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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

CIVIL SERVICE COMMISSION,
Department of Human Resources, City and
County of Honolulu,

Petitioner,
and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 142,
AFL-CIO,

Intervenor

CASE NO. 18-DR-03-113

ORDER NO. 3387

DECLARATORY RULING

In the Matter of

HONOLULU POLICE DEPARTMENT,
City and County of Honolulu,

Petitioner
and

CIVIL SERVICE COMMISSION, City and
County of Honolulu; HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 142,
AFL-CIO; and FRANCINE K. GUZMAN,

Intervenors

CASE NO. 18-DR-03-114

DECLARATORY RULING

CASE NO. DR-03-113

On March 14, 2018, the CIVIL SERVICE COMMISSION, City and County of Honolulu (CSC), filed a Petition for Declaratory Ruling (113 DR Petition) with the Hawaii Labor Relations Board (Board or HLRB). The 113 DR Petition, among other things, alleged the following:

On September 26, 2017, the Civil Service Commission ("CSC") issued Findings of Fact, Conclusions of Law, Decision and Order in the Matter of the Appeal of Francine K. Guzman and Honolulu Police Department ("HPD"), City and County of Honolulu. See Exhibit A attached. The CSC granted the appeal of Ms. Guzman concerning her non-selection to the position of Senior Clerk Typist and ordered that HPD re-do the interview and selection process. See Exhibit A attached.

The HPD filed a timely notice of appeal to the Circuit Court challenging whether the CSC had jurisdiction of the case or whether the proper forum was the grievance procedure as set forth in the HGEA Unit 3 collective bargaining agreement.

On March 12, 2018, the Honorable Judge Keith K. Hiraoka, Civil No. 17-1-1732-10 (KKH), issued the attached Order and Notice of Entry in the HPD appeal of the CSC decision in the Francine Guzman case. See Exhibit B attached.

Judge Hiraoka ordered that the case be stayed and temporarily remanded because the Hawaii Labor Relations Board has primary jurisdiction over HPD's challenge to the Commission's jurisdiction over Guzman's appeal pursuant to section 76-14 (c)(2), HRS. See Exhibit B attached.

Under Paragraph 4. of the 113 DR Petition, requiring an indication of the appropriate bargaining unit(s) of the employee(s) involved, CSC responded bargaining unit 3 (Unit 3). Under Paragraph 5. of the 113 DR Petition requiring that the Petitioner, "Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position[.]" CSC asserted:

The CSC contends that the CSC had jurisdiction on the Guzman appeal because: (1) sections 76-47(a) and 76-14(a), HRS, provides the CSC with exclusive authority to hear appeals related to recruitment and examination; (2) Ms. Guzman was applying for a lateral transfer and not a promotion, i.e., there is a provision in

the HGEA Bargaining Unit 3 related to promotions (Article 13) however there is no provision that covers lateral transfers; (3) the HGEA declined to proceed with the grievance for Ms. Guzman related to the non-selection, i.e., HGEA did not go forward with an individual grievance or a class grievance; and (4) the HPD should not be allowed to challenge the CSC decision after the CSC has already issued its decision, i.e., if HPD wanted to challenge jurisdiction HPD should have filed a petition for declaratory ruling with the Hawaii Labor Relations Board before the CSC issued its decision.

Exhibit “A”, attached to the 113 DR Petition is Honolulu City and County Civil Service Commission Findings of Fact, Conclusions of Law, Decision and Order, dated September 26, 2017 (CSC Decision) granted the appeal against the Honolulu Police Department, City and County of Honolulu (HPD) of Francine K. Guzman (Guzman), who was challenging her non-selection for the position of Senior Clerk Typist for District 8. In so ruling, the CSC found that the HPD interview/selection process for the position “was arbitrary, capricious, and/or discriminatory warranting a re-do of the interview/selection process to [e]nsure that the process is fair for all applicants.” HPD appealed the CSC decision to the First Circuit Court, State of Hawaii (Guzman appeal). Exhibit “B”, attached to the 113 Petition is an Order; Notice of Entry in Civil No. 17-1-1732-10 (Guzman Order) in the Guzman appeal. The Guzman Order stayed and temporarily remanded the case for the Board to rule on the jurisdictional issue of whether the proper forum for the Guzman appeal was with the CSC or the grievance/arbitration process.

