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Case No. 16-DR 00-108

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

MERIT APPEALS BOARD, STATE OF
HAWAII,

Petitioner,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; DEPARTMENT OF PUBLIC
SAFETY, State of Hawaii; KEIRON PRATT;
and UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO,

Intervenors.

CASE NO. DR-00-108

ORDER NO. 3275

DECLARATORY RULING

DECLARATORY RULING

On May 31, 2016, the MERIT APPEALS BOARD, STATE OF HAWAII (MAB) filed a Petition for Declaratory Ruling (Petition for DR) with the Hawaii Labor Relations Board (Board or HLRB). The Petition for DR made the following assertions:

On March 4, 2016, Kieron Pratt (“Mr. Pratt”) filed an internal complaint with the Department of Public Safety (“PSD”) for an “other adverse employment action that cannot be processed through the Collective Bargaining Process,” specifically claiming a violation of Hawaii Revised Statutes (“HRS”) Section 134-7(c)(1) and 18 U.S.C. 922(g)(3).

On April 12, 2016, the PSD denied Mr. Pratt’s internal complaint regarding violations of HRS Section 134-7(c)(1) and 18 U.S.C. Section 922(g)(3), and directed Mr. Pratt to file an appeal to the Merit Appeals Board (“MAB”) if he disagreed with PSD’s decision.

On May 10, 2016, Mr. Pratt submitted an appeal to the MAB regarding an examination regarding his suitability. In his claim, Mr. Pratt claims “he should have been given his firearm back and be restored to full status as Sheriff Deputy.” See Exhibit 1.

Mr. Pratt’s claim of PSD’s violations of HRS Section 134-7 regarding the ownership or possession of a firearm, and 18 U.S.C. Section 922(g)(3) regarding firearms in possession of an unlawful user or addicted to any controlled substance may not be proper under Hawaii Administrative Rules (“HAR”) Section 14-25.1-1 (b)(4)(c), as the MAB is unsure whether it has jurisdiction to hear this “other employment action.”

HRS Section 76-14(c)(2) provides:

- (2) The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board;

Under the facts presented and the relief claims, there is an issue as to whether the MAB has jurisdiction over this matter, as there is no indication as to how Mr. Pratt is affected regarding (1) recruitment and examination, (2) classification or reclassification of a particular position, (3) initial pricing of classes, and (4) other employment actions (see HRS Section 76-14(a)).

Under paragraph 6 of the Petition for DR form, “Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position[.]” the MAB asserted:

As set forth previously, the MAB is seeking guidance from the HLRB pursuant to HRS Section 76-14(c)(2). In the instant case, the MAB does not believe it has jurisdiction to hear Mr. Pratt’s claim.

Section 14-25.1-1, HRS [sic], provides, in relevant part:

- (b) The merit appeals board shall decide appeals from actions taken by the Chief Executive, the director, an appointing authority, or a designee acting on behalf of one of these individuals, as follows to:

....

- (4) Other employment actions taken against civil service employees who are excluded from collective bargaining coverage under Section 89, HRS, if the employee [sic] suffers a legal wrong by the action. These actions include:

....

- (C) other employment actions if the employee suffers a legal wrong by the action.

Although the PSD instructed Mr. Pratt to seek appeal of the denial of his internal complaint with the MAB, the MAB does not believe it has jurisdiction under the [sic] claims presented.

Exhibit “2” attached to the Petition for DR is a Department of Human Resources Development (DHRD) Internal Complaint Form (Internal Complaint Form). Under “Type of Complaint” on the Internal Complaint Form, Mr. Pratt had checked “***Other Adverse Employment Action That Cannot be Processed Through Collective Bargaining Process***” (emphasis added). In his statement of facts attached to the Internal Complaint Form, Mr. Pratt alleged, *inter alia*, that the employer, STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY (PSD or DPS), “wrongfully took away his firearm and wrongfully disallowed him to carry a firearm in the performance of his duties and responsibilities as Sheriff Deputy. The relief being sought by Complainant is that he should be restored to full status as Sheriff Deputy and to allow him to carry a firearm so that he can continue in his position as Sheriff Deputy.” The attachment further alleged, “PSD’s continuing refusal to allow Complaint [sic] to carry a firearm is unreasonable and unjustifiable. PSD took away his firearm based upon the Federal Gun Control Act and Hawaii Revised Statutes (‘HRS’) §134-7.”

