

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO,

Complainant,

and

DAVID Y. IGE, Governor, State of
Hawai'i;ⁱ RYKER WADA, Director,
Department of Human Resource
Development, State of Hawai'i;ⁱⁱ
KIRK CALDWELL, Mayor, City
and County of Honolulu,ⁱⁱⁱ

Respondents.

CASE NOS. CE-01-710a
CE-10-710b

ORDER NO. 3516

ORDER DENYING UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646,
AFL-CIO'S MOTION TO
CONSOLIDATE PROCEEDINGS AND
HEARINGS IN CASE NOS. CE-01-710a
and CE-10-710b WITH CASE NOS. CE-
01-720a AND CE-10-720b

ORDER DENYING UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO'S MOTION TO CONSOLIDATE PROCEEDINGS AND HEARINGS IN
CASE NOS. CE-01-710a AND CE-10-710b WITH CASE NOS. CE-01-720a AND CE-10-720b

On May 10, 2019, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed with the Hawai'i Labor Relations (Board) a Motion to Consolidate Proceedings and Hearings (Motion to Consolidate) in Case Nos. CE-01-710a and CE-10-710b (710) with Case Nos. CE-01-720a and CE-10-720b (720) because the same parties and the issue is substantially the same in light of the Hawai'i Supreme Court's ruling in United Public Workers, AFSCME, Local 646, AFL-CIO v. Abercrombie, 133 Hawai'i 188, 325 P.3d 600 (2014) (Abercrombie). The Board denies the Motion to Consolidate for the following reasons.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Board Case No. CE-01-710

On June 24, 2009, Complainant UPW filed a prohibited practice complaint (710 Complaint) against Respondents then-Hawai'i Governor LINDA LINGLE (Lingle), then-Director for the Department of Human Resources, State of Hawai'i; MARIE LADERTA (Laderta and collectively State Respondents) and then-Mayor for the City and County of Honolulu MUI HANNEMANN (Hannemann or City Respondent and collectively Respondents with the State Respondents) for allegedly wilfully violating Hawai'i Revised Statutes (HRS) §§ 89-3, 89-6(d), 89-9(a), and 89-13(a)(1), (5), (7), and (8). The Complaint alleged that: the bargaining unit 1 (Unit 1) collective bargaining agreement (Unit 1 CBA) § 66 and the Unit 10 (Unit 10) collective bargaining agreement (Unit 10 CBA) § 68 (collectively CBAs) require any party desiring to renew, modify, or terminate the agreement to provide written notice between July 15-30, 2008 and exchange written proposals by the deadline or the existing terms of the agreements are renewed; the parties submitted their written notices and commenced negotiations over the July 1, 2009- June 30, 2011 CBAs; the parties agreed on basic ground rules for the negotiations (including confidentiality and no public announcement or news media releases regarding the negotiations except by mutual agreement and that off the record discussions shall be considered off the record until the parties agreed to negotiate the new, amended, or counterproposals on the record). The 710 Complaint further alleged that: Respondents abrogated the basic ground rules of negotiations; wilfully violated CBA §§ 66 and 68, and unlawfully interfered, restrained, and coerced employees in the exercise of their HRS Chapter 89 rights by submitting proposals to modify renewed provisions of the CBAs (§§ 12 and 13) in wilfull violation of §§ 66 and 68; made unlawful references and disclosures to off the record discussions contrary to the basic ground rules of negotiations; made public announcements and issued new media releases on the contents of negotiation without mutual agreement; threatened the layoff of employees contrary to the renewed CBA terms and provisions and in retaliation to the lawful exercise of protected concerted activities under HRS § 89-3; and undermined the process of multi-employer bargaining to ensure a statewide Unit 1 and 10 collective bargaining agreements under HRS § 89-6(d).

The 710 Complaint requested appropriate relief including interlocutory relief enjoining Respondents from making public announcements or issuing news media releases on the content of negotiations without mutual agreement, and/or threatening employees with layoffs for the lawful exercise of protected concerted activities; declaratory, injunctive, and make whole relief for the prohibited practices committed; ordering compliance with CBA §§ 66 and 68 renewing §§ 12 and 13 of the CBAs; prohibiting Respondents from disclosing or referring to "off the record" discussions contrary to basic ground rules; requiring employers to comply with the bargaining process under HRS § 89-6; and other affirmative relief.