On March 29, 2018, the Board issued Order No. 3334 Pretrial Order and Notices: (1) Notice of Filing of Petition for Declaratory Ruling; (2) Notice of Deadline for Filing Petitions for Intervention; (3) Notice of Board Hearing and Status Conference; and (4) Notice Regarding Protection of Social Security Numbers and Personal Information. On April 5, 2018, the Board issued an Errata to Order No. 3334 providing that The Notice of Deadline for Filing Petitions for Intervention should be April 11, 2018.

On April 11, 2018, HAWAII GOVERNMENT EMPLOYEES ASSOCIATION (HGEA) filed its Petition for Intervention (HGEA 113 Intervention) alleging, among other things, that HGEA is the exclusive representative for Unit 3; that Guzman is an HPD Senior Clerk Typist and a member of Unit 3; that HGEA filed a class grievance referenced by both Petitioners [for Declaratory Rulings] on behalf of HPD internal applicants (Unit 3 employees), including Guzman, regarding the HPD transfer policy and the City and County of Honolulu Transfer Policy; the class grievance is currently pending at Step 3; and the individual grievance referenced by CSC was also filed by HGEA on behalf of internal applicants who were informed of their non-selection to the District 8 Senior Clerk Typist position. HGEA seeks intervention to protect the procedural and substantive rights of Unit 3 employees and other employees in units

represented by HGEA who may also be impacted because they are subject to the same/similar collective bargaining provisions, administrative rules, and policies and procedures as Guzman; the Board's ruling of CSC jurisdiction may affect pending grievances that HGEA filed on behalf of Guzman and/or other internal applicants, and the rights of these and other similarly situated Unit 3 employees and potentially employees in all other HGEA represented units in the same or similar situations in the future.

CASE NO. DR-03-114

On March 20, 2018, HPD filed a Petition for Declaratory Ruling (114 DR Petition) with the Board that, among other things, alleged the following:

Francine K. Guzman ("Guzman"), a member of HGEA Bargaining Unit 3, appealed an agency to the Civil Service Commission ("Commission"). In response, the Honolulu Police Department ("HPD") filed a Motion to Dismiss, arguing that (1) the Commission lacked jurisdiction, and (2) Guzman lacked standing. The Commission rendered its decision on September 26, 2017, in the form of a Findings of Fact, Conclusions of Law, Decision and Order, finding that it had "authority" to decide the appeal. See Exhibit 1.

The HPD timely appealed the Commission's decision to the Circuit Court of the First Circuit, where it stayed and remanded the case. See Exhibit 2.

Under Paragraph 5. of the 114 DR Petition, requiring that the Petitioner "Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position[.]" HPD asserted:

HPD contends that (1) the Civil Service Commission lacked jurisdiction to decide Guzman's appeal, and (2) Guzman lacked standing to appeal to the Civil Service Commission.

In particular, HPD argues that the Commission lacked jurisdiction under section 76-14, HRS, and section 1-4, Commission Rules. Moreover, Guzman lacked jurisdiction under section 1-34(b), Commission Rules.

The lack of jurisdiction and standing stem from the fact that there is a pending class grievance in which Guzman is a named grievant.

Exhibit “1”, attached to the 114 DR Petition is the CSC Decision referenced above as Exhibit “A” attached to the 113 DR Petition. Exhibit “2”, attached to the 114 DR Petition is the Order in the Guzman appeal referenced above as Exhibit “B” attached to the 114 DR Petition.

On March 29, 2018, the Board issued Order No. 3335 Pretrial Order and Notices: (1) Notice of Filing of Petition for Declaratory Ruling; (2) Notice of Deadline for Filing Petitions for Intervention; (3) Notice of Board Hearing and Status Conference; and (4) Notice Regarding Protection of Social Security Numbers and Personal Information. On April 5, 2018, the Board issued an Errata to Order No. 3335 providing that The Notice of Deadline for Filing Petitions for Intervention should be April 11, 2018.

On April 11, 2018, CSC filed a Civil Service Commission’s Petition for Intervention (CSC Intervention).

