRIEFS IN CE-11-864.

On August 31, 2016, Complainant filed HFFA/IAFF MOTION FOR STATUS CONFERENCE in Cases Nos. CE-11-845 and CE-11-864.

On September 7, 2016, the Board received RESPONDENTS' STATEMENT OF NO OPPOSTION TO HFFA/IAFF'S MOTION FOR STATUS CONFERENCE FILED ON AUGUST 31, 2016.

On September 8, 2016, the Board issued Order No. 485[4], ORDER GRANTING HFFA/IAFF MOTION FOR STATUS CONFERENCE AND NOTICE OF STATUS CONFERENCE.

On September 16, 2016, a status conference was held. The Parties acknowledged that no written settlement had been achieved. Therefore, the Parties agreed to set a date for submission of post hearing briefs. A NOTICE OF SUBMISSION OF POST HEARING BRIEFS was sent to the Parties on September 16, 2016, requiring that simultaneous post hearing briefs be submitted to the Board through the File & ServeXpress eFiling system on Monday, October 17, 2016 by the close of business at 4:30 pm.

On October 17, 2016, the Complainant's counsel filed with the Board HFFA/IAFF MOTION FOR AN EXTENSION OF THE DEALINE TO FILE ITS POST HEARING BRIEF IN CE-11-864.

On October 17, 2016, the Respondents filed STIPULATION TO EXTEND DEADLINE TO FILE POST-HEARING BRIEF stipulating to extending the filing of post hearing briefs to October 24, 2106[5].

On November 9, 2016, counsel for the Respondents and the Complainant, in Case No. CE-11-864, filed a SECOND AMENDED STIPULATION TO EXTEND DEADLINE TO FILE POSTHEARING BRIEF ORDER NO. 3206 stipulating that parties would "…simultaneously file

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[4] On September 9, 2016, the Board entered Order No. 3186 ERRATA TO ORDER GRANTING HFFA/IAFF MOTION FOR STATUS CONFERENCE AND NOTICE OF STATUS CONFERENCE, which corrected the original order number.

[5] On October 26, 2016 the Respondents filed **AMENDED** STIPULATION TO EXTEND DEADLINE TO FILE POST-HEARING BRIEF, extending the date to file post-hearing brief to Friday, November 4, 2016, indicating the October 24th was an error.

their post-hearing and/or submit a settlement agreement by the close of business on December 2, 2016", which was approved and so ordered by the Board.

On December 2, 2016, the RESPONDENTS' POST-HEARING BRIEF was filed with the Board.

On December 4, 2016, Complainant's counsel filed HFFA/IAFF'S POST HEARING BRIEF.

On December 7, 2016, the RESPONDENTS' MOTION TO STRIKE HFFA'S POST-HEARING BRIEF was filed with the Board.

On December 12, 2016, Complainant's counsel filed HFFA/IAFF'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER.

On December 15, 2016, the Board issued Order No. 3217 ORDER GRANTING AND DENYING IN PART RESPONDENTS' MOTION TO STRIKE HFFA'S POST-HEARING BRIEF; ORDER DENYING HFFA/IAFF'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER, which found

> "…that the Complainant HFFA did violate the terms of the Stipulation and Order No. 3206 by filing their post-hearing brief two days past the agreed deadline of December 2, 2016. This time was significant enough to have allowed the Complainant HFFA the opportunity to review the Respondents' post-hearing brief before formulating the text of the brief, which was filed by the Complainant on December 4, 2016. Since parties had agreed to simultaneously file post-hearing briefs, the Complainant HFFA should suffer some consequence for the untimely filing. However, the Board does not believe that the best interests of reaching a just decision are served by striking the Complainant HFFA's brief from the record."

The Board granted the Respondent two (2) days from the date of the order to file a reply to the Complainant HFFA's post-hearing briefing without any reply from the Complainants HFFA.

On December 16, 2016, the RESPONDENT'S [sic] REPLY TO HFFA'S POST-HEARING BRIEF was filed with Board.

II. FINDINGS OF FACT

Based on:

A. All of the matters which are part of the record on this case (e.g., all transcripts, pleadings, declarations, exhibits, notices and orders filed with the Board);

B. All exhibits admitted into evidence at the Combined Hearing;

C. The testimony of each witness (whether elicited on direct, cross or redirect examination) and the Board's determination of the credibility, and the weight to be given to the testimony, of each witness;

D. The arguments of counsel (including the arguments made in their respective closing briefs); and

E. Such other matters which the Board is allowed to consider, including any matters which the Board is allowed to take notice of pursuant to HRS Chapters 89, 91 and 377, and in addition to any findings or conclusions contained in Parts I and II above (which are hereby incorporated herein by reference), the Board adopts and enters the following Findings of Fact and Conclusions of Law (if it should be determined that any finding of fact should be considered as a conclusion of law or any conclusion as a finding or as mixed findings and conclusions, then they shall be treated to be as such),

the Board adopts the following findings of fact:

1. Parties.

(a) HFFA is, and was at all times relevant herein, (a) an employee organization within the meaning of HRS Section 89-2, and (b) the duly certified exclusive bargaining representative of firefighters (bargaining unit 11 or BU 11).