On June 24, 2009, the UPW filed UPW's Motion for Interlocutory Relief (UPW's 710 Motion for Interlocutory Relief) requesting that Respondents be enjoined from continuing to violate the ground rules for bargaining, and interfering, restraining, and coercing employees in the free exercise of rights under HRS Chapter 89 during the course of negotiations over the CBAs.

On July 1, 2009, the State Respondents filed their Memorandum in Opposition to United Public Workers' Motion for Interlocutory Relief Filed on June 24, 2009. In asserting that the motion should be denied, the State Respondents argued that the Board does not have authority to issue an interlocutory order prior to conducting a hearing on the merits (HOM); and that even assuming that UPW's motion is appropriate at this time, the facts do not support granting such extraordinary relief and should be denied. Finally, the State Respondents argue that the UPW is seeking to avoid a hearing on the merits via its motion for interlocutory relief. On July 2, 2009, the City Respondent filed Respondent Mufi Hannemann's Memorandum in Opposition to Complainant's Motion for Interlocutory Relief Filed June 24, 2009. In opposing the Motion, Hannemann argued that he did not make public the content of any negotiations, and that the proposed amendments to Section 12-Layoff and Section 13-Placement of Laid off Employees on the Recall List are included in the public employer's proposal to the Union under HRS § 89-9(d).

On July 22, 2009, the State Respondents filed their Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment (State 710 MTD/MSJ). The State Respondents supported their Motion on three grounds. First, they argued that the State has not publicly commented upon "the content of negotiations discussions". Rather, in fact, the UPW specifically alleged that the State refused to enter into negotiation discussions on the issue of furloughs; and therefore, furloughs were not the content of negotiations discussions. Second, the State Respondents contended that the CBAs do not automatically renew, as evidenced by the past practice of the parties in executing MOAs to continue the CBAs upon expiration until a new CBA is agreed upon. Third, the State Respondents asserted that the State has not threatened employees with layoffs, the State has the legal right to lay off employees, and the layoff of employees was done to address the State's financial emergency. The UPW filed UPW's Memorandum in Opposition to Respondents Linda Lingle and Marie Laderta's Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment Filed on July 22, 2009.

On July 28, 2009, the City Respondent filed his Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment (City MTD/MSJ). In support of dismissal, Hannemann contended that: the City had not publicly disclosed "content of negotiations", or alternatively, that UPW has waived any claim of confidentiality by first commenting on negotiations; new, amended, or counterproposals during negotiations do not amount to a violation of HRS § 89-13 as a matter of law; and there is no evidence that the City has threatened any of the employees with layoffs. On August 3, 2009, UPW filed UPW's Opposition to Respondent Hannemann's Motion to Dismiss and/or for Summary Judgment Filed July 28, 2009.

On August 5, 2009, the UPW filed UPW's Motion to Withdraw Complaint Without Prejudice Against Respondent Mufi Hannemann (Motion to Withdraw Complaint). On August 10, 2009, the State Respondents filed Respondents Linda Lingle and Marie Laderta's Notice of Opposition to UPW's Motion to Withdraw Complaint Without Prejudice Against Respondent Mufi Hannemann,

On October 19, 2009, the State Respondents filed Respondents Linda Lingle and Marie Laderta's Motion to Stay Grievance/Arbitration Proceedings in UPW Case Nos. DMN-09-01 & DMN-09-02 and DMN-09-03 & DMN-09-04 (Motion to Stay). On October 26, 2009, the City Respondent filed Respondent Mufi Hannemann's Statement of No Opposition to Respondents Linda Lingle and Marie Laderta's Motion to Stay Grievance/Arbitration Proceedings in UPW Case Nos. DMN-09-01 & DMN-09-02 and DMN-09-03 & DMN-09-04. On October 26, 2009, the UPW filed UPW's Opposition to Respondents' Motion to Stay Grievance Arbitration Filed October 19, 2009.