On April 11, 2018, HGEA filed a Petition for Intervention (HGEA 114 Intervention) with allegations like those in its HGEA 113 Intervention.

On April 11, 2018, Guzman filed a Petition for Intervention (Guzman Intervention). In her Intervention, Guzman alleged that on December 1, 2016, six internal applicants applied for the District 8 position but did not meet the minimum score based on the testimony of Detective Julianne Kusuda, HPD HRD; based on Guzman’s scorecard and comments by the interview panel, Guzman scored either a 2 for 5 of the interview questions and a 3 for 1 on the interview questions not meeting the minimum score; an external interview was conducted and based on the scorecard and comments by the interview panel, the selectee scored all 4s on six of the interview questions despite no prior experience and knowledge and answer that “she Googles on two of responses to the interview questions[;]” the scorecards and comments were made available to her after submission into evidence at the CSC appeal; the CSC decision “was based on the evidence and the fact that the interview panels [sic] testimony was arbitrary. In addition, the scores and the comments by the interview panel reflects a discrepancy.”

APRIL 16, 2018 HEARING ON PETITIONS FOR INTERVENTION

On April 16, 2018, the Board held a hearing on the Petitions for Intervention at which all the Petitioners for the declaratory rulings and for intervention were present. At the hearing, presiding Board Member J N. Musto noted that there were no objections to the interventions requested and orally ordered the consolidation of Case Nos. DR-03-113 and DR-03-114 for the purposes of argument and decision, which would be included in the written decision. Based on the lack of any objections to the Petitions for Intervention, Board member Musto further orally granted the HGEA 113 and 114 Interventions and the Guzman Intervention in Case No. DR-03-

114 and stated that the granting of the Interventions would be included in the written declaratory ruling. The Board established a deadline of May 21, 2018 for submission of briefs and permitted a reply brief deadline of June 18, 2018.

FILING OF JURISDICTIONAL BRIEFS

On May 18, 2018, CSC filed Petitioner-Intervenor Civil Service Commission's Jurisdictional Brief.

On May 21, 2018, HGEA filed Intervenor Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Jurisdictional Brief.

On May 21, 2018, HPD filed Honolulu Police Department, City and County of Honolulu's Opening Brief Re: Jurisdiction and Standing.

ORDER CONSOLIDATING CASE NOS. DR-03-113 AND DR-03-114

Hawaii Administrative Rules (HAR) § 12-42-8(g)(13), which governs consolidation provides:

(13) The board, on its own initiative or upon motion, may consolidate for hearing or other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

The Board finds that Case Nos. DR-03-113 and DR-03-114 involve substantially similar parties CSC, HGEA, HPD, and Guzman. A review of the 113 Petition and the 114 Petition further shows that both Petitions involve a similar issue of whether the jurisdiction regarding Guzman's claims arising out of her non-selection for the Senior Clerk Typist position are within the jurisdiction of the CSC or the Unit 3 CBA grievance process. The Board finds that the consolidation of the proceedings and contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and that rather than delaying, a consolidation will facilitate the proceedings. For these reasons, the Board consolidates Case Nos. DR-03-113 and 114.

ORDER ON PETITIONS FOR INTERVENTION

HAR § 12-42-8(g)14, which governs intervention in Board proceedings, provides as follows:

- (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.
 - (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.
 - (C) The original and five copies of the petition with certificate of service on all parties, shall be filed with the board.
 - (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.

In addition to the lack of objections to the intervention by any of the parties, the Board further finds that the CSC,¹ HGEA, and Guzman in their respective Petitions for satisfied the foregoing criteria for intervention.

Having thoroughly reviewed the DR Petitions, the briefs by the parties, exhibits, and the entire record, the Board hereby issues the following Declaratory Ruling without oral arguments from the parties in accordance with its own administrative rules disfavoring hearings on declaratory rulings. HAR § 12-42-9(h)(1) provides “[a]lthough in the usual course of processing

a petition for a declaratory ruling no formal hearing shall be granted to the petitioner, the board may, in its discretion, order such proceeding set down for a hearing.”

The Board further finds that under HAR § 12-42-9(i) providing that, “[a]ny 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.” Therefore, for purposes of the Board’s Declaratory Ruling, all facts alleged in the Petitions for DR are deemed to be true, as are other relevant facts alleged by the parties and not in controversy.

