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Case No. 17-DR-07-111**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY,

Petitioner,

and

DAVID Y. IGE, Governor, State of Hawaii,

Intervenor.

CASE NO.: 17-DR-07-111

ORDER NO. 3289

DECLARATORY RULING

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On August 21, 2017, Petitioner UNIVERISTY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Petitioner) filed with the Hawaii Labor Relations Board (Board) a PETITION FOR DECLARATORY RULING (Petition for DR) regarding Hawaii Revised Statutes (HRS) § 89-10(b), and a recently negotiated and ratified collective bargaining agreement (CBA or collective bargaining agreement) for Unit 7. The UHPA requested that the Board process the Petition for DR on an expedited basis since a “special session of the legislature is scheduled, beginning on August 28, 2017.”

On August 22, 2017, the Board sent notice of the Petition for DR (Notice) to the various public employers and public employee organizations who may be potential intervenors in this matter. The Notice set the deadline for the filing of a petition for intervention as 4:30 p.m. on August 24, 2017. The Notice further provided that the Board would conduct a hearing to rule on any petition for intervention that may be filed, and to receive oral arguments pertaining to the Petition for DR, on August 25, 2017, at 9:00 a.m.

On August 24, 2017, Intervenor DAVID Y. IGE, Governor, State of Hawaii (Intervenor or Governor) filed a PETITION FOR INTERVENTION (Petition for Intervention) in this matter. The Petition for Intervention asserted, *inter alia*, that the Governor is a public employer for Unit 7 for purposes of negotiating a collective bargaining agreement, along with the Board of Regents and the President of the University of Hawaii; that the Petition for DR concerns the Governor's authority to submit cost items to the legislature during a special session and therefore the Governor is a necessary party; and that there is no other way to protect the Governor's interest in this proceeding other than its Petition for Intervention.

On August 25, 2017, the Board held a hearing on the Petition for DR. Board Members Sesnita A.D. Moepono presided, and Board Member J N. Musto participated. Counsel for the UHPA and counsel for the Governor were present and participated in oral arguments regarding the Petition for DR.

At the hearing, the Board orally granted the Governor's Petition for Intervention; the UHPA had not objected to the Governor's Petition for Intervention. The Governor, as a public employer of Unit 7 employees for purposes of HRS § 89-10(b), stated sufficient interest in the Petition for DR to warrant intervention, and the Board further finds that the Governor's participation would assist in the development of a sound record and would not broaden the issues or unduly delay the proceeding.

After the presentation of arguments, the Board also issued an oral declaratory ruling on the Petition for DR. The Board's oral rulings are incorporated herein.

The Petition for DR states in pertinent part:

UHPA seeks a declaration from the Board to the effect that the legislature may fund a collective bargaining agreement during a special session, and that the Governor does not breach any law by collaborating in that process.

* * *

UHPA negotiated, ratified, and, as of August 3, 2017, signed a renewed collective bargaining agreement with the Public Employer. This process was completed after the adjournment of the legislature in 2017. The agreement is in effect as to language items, but awaits appropriation for salary and other cost items (except EUTF funding, which had been appropriated in regular session). . . .

* * *

§ 89-19(b) H.R.S., particularly the clause which provides: “except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor’s next operating budget.”

* * *

The clause in § 89-10(b) certainly mandates that the governor must propose any needed appropriations for collective bargaining agreements to the next available regular legislative session, as part of his budget proposal. However, neither that clause, nor anything else in § 89-10(b), specifically precludes the legislature from calling a special session on its own constitutional authority, and making an appropriation, if it so chooses, for a collective bargaining agreement; provided only that the legislative houses agree between themselves to take up the matter.

There is nothing illegal about funding a collective bargaining agreement in an optional special session. Although neither the legislature nor the governor is legally obliged to call a special session to fund a collective bargaining agreement, there is also no prohibition against doing so apparent in the Hawaii Constitution, Article III, Section 10. There is also nothing in Article II, Section 10, that limits the legislature’s general power granted in Article III, Section 1. Nothing in Chapter 89 amounts to an express limitation on legislative authority in special sessions. Phrased another way, whether to bring forward a bill to fund a collective bargaining agreement in special session is a political choice.

Should the legislature choose to take the matter up, then its acceptance or rejection of the cost items would have the same effect as an acceptance or rejection of them in a regular session. But because the legislature is under no obligation to call a special session in the first place, should the legislature call a special session and not choose to consider an appropriation, then any needed appropriation would remain pending for acceptance or rejection in the next regular session, as explicitly contemplated in § 89-10(b).