On October 17, 2014, the UPW filed UPW's Motion for Leave to File First Amended Complaint (Motion to Amend Complaint) for retaliation against UPW and its members for having pursued legal relief from announcements by Lingle and her administration of furloughs that preceded the layoff notice of Units 1 and 10 based on Abercrombie. On October 21, 2014, the State Respondents filed Respondents Linda Lingle and Marie Laderta's Memorandum in Opposition to UPW's Motion for Leave to File First Amended Complaint (Opposition to Filing First Amended Complaint). On October 22, 2014, the City Respondent joined in the Opposition to Filing First Amended Complaint.

On May 10, 2019, the UPW filed the Motion to Consolidate.

On May 14, 2019, the State Respondents filed Respondents' David Y. Ige and Ryker Wada's Memorandum in Opposition to UPW's Motion to Consolidate Proceedings and Hearings in Case CE-01-710a, and CE-10-710b, with Case CE-01-720a and CE-10-720b (Opposition to Consolidation). On May 20, 2019, the City Respondent filed Respondent Kirk Caldwell, Mayor, City and County of Honolulu's Joinder in the Opposition to Consolidation.

B. Board Case No. CE-01-720

On July 31, 2009, Complainant UPW filed with the Board a prohibited practice complaint (720 Complaint) against Laderta, alleging violations of HRS § 89-13(a)(5), (7), and (8) arising out of a July 22, 2009 request to negotiate and for information on impending layoffs of 123 Unit 1 and 93 Unit 10 employees.

On August 17, 2009, Laderta filed a Motion to Dismiss and/or for Summary Judgment (State 720 MTD/MSJ), asserting that, by letters dated July 30, 2009 and August 7, 2009, the State responded to the UPW's information request; and that the decision to lay off employees is not negotiable pursuant to HRS § 89-9(d).

On August 24, 2009, the UPW filed a Motion to Amend Complaint; a Motion for Interlocutory Relief (Complainant's 720 Motion for Interlocutory Relief); and UPW's Opposition to Respondent Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

On August 27, 2009, the Board issued Order No. 2634 which granted the Motion to Amend Complaint and set deadlines to supplement previously filed Motions and responses.

On August 27, 2009, the UPW filed the First Amended Complaint (720 Amended Complaint). The Amended Complaint alleged that Respondents Laderta, Lingle, and former Director of the Department of Public Safety Clayton A. Frank (Frank) violated HRS §§ 89-3, 89-9(a), (c), and (d), and 89-13(a)(1), (3), (5), (7), and (8). The alleged violations were based, among other things, on the claims that:

10. On June 16, 2009 the UPW notified the State (and other public employer[s]) of a desire to renew and to amend various provisions of the July 1, 2007 to June 30, 2009 unit 1 and 10 agreements, pursuant to section 66 (unit 1) and section 68 (unit 10).
11. On June 30, 2009 the State of Hawaii (and other public employers) notified the UPW of a desire to renew and amend various provisions of the July 1, 2007 to the June 30, 2009 unit 1 and 10 agreements.
12. Negotiations over the terms of the July 1, 2009 to June 30, 2011 agreement commenced on July 14, 2008 (for unit 1), and November 20, 2008 (for unit 10).
13. On or about April 1, 2009 the State of Hawaii made an "off the record" proposal to UPW for a furlough plan and procedure for 16 days per year and 32 days per year.
14. The proposed furlough plan was discussed on or about April 13, 15, and 23, 2009 between UPW and the State, and on May 19 and 30, 2009 with representatives of the State, UPW, (together with representatives of UHPA, HSTA and HGEA).
15. At all relevant times during the discussions the proposed State furlough plan was presented and discussed as a means of addressing the State's projected fiscal

shortfall for the next two years by the Lingle administration, and as an alternative to layoffs.

18. On June 1, 2009 Linda Lingle unilaterally announced a statewide furlough of three days a month (36 days a year) for a period of two years (for a total of 72 days) purportedly to “avoid having to layoff employees.”

19. On June 2, 2009 Marie Laderta solicited input from the UPW regarding the June 1, 2009 furlough plans.

20. On June 8, 2009 UPW requested Linda Lingle to negotiate over the June 1, 2009 decision and action and to cease and desist from unilaterally implementing the statewide furlough of three days a month for all state employees for two years.