(b) Each of the following Respondents is an "employer" within the meaning of HRS Section 89-2: Kirk Caldwell, Mayor, City and County of Honolulu; Chief Neves, Chief of HFD; HFD; and the City and County of Honolulu.

2. Collective Bargaining Agreement.

(a) The applicable collective bargaining agreement is the Unit 11 Collective Bargaining Agreement which is in effect for the period from July 1, 2011 to June 30, 2017 (CBA).

(b) The provisions of CBA Section 7 are adopted as a finding of fact.

3. On or about May 5, 2015, Chief Neves produced a video message that was sent to all HFD employees. Included in the HFD employees who received the video messages were those included in BU 11, for which the HFFA/IAFF is the certified exclusive representative as defined under HRS Section 89-2. The video message was entered into the record on a video disk as Respondents' Exhibited A, and a certified written transcription of the May 2015 MESSAGE of Chief Neves was entered into the record as Complainant's Exhibit 5.

4. On July 31, 2015, the Complainant HFFA/IAFF filed the Complaint, which alleges that the

Respondents violated HRS Section 89-13(a)(1), (2) and (7). Specifically, the Complainant HFFA/IAFF asserts that Chief Neves, in the May 2015 video message to all HFD employees, criticized and ridiculed the HFFA/IAFF by showing two pages of the Union's PowerPoint presentation that the exclusive representative used when conducting a meeting for BU 11 employees pursuant to the July 1, 2011 through June 30, 2017 Bargaining Unit 11 Agreement, *Section 7, Orientation of Employees* (HFFA Exhibit 2.) On the second page of the two-page document, the PowerPoint slide was "GRIPES VS. GRIEVANCES." The video, Respondent's Exhibit A, shows Chief Neves reading verbatim from the copy of the PowerPoint slide. The transcript of the video in Complainant's Exhibit 5 substantiates the verbatim reading.

5. The Complainant HFFA/IAFF argues, *inter alia*, that the statements made by Chief Neves in the video, from line 8, p. 10 through line 13, p. 12 in the transcript, Complainant's Exhibit 5, constitute violations of HRS Section 89-13 (a),(1) (2) & (3). Such violations being described and characterized in the following assertions made by the Complainant.

> Respondent Neves's Video of May 2015, clearly unabashedly and officially informs all Fire Fighters of his opinion, a Public Employer's opinion, of Gripe vs Grievance for the ostensible purpose of trying to persuade his readers that some of what they have been receiving in emails and HFFA Bulletins, and even on TV, are nothing more than gripes! Clearly an interference by a public employer to "influence" employees about their contractual grievance procedure, guaranteed by Section 89-10. 6, HRS and to interfere with the message from their Union! (See, Complainant's Post Hearing Brief at p. 10.)

6. The original Complaint, *inter alia*, ascribes to Chief Neves that the motives behind the issuance of May 2015 video to be:

> 15. Respondent Neves's criticism intentionally and by design, **willfully attempted to discourage BU 11 employees from joining and/or maintaining their membership in HFFA/IAFF**, by involving himself, his HFD administration, and the current City administration in the internal communications between HFFA/IAFF and its membership.
>
> 16. Respondent Neves's May 2015 Chief's Video is an **attempt to discredit the HFFA/IAFF by misinterpreting HFFA orientation material**.
>
> 17. Respondent Neves's May 2015 Chief's Video is an **attempt to turn new and long time HFFA members against the HFFA/IAFF in the undisguised anti-union effort** to interfere with internal Union communications, and internal Union elections." (**Emphasis added**) (*See* Complaint, July 31, 2015, p. 7).
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> * * *

> 19. Respondent Neves's criticism of HFFA/IAFF **interferes, restrains or coerces BU 11 employees in the exercise of their right** to form, join, or assist any employee organization for the purpose of collective bargaining, and their right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection in violation of Section 89-3, HRS." (*See* Complaint, p. 8) (**Emphasis added**)

7. Counsel for the Complainant points to Chief Neves' testimony during the hearing as further evidence of intention of the Respondent's intention to violate HRS Section 89-3:

> Respondent Neves further admitted that what prompted his motivation to use the HFFA/IAFF PowerPoint presentation given to the recruits because "this was a good definition of the difference between the various levels of people not agreeing with the Chief. So I thought it was good depiction." (TR of 10/19/2015 at 15, ln 20-13).

