Order

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LOUIS VICTORINO, Complainant, and GEORGE R. ARIYOSHI, Governor, State of Hawaii; DEPARTMENT OF TRANSPORTATION, State of Hawaii; and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondents.	CASE NOS.: CE-01-96 CU-01-49 ORDER NO. 578 ORDER GRANTING MOTION TO DISMISS
In the Matter of STANLEY GONSALVES and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainants, and LOUIS VICTORINO and E. COURTNEY KAHR, Respondents.	CASE NO. CEE-01-1

ORDER GRANTING MOTION TO DISMISS

On April 9, 1985, Complainants STANLEY GONSALVES and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO [hereinafter referred to as UPW], filed with this Board a Prohibited Practice Complaint, Case No. CEE-01-1, against Respondents LOUIS VICTORINO and E. COURTNEY KAHR.

The complaint charges that Respondents VICTORINO and his attorney, KAHR, have wilfully interfered with, threatened, restrained and coerced Complainant GONSALVES in the exercise of his rights guaranteed under Chapter 89, Hawaii Revised Statutes [hereinafter referred to as HRS], and have wilfully violated the terms of the collective bargaining agreement of Unit 1 by the actions of:

a. Filing a prohibited practice complaint in Case Nos. CE-01-96 and CU-01-49 in retaliation for Complainant's exercise of his right to file a grievance;

b. Threatening legal action in abrogation of the terms of § 16.06(c) of the Unit 1 contract and the award of Arbitrator Stanley Ling in the case of United Public Workers, Local 646, and State of Hawaii, dated December 4, 1984, if Complainant seeks enforcement of the arbitrator's award;

c. Filing a complaint to restrain, coerce and interfere with Complainant's rights under Chapter 89, HRS, to engage in lawful, concerted activity and in blatant violation of his rights under the Unit 1 contract, § 16.06(c);

d. With the purpose of disrupting the effect of Arbitrator Ling's award, Respondents contacted state officials and threatened legal action including the filing of a grievance and charges with HPERB; and

e. Communicating threats of legal action against the UPW for its enforcement of the terms of the collective bargaining agreement.

On June 27, 1985, Respondents VICTORINO and KAHR filed with the Board a Motion to Dismiss accompanied by the affidavit of KAHR. The motion alleged that the complaint should be dismissed with prejudice with respect to KAHR on the basis that the Board has no jurisdiction over Respondent KAHR, and that the instant complaint fails to state a claim upon which relief can be granted. Respondent KAHR further moved to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that the 90-day statute of limitations provided for in § 89-14, HRS, has expired. In her affidavit, KAHR alleged that she is not a public employer, public employee, or an employee organization as those terms are defined in § 89-2, HRS. She alleges that § 89-13, HRS, the section under which the instant complaint has been brought, only prohibits a public employer, a public employee, and an employee organization from engaging in proscribed acts. She alleges that the Board does not have jurisdiction over persons who are not public employers, public employees and employee organizations. On that basis, she contends the instant complaint fails to state a claim upon which relief could be granted. She further states that the only state agency that has jurisdiction over her in private practice as an attorney is the Supreme Court of Hawaii, Office of the Disciplinary Counsel, and/or the State of Hawaii Bar Association.

KAHR further alleges in her affidavit that § 89-14, HRS, incorporates by reference § 377-9, HRS, and states that said sections set forth the procedure for submitting and adjudicating

prohibited practices. Section 377-9, HRS, states that no complaints of any unfair labor practices shall be considered unless filed within 90 days of its occurrence. KAHR alleges that the instant complaint fails to state a claim upon which relief can be granted, inasmuch as the instant complaint fails to allege that the affiant engaged in any prohibited practice within 90 days prior to the filing of the instant complaint.

KAHR therefore requests that attorneys fees and costs be awarded for her defense of the instant complaint on the basis that it is apparent that the complaint brought against her was maliciously filed and that said action was taken by Complainants GONSALVES and UPW only to harass, vex, annoy and to attempt to interfere with her private practice of law.