21. On June 8, 2009 the UPW requested Linda Lingle to terminate all private contracts for services which have historically and customarily been performed by civil servants no later than June 30, 2009, and to cease and desist from undermining the job security of civil servants.

22. On June 10, 2009, Lingle and Laderta refused to negotiate as requested by the UPW, and declined to cease and desist from the unilateral course of action.

23. On June 12, 2009 the UPW filed class grievances against Lingle and Laderta for alleged violations of the Unit 1 and 10 agreements in DMN-09-01 and DMN-09-02 relating to the June 1, 2009 announced furloughs.

24. On June 16, 2009 UPW (as well as HSTA and HGEA) filed civil complaints in the circuit court of the first circuit contesting the constitutionality of the June 1, 2009 decision and action by Lingle, and seeking injunctive and other relief against Linda Lingle, Marie Laderta, and Georgina Kawamura.

25. Upon learning of the complaints by UPW, HSTA and HGEA Linda Lingle made the following threat on June 16, 2009:

“If the unions are successful at blocking furloughs, we will go to some mass layoffs and some shutdown of programs.” (Emphasis added).

26. On June 18, 2009 Linda Lingle repeated her prior threat and indicated that state officials were preparing layoff plans as follows:

“If the furloughs are not implemented, the State would have to layoff at least 2,500 Executive Branch employees to make up for the projected revenue short falls. Such layoffs could also result in shut down of entire programs and services. State executive departments are preparing layoff plans in the event that public worker unions are successful in blocking the implementation of the furlough plan.” (Emphasis added).

27. The threats of mass layoffs and the shutdown of programs by Lingle on June 16, 2009 and June 18, 2009 interfered, restrained, and coerced employees in the exercise of statutory and constitutional rights (by and through the UPW).

28. On June 19, 2009 the UPW amended its class action grievances in DMN-09-01 and DMN-09-02 for alleged discrimination and violations of Section 3, 12, and 66, and requested information regarding the announced furloughs and layoff plans.

29. On July 2, 2009, the Honorable Karl K. Sakamoto granted a motion for temporary restraining order in the civil actions, determined that furloughs constitute a core subject of collective bargaining under Article XIII, Section 2 of the State Constitution and enjoined the unilateral statewide furlough of three days per month for two years.

30. During the week following the July 2, 2009 oral ruling Lingle indicated in public statements and remarks that plans to implement layoffs were being finalized (as previously threatened).

31. On July 7, 2009 Laderta requested UPW (and HGEA) per the court ruling “to negotiate on: (1) the number of furlough days; (2) the State’s furlough plan(s); (3) furlough procedures; and (4) the impact of the furlough plan(s) on affected employees.” (Emphasis added).

32. On July 8, 2009 UPW (together with HSTA, HGEA, and UHPA) agreed to negotiate as requested by Laderta and bargaining sessions resumed on July 13, 2009, during which formal and informal proposals were submitted by UPW (and the other unions) on furloughs and other means of achieving labor cost savings (and thereby avoid layoffs).

33. Another bargaining session was scheduled for July 21, 2009 between the State, UPW, HGEA, HSTA, and UHPA.

34. On or about July 20, 2009 Laderta announced the impending layoff of approximately 123 unit 1 and 93 unit 10 employees (including employees of the Kulani Correctional Facility) in a letter to the UPW.
35. The State, UPW, HGEA, HSTA, and UHPA met on July 21, 2009 as scheduled and to date no other bargaining sessions on a multi-union basis with the state and other public employers have been held.
36. On July 22, 2009 the union requested the State of Hawaii to negotiate over the impending layoffs announced on July 20, 2009, and in a letter to Laderta requested information needed in connection with the negotiations within 7 days of July 22, 2009 (with bargaining to commence 10 days after July 22, 2009).
37. The impending layoffs of 123 unit 1 and 93 unit 10 employees has a material and significant impact on the wages, hours, and other terms and conditions of employment of bargaining unit employees and on the bargaining units represented by the UPW, thereby rendering the decision to layoff a mandatory subject of bargaining.
38. In its letter dated July 22, 2009 UPW informed Laderta that it considered the decision and action announced on July 20, 2009 to be unlawful.
39. Under Sections 76-43 and 89-9 (a), HRS, the criteria and procedure for layoffs is negotiable as well.
40. On July 23, 2009 Clayton Frank notified the UPW of an impending layoff due to the closure of the Kulani Correctional Facility on or about October 26, 2009.
41. On July 29, 2009 UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani Correctional Facility and submitted a supplemental request for information to Laderta and Frank. The union requested a response to the information request within seven days.
42. Laderta failed to respond to the July 22, 2009 request for bargaining or to the information request of the union within 7 days as requested by the union on July 22, 2009, and on July 30, 2009 refused to negotiate claiming that layoffs is a management right.
43. Without the information requested on July 22, 2009 the union is unable to perform its function as required under Section 89-8 (a), HRS, in behalf of all employees in the bargaining units.