Guzman, as an HPD Senior Clerk Typist is, and was, for all relevant times, a public employee and member of HGEA represented Unit 3.

On October 24, 2016, HPD posted a vacancy for a senior clerk typist position in District 8. Ms. Guzman was one of six HPD employees, who applied and were interviewed for the position by a three-person panel. At the time of her application, Guzman was a Senior Clerk Typist, and the selection to a District 8 position would have been a lateral transfer. None of these internal applicants received a passing score from the panel. On January 6, 2017, the same panel interviewed six external (non-HPD employees). The panel selected the external applicant with the highest score for the District 8 position. On April 7, 2017, Guzman was notified by HPD of her non-selection for the position.

HGEA and certain public employers, including the City and County of Honolulu, were parties to a collective bargaining agreement for Unit 3, in effect from July 1, 2013 through June 30, 2015 (2013-15 Unit 3 CBA). On June 5, 2015, the HGEA and certain public employers, including the City and County of Honolulu, entered into a Memorandum of Agreement for Bargaining Units 3 and 4 Collective Bargaining Agreements Effective July 1, 2015 to June 30, 2017 (MOA and collectively the Unit 3 CBA). The MOA implemented a Tentative Agreement reached during negotiations of the collective bargaining agreement covering Unit 3 employees, effective July 1, 2015 through June 30, 2017. In the MOA, the parties further agreed, among other things that the terms and conditions of the 2013-15 Unit 3 CBA is incorporated without change in the Unit 3 CBA, except for the articles regarding salaries, the Hawai’i Employer-Union Health Benefits Trust Fund, and the duration.

The Unit 3 CBA contained ARTICLE 11 – GRIEVANCE PROCEDURE, which provides that “Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure....”

On February 23, 2017, HGEA filed a class grievance regarding their non-selection of the District 8 Senior Clerk Typist position (non-selection grievance) alleging violations of Article 3 – Maintenance of Rights and Benefits, Article 14 – Promotion, and Article 55 – Salaries. On April 7, 2017, after review and assessment of the grievance, HGEA withdrew this Step 1 class grievance based on a determination that the non-selection grievance involved matters not covered by the Unit 3 CBA grievance procedure.

On April 17, 2017, Guzman appealed her non-selection to the CSC challenging the fairness of the interview/selection process (non-selection, retaliation, favoritism, and nepotism) because none of the internal applicants passed the interview and HPD selected an external applicant for the position. Guzman requested that HPD should use the internal candidates with years of experience within the department, select the best qualified candidate for the position, and reprimand the interview panel for their unethical practices. On September 26, 2017, the CSC granted the appeal upon a finding that Guzman produced sufficient credible evidence questioning the HPD interview/selection process at issue and rendered a decision ordering that HPD re-do the interview and selection process for the District 8 senior clerk typist position subject to specific conditions. In so ruling, the CSC determined that the process was arbitrary, capricious, and/or discriminatory warranting a re-do based on concerns regarding the interview and selection for the position, such as why none of the internal applicants received passing scores, whether the internal applicants were held to a higher scoring standard, why Guzman received scores of 2-3 while Kahalewai received scores of 4 on the questions, and whether Kahalewai's status as the widow of an HPD officer impacted her highest interview score. The CSC further concluded that under HRS §§ 76-14 and 76-47, CSC was authorized to hear the appeal, which challenged Guzman's non-selection and HRS § 76-14(a)(1) specifically provided CSC with authority to decide appeals based on recruitment and examination.