8. The Complainant referred to the testimony of HFFA/IAFF President Lee:

> President Lee further admitted that he has no grudge against Chief Neves when he communicates with his employees on matters regarding the operation**,** and the health and safety and welfare of the public. (TR at 120, ln 15-22) But that is not what this prohibited practice complaint is about. (TR at 120, ln 25; at 121, ln 1-2) This prohibited practice complaint **"is about interference with the Union and our ability to communicate and educate** and ..." (TR at 121, ln 3-4)

III. DISCUSSION

The sole basis of the above referenced Complaint, which charges violations of HRS Sections 89-3 and 89-13(a)(1), (2) and (7), is the allegation that Chief Neves prepared and distributed a video to all the employees of the HFD and as a part of the video presentation, he displayed two pages of the HFFA/IAFF Power Point presentation used in a prior presentation by the HFFA/IAFF to a new employee orientation meeting for members of Bargaining Unit 11 at an employee orientation meeting.

HRS Section 89-13(a)(1), (2) & (7) makes it 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; or (7) refuse or fail to comply with any provision of this chapter.

The Complainant HFFA/IAFF argues that the video presentation of Chief Neves is critical of HFFA/IAFF, the exclusive bargaining unit representative, to the point of ridicule. It is asserted that the use by Chief Neves of the HFFA/IFFA Power Point slide titled "Gripe vs Grievance" was

done to make all complaints from HFFA/IAFF about Chief Neves seem to be gripes, i.e., something not of serious concern.

To find a violation of Section 89-13(a)(1), (2) & (7), one must find substantive connection between what was said in the video to the results which are alleged in the Complaint.

After reviewing both the video itself and the transcript made from the video, the Board has applied a "reasonable person" standard to what was said, and how it was said. It should be noted that the video was distributed to all employees of the HFD, not just the members of BU 11.

In Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623, 113 S. Ct. 2264, 2280, 124 L. Ed. 2d 539, 564, (U.S. 1993):

> …review under the "clearly erroneous" standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." **And application of a reasonableness standard is even more deferential** than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no **reasonable person** would find it to be true, to whatever the required degree of proof. (**Emphasis added**)

The Board finds nothing in the video or the transcript of the video that misstates the content of the HFFA/IFFA Power Point slides. The definition made by the HFFA/IFFA between a "gripe" and "grievance" is not misrepresented by Chief Neves. Chief Neves's description of the procedural aspects assigned to grievances are not erroneous, nor is his somewhat simplistic description of complaints filed with this Board. He acknowledges HFFA/IFFA's responsibility in the filing of grievances as the exclusive representative, and adopts the definition of the HFFA/IFFA, "…because this was a good definition of the difference between the various levels of people not agreeing with the Chief. So I thought it was good depiction." (TR at 15)

Under HRS § 89-13(a)(1) it is a prohibited practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by HRS Chapter 89. HRS § 89-3 guarantees employees the right to self organize, to form, join or assist labor organizations, to bargain collectively with the representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employer conduct that interferes with, restrains, or coerces employees in the exercise of these rights violates HRS § 89-13(a)(1). The test is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. (Emphasis added) *See*, Decision No. 404, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 72 (2000) (United Public Workers) *citing* Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984).

In United Public Workers, *supra*, the Board discussed HRS § 89-13(a)(1) as follows:

> The Board discussed § 89-13(a)(1), HRS, in Decision No. 50, Hawaii Federation of College Teachers, Local 2003, 1 HPERB 464 (1974). The Board considered whether an Assistant Vice

> Chancellor's encouragement of a "no representation" vote constituted a prohibited practice. The Board held that an employer had the right to express opinions and persuade its employees to join or not to join a union under the First Amendment as part of the exercise of freedom of speech and freedom of assembly as long as the expression was not coupled with coercion. The Board stated:
>
> Section 89-13(a)(1), HRS, is patterned after Section 8(a)(1) of the National Labor Relations Act. Congress was dissatisfied with the NLRB's rulings in the free speech area based on Section 8(a)(1) and enacted more definitive language under Section 8(c) to clarify that an employee is interfered with, restrained or coerced when the employer expresses views, argument or opinion only if the expression contains a threat of reprisal or force or promise of benefit. Southwire Co. v. NLRB, 383 F.2d 235, 65 LRRM 3042 (5th Cir. 1967). More recently and more explicitly, the Supreme Court defined the scope of permissible employer communications. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

See, United Public Workers, Decision No. 404 at 74-75.