44. The free flow of information is vital to the collective bargaining process and the failure to provide the UPW the requested information in a prompt and full manner (and the refusal to meet to commence negotiations) constitutes a material breach of the duty to bargain.
45. On August 3, 2009 respondent Frank commenced the closure of Kulani Correctional Facility by informing inmates of their relocation by the end of September 2009.
46. On August 4, 2009 Linda Lingle announced a decision to implement through written notices the layoff of approximately 1,100 State employees (including unit 1 and 10 employees) on or about November 13, 2009, and threatened a second round of layoffs.
47. On and after August 4, 2009 various state officials sent out written notices of layoffs to the 1,100 State employees including notices to unit 1 and 10 employees.
48. The August 4, 2009 notices required employees to complete on line reduction in force (RIF) applications and work force reduction placement questionnaires by August 18, 2009.
49. The reduction in force and layoff procedures, time deadlines, criteria, and arbitrary requirements as set forth by respondents on August 4, 2009 were not subject to prior notice, consultation, or negotiations with the UPW.
50. On and after August 4, 2009 bargaining unit 1 and 10 employees submitted requests to extend time deadlines, and submitted requests for information needed to exercise their options under Sections 12, 13, 38, and for compliance with various provisions of the collective bargaining agreements.
51. On August 7, 2009 respondents Laderta and Frank provided partial (but not full) responses to the request for information submitted to them by the UPW on July 22[,] 2009 and July 29, 2009.
52. On August 12, 2009 the Board in connection with the UPW request for information on class action grievances filed in DMN-09-01 and DMN-09-02 granted the UPW's motion for summary judgment in Case Nos. CE-01-711a and CE-10-711b, and required Laderta to provide information relevant to furloughs and layoffs.

53. By the aforementioned conduct and other deeds to be established during the course of the proceedings respondents have willfully:

- a. Interfered, restrained, and coerced employees in the exercise of rights guaranteed under chapter 89 in violation of Section 89-13 (a) (1), HRS;
- b. Discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of Section 89-13 (a) (3), HRS...;
- c. Refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of Section 89-13 (a) (5), HRS...;
- d. Refused to comply with provisions of chapter 89, including Sections 89-3, 89-9 (a), (c), and (d), HRS, in violation of Section 89-13 (a) (7), HRS; and
- e. Violated the terms of the unit 1 and 10 collective bargaining agreements including but not limited to Sections 1, 3, 11, 12, 13, 14, 38, 66, and 68, in violation of Section 89-13 (a) (8), HRS.

Finally, UPW requested that the Board grant appropriate remedies to correct Respondents' wrongs, including but not limited to interlocutory relief to enjoin the implementation of the unlawful layoffs; cease and desist from continuing prohibited conduct, declaratory relief that Respondents engaged in multiple prohibited practices in violation of HRS Chapter 89, make whole relief to the Union and the employees, including back pay and loss of overtime with interest; and attorney's fees and costs under HRS § 377-9(d), as amended.

After the filing of the 720 Amended Complaint, the parties filed supplemental memoranda and responses to the Respondents' 720 MTD/MSJ and to the UPW 720 Motion for Interlocutory Relief.