On June 2, 2016, the HLRB issued a Notice of Filing of Petition for Declaratory Ruling; Notice of Deadline for Filing Petitions for Intervention; and Notice of Board Conference (Notice of Filing).

On June 13, 2016, the HGEA filed its Petition for Intervention (HGEA Petition), alleging, *inter alia*, that the HGEA is the exclusive representative for bargaining unit 14 (Unit 14); that Mr. Pratt is a member of Unit 14 as a Deputy Sheriff II with the Criminal Investigations Unit, Sheriff

Division, PSD; that on March 8, 2016, HGEA filed a grievance on behalf of Mr. Pratt after PSD informed Mr. Pratt that he was deemed unsuitable to carry a firearm and continue in his position as a Deputy Sheriff, and offered him the option of a job search, retirement, or resignation; and that the grievance is being held in abeyance pending the outcome of the internal complaint filed by Mr. Pratt because they both involved similar issues arising out of the same facts. The HGEA further asserted that “[t]he outcome of Mr. Pratt’s appeal before the MAB will affect the pending grievance that HGEA filed on behalf of Mr. Pratt.”

The HGEA is the exclusive representative for Mr. Pratt and other employees in Units 2, 3, 4, 6, 8, 9, 13, and 14. With respect to Mr. Pratt’s grievance, the HGEA asserted, “[o]n March 8, 2016, HGEA filed a Step 1 Grievance on behalf of Mr. Pratt, alleging that PSD violated Article 3 – Maintenance of Right and Benefits; Article 4 – Personnel Policy Changes; Article 5 – Rights of the Employer; Article 8 – Discipline; and Article 17 – Personal Rights and Representation of the Unit 3¹ Collective Bargaining Agreement.”

The HGEA further asserted that “[b]y letter dated April 7, 2016, PSD Director Nolan Espinda (Director Espinda) informed HGEA that it was ‘returning’ the grievance with no action”; and, that Director Espinda further stated “[i]t is the Department’s opinion that the job search process is not covered under the Bargaining Unit 3 Agreement and the appropriate appeals avenue is the Merit Appeal Board.” By letter dated April 7, 2016, the HGEA responded to Director Espinda’s letter and “clarified that HGEA is not arguing the job search process, but that ‘the PSD took the erroneous action to job search the Grievant without cause – essentially terminating him from his position as a Deputy Sheriff II’” and informed Director Espinda “of its contention that the Step 1 grievance be heard.”

Also on June 13, 2016, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed its own Petition for Intervention (UPW Petition) as the exclusive representative

¹ HRS § 89-6(a)(14) provides that Unit 14 shall be comprised of “State law enforcement officers and state and county ocean safety and water safety officers.” Unit 14 was created by Act 137, 2013 Hawaii Session Laws (SB883). Act 137 further provided that the “rights, benefits, and privileges currently enjoyed by state law enforcement officers and state and county ocean safety and water safety officers shall be maintained under their existing collective bargaining agreement and any successor agreement until a collective bargaining agreement is negotiated for the new bargaining unit (14).” 2013 Haw. Sess. Laws Act 137, § 5 at 430.

of institutional, health, and correctional workers in Unit 10. The UPW Petition included the assertion that it “negotiated over the subject matter of the Merit Appeals Board’s request for declaratory ruling and order” and attached as support of its assertion Attachment 4, “Supplemental Agreement on Implementation of the Federal Gun Control Act of 1968” signed by the State of Hawaii, PSD, and the UPW (Supplemental Agreement). The UPW further asserted that the HLRB’s “ruling on the Federal Gun Control Act of 1968 and Section 76-14, HRS, will affect the statutory and contractual rights and remedies of bargaining unit employees similarly situated” and referenced Attachment 4, the Supplemental Agreement between the State and the UPW (CROA at 50). The UPW also asserted that its participation will “assist in developing a sound record regarding what statutory and contractual rights and remedies extend to PSD employees who are required to have the ability to carry or possess firearms and who may lose such a privilege” and that its interest is intended to protect “collective bargaining rights of employees who may be adversely affected by reason of the federal statute.”

On June 24, 2016, the HLRB heard oral argument on the HGEA and UPW petitions to intervene which the HLRB took under advisement. At the oral argument, the HLRB inquired whether the HGEA had been in contact with Mr. Pratt. The HLRB indicated it would serve Mr. Pratt and PSD with a notice of the Petition for DR and provide them an opportunity to file a petition for intervention.