The Petition for DR further asserts that “[o]n August 3, the Governor’s chief of staff indicated that there were ‘technical problems’ in moving forward with the appropriation in special session. On information and belief, based on subsequent discussion, it appears that the Governor’s office is concerned that § 89-10(b) H.R.S. may bar appropriations for collective bargaining agreement from being considered in special sessions.”

The Petition for Intervention asserts that May 4, 2017, was the last day of the 2017 legislative session, and that on June 19, 2017, Unit 7 members ratified the proposed Unit 7 CBA. The Petition for Intervention further asserts that the Board does not have the legal authority to grant relief sought by UHPA without running afoul of the separation of powers; that the Board

cannot command the legislature to fund cost items in the Unit 7 CBA; the legislature's determination of whether to fund cost items during a special session in a non-justiciable political questions; and the Board has no authority to make a declaration of law regarding the Governor's obligation to submit or not submit costs items to the legislature during a special session.

At hearing, the parties clarified their legal positions and background facts. The Governor received notice of the ratification of the Unit 7 CBA on June 21, 2017. On June 29, 2017, the Governor sent correspondence to the Speaker of the House and the President of the Senate, regarding the ratification of the Unit 7 CBA and submission of the cost items, including the estimated amounts, to be included in the Governor's supplemental budget pursuant to HRS § 89-10(b), with copies to the Chair of the Ways and Means Committee and the Chair of the House Finance Committee. The UHPA clarified that it expected funding during a special session to avoid a "retro-check" with tax implications, and to avoid a negative impact from increased health care deductions; that the Chief of Staff raised a "technical concern" over the funding which the UHPA assumed meant HRS § 89-10(b); that Speaker of the House had raised a similar "technical concern"; that the Governor had since called and said he intended to submit a bill for funding; and that the UHPA desires a ruling from the Board to remove any cloud over the funding. The parties agreed that the Board cannot rule on whether the legislature may refuse a funding bill submitted by the Governor; that the Governor has not yet failed to live up to any agreement with the UHPA regarding the funding; and that the legislature may reject funding by implication as discussed in a 1972 opinion by the Attorney General of Hawaii. The Governor agreed that HRS § 89-10(b) imposes a ministerial requirement on the Governor to submit cost items within ten days of ratification for inclusion in the next operating budget, and the UHPA agreed that the statute requires the Governor to take some action so that cost items are dealt with at the next regular session, but asserted that nothing stops the legislature from dealing with the issue earlier if it so chose.

The Board takes notice of the legislative proceedings in the Second Special Session of 2013, as brought up at hearing by the Governor. The Governor asserted that in 2013, the Governor sent a letter to the Speaker of the House and the President of the Senate regarding cost items for two collective bargaining units. In the 2013 Second Special Session, the House itself introduced two bills to fund the cost items – HB1 to fund the cost items in the Unit 10 CBA, and

HB2 to fund the cost items in the Unit 13 CBA. HB1 was passed and enacted as Act 002, and HB 2 was passed and enacted as Act 003.

HRS § 89-10 governs written agreements; enforceability; cost items, and provides in subsection (b):

All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

With respect to the Board's authority to issue a declaratory ruling, Hawaii Administrative Rules (HAR) § 12-42-9, governing declaratory rulings by the Board, states that "[a]ny public employee, employee organization, public employer, or interested person or organization may petition the [B]oard for a declaratory order as to the applicability of any *statutory provision* or of any rule or order of the [B]oard" (emphasis added). In turn, HRS § 89-5 establishes the Board's authority over chapter 89, HRS, including the authority to "[r]esolve controversies under this chapter[.]" However, the Board, as an administrative agency, can only wield powers expressly or implicitly granted to it by statute (TIG Ins. Co. v. Kauhane, 101 Hawaii 311, 327, 67 P.3d 810, 826 (App. 2003)).

Here, the Board does not rule as broadly as requested in the Petition for Declaratory Ruling, for example, the request for ruling that "the Governor does not breach *any law* by collaborating in that process" (emphasis added). However, at hearing, the UHPA clarified that it was seeking a ruling that merely that HRS § 89-10(b) does not prohibit or preclude the funding of cost items during a special session.

Accordingly, based upon the record in this proceeding, including the parties' pleadings and assertions and legal arguments made at hearing, the Board hereby issues the following declaratory ruling:

DECLARATORY RULING:

Hawaii Revised Statutes § 89-10(b) does not address “special sessions” of the Hawaii State Legislature. Therefore, HRS § 89-10(b) does not bar the Governor or the Legislature from addressing or not addressing cost items as defined in HRS chapter 89 during a “special session.”

DATED: Honolulu, Hawaii, August 28, 2017.

HAWAII LABOR RELATIONS BOARD



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

J. N. Musto
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