On May 11, 2017, HGEA filed a Step 1 grievance (transfer grievance) on behalf of eight internal applicants Unit 3 HPD member, including Guzman, alleging that HPD failed to open the vacant position to a transfer for internal civilian employees prior to conducting an internal and/or external recruitment for the civil vacancy under the HPD transfer policy and the City and County of Honolulu Transfer policy. The grievance alleged violations of Article 3 – Maintenance of Rights and Benefits, Article 14 – Promotion, Article 55 – Salaries, HPD Transfer Policy, and the City and County of Honolulu Transfer Policy. The Step 1 grievance sought for the Employer to select one of the eight internal applicants to the D-8 Senior Clerk Typist position. On May 22, 2017, HPD denied the class grievance for untimeliness under Unit 3 CBA Article 11. On May 30, 2017, HGEA proceeded to Step 2 on this class grievance. On June 14, 2017, in response to a request for information made in the Step 2 grievance letter, the City took the position that according to HPD, there was no internal transfer policy applicable to Unit 3 employees. After the Director of Human Resources responded to the Step 2 class grievance, on July 14, 2017,

HGEA sent a letter to the Director informing her of the Union's intent to arbitrate the transfer grievance. According to the representations of counsel for the HGEA and the HPD at the April 16, 2018 hearing, the class grievance was still pending at the arbitration step awaiting selection of an arbitrator.

HPD filed an appeal from the CSC Decision to the First Circuit Court, State of Hawaii. As stated above in the 113 DR Petition, the circuit court retained jurisdiction and stayed and temporarily remanded the case pending the Board's exercise of its primary jurisdiction to determine HPD's challenge to the CSC's jurisdiction over Guzman's appeal.

HRS § 76-11 defines "Merit appeals board" as follows:

§76-11 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Merit appeals board" means a jurisdiction's appellate body for purposes of section 76-14 regardless of whether it is named merit appeals board, civil service commission, or appeals board.

(Emphasis added)

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

§76-14 Merit appeals board; duties, and jurisdiction. (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 actions 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. Appeals under this section shall be filed within time limits and in the manner provided by rules of the merit appeals board.

(c) The rules adopted by the merit appeals board shall provide for the following:

(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[.]

(e) This section shall be construed liberally to determine whether the appeal falls within the jurisdiction of the merit appeals board.

HRS § 76-47(a) provides:

§76-47 Merit appeals boards; appointment, authority, procedures. (a) Each jurisdiction shall establish a merit appeals board that shall have exclusive authority to hear and decide appeals relating to matters set forth in section 76-14 concerning the civil service of the jurisdiction.

(Emphasis added)

CSC Rule § 1-4 **Limitation of jurisdiction.** provides:

Where the terms of collective bargaining agreements pursuant to chapter 89, HRS, conflict with these rules the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d), HRS.

CSC Rule § 1-34 **Standing to appeal.** provides in relevant part:

(a) The commission shall decide appeals from any action under chapter 76, HRS taken by the mayor, the director, an appointing authority, or a designee acting on behalf of one of these individuals, relating to:

- (1) Recruitment and examination if the person has a "complaint" as defined under section 10-2 of the rules of the director of human resources;
- (2) Classification and reclassification of a particular position if the person has a "complaint" as defined under section 10-2 of the rules of the director of human resources, and is an employee covered by chapter 76, HRS;
- (3) Initial pricing of classes if the person has a "complaint" as defined under section 10-2 of the rules of the director of human resources, and is an employee covered by chapter 76, HRS; and
- (4) Other employment actions under chapter 76, HRS 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, HRS if the person has a "complaint" as defined under section 10-2 of the rules of the director of human resources, and is an employee covered by chapter 76, HRS who is excluded from collective bargaining

(b) It is required, however, that the person exhaust all internal complaint procedures, including administrative review and departmental complaint procedures, before an appeal is filed with the commission. In addition, the commission shall not act on an appeal if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency. The commission shall also not act on appeal if the appeal

involves matters covered by the grievance procedures contained in each of the collective bargaining agreements. In these cases, the commission shall dismiss the appeal and defer to the other authority. The commission shall also not proceed on an appeal if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii Labor Relations Board. Finally, the commission shall use the conditions listed in section 76-41(b), HRS in reaching a decision on whether an action taken by the appointing authority based on a failure by the employee to meet the performance requirements of the employee's position is with or without merit.

CSC Rule § 3-25 **Selection by the appointing authority** provides in relevant part:

- (a) The appointing authority may request to interview as many eligibles certified from an open-competitive eligible list as deemed necessary to fill the vacant position based on job related requirements and program needs upon approval of the director. All eligible who possess the job elated requirements must be given the opportunity for an interview.
- (b) The appointing authority shall interview all interested and available eligibles certified from the intra-departmental or inter-departmental promotional list.
- (c) The requirement to interview an eligible may be waived whenever the appointing authority has interviewed and fully assessed the eligible's qualifications for a similar position from another interview conducted during the previous twelve months.
- (d) All eligibles that are interviewed, but not selected shall be notified in writing.
- (e) Appointment from a certificate of eligibles may be made without regard to rank order.

