

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

YA-WEN HSIAO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION,

Respondent(s).

CASE NO(S). 20-CU-08-383

ORDER NO. 3656

PRETRIAL CONFERENCE MINUTE
ORDER

PRETRIAL CONFERENCE MINUTE ORDER

Complainant Ya-Wen Hsiao (Ms. Hsiao) filed this case with the Hawai'i Labor Relations Board (Board) based on allegations that Respondent Hawaii Government Employees Association, (HGEA) committed certain prohibited practices through its conduct regarding Ms. Hsiao's grievance and that the Employer, the University of Hawai'i, violated the applicable collective bargaining agreement.

1. Issues

At the pretrial conference before the Board, it was determined that the following issues will be tried before the Board during the hearing on the merits (HOM). Any objections are noted below the issue statement:

1. Whether HGEA committed a prohibited practice under Hawai'i Revised Statutes (HRS) § 89-13(b)(4) by violating its duty of fair representation to Ms. Hsiao by acting arbitrarily, discriminatorily or in bad faith, through its conduct regarding Ms. Hsiao's grievance, including whether HGEA's processing of the grievance was perfunctory.

HGEA objected to issue statement 1 because it disagreed that the discrimination alleged by Ms. Hsiao may not be proper. The Board notes that "discriminatory" is a part of the legal standard for analyzing a claim of a breach of the duty of fair representation and that the definition of what types of conduct are "discriminatory" has been addressed by the Board in

several cases. Any objections that HGEA may have to the type of discrimination alleged by Ms. Hsiao may be addressed at the hearing.

2. Whether the Employer violated the collective bargaining agreement for Bargaining Unit 8 when it notified Ms. Hsiao that it would not be renewing its sponsorship of her employment-based visa.

Ms. Hsiao's representative, Bryan Feliciano (Mr. Feliciano), disagreed that a prohibited practice complaint based on an alleged breach of the duty of fair representation must meet the hybrid test set out in Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 101-102, 94 P.3d 652, 656-57 (2004). However, Mr. Feliciano agreed that he could proceed with his case on this issue.

3. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(1) by interfering, restraining, or coercing Ms. Hsiao, in the exercise of any right guaranteed under HRS Chapter 89, through its conduct regarding Ms. Hsiao's grievance.
4. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(5) by violating the terms of the bargaining unit 8 collective bargaining agreement through its conduct regarding Ms. Hsiao's grievance.

Accordingly, these are the issues that the Board will consider at the hearing on the merits. If any additional issues arise through the course of the hearing, a party or parties may ask for leave to amend their complaint or answer to add an additional issue(s) based on conforming to the evidence.

2. Witnesses

2.1. Both Parties' Witnesses

At the pretrial conference before the Board, the parties agreed that they would not object to following witnesses appearing to testify before the Board:

1. Ms. Hsiao, Complainant
2. Mr. Feliciano, Complainant Representative

The Board informed Mr. Feliciano that he may testify by providing a testimonial statement to the Board, after which, HGEA may cross-examine him. HGEA brought up the issue that Mr. Feliciano may claim a type of privilege; however, the Board noted that any such objections could be brought up at the appropriate time.

3. John Clivio (Mr. Clivio), HGEA Business Agent

HGEA has previously informed the Board that Mr. Clivio is unavailable to testify. However, both parties may wish to call him in their respective cases-in-chief if he is available. The Board informed the Complainant that if she wishes to call Mr. Clivio in her case-in-chief, she would need to produce him, which may require a subpoena.

2.2. Additional Complainant Witnesses

The Board has the following notes regarding the other witnesses identified by Ms. Hsiao.

1. HGEA Custodian of Records

The Board has issued a subpoena for HGEA's Custodian of Records for certain documents. HGEA has raised the issue of proper service of a subpoena. The Board informed the parties that the proper method of serving a subpoena is for a person over the age of 18 years old, who is not a party to these proceedings, to serve the subpoena in person.

HGEA has filed a Motion to Quash the subpoena. The Board notes that Ms. Hsiao has five business days to respond to the Motion to Quash and, accordingly, will take the issues raised in the Motion to Quash up at the HOM.

Accordingly, this witness may or may not be called.

2. Stacy Moniz (Mr. Moniz), HGEA Advocacy Chief

Mr. Moniz is HGEA's representative in this matter. After informing the Board that he is not the supervisor of Mr. Clivio or any other HGEA Business Agent, Ms. Hsiao withdrew Mr. Moniz's name from the witness list.

2.3. Additional HGEA Witnesses

The Board has the following notes regarding the other witnesses identified by HGEA.

1. Kapono Apao (Mr. Apao), HGEA Lead Agent for Governance for Bargaining Unit 8

Mr. Apao, among other things, had conversations with Mr. Clivio about Ms. Hsiao's underlying grievance. Ms. Hsiao brought up questions about Mr. Apao's ability to testify due to hearsay concerns. Hearsay concerns may be brought up at the appropriate time at the hearing on the merits.

2. UH Witnesses

HGEA listed seven witnesses from the University of Hawai'i on its witness list but decided to withdraw all seven of the witnesses from the University of Hawai'i.

3. Exhibits

At the pretrial conference before the Board, the parties agreed that following exhibits will be admitted into evidence:

1. HGEA's Exhibits U-1 through U-4 and U-6 through U-9; and
2. Noted that the filing date of U-9 was April 30, 2020 at 5:04 pm.

Accordingly, the listed exhibits will be moved into evidence and will not need to be moved into evidence during the HOM.

The parties also noted that Exhibit M and Exhibit U-9 were substantially duplicative. Therefore, Exhibit M will not be used at the hearing.

4. Bifurcation

At the pretrial conference before the Board, the Board also informed the parties that it would be bifurcating the case. The first part of the case will focus on the Respondents' conduct or actions. 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 on whether Respondents violated Chapter 89. Based on the issues agreed to this morning, this means that the Board will hear the fact specific HRS Chapter 89 issues surrounding the issues of HGEA's conduct in processing Ms. Hsiao's grievance and the Employer's conduct in allegedly violating the collective bargaining agreement.

Ms. Hsiao, as the Complainant, bears the burden of proof in these proceedings. Ms. Hsiao's burden of proof at the first stage of the proceedings is to prove a violation of HRS Chapter 89. Not a wilfull violation. That means that the Board will not consider any evidence related to the Respondents' intent at this time.

In this case, what this means is that Ms. Hsiao must show that HGEA's conduct regarding the processing of her grievance was done arbitrarily, discriminatorily, or in bad faith and that the Employer violated the collective bargaining agreement; that HGEA interfered with

her rights under HRS Chapter 89; and/or that HGEA violated the collective bargaining agreement.

If Ms. Hsiao intends to argue that HGEA breached its duty of fair representation discriminatorily, then she must establish the conduct by showing, “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge, 403 U.S. 274, 301 (1971).

The Board will not consider, in this first stage of the case, whether or not any action was done with the intent to violate HRS Chapter 89.

After the Board issues its decision on the question of whether or not a violation of HRS Chapter 89 occurred, the Board will then determine whether it will hear evidence of the wilfulness of those violations. This second part will be held separately, if the Board determines it is necessary.

5. Scheduling and Final Matters

The Board will begin the hearing at 9:00 a.m. instead of 10:00 a.m. on September 22, 2020. Additionally, the Board gave permission for Ms. Hsiao and Mr. Feliciano to be in the same room while testifying, as they are the Complainant and her representative.

DATED: Honolulu, Hawai‘i, September 15, 2020.

HAWAI‘I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

Copies sent to:

Bryan Feliciano, Complainant Representative
Stacy Moniz, HGEA