On September 10, 2009, the Board heard oral arguments on the State MTD/MSJ and Complainant's Motion for Interlocutory Relief. In support of its Motion for Interlocutory Relief, Complainant argued, among other things, that the layoffs were retaliatory.

On October 22, 2009, the Board issued Order No. 2656 Findings of Fact, Conclusions of Law, and Order Granting in Part Respondents' Motion to Dismiss and/or for Summary Judgment and denying Complainant's 720 Motion for Interlocutory Relief, and Notice of Hearing (Order No. 2656). The Conclusions of Law set forth in Order No. 2656, among many other things, concluded the following:

12. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(1), (3), and (7) (subsection § 89-13(a)(7) with respect to alleged violation of § 89-3):

B. Even assuming that the Union has made a prima facie case of...retaliation, the State has presented a legitimate non-discriminatory and non-retaliatory reason for its decision to layoff workers, and the Union has not presented evidence to rebut the State's assertions (the decline in revenues) or to demonstrate that the state reason is mere pretext.

C. Accordingly, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based on this issue.

16. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(8):

B. To the extent the alleged violations of the collective bargaining agreements involved...retaliation..., the Board grants summary judgment in favor of Respondents and denies Complainant's Motion for Interlocutory Relief on these issues, for all the reasons discussed above.

(Emphasis added)

Further, Order No. 2656 provided the following Summary of its rulings:

SUMMARY

25. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(1), (3), and (7) (subsection § 89-13(a)(7) with respect to alleged violation of § 89-3), the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

26. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(5) and (7) (subsection § 89-13(a)(7) with respect to alleged violation of §§ 89-3 and 89-9(a) and (d)), the Board concludes that Respondents are entitled to summary judgment on this issue. The Board therefore denies injunctive relief based upon this issue as Complainant has failed to establish likelihood of success on the merits of this issue.

27. With respect to the issue of the procedures and criteria for layoffs, such procedures and criteria are permissive [and] Respondents are entitled to summary judgment on this issue, and the Board denies Complainant's Motion for Interlocutory Relief with respect to this issue.

28. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(7) with respect to alleged violation of HRS § 89-9(c), the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to this issue, and denies Complainant's Motion for Interlocutory Relief with respect to this issue.

29. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(8), to the extent the alleged violations of the collective bargaining agreements involved alleged failure to negotiate or bargain, discrimination, retaliation, adherence to the layoff procedures, or interference, restraint, or coercion, the Board grants summary judgment in favor of Respondents and denies Complainant's Motion for Interlocutory Relief on these issues, for all the reasons discussed above. To the extent the alleged violations of the collective bargaining agreements involve other issues (such as employee discipline or leaves of absence), the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to these issues, and denies Complainant's Motion for Interlocutory Relief with respect to these issues.

30. With respect to the issue of collective bargaining agreement provisions continuing beyond the agreement's expiration date, the Board concludes that the

provisions of the agreements did not automatically renew, and any continuation of provisions of the Unit 1 and Unit 10 agreements beyond the agreements' expiration dates are controlled by the principles in Katz, cited to with approval by the circuit court in HGEA v. Linda Lingle, Civil No. 09-1- 1375-06(KKS).

31. With respect to the issue of Respondents' alleged failure to provide information, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

(Emphasis added)

Based on a review of the foregoing Conclusions of Law and Summary in Order No. 2656, Order No. 2656 resolved all the issues in this case except for the allegations of prohibited practice pursuant to HRS § 89-13(a)(7) regarding alleged violation of HRS § 89-9(c) (the employer's duty to consult with the union) and allegations of prohibited practice pursuant to HRS § 89-13(a)(8) to the extent that the alleged violations of the CBAs involve issues other than the alleged failure to negotiate or bargain, discrimination, retaliation, adhere to the layoff procedures, or interference, restraint, or coercion (such as employee discipline or leaves of absence). Order No. 2656 further noticed a November 2, 2009 HOM on the remaining issues.

On October 28, 2009, the Board issued Errata for Order No. 2656, which corrected inadvertent omissions from the caption.

The Board records indicate that HOMs were held in this case on November 2, 3, 12, 18, and 19, 2009; and status conferences held on December 8, 16, and 29, 2009, January 12, 2010, and February 3, 2010.

