

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME LOCAL 152,
AFL-CIO,

Complainant,

and

DEREK KAWAKAMI, Mayor, County of
Kaua'i,

Respondent.

CASE NOS.: 20-CE-03-946a
20-CE-04-946b
20-CE-13-946c

ORDER NO. 3640

ORDER GRANTING RESPONDENT'S
MOTION TO AMEND RESPONDENT'S
ANSWER TO FIRST AMENDED
PROHIBITED PRACTICE COMPLAINT
AND LIMITING THE TESTIMONY OF
CERTAIN WITNESSES

ORDER GRANTING RESPONDENT'S
MOTION TO AMEND RESPONDENT'S ANSWER TO
FIRST AMENDED PROHIBITED PRACTICE COMPLAINT
AND LIMITING THE TESTIMONY OF CERTAIN WITNESSES

On May 1, 2020, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA) filed the instant prohibited practice complaint (Complaint) against Respondent DEREK KAWAKAMI, Mayor, County of Kaua'i (Kawakami) with the Hawai'i Labor Relations Board (Board). After that, on May 7, 2020, HGEA submitted to the Board a First Amended Prohibited Practice Complaint (First Amended Complaint) against Kawakami. The First Amended Complaint alleges, among other things, that Kawakami committed prohibited practices in violation of Hawai'i Revised Statutes (HRS) §§ 89-1(b)(2), 89-9(a) and (c), 89-13(a)(1), (5), (7), and (8) arising out a movement reduction scheduling directive, which, among other things, implemented a 4 day, 10 hours a day (4-10) work schedule for County of Kaua'i offices during the period of the Mayor's emergency proclamation effective April 27, 2020.

Kawakami filed an Answer to the First Amended Complaint on May 12, 2020ⁱ.

The Board required that the parties submit proposed witness lists to the Board on or by July 13, 2020. Both parties did so.

Hearings on the Merits (HOM) in this case began on July 28, 2020 and have not yet concluded. On the first day of the HOM, among other things, the Board invoked the Witness Exclusion Rule, which bars witnesses from viewing or listening to any portion of the proceedings prior to being called as a witness.

On July 31, 2020, Kawakami filed Respondent's Motion to Amend Respondent's Answer to First Amended Prohibited Practice Complaint (Motion to Amend). The Motion to Amend, among other things, requests leave to amend Respondent's Answer to First Amended Prohibited Practice Complaint (Answer) to add an additional defense to the proceedings, namely the exclusion found in HRS § 89-9(d)(8).

On August 3, 2020, HGEA filed an amended witness list, which added as a witness, Sanford Chun, Executive Assistant for Field Services, HGEA (Chun).

HGEA opposed the Motion to Amend on August 7, 2020 in Complainant Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO's Opposition to Respondent's Motion to Amend Respondent's Answer (Opposition to Motion to Amend). In its Opposition to Motion to Amend, among other things, HGEA argues that the Motion to Amend is prejudicial and futile.

The Board heard oral argument on the Motion to Amend at a hearing on August 12, 2020.

After consideration of the complete record, including the Motion to Amend, the Opposition to Motion to Amend, and the oral argument presented by the parties, the Board hereby GRANTS the Motion to Amend.

Hawai'i Administrative Rules (HAR) § 12-42-8(g)(10)(A) states, "Any document filed in a proceeding may be amended, in the discretion of the board, at any time prior to the issuance of a final order thereon."

The Board first addresses HGEA's claim that the amendment would be futile. HGEA's argument relies on potential violations of the applicable collective bargaining agreements (CBAs). The Board has already dismissed the alleged HRS § 89-13(a)(8) violation, the only alleged violation which relates to violations of the applicable CBAs, due to HGEA's failure to exhaust administrative remedies. The Board, therefore, is not considering whether Kawakami violated any CBA. Therefore, the Board finds HGEA's argument that the amendment would be futile unpersuasive.

HGEA also asserts that the allowing the amendment would be potentially prejudicial to HGEA. The Board agrees that it would be prejudicial to allow Kawakami to raise a defense that HGEA cannot challenge with evidence, given that HGEA bears the burden of proof in the proceedings. Therefore, the Board further orders that when the HOM continues, HGEA will be permitted to recall any witnesses who have previously testified, to allow them to testify for the

limited purposes of responding to the HRS § 89-9(d)(8) defense. The Board also requires Kawakami to ensure that those witnesses appear (either in person or by remote access) if HGEA wishes to recall them for this limited purpose. Kawakami will further be permitted to question those same witnesses on its own direct examination, with the same requirement that the testimony be limited to the HRS § 89-9(d)(8) defense.

The Board will further limit the testimony of Chun, as a late added witness, to the HRS § 89-9(d)(8) issue, as the Board has concerns regarding the fact that HGEA chose to add Chun as a late witness, despite the fact that he was known to HGEA as a potential witness prior to the submission of the witness lists, and that HGEA has not made any assurances that Chun has not witnessed any portion of the HOM to date.

The Board further wishes to correct an apparent misunderstanding: the Board has **NOT** ruled as to the validity of any part of any Emergency Proclamation enacted under HRS Chapter 127A. **What this means is that the Board has not ruled whether HRS Chapter 89 is suspended by any Emergency Proclamation or not.** Any assertion to the contrary is incorrect.

ORDER

Accordingly, the Board hereby:

1. GRANTS the Motion to Amend, allowing Kawakami to add the defense of HRS § 89-9(d)(8) to its Answer;
2. Orders that HGEA is permitted to call Chun and recall any witnesses who have previously testified, only for the limited purpose of responding to the HRS § 89-9(d)(8) defense;
3. Orders that Kawakami is permitted to recall any witnesses who have previously testified, only for the limited purpose of responding to the HRS § 89-9(d)(8) defense; and
4. Orders that Kawakami make those witnesses who previously testified available for HGEA to recall to testify (either in person or by remote access) without the need for HGEA to submit another subpoena for those witnesses.

DATED: Honolulu, Hawai'i, August 13, 2020



HAWAII LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair


SESNITA A.D. MOEPONO, Member


J.N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA

Mark L. Bradbury, Deputy County Attorney

¹ The Board notes that the First Amended Complaint would generally be considered procedurally defective, as HGEA neither asked for nor received leave to amend the Complaint prior to filing the First Amended Complaint in accordance with Hawai'i Administrative Rules (HAR) § 12-42-43. Accordingly, the Board did not Notice the First Amended Complaint. However, the County, by answering the First Amended Complaint, acknowledged receipt of the First Amended Complaint. Therefore, the Board, in its discretion under HAR § 12-42-43, will allow the First Amended Complaint to serve as the charging document in this case.

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