On June 24, 2016, the HLRB issued a “Supplemental Notice of Filing of Petition for Declaratory Ruling; and Supplemental Notice of Deadline for Filing Petitions for Intervention; and Attachment 1” to Mr. Pratt and PSD.

On June 27, 2016, the HLRB issued a Notice of Submission of Briefs, in which the HLRB notified “all parties and potential parties that each shall file and serve the other parties with a brief addressing the jurisdiction of the Petitioner to adjudicate the dispute between Pratt and DPS” and to “attempt to reach agreement on a set of operative and relative facts (including documents) necessary or required for the Board to issue a declaratory ruling.”

On June 30, 2016, Mr. Pratt filed a Petition for Extension of Time to File Petition for Intervention. The HLRB granted Mr. Pratt an extension on July 1, 2016.

On July 5, 2016, PSD filed a Petition for Intervention (PSD Petition). The PSD Petition asserted, *inter alia*, that it is the employer of Mr. Pratt, and it is PSD’s decision that is being

appealed by Mr. Pratt to the MAB, and that the HLRB's decision would affect PSD's special interest as a party to the underlying case.

On July 12, 2016, Mr. Pratt filed his Petition for Intervention (Pratt Petition), asserting that he is an employee of PSD who suffered an adverse decision by PSD, who filed an appeal to the MAB out of an abundance of caution to preserve his rights, without waiving, limiting, and/or restricting his rights and claims in the pending grievance as a member of Unit 14 under the HGEA Agreement. Mr. Pratt also asserted his interest in preserving his legal and contractual rights before the MAB and under the HGEA Agreement, and further asserted that he is the aggrieved party who will provide the factual basis in support of his appeal to the MAB.

On August 12, 2016, the HLRB issued collateral Order No. 3182, Order Granting Petitions for Intervention Filed by Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; Department of Public Safety, State of Hawaii; and Kieron Pratt; Denying Petition for Intervention Filed by United Public Workers, AFSCME, Local 626, AFL-CIO; and First Amended Notice of Submission of Briefs.

On October 31, 2016, PSD filed Intervenor Department of Public Safety's Brief in Response to the Merit Appeals Board's Petition Regarding Kieron Pratt's Internal Complaint (PSD Response).²

Also on October 31, 2016, the HGEA filed Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Position Statement (HGEA Position Statement).

The Board's denial of the UPW Petition in Order No. 3182 was subsequently overturned by the circuit court in Civil No. 16-1-1706-09 (RAN); accordingly, on April 18, 2017, the Board issued Order No. 3246, granting the UPW's Petition and setting a briefing schedule for the UPW to file a legal brief and for the other parties to serve the UPW with legal briefs previously filed.

On April 27, 2017, the HGEA filed a motion to place under seal its Exhibit "D" attached to the HGEA Position Statement that was filed on October 31, 2016. Exhibit "D" contained information such as an employee's medical and health records, and social security number. On May 4, 2017, the UPW filed UPW's Opposition to HGEA's Motion to Place Under Seal and Not

² PSD subsequently filed an Errata to the PSD Response, to correct references to Mr. Pratt's bargaining units, on November 1, 2016. Also on November 1, 2016, PSD filed a Declaration of Maria Cook in support of PSD's Response and attached exhibits.

Redact Exhibit D to HGEA's Position Statement, asserting that the UPW did not object to the redaction of social security number, but did object to redacting of medical and personnel records. On May 5, 2017, the HGEA filed HGEA's Response to UPW's Opposition to HGEA's Motion to Place Under Seal and Not Redact Exhibit "D" to HGEA's Position Statement, Filed May 4, 2017, asserting that the UPW had been provided with a complete copy of the HGEA Position Statement, with the only items "redacted/blacked out" being the employee's social security number and home address, and that redaction of other "personal information" contained in Exhibit "D" was not feasible and this immediate sealing was appropriate.

On May 10, 2017, the UPW filed United Public Workers, AFSCME, Local 646, AFL-CIO's Memorandum of Fact and Law of Jurisdiction.