During the November HOM, the Complainant called Remy T. Bolante; Linda K. Ishii; Wesley Hayashi, Richard Ah Yo; Edward K. Kinzie; Roslyn Murakane; Douglas Cobble, Kolakiaokalani Kamaka, June Rabago, Respondent Laderta, UPW State Director Dayton Nakanelua (Nakanelua), and Respondent Frank. The Board received into evidence numerous exhibits introduced by the parties.

At the November 18, 2009 HOM, then-Board Chair James B. Nicholson (Chair Nicholson) stated that the Board would reconvene to receive the testimony of Nakanelua regarding two possible meetings with the Governor or a stipulation regarding those meetings and discussions as to the Kulani closure and the layoffs and to issue any order that the Board deems necessary.

At the November 19, 2009 HOM, Chair Nicholson orally issued the following ruling (November 19, 2009 Oral Ruling):

CHAIRMAN NICHOLSON: Based on the evidence and testimony presented at hearing, the Board finds that there is a duty to bargain over the effects of the closure of the Kulani Facility.

Employer is ordered to maintain all wages and benefits of Kulani Unit 1 and Unit 10 employees in the positions they held at Kulani through and including December 31, 2009.

In order to avoid any disruption, Unit 1 or 10 employees who have relocated to other islands will be allowed to remain there during the bargaining process.

During the period from November 20th through and including December 31st, 2009, PSD will be given the responsibility of assigning Kulani Unit 1 and 10 employees to other correctional facilities on the Big Island.

The parties will commence bargaining over the effects of the Kulani closure forthwith.

The Board will conduct status conferences on December 8 and December 16 at 8:30 a.m. in the Board's hearing room regarding the status of the bargaining process.

The Board will be issuing a written decision on this matter as well as other issues in this case.

UPW's counsel requested clarification regarding whether the oral order included HCCC employees who had been given notices that they were going to be relocated or terminated because of their displacement by Kulani employees. The Board Chair responded that "...those types of things will be handled during the effects bargaining, and if those issues are raised and it's a concern, I think that the Union and the Employer would handle that situation."

At the subsequent December 8 and 16, 2009 status conferences, the parties reported on the progress of negotiations. At the December 16, 2009 status conference, the parties reported working on a proposed resolution regarding the issue of effects bargaining over the Kulani closure, which was waiting the Governor's approval.

At the February 3, 2010 status conference, the parties signed the proposed resolution.

On February 4, 2010, Respondents filed Respondents' Report to the Board on the Status of the Effects [Bargaining] Over the Closure of the Kulani Correctional Facility and attached Exhibit "A", the Proposed Resolution HLRB Decision No. 720 Kulani Closure, which was signed

by Nakanelua and Respondent Frank and dated February 3, 2009 (Proposed Resolution). The Proposed Resolution provided, among other things:

4. UPW and PSD will enter into a written agreement, which will include RIF/Layoff compensation adjustment for those who are placed into permanent appointments similar to what is done with other UPW employees in the same Bargaining Unit who have been subject to layoffs and placements.

5. It is understood, warranted and agreed between the parties that the claims raised in this matter are fully disputed and this resolution is in no manner an admission of any liability, nor will this resolution be represented by anyone to be an admission of liability of any kind.

6. This agreement resolves the effects bargaining over the closing of Kulani Correctional Facility and otherwise does not amend or revise any existing language in the collective bargaining agreement and resolution shall have no effect, impact or precedent value as to any other claim, action, proceeding or matter of any kind.

7. For the State, this proposed resolution is subject to approval by the Governor or designee.

On September 9, 2010, Respondents filed Respondents' Supplement to the Record, which was a copy of the Hawai'i Supreme Court's (Court) decision in Hawai'i Gov't Emp. Ass'n AFSCME, Local 152, AFL-CIO v. Lingle, No. 29972, 124 Hawai'i 197, 239 P.3d 1 (2010).

There was no further action taken in this case until the Board held a status conference in this case on February 3, 2014.

Following that status conference, there was no further action in this case for another five years until the Board noticed a February 4, 2019 status conference.