The selection process shall be documented and transmitted to the director for approval.

HRS § 76-18 provides that, "There shall be examinations for testing the fitness and ability of applicants in civil service. Moreover, HRS § 76-22.5 recruitment, provides in relevant part that, [t]he director shall adopt rules in accordance with sections 76-1 and 78-1 to determine, establish, and maintain the manner in which civil service positions are to be filled."

Both CSC and the HGEA take the position that the CSC had jurisdiction over the Guzman appeal. HPD disagrees and takes the position that CSC lacked jurisdiction over the Guzman appeal because this is a matter subject to the Unit 3 CBA. Pursuant to its authority under HRS § 76-14(c)(2), the Board issues a declaratory ruling that CSC had jurisdiction over

the Guzman appeal based on the above-stated facts and statutory provisions and for the following reasons.

There is no question based on HRS § 76-11 that for purposes of HRS § 76-14, that the “[m]erit appeals board” means the CSC, which rendered the decision on the Guzman appeal. There is no dispute in this case that the crux of Guzman’s case is HPD’s interview and selection process for the District 8 Senior Clerk Typist position. and that the dispute falls within the “recruitment and examination process”. Based on CSC Rule § 3-25 relating to “Selection by the appointing authority”, interviews are part of the selection process. HRS§ 76-14(a)(1) specifically provides that the CSC has jurisdiction to decide appeals relating to recruitment and examination; and that under HRS § 76-14(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 [CSC].” HRS § 76-14(e) provides further that, “This section shall be liberally construed to determine whether the appeal falls within the jurisdiction of the merit appeals board.” Guzman obviously is a “person” who applied and was interviewed to be selected by HPD to fill the position at issue. Based on the statutory language of HRS Chapter 76 and the facts of this case, CSC has jurisdiction under HRS § 76-14(a)(1) because the controversy does involve Ms. Guzman’s application for and filling of the District 8 Senior Clerk Typist position. Guzman falls within HRS § 76-14(b) as “[a]ny person suffering legal wrong by an action under (a)(1) or aggrieved by such action”. Therefore, her CSC appeal from HPD’s non-selection of her for the District 8 Senior Clerk Typist position falls within “recruitment and examination” for that position.

HPD’s position that CSC lacked jurisdiction and Guzman lacked standing because this dispute addresses recruitment and examination, management rights governed by the Agreement or a transfer process subject to the Unit 3 grievance procedure, simply has no merit for two reasons. The Board acknowledges that HPD is correct that HRS § 89-9(d) governs an employer’s management rights and includes the determinations of qualifications and the nature and content of examinations. *See* HRS § 89-9(d)(2). However, the Guzman appeal was not focused on a determination of qualifications or the nature and content of examinations. The Guzman appeal disputed the fairness of the interview process. Second, HPD contends that the CSC lacked jurisdiction under HRS § 76-14(c)(1) because as a Unit 3 member, Guzman has no standing under HSC Rule § 1-34 because the dispute is subject to the Unit 3 CBA.ⁱⁱ Further, that CSC Rule § 1-4 provides that when there is a conflict between a collective bargaining agreement and the CSC Rules, the collective bargaining agreement prevails. HPD fails to recognize, however, that the Guzman appeal does not involve a “conflict” between CSC Rules and the Unit 3 CBA. The Unit 3 CBA contains provisions regarding tests and/or examination, such as ARTICLE 13 – Promotions, Paragraph B.2. (the employer’s assurance to the Union that in selecting employees for promotion, continuing efforts will be made to use tests and/or examinations that directly relate to the skills, abilities, and qualifications required for the class)