The standard set by the Board with respect to the employer's right to communicate with members of the bargaining unit was not violated by Chief Neves in the statements he recorded for the video. He did not advocate for any action to be taken against the exclusive representative, HFFA/IFFA in violation of any section of HRS Chapter 89. Of the sixteen pages of transcript from the video made by Chief Neves, less than three pages were the comments of the Chief with reference the HFFA/IFFA's Power Point slides gripes v. grievances, found in Complainant's Exhibit 5; approximately 3 ½ minutes out of the 18 ½ minute video.

A substantial amount of the argument of the Complainant is predicated on what the motivations of Chief Neves might have been when he decided to make and distribute video presentations. Even if one were to accept the conclusions reached by the HFFA/IFFA with respect to those motivations, a violation occurs when it can be demonstrated that there are commensurate effects that form a nexus with the act of distributing the video. In support of the Complaint, evidence of the consequences that resulted from those actions would demonstrate that whatever the underlying motivation, the employer had moved to willfully violate the law.

Perhaps the criticism of Chief Neves and his leadership of the HFD by HFFA/IFFA was at the heart of the Chief making the video. However, the content of the video itself does not show the Chief making statements detrimental to, or derogatory comments about, the exclusive bargaining representative, nor does the Chief make any remarks that call on HFD to ignore or discount any statements that may have been made by the HFFA/IFFA in any venue, email, presentation, or meeting. Although the Chief may harbor dissatisfaction with HFFA/IFFA and its leadership, there was no such expression made in the video. In the Chief's video presentation there is no evidence of sarcasm or negative tone directed at the HFFA/IFFA. If anything, the Chief seems to recognize the legitimate role of the HFFA/IFFA in the processing of grievances and decisions to take grievances to arbitration. Nowhere in the video does Chief Neves say, suggest,

or imply that the HFFA/IFFA does respect "gripes" coming from BU 11 members, as opposed to the Fire Chief's concern over such issues. The mere fact that the Chief expressed his concern isn't *ipso facto* a statement that HFFA isn't concerned, and a reasonable person would not reach such a conclusion after listening to the video message.

After viewing the video or reading the transcript of the video, no reasonable person would find the Chief Neves's video statement to be directed at HFFA/IFFA, even if those statements were meant to respond to any internal or external criticism of his leadership. The video doesn't mention specific criticism, but it does acknowledge that they are ways for individuals to address their individual concerns. The Chief specifically says that the "ways to address" concerns include HFFA/IFFA through grievances, arbitrations, and this Board, and he says nothing that was meant to dissuade BU 11 members from sending their gripes to HFFA/IFFA as well.

There is nothing in the record that demonstrates or points to the HFFA/IFFA having been interfered with in their communications to members of the BU 11. There is no evidence that membership participation of those in BU 11 had declined or was impeded in any way through the distribution of the Chief Neves video, including those who choose to become members of HFFA/IFFA or non-members of HFFA/IFFA requesting statutory dues rebates. Thus, Chief Neves's video did not interfere, restrain or coerce BU 11 employees in the exercise of their right to form, join, or assist any employee organization for the purpose of collective bargaining, and their right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection in violation of Section 89-3, HRS.

Pursuant to HRS § 91-10(5), "the party initiating the proceedings shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." In the present case, the Board finds and concludes that the Complainant has not met its burden under § 91-10(5) with respect to the allegations in the Complaint.

Based on a full review of the record in this case, including the post-hearing briefs of both the Complaint and the Respondents, the Board finds the prohibited practice charge to be without merit and dismisses the case.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject complaint pursuant to HRS §§ 89-5 and 89-14, HRS.

2. The employer did not violate HRS § 89-13(a)(1) by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89.

3. The employer did not violate HRS §89-13(a)(2) to dominate, interfere, or assist in the formation, existence, or administration of any employee organization.

4. The employer did not violate HRS § 89-13(a)(7) by refusing or failing to comply with any provision of Chapter 89.

5. The Board concludes that based on the preponderance of evidence the Employer did not commit a prohibited practice in wilful violation of HRS §§ 89-13(a)(1), (2) and (7) when Chief Neves distributed a video presentation to the employees of the Honolulu Fire Department.

V. ORDER

The Complaint in CASE NO. CE-11-864 is dismissed and the matter is closed.

Dated: Honolulu, Hawaii, January 24, 2017

HAWAII LABOR RELATIONS BOARD

Sesnita A. M. Moepono

SESNITA MOEPONO, MEMBER

J.N. MUSTO, MEMBER

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