On July 2, 1985, Complainants GONSALVES and UPW filed a Memorandum in Opposition to Motion to Dismiss. Therein, Complainants opposed the motion to dismiss as to KAHR on the basis that:

1. Under Subsection 89-13(b), HRS, a designated agent of a public employee is a proper party for whom jurisdiction may be exercised by the Board;

2. A designated agent of a public employee who interferes, restrains or coerces other public employees in the exercise of their rights under Chapter 89, HRS, is in violation of Subsection 89-13(b)(1), HRS; and

3. The alleged violation by Respondent KAHR occurred within the 90-day statute of limitations.

Subsection 89-13(b), HRS, states:

> [§89-13] Prohibited practices; evidence of bad faith.
>
> * * *
>
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
>
> (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

Complainants aver that KAHR, as a designated agent of VICTORINO, interfered with the rights of GONSALVES provided under §§ 89-3 and 89-10(a), HRS, to file a grievance challenging the selection of VICTORINO and to enforce the seniority provisions of the Unit 1 contract on promotions. Complainants, at page 5 of their Brief, argue that Senate Standing Committee Report No. 745-70, 1970, Senate Journal at 1330, 1332, states that Subsection 89-13(b), HRS, is modeled after procedures "utilized by the Hawaii Employment Relations Board under Chapter 377, HRS." Complainants then cite to § 377-7, HRS, which lists nine

different grounds for unfair labor practices by "employees" acting "individually or in concert." It states in relevant part:

> §377-7 Unfair labor practices of employees. It shall be an unfair labor practice for an employee individually or in concert with others:
>
> (1) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 377-4;
>
> * * *
>
> (3) To violate the terms of a collective bargaining agreement;
>
> * * *

In addition, Complainants argue, under § 377-8, HRS, "any person" may commit an unfair labor practice. The prohibition applies to more than just employees. Section 377-8, HRS, provides:

> §377-8 Unfair labor practices of any person. It shall be an unfair labor practice for any person to do or cause to be done, on behalf or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by sections 377-6 and 377-7.

"Persons," Complainants argue, are defined in § 377-1, HRS, to include legal representatives. Section 377-1, HRS, states:

> §377-1 Definitions. When used in this chapter:
>
> (1) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

Complainants further argue that persons acting in a representative capacity come within the Board's jurisdiction in certain instances. They cite to Administrative Rules § 12-42-7(c) which states:

> Appearance and practice before the Board.
>
> * * *
>
> (c) When a person acting in a representative capacity appears in person or signs a paper in practice before the Board, that individual's personal appearance or signature shall constitute a representation to the Board that under the provisions of this chapter and the law such individual is authorized and qualified to represent the particular person on whose behalf the individual acts. The Board may at any time require any person transacting business before the Board in a representative capacity to show authority and qualification to act in such capacity.

Complainants argue that Subsection 89-13(b), HRS, establishes the scope of persons who come within the Board's jurisdiction for prohibited practices. They cite to the portion of Subsection 89-13(b), HRS, which states "it shall be a prohibited practice for a public employee or for an employee organization or <u>its designated agent</u> wilfully to . . . ." Complainants argue that the phrase "its designated agent" applies to both employee organizations and to public employees, and not just to "employee organizations." The Board, they thus argue, has jurisdiction over KAHR as the designated agent of public employee VICTORINO. This intent to read the phrase "its designated agent"

as applying to both public employees and public employee organizations is derived by Complainants from Standing Committee Report No. 745-70, which states in relevant portion:

> (3) Prevention of prohibited practices.
>
> Your committee has reviewed the proceedings utilized by the Hawaii Employment Relations Board for the prevention of unfair labor practices and finds that the same proceedings can effectively be utilized by the Hawaii Public Employment Relations Board for the prevention of prohibited practices. Your committee has included violations of an agreement among the list of prohibited practices. The proceedings applicable to prohibited practices shall be utilized to remedy any violations of an agreement. Your committee does not concur with the provision to bring suits for violations of agreement directly to the Circuit Court. [Emphasis added.]

Citing this language, Complainants argue that since under Chapter 377, HRS, unfair labor practice prohibitions apply to "any persons" and not just to "employees," the same scope of jurisdiction should apply under Chapter 89. Complainants further argue that any doubt as to the proper scope is resolved by § 89-14, HRS, which states:

> §89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "board"

shall include the board and "labor organization" shall include employee organization. [Emphasis added.]