On June 13, 2017, the Board issued Order No. 3266, granting the HGEA's motion to place Exhibit "D" under seal, and using Rule 10.4 of the Hawaii Court Records Rules (HCRR) as guidance, ordered that Exhibit "D" be sealed in similar manner to that described in HCRR Rule 10.4, to prohibit public access while allowing access by the Board and its personnel in the performance of their duties, attorneys of record, parties to the proceeding, and necessary service providers.

Having thoroughly reviewed the Petition for DR, the position statements by the various parties, exhibits, and other filings and documents in this case, the Board hereby issues the following Declaratory Ruling:

As a preliminary matter, the Board issues this Declaratory Ruling without oral arguments from the parties, as hearings on petitions for declaratory ruling are disfavored under the Board's administrative Rules. HAR § 12-42-9, which governs declaratory rulings by the Board, provides that "[a];though *in the usual course of processing a petition for declaratory ruling no formal hearing shall be granted* to the petitioner, the [B]oard *may, in its discretion*, order such proceeding set down for hearing" (§ 12-42-9(h)(1), emphases added).

The Board further notes that HAR § 12-42-9(i) mandates that "[a]n 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. . . ." Accordingly, for purposes of the Board's Declaratory Ruling herein, all facts alleged in the Petition for DR are deemed to be true, as are other relevant facts alleged by the parties and not in controversy.

Mr. Pratt, as a Deputy Sheriff II for PSD, was at all relevant times a member of the HGEA's Bargaining Unit 3, and subsequently Bargaining Unit 14. According to the Minimum Qualification Specifications for the Deputy Sheriff classification, applicants must meet all federal and State regulations applicable to the carrying, use and possession of firearms and ammunition. The HGEA and Mr. Pratt disagree with PSD as to whether Mr. Pratt meets the requirements under HRS § 134-7(c)(1) and 18 U.S.C. § 922(g)(3) to possess a firearm and ammunition.

On or about May 27, 2014, Mr. Pratt took a medical leave of absence in compliance with a Drug and Alcohol Testing Memorandum of Agreement (MOA) between the HGEA and the State of Hawaii. Subsequently, on July 28, 2014, Mr. Pratt entered into a Voluntary Admission Agreement with PSD. Mr. Pratt returned to work on September 3, 2014. Shortly thereafter, PSD received a letter from Mr. Pratt's treating physician that Mr. Pratt was able to return to regular duty at that time. On October 23, 2014, PSD directed Mr. Pratt to attend an independent evaluation (IME). Based upon PSD's reading of the IME report, PSD notified Mr. Pratt on January 8, 2015, that he did not meet the legal requirements to possess a firearm, and to contact PSD's Civil Rights Compliance Office to schedule a meeting to discuss his employment options. Further information was shared with PSD in the following months, and on August 18, 2015, PSD sent a letter to Mr. Pratt informing him he does not meet the requirements applicable to the possession of firearms, and therefore PSD had scheduled a meeting to discuss his employment options. A meeting was then held on September 9, 2015, during which PSD gave Mr. Pratt the option of a job search, retirement, or resignation. Subsequently, PSD received further information, but the information did not change its determination that it was not possible to provide Mr. Pratt an accommodation to carry a firearm and thus continue his position as Sheriff Deputy. PSD advised Mr. Pratt that if it did not receive his selection by March 14, 2016, it would begin processing his discharge.

On March 4, 2016, Mr. Pratt filed an internal complaint with PSD for "Other Adverse Employment Action that Cannot be Processed Through Collective Bargaining Process" and violations of HRS § 134-7(c)(1) and 18 U.S.C. § 922(g)(3).

On March 8, 2016, the HGEA filed a Step 1 grievance (Grievance) on behalf of Mr. Pratt, alleging that PSD violated Article 3 – Maintenance of Rights and Benefits; Article 4 – Personnel Policy Changes; Article 5 – Rights of the Employer; Article 8 – Discipline; and Article 17 – Personal Rights and Representation of the Unit 3 Collective Bargaining Agreement (CBA). The HGEA alleged that by PSD's letter dated February 29, 2016, the grievant received notification of

termination from his position as a Deputy Sheriff II as he was deemed unsuitable to carry a firearm, and that PSD drew this erroneous conclusion by citing HRS § 134-7(c)(3). On April 4, 2016, PSD returned the Grievance with no action because Mr. Pratt was undergoing the job search process and had not been terminated; further, that the job search process is not covered under the BU 3 CBA and that the appropriate avenue was the MAB. On April 7, 2016, the HGEA responded to PSD, contending that the HGEA was not arguing the job search process; rather, that PSD took the erroneous action to job search the grievant without cause, which was essentially terminating him from his position as a Deputy Sheriff II.

