

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

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,

Respondents.

CASE NO(S). 20-CE-05-590
~~20-DR-05-115~~

ORDER NO. 3646

PRETRIAL ORDER AND NOTICES

- 1) NOTICE TO PARTIES OF
EXTRAORDINARY
CIRCUMSTANCES
- 2) NOTICE OF FILING
REQUIREMENTS;
- 3) NOTICE OF APPEARANCE AND
ACCESSIBILITY OR
ACCOMMODATIONS;
- 4) NOTICE OF STRUCTURE FOR
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- 5) NOTICE OF BIFURCATION OF
CASE;
- 6) NOTICE OF PRETRIAL
CONFERENCE
- 7) NOTICE OF WITNESS
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- 9) NOTICE OF HEARING ON THE
MERITS; AND
- 10) SCHEDULE OF HEARINGS,
CONFERENCES, AND DEADLINES

PRETRIAL ORDER AND NOTICES

THE PARTIES ARE HEREBY NOTIFIED AND ORDERED TO COMPLY WITH THIS PRETRIAL ORDER AND NOTICES. The Hawai'i Labor Relations Board (Board) may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this

Pretrial Order and Notice if the parties or attorneys have not shown good cause for failure to comply or a good faith effort to comply.

This document controls the course of proceedings and may not be amended except by the Board through an Order or Notice, by a written request by a party with written consent of all the parties (stipulation), or by an order granting a motion filed with the Board. The use of singular, plural, masculine, feminine, and neuter pronouns include the others as the context may require.

(1) **NOTICE OF EXTRAORDINARY CIRCUMSTANCES**

Due to the current concerns regarding Coronavirus Disease 2019 (COVID-19), the Governor of the State of Hawai'i (Governor) issued a series of Emergency Proclamation, with the first being signed on March 5, 2020. These proclamations, among other things, gave agencies the ability to conduct certain hearings by telephone or video conference without the physical presence of the parties at the same location, and suspend certain rules, statutory requirements, and administrative hearing procedures as needed to deal with the emergency situation brought on by COVID-19.

On March 29, 2020, the Governor issued Executive Order No. 20-02, which, among other things, gave the Board the sole discretion to waive the requirement in HRS § 377-9 to hold a hearing on the complaint not more than 40 days after the filing of the complaint or amendment thereof.

Accordingly, the Board will hold hearings as much as possible by telephone or video conferencing and is mandating electronic filing during the emergency period, unless terminated by separate order, whichever occurs first.

(2) **NOTICE OF FILING REQUIREMENTS**

1) **Electronic Filing**

All filings in this case must be made electronically through the Board's filing service FileandServeXpress (FSX). There is no charge to the parties for use of this electronic filing service. Should any party not have access to the Internet, or for any other concerns or complications, please contact the Board via electronic mail or (808) 586-8616.

To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at <http://labor.hawaii.gov/hlrb/forms/>.

Questions regarding the Board's electronic filing system should be directed to the Board's staff at (808) 586-8616.

2) Filing Requirements Regarding Protection of Social Security Numbers and Personal Information

Before a party files or submits any pleading, correspondence, or other document (Documents) to the Board, whether electronically or manually, the party must make certain that all social security numbers and personal information are redacted or encrypted. “Personal information” includes social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board’s consideration of this case, the submitting party must submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai‘i Court Records Rules, as amended.

If a party submits a document that requires redaction of a page(s), the party must, by motion, request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), “The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document.”

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply or a good faith attempt to comply.

(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS

All parties have the right to appear and to be represented by counsel or any other authorized person in all Board proceedings, subject to the Extraordinary Circumstances set forth in Section (2) above. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

The parties should be aware that the Board is in a secured State of Hawai‘i building that, due to the Extraordinary Circumstances set forth in Section 2 above, is unable to be accessed to the public.

(4) NOTICE OF STRUCTURE FOR ONLINE PROCEEDINGS

The Board currently uses Zoom as its platform for online proceedings. Parties and representatives should familiarize themselves with Zoom in preparation for all online Board proceedings. For security purposes, the Board will utilize the “waiting room” function.