Section 377-9(b), HRS, provides in relevant part:

> §377-9 Prevention of unfair labor practices.
>
> * * *
>
> (b) Any party in interest may file with the board a written complaint, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice. The board shall serve a copy of the complaint upon the person charged, hereinafter referred to as the respondent. If the board has reasonable cause to believe that the respondent is a member of or represented by a labor union, then service upon an officer of the union shall be deemed to be service upon the respondent. Service may be by delivery to the person, or by mail or by telegram. Any other person claiming interest in the dispute or controversy, as an employer, an employee or their representative, shall be made a party upon proof of the interest. The board may bring in additional parties by service of a copy of the complaint. [Emphasis added.]
>
> * * *

Complainants allege that within the context of Subsection 89-13(b), HRS, the word "or" following the words "public employee" and "employee organization" should be read as "and." Support for this proposition is found in Wee v. Board of Accountants, 51 Haw. 80 (1969), wherein the Court states:

> Such construction requires the substitution of the word "and" for the "or." This may be done in order to arrive at a reasonable construction. Section 1-23, HRS, provides: "Each of the terms 'or' and 'and' has the meaning of the other or of both;" and section 1-13 provides that in construing

> ambiguous statutory language, the true meaning of ambiguous words may be ascertained by examining the context in which they are used.

Id. at 84.

In using the word "or" in § 89-13(b), HRS, i.e., "It shall be a prohibited practice for a public employee or for an employee organization or its designated agent," a conjunctive meaning of "and" was intended. Page 11 of the Memorandum in Opposition to Motion to Dismiss. Such a reading conjoins "designated agent" to not only "employee organization," the subject immediately preceding it, but also to "public employee," and comports with the intent to give the section a broad scope, Complainants argue.

Complainants argue that attorneys are not immune to regulation under Chapter 89. They cite to Food and Commercial Workers, 427 NLRB No. 23, 103 LRRM 1140 (1980), wherein the National Labor Relations Board held that a lawsuit brought in pursuit of an unlawful objective violates the unfair labor practice provisions of the National Labor Relations Act.

Finally, Complainants argue that the claim against KAHR is not time-barred. They note that the complaint by GONSALVES was filed on April 9, 1985. The prohibited practice by KAHR occurred on or about March 11, 1985 when, Complainants argue, as a representative of VICTORINO she filed a prohibited practice charge in the VICTORINO case. The case was thus filed well within the limitations period, Complainants argue.

It is well-settled law that courts are bound by the plain, clear and unambiguous language of a statute unless literal

construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the statute. Matter of Spencer's Estate, 60 Haw. 497 (1979), 591 P.2d 611. Even where this well-settled rule is departed from, the courts bind themselves to the statutory language as a starting point for statutory construction. The Hawaii Supreme Court stated that although it rejects the approach to statutory construction that limits courts to the words of a statute no matter how clear they may appear upon perfunctory review, it is still fundamental that the starting point for interpreting the statute is the language of the statute itself. State v. Lo, 66 Haw. 653, 675 P.2d 754 (1983), at 659. The Hawaii Supreme Court adheres to the proposition that, "Absent a clearly expressed intention to the contrary, language of a statute must ordinarily be regarded as conclusive." Id. at 659. Thus, although the Court recognizes that literal language may, in some instances, not be truly expressive of the legislature's intent, departure from the literal language will only occur where a contrary intention is clearly expressed. The Hawaii Supreme Court has stated that where the language of the law in question is plain and unambiguous, statutory construction by the court is inappropriate and the court's duty is only to give effect to the law according to plain and obvious meaning. Strouss v. Simmons, 66 Haw. 32, 657 P.2d 1004 (1982), at 50.

Complainants allege that the legislature's use of the word "its" in Subsection 89-13(b), HRS, is ambiguous. They thus allege that in the phrase, "It shall be a prohibited practice for

a public employee or for an employee organization or its designated agent wilfully to . . . ," the word "its" is a possessive pronoun tying the phrase "designated agent" to the preceding phrase "public employee" as well as the preceding phrase "employee organization," and not just a possessive pronoun tying the phrase "designated agent" to the preceding phrase "employee organization."

