

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS  
ASSOCIATION,

Complainant(s),

and

DAVID IGE, Governor, State of Hawai'i;  
CHRISTINA M. KISHIMOTO,  
Superintendent, Department of Education,  
State of Hawai'i; BOARD OF EDUCATION,  
State of Hawai'i,

Respondent(s).

CASE NO(S). 20-CE-05-950  
20-DR-05-115

ORDER NO. 3644

MINUTE ORDER DENYING MOTION  
FOR EMERGENCY TEMPORARY  
INTERLOCUTORY ORDER AND  
GRANTING, IN PART, AND DENYING,  
IN PART, MOTION TO DISMISS;  
PREHEARING CONFERENCE ORDER  
REGARDING THE ISSUES IN THE CASE

MINUTE ORDER DENYING MOTION FOR EMERGENCY TEMPORARY INTERLOCUTORY  
ORDER AND GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS

Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed this case with the Hawai'i Labor Relations Board (Board) based on allegations that Respondents DAVID IGE, Governor, State of Hawai'i (Ige); CHRISTINA M. KISHIMOTO, Superintendent, Department of Education, State of Hawai'i (Kishimoto); BOARD OF EDUCATION, State of Hawai'i (BOE, and collectively with Ige and Kishimoto, Respondents) committed certain prohibited practices by requiring bargaining unit 5 (BU 5) members to return to their worksites in the midst of the Coronavirus Disease 2019 (COVID-19) pandemic and/or when those named Respondents did not negotiate with HSTA over the impact of a change in working conditions.

Complainant HSTA moves for the Board to issue an emergency temporary interlocutory order to prevent the Respondents from requiring the BU 5 members to return to their worksites, and Respondents move to dismiss the prohibited practice complaint (Complaint) and petition for declaratory order (Petition) filed with the Board.

When considering these motions, the Board considers the following issues:

1. Whether the balance of HSTA's likelihood of success on the merits of the case, the alleged irreparable injury, and the public interest, falls in favor of granting an emergency temporary interlocutory order;
2. Whether the Board has jurisdiction to hear this case, given the COVID-19 pandemic and the Emergency Proclamations issued regarding it;
3. Whether the Board has jurisdiction to hear the issues raised by HSTA regarding potential violations of Hawai'i Revised Statutes (HRS) Chapter 396, given that the Board has appellate jurisdiction over citations and orders issued under HRS Chapter 396;
4. Whether the law requires that HSTA exhaust the administrative remedies available to them through the grievance process, and if it does, if HSTA did, in fact, exhaust those remedies, given that it has not filed a grievance;
5. Whether the Petition is properly before the Board, given that Declaratory Ruling Petitions are not used to receive declaratory relief and that Hawai'i Administrative Rules (HAR) § 12-42-42(f) states that, "only one complaint shall issue against a party with respect to a controversy."

Based on the record of the proceedings, including the oral arguments presented by the parties at the motion hearing on August 31, 2020, the Board resolves the issues above as follows:

1. The Board finds that the balance of HSTA's likelihood of success on the merits of the case, the alleged irreparable injury, and the public interest, **does not** fall in favor of granting an emergency temporary interlocutory order and, accordingly, **denies** the motion for emergency temporary interlocutory order;
2. The Board finds that it has jurisdiction to consider the Complaint because it has original jurisdiction to consider prohibited practice complaints, even where there may be constitutional or other statutory issues that the Board may not consider.

Any issues related to the constitutionality of other sections of the HRS cannot be brought before the Board. Those are issues that can be raised on appeal. The Board has the authority to hear the HRS Chapter 89 issues when there are constitutional issues or issues under other sections of the HRS under the Hawai'i Supreme Court's rulings in Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197 (2010).

The Board's authority is to determine issues under HRS Chapter 89. The Board is not here to interpret HRS Chapter 127A or emergency proclamations.

Therefore, the Board **denies** the Motion to Dismiss on this issue. In denying the Motion to Dismiss on this issue, the Board **does not** take a position on whether or not any portion of any Emergency Proclamation suspends any part of HRS Chapter 89, as the Board does not have jurisdiction to consider such a question;

3. The Board finds that it does not have jurisdiction to consider the HRS Chapter 396 issues raised in the Complaint and the Petition because the Board does not have original jurisdiction over issuing citations and orders under HRS Chapter 396.

HRS Chapter 396, the Hawai'i Occupational Safety and Health Law, states that the Department of Labor and Industrial Relations (DLIR) is responsible for administering occupational safety and health standards throughout the state. HRS § 396-4. DLIR has the right to investigate and inspect worksites for this purpose, and DLIR has the right to issue citations and orders regarding violations of HRS Chapter 396. HRS § 396-4.