Prior to the hearing:

1. The Board will provide Zoom login information to the parties in advance of the hearing.
2. A party who shares the Zoom login information with any other group or individual (Sharing Party) must provide the Board and the other party/parties with a complete list of participants they have invited to attend the proceedings, including any support staff and witnesses. This list must be emailed to the Board at dllr.laborboard@hawaii.gov.
3. Any Sharing Party must inform non-witness participants:
 - 1) that they must keep their microphones muted at all times; and
 - 2) that they must keep their cameras off at all times.
4. Any Sharing Party must inform **all** participants:
 - 1) that they must submit their full name as their username when requesting entry to the Zoom conference, to allow the Board to ensure compliance with the witness exclusion rule, unless the party sets up a device specifically for witness use only, in which case that device may log in with the username “witness”; and
 - 2) that they may not record, screen shot, record conversations, and/or use third party software to record the proceeding.

(5) NOTICE OF BIFURCATION OF CASE

The law sets out what constitutes a prohibited practice in HRS § 89-13 by setting forth certain actions that may be violations of HRS Chapter 89. However, unlike under the National Labor Relations Board (NLRB) standards, for those actions to be considered prohibited practices, they must be committed “wilfully” or with the “conscious, knowing, and deliberate intent” to violate HRS Chapter 89.

Accordingly, the Board will hear this case in two parts, bifurcating the case. The first part will focus on Respondents’ conduct. If the Board finds that Respondents’ conduct violated a provision or provisions of HRS Chapter 89, the Board will turn to the second part, which will focus on Respondents’ wilfulness.

First, the Board will hear the evidence regarding whether Respondents violated Chapter 89. This means that the Board will hear the fact specific HRS Chapter 89 issues surrounding the issue of BU 5 members returning to their worksites and consultations/negotiations between HSTA and Respondents, or the lack of consultations/negotiations, over the impact of a change in work conditions that was or was not initiated by Respondents.

HSTA, as the Complainant, bears the burden of proof in these proceedings. HSTA's burden of proof at the first stage of the proceedings is to prove a violation of HRS Chapter 89. Not the willfulness of a violation. That means that the Board will not consider any evidence related to the Respondents' "conscious, knowing, and deliberate intent" to violate HRS Chapter 89 at this time.

(6) **NOTICE OF PRETRIAL CONFERENCE**

PURSUANT TO HRS §§ 89-5(i)(4) and (i)(5), and 377-9:

NOTICE IS HEREBY GIVEN that the Board will conduct a Pretrial Conference on the date listed below and in the Schedule in this document.

DATE AND TIME: September 18, 2020 at 10:00 am

LOCATION: Remote Zoom Hearing

1) Pretrial Statement

Both the Complainant(s) and the Respondent(s) must file a Pretrial Statement with the Board as listed in the Schedule set forth below. The Pretrial Statement must include the following:

1. Witness List

The witness lists must include, in the interest of judicial economy, a brief but meaningful summary of the nature of the testimony expected, and the order in which the witnesses are expected to be called upon, subject to the witness' availability.

The summary for each witness must include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; see HRS § 91-10(1). The summary, therefore, must include sufficient information to show the Board that the testimony of each witness will be different, and so the summary for each witness must be individualized.

The witness list must also include information regarding the location where the party expects the witness to testify from. This location may include the witness' home, a party's office, or any other location from which the witness can testify remotely, without assistance or interference from any other party, and can access the relevant exhibits.

If a party intends to file a request for a subpoena for a witness, such request must be concurrently filed with the Pretrial Statement, and a notation that a request is being made must be listed in the witness list.

2. Exhibit List

The exhibit lists must include copies of the proposed exhibits. The parties are encouraged to use the File & ServeXpress eFiling system to file the exhibits before or by 4:30 p.m. (HST) on the deadline day. The exhibits must be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes, with each exhibit bookmarked. Alternatively, a party may file exhibits by mail to the Board; the date of receipt by the Board will be deemed the date of filing.

If a party intends to file a request for a subpoena duces tecum for any of its exhibits, such request must be concurrently filed with the Pretrial Statement, and a notation that a request is being made must be listed in the exhibit list.

HSTA must identify its exhibits using numerical designations preceded by U (e.g., U-1, U-2, U-3, etc.). Respondents must identify their exhibits using numerical designations preceded by E (e.g., E-1, E-2, E-3, etc.).

If there are any duplicative exhibits, the parties must withdraw the duplicative exhibits and refile them as Joint Exhibits. The parties must designate one party to file these exhibits, and the Exhibits must be marked with numerical designations preceded by J (e.g., J-1, J-2, J-3, etc.).