The word "its" is defined as follows:

The possessive form of the pronoun "it" used to indicate possession, agency, or reception of an action by the thing or non-human being spoken of: 1. Used attributively: its forepaw. 2. Used absolutely: The appeal of the plain girl in the fancy bonnet was more "its" than "hers." The American Heritage Dictionary of the English Language, p. 696 (1st ed. 1975).

Taking a literal interpretation of § 89-13(b), HRS, it is readily apparent that the legislature used the word "its" to forward their intention to bring only the designated agent of employee organizations under the purview of § 89-13(b), HRS, and not also the designated agents of public employees. Had the legislature intended to include designated agents of employees under coverage, it would have used the pronouns "their" or "his" preceding designated agent to indicate reference to both the human being, i.e., public employee, and the non-human being, i.e., employee organization. The word "its" was clearly intended to refer to the non-human entity, i.e., the "employee organization" as distinguished from the human entity, i.e., the public

employee. Thus, under a literal reading of Subsection 89-13(b), HRS, the designated agents of public employees are not chargeable with prohibited practices. Departure from this literal meaning is only justified where it renders the statutory language absurd or unjust. Complainants have proferred no arguments as to why it would be absurd or unjust to rely upon the plain and clear meaning of the statutory language. Neither does the Board see any absurdity or injustice in so reading the statute literally. Complainants argue for a broad reading while failing to establish that such a broad reading is necessary to avoid absurdity or injustice.

Even if the Board were to agree with Complainants that an ambiguity exists as to whether the phrase "its designated agents" refers to the designated agents of both employee organization and public employees, the Board finds no basis for Complainants' arguments that the ambiguity should be resolved in favor of a broad reading. Reading "and" as "or" creates more confusion than less. Complainants have not shown that an intent contrary to that expressed by a literal reading was intended by the legislature. Thus, the Board has no basis on which to resolve the ambiguity in Complainants' favor.

Moreover, contrary to Complainants' arguments, Chapter 377 does not warrant the broad reading. None of Complainants' arguments support the conclusion that the legislature intended that agents of public employees should be subject to prohibited practice charges under Chapter 89 because such procedures are permissible under Chapter 377. Complainants' argument rests on

the reference to Senate Standing Committee Report No. 745-70, 1970, Senate Journal at 1330-1332 where it is stated that Subsection 89-13(b), HRS, is modeled after procedures "utilized by the Hawaii employment relations board under Chapter 377, HRS." This reference is not substantial enough to warrant the conclusion that the legislature meant that the procedures and substance of Chapter 377 should be adopted wholesale in the implementation of Chapter 89. Had that been the legislature's intent, Chapter 89 would not have been necessary. The Committee Report clearly states a basic intention to grant similar remedies in the public sector for prohibited practices as are available in the private sector. The intention to utilize the same procedures in the public sector as in the private sector clearly does not extend to an intent to grant identical remedies. Thus, Complainants' arguments that since under §§ 377-7, 377-8 and 377-1, HRS, an employee's attorney conceivably can be liable for unfair labor practices do not carry over to a parallel situation in the public sector.

Moreover, Complainants have failed to establish that KAHR filed the instant complaint for unlawful objectives. This case thus offers no occasion to establish a precedent based on a non-literal reading of the statutory language involved.

The Board agrees, however, with Complainants that the instant complaint is not time-barred. Complainants' complaint was filed on April 9, 1985 which is well within the 90 days from the date of KAHR's filing VICTORINO's complaint, March 11, 1985.

Based upon the foregoing, the instant motion to dismiss is granted. Respondent KAHR is hereby dismissed as a Respondent in Case No. CEE-01-1. Respondent VICTORINO shall be the sole Respondent in the case.

DATED: Honolulu, Hawaii January 27, 1986.

HAWAII LABOR RELATIONS BOARD

MACK H. HAMADA, Chairperson

JAMES K. CLARK, Board Member

JAMES R. CARRAS, Board Member

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