The Grievance is being held in abeyance pending the outcome of Mr. Pratt's internal complaint and appeal to the MAB.

HRS § 76-14(c) provides in relevant part:

- (2) The merit appeals board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii labor relations board[.]

HRS § 76-14(a) provides in relevant part:

- (a) The merit appeals board of each jurisdiction shall decide appeals from any action under this chapter taken by the chief executive, the director, an appointing authority, or a designee acting on behalf of one of these individuals, relating to:
 - (1) Recruitment and examination;
 - (2) Classification and reclassification of a particular position, including denial or loss of promotional opportunity or demotion due to reclassification of positions in a reorganization;
 - (3) Initial pricing of classes; and
 - (4) Other employment action under this chapter, including disciplinary actions and adverse actions for failure to meet performance requirements, taken against civil service employees who are excluded

from collective bargaining coverage under section 89-6.

- (b) Any person suffering legal wrong by an action under subsection (a)(1) or aggrieved by such action shall be entitled to appeal to the merit appeals board. Any employee covered by chapter 76 suffering legal wrong by an action under subsection (a)(2) or (3) shall be entitled to appeal to the merit appeals board. Only employees covered by chapter 76, who are excluded from collective bargaining, suffering legal wrong by an action under subsection (a)(4) shall be entitled to appeal to the merit appeals board.

With respect to HRS § 76-14(a)(1), recruitment and examination, HRS § 76-18, entitled “Examinations,” states, “[t]here shall be examinations for testing the fitness and ability of *applicants* for positions in civil service” (emphasis added). Further, HRS § 76-22.5, entitled “Recruitment,” provides “[t]he director shall adopt rules . . . to determine, establish, and maintain *the manner in which* civil service *positions are to be filled*” (emphases added). Based upon the statutory language in chapter 76 and the facts of this proceeding, it does not appear that the MAB has jurisdiction under HRS § 76-14(a)(1), as the controversy does not involve Mr. Pratt’s *application for*, nor the *filling of*, his Deputy Sheriff II position.

With respect to HRS § 76-14(a)(2), classification and reclassification, HRS § 76-13.5, entitled “Classification,” provides that each director shall establish, implement and maintain one or more classification systems covering all civil service positions, not otherwise exempted by rules; the objective of the classification system is achieving “equal pay for equal work” in accordance with the merit principal. Based upon the statutory language and the facts in this proceeding, it does not appear that the MAB has jurisdiction under HRS § 76-14(a)(2), as the controversy does not involve the establishment, implementation, or maintenance of a classification system designed to achieve equal pay for equal work.

With respect to HRS § 76-14(a)(3), initial pricing of classes, the controversy does not appear to involve a dispute over the initial pricing of a class or group of positions.

With respect to HRS § 76-14(a)(4), other employment action, that subsection expressly applies to other actions “taken against civil service employees *who are excluded from collective bargaining coverage* under section 89-6” (emphasis added). Furthermore, HRS § 76-14(b) provides that “[o]nly employees covered by chapter 76, *who are excluded from collective*

bargaining, suffering legal wrong by an action under subsection (a)(4) shall be entitled to appeal to the merit appeals board” (emphasis added). Here, it is undisputed that Mr. Pratt, at all relevant times, was covered under the collective bargaining provisions of chapter 89, and was a member of the HGEA and therefore covered, initially, under the HGEA Unit 3 CBA and then under the HGEA Unit 14 CBA. Furthermore, it is undisputed that the HGEA filed a Grievance on his behalf, which is currently pending although held in abeyance.

CONCLUSION

For the reasons discussed above, the Board hereby concludes that the MAB does not have jurisdiction over the controversy, pursuant to the provisions of HRS § 76-14. The Petition for DR asserted, “the MAB does not believe it has jurisdiction under [the] claims presented.” The Board hereby declares that it agrees with the MAB, that the MAB does not have jurisdiction under the claims presented.

DATED: July 11, 2017, Honolulu, Hawaii.

HAWAII LABOR RELATIONS BOARD

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member



J. N. Musto

J N. MUSTO, Member

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