At the February 4, 2019 status conference, UPW's counsel noted, among other things, that after the Abercrombie decision, there was an order for mediation of the civil matter, the parties entered into a memorandum of agreement for arbitration and mediation (MOA), that this case is under mediation with Walter Ikeda (Ikeda), and that these proceedings were stayed. However, UPW's counsel was uncertain whether the MOA was still in effect (because of the employer's withdrawal from the MOA) and whether the stay was in effect. UPW's counsel requested mediation from the Board and that the status conference be continued for two months to enable him to review the case. Respondents' counsel believed that because this case is in mediation, the mediation would stop if the instant case began to move. Respondents' counsel did not object to additional time for consideration.

Accordingly, on April 15, 2019, the Board held another status conference. At this status conference, UPW's counsel took the position that there should be an HOM on the same issues submitted to the Board for dismissal. Respondents' counsel submitted the Proposed Resolution and took the position that the remaining issues required determination after conferring with UPW and DHRD. At the end of the status conference, the presiding Board Member J N. Musto stated that the Board would issue a notice of HOM dates and deadlines and review the dispositive motions.

On April 30, 2019, the Board issued Order No. 3494 Requiring Parties to Submit Statement of Clarification of Remaining Issues and Provide Information Regarding Status of the Case (Order No. 3494). In Order No. 3494, based on a review of the record, the Board concluded that the Order No. 2656 addressed and resolved most of the issues raised by the 720 Amended Complaint, the Motion for Interlocutory Relief, and the State 720 MTD/MSJ in this case. In addition, the five November 2009 HOMs and the November 19, 2009 oral ruling ordering the parties to bargain regarding the effects of the Kulani closure appears to have disposed of the failure to bargain issue.

Accordingly, in Order No. 3494, the Board found that the only unresolved issues in this case appear to be certain alleged CBA violations, such as employee discipline or leaves of absences, as noted in Order No. 2656. Further, that based on the representations of counsel for the parties in this case, there was also the question of whether, and to what extent, these remaining unresolved issues are before Ikeda. The Board took the position that any issues already determined by the Board in Order No. 2656 or the November 19, 2009 oral ruling to bargain and any issues addressed in the November 2009 HOMs related to that oral ruling would not be relitigated in any future HOMs.

For the purposes of clarification and efficiency of the hearing process, prior to setting new dates for the HOM and the deadlines, the Board required and ordered a Statement of Clarification of Remaining Issues and Information Regarding Case Status (Statement) from each of the parties. Pursuant to Order No. 3503, UPW has a current deadline of July 1, 2019 to file its Statement and the State Respondents have until August 30, 2019 to file their Statement.

II. MOTION TO CONSOLIDATE

Hawai'i Administrative Rules (HAR) § 12-42-8(g)(13) provides:

- (13) The board, on its own initiative or upon motion, may consolidate for hearing or other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration

will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

(Emphasis added)

The decision to consolidate is within the discretion of the Board. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 124 Hawai'i 372, 375, 244 P.3d 609, 612 (Haw. Ct. App. 2005).

In support of its Motion to Consolidate, UPW contends that Case Nos. CE-01-710a & b and CE-01-720a & b involve the same parties and substantially the same issues in light of Abercrombie.

In their Opposition to the Motion to Consolidate, the State Respondents, joined by the City Respondent argue that the issues in the two cases are not the same because the present case involves major issues related to whether collective bargaining agreements automatically renew upon expiration and whether the State publicly commented upon the content of negotiation discussions. In contrast, CE-01-720a and b involves the Proposed Resolution HLRB Decision No. 720 Kulani Closure and the Ikeda mediation, for which the Board has requested the parties to submit a statement of clarification of remaining issues and information regarding case status.

Except for the City Respondent in CE-01-710a & b, the Board agrees with the UPW that the parties are substantially the same. However, the Board does not concur with the UPW that the issues are substantially the same.

The 710 Complaint is limited to prohibited practice allegations for violations of HRS §§ 89-3, 89-6(d), 89-13(a)(1), (5), (7), and (8) committed regarding the negotiations regarding the July 1, 2009- June 30, 2011 CBAs . The alleged misconduct included whether Respondents wilfully: abrogated the