All Exhibits must be bates-stamped in the upper right-hand corner.

Additionally, HSTA must submit to the Board the full applicable collective bargaining agreement(s), including any Memoranda of Understanding, Memoranda of Agreement, or any other supplemental agreement that has any bearing on these proceedings. These documents must be marked as Board Exhibit 1 or Board Exhibit 1a, 1b, 1c, etc. and must be bates-stamped in the upper-right hand corner.

2) Pretrial Conference

At the pretrial conference, the Parties must be prepared to discuss, raise, and present their position regarding the presentation of the anticipated evidence (witnesses, exhibits) to be introduced at the Hearing on the Merits (HOM), including but not limited to any stipulations, evidentiary issues, objections, or confidentiality issues that require protection from public disclosure and the narrow tailoring of methods to protect that information (e.g. sealing or redaction).

While all parties have the right to appear at the Pretrial Conference and to be represented by counsel or any other authorized person, all parties are required to either appear videographically or have a representative appear videographically. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(7) NOTICE OF WITNESS REQUIREMENTS

Due to the situation with COVID-19, all witnesses must testify videographically. The parties must inform their witnesses that, unless otherwise directed or allowed, when the witness testifies:

1. The witness must be in a location without anyone else in the room with them, and there should be no one at the location who can overhear their testimony;
2. The device from which the witness appears must be used during the witness' testimony solely for the purpose of the witness appearing by video;
3. The witness may not consult with anyone during testimony;
4. The party calling the witness must ensure that the witness has access to all exhibits in the case;
5. The witness must not look at or make reference to notes or any other documents or materials other than the exhibits, and may look at the exhibits only when directed to do so by a party or the Board;
6. At all times while testifying, the witness must be clearly visible, face the camera, and speak directly and audibly into the microphone;
7. The witness may not use a virtual background; and
8. The witness must not have any communication with third parties while they are on the stand and under oath.

(8) NOTICE OF THE WITNESS EXCLUSION RULE

The Board is invoking the witness exclusion rule for the hearing on the merits. Accordingly, the parties must inform their witnesses and potential witnesses that they may not attend any of the hearings on the merits in the case until their testimony, including any rebuttal testimony, is completed. Should an individual attend any portion of the hearing on the merits, the Board may

disqualify their testimony under the witness exclusion rule, unless the party can show good cause as to why they did not and should not have known that the individual could be a potential witness.

Those witnesses and potential witnesses who attend proceedings prior to the beginning of the hearing on the merits are not in violation of this rule.

(9) NOTICE OF THE HEARING ON THE MERITS

NOTICE IS HEREBY GIVEN, pursuant to HRS §§ 377-9, 89-5(i)(3), (4), (5), and 89-14, and HAR §§ 12-42-46 and 12-42-49 that the Board will conduct an HOM on the instant Complaint at the place, time and date listed below and in the Schedule set forth below. The purpose of the HOM is to receive evidence and arguments on whether Respondent(s) committed prohibited practices as alleged by Complainant(s).

DATE AND TIME: September 23-25, 2020 at 10:00 a.m.

LOCATION: Remote Zoom Hearing

Subject to the Board's discretion due to the Extraordinary Circumstances listed above in Section 2, all parties have the right to appear at the Hearing on the Merits and to be represented by counsel or any other authorized person. All parties have the right to appear or videographically at the HOM and to be represented by counsel or any other authorized person.

Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(10) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

<u>DATES AND DEADLINES</u>	<u>DATE</u>	<u>TIME</u>
<u>Respondents' Answer to Remaining Allegations in Complaint</u>	9/10/2020	
<u>Pretrial Statement; Exchange of Exhibits; Subpoena Deadline</u>	9/11/2020	
<u>Pretrial Conference and Hearing on Dispositive Motions</u>	9/18/2020	10:00 am
<u>Hearing on the Merits</u>	9/23-25/2020	10:00 am

All submissions must be filed on or before 4:30 p.m. on the deadline date.

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

HAWAI'I LABOR RELATIONS BOARD



Gregory R. Oshiro

GREGORY R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

Copies sent to:

Keani Alapa, Esq.

Vladimir Devens, Esq.

Richard Thomason, Deputy Attorney General

ⁱ 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.

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

PRETRIAL ORDER AND NOTICES

ORDER NO. 3646