and ARTICLE 40 – OTHER LEAVES OF ABSENCES, Paragraph I.1. Other Rights and Conditions (providing for regular employee on an approved leave of absence to be eligible for promotional examinations and status of promotional eligible lists). However, the CSC appeal based on Guzman’s non-selection does not implicate an interpretation of Unit 3 CBA ARTICLES 13 or 40. The HGEA’s withdrawal of the February 23, 2017 non-selection grievance supports that the non-selection issues were deemed to be not grievable under the Unit 3 CBA. HPD points out numerous Unit 3 CBA transfer provisions, and the Board is also aware of the pending transfer grievance filed on behalf of eight HPD employees, including Guzman. However, this transfer grievance is based on the HPD’s failure to open the vacant position for a transfer for internal civilian employees prior to conducting an internal and/or external recruitment for the civilian vacancy. This issue is also not the same as the non-selection ground for Guzman’s appeal based on the fairness of interview process, which was before the CSC. Nor are any of these Unit 3 CBA transfer provisions put forth by HPD applicable to the issue raised by the Guzman in her CSC appeal. Although the remedy of selection of one of the internal applicants was requested in both the transfer grievance and the CSC appeal, the Board notes that in her May 9, 2017 statement to the CSC, Guzman broadened her remedy request to the CSC to “evaluate the entire interview and selection process of the Honolulu Police Department’s Human Resources Division and require compliance of all Civil Service, HPD, HRD, HGEA, and CALEA Standards and Policies.” The Board finds that the merits of the Guzman appeal and the transfer grievance are not based on the same grounds nor do they conflict. For the foregoing reasons, the Board concludes that the Guzman appeal was properly before the CSC under HRS § 76-14(a)(1).

CONCLUSION AND ORDER

The Board orders the consolidation of Case Nos. DR-03-113 and DR-03-114.

The Board orders that the CSC, HGEA, and Guzman Interventions be granted.

The Board hereby holds that the CSC had jurisdiction over the controversy in the Guzman appeal under the provisions of HRS § 76-14(a)(1). The Board, accordingly, agrees with the assertion in the 113 DR Petition that CSC had jurisdiction over the Guzman appeal and disagrees with the contention in the 114 DR Petition that CSC lacked jurisdiction to decide Guzman’s appeal and that Guzman lacked standing to appeal to the CSC.

CIVIL SERVICE COMMISSION, Department of Human Resources, et al. v. HGEA, et al.
CASE NO. 18-DR-03-113
HONOLULU POLICE DEPARTMENT, City and County of Honolulu v. HGEA, et al.
CASE NO. 18-DR-03-114
DECLARATORY RULING
ORDER NO. 3387

DATED: Honolulu, Hawaii, August 6, 2018.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



N. MUSTO, Member

Copies to:

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ⁱ The Board did not specifically rule on CSC's Intervention at the April 16, 2018 Hearing on the Petitions for Intervention. However, the Board finds that there were no objections from any party on any of the interventions,

including that of the CSC Intervention. Accordingly, the CSC Intervention is granted also in this written declaratory ruling.

ⁱⁱ HPD relies on a prior CSC decision in Sanico v. Honolulu Police Department (5/23/17) (Sanico) for its position that Guzman’s non-selection is governed by the grievance procedure under the Unit 3 CBA and that the employee covered by a collective bargaining agreement lacks standing to appeal to the CSC. The Board has reviewed both the Sanico and Guzman appeal decision and finds that there are significant distinctions in the challenges and evidence produced regarding the non-selection brought in each case. The Sanico appeal was brought simply from her non-selection for the District 8 Clerk Typist position. In dismissing the appeal, the CSC concluded that the challenge to the non-selection in that case was a matter covered by the applicable collective bargaining agreement grievance procedure. In the Guzman appeal, however, the challenge was focused more specifically on the fairness of the interview/selection process. In this appeal, the CSC found that Guzman produced sufficient credible evidence to question whether the HPD interview/selection process for the District 8 Senior Clerk Typist position was fair to all applicants. As discussed fully above, in finding that a re-do of that process was warranted, the CSC found that there a number of concerns regarding the conducting of that process and that the process was arbitrary, capricious, and/or discriminatory and concluded that “[t]he Appellant produced sufficient credible evidence to question whether the HPD interview/selection process for the position of Senior Clerk Typist for District 8 was fair to all applicants”. Accordingly, the Board does not find Sanico dismissal controlling of the declaratory ruling issue in this case.