This Board serves as the appeals board for citations and orders issued by DLIR that are contested by those cited or who have orders where DLIR finds against them. HRS § 396-3. This Board hears "contests" of the citations and orders issued by DLIR and may affirm, modify, or vacate the citation and order, remand the case back to DLIR, or direct other relief as may be appropriate. HRS § 396-11.

This Board does not have original jurisdiction to issue a citation under HRS Chapter 396. Accordingly, the Board **grants** the Motion to Dismiss on the issue of violations of HRS Chapter 89 and dismisses all claims involving HRS Chapter 396;

4. The Board finds that the law requires HSTA to exhaust the administrative remedies available to them through the grievance process, and that HSTA has not exhausted those remedies. Accordingly, the Board **grants** the Motion to Dismiss on this issue and dismisses all claims that Respondents committed prohibited practices under HRS § 89-13(a)(8) by violating the collective bargaining agreement or by violating any MOU modifying the CBA;

5. When it comes to the Declaratory Ruling Petition, HSTA has stated that they are seeking declaratory relief. That is not the same thing as a Declaratory Ruling. The Board's Declaratory Ruling Petitions are made to allow parties to ask the Board to issue a non-binding, non-precedential ruling on whether certain statutory provisions, rules, or Board Orders apply to a particular set of facts. Not to ask for declaratory relief.

Given that HSTA is asking for declaratory relief, hearing both the Complaint and Petition would not be in line with the Board's rule that "only one complaint shall issue against a party with respect to a controversy." HAR § 12-42-42(f).

Accordingly, the Board grants the Motion to Dismiss as to the declaratory ruling and dismisses Case No. 20-DR-05-115 in its entirety

The Findings of Fact and Conclusions of Law associated with these rulings will be incorporated into the final decision and order issued in this case.

#### PREHEARING CONFERENCE ORDER REGARDING ISSUES IN THIS CASE

Based on the Complaint and as agreed to by the parties at the prehearing conference the issues remaining before the Board in this case are:

1. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(1) by interfering, restraining, or coercing BU-5 members in violation of their rights under HRS Chapter 89 when they required BU-5 members to report to worksites and/or when Respondents did not negotiate with HSTA over the impact of a change in working conditions that was or was not initiated by Respondents;
2. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(2) by dominating, interfering, or assisting in the formation, existence, or administration of HSTA;
3. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(3) by discriminating against BU-5 members in regard to hiring, tenure, or any term or condition of employment, to encourage or discourage membership in any employee organization by requiring BU-5 members to report to worksites;
4. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(4) by discriminating against BU-5 members because they exercised

their rights under HRS Chapter 89 or because they informed, joined, or chose to be represented by any employee organization by requiring BU-5 members to report to worksites;

5. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(5) by refusing to bargain collectively in good faith with HSTA regarding a change in work conditions that was or was not initiated by Respondents;
6. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(7) by refusing to consult and/or negotiate with HSTA over the impact of a change in work conditions that was or was not initiated by Respondents and/or over the implementation of management decisions that affect terms and conditions of employment that are subject to collective bargaining, in violation of HRS § 89-9; and
7. Whether Respondents were required to negotiate with HSTA over the impact of a change in work conditions that was or was not initiated by Respondents in violation of HRS § 89-9, and/or over the implementation of management decisions that affect terms and conditions of employment that are subject to collective bargaining, given the management rights listed under HRS § 89-9.

Should HSTA wish to raise additional issues, it must submit a motion for leave to amend its Complaint. Should Respondents raise additional issues in their Answer, the Board will determine those issues at the pre-trial conference.

The Board will issue a pre-trial order in this matter setting forth the course of proceedings, including the schedule, hearing dates, and times in this case.

DATED: Honolulu, Hawai'i, \_\_\_\_\_ September 1, 2020 \_\_\_\_\_.




HAWAII LABOR RELATIONS BOARD

*Marcus R. Oshiro*

MARCUS R. OSHIRO, Chair

*Sesnita A. D. Moepono*

SESNITA A.D. MOEPONO, Member



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J. N. MUSTO, Member

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<sup>i</sup> At the Prehearing Conference, HSTA moved for the Board of Education (BOE) to be substituted for the Department of Education (DOE) in all filings under Hawai'i Administrative Rules (HAR) § 12-42-8(g)(12), and the Board granted the Motion. Accordingly, all future filings will reflect this substitution. Respondents' counsel accepted service of the Complaint on behalf of BOE and stated that all of the Respondents' previous filings, including the Opposition to Motion for Temporary Emergency Interlocutory Order and Motion to Dismiss, would apply to BOE.

HSTA v. DAVID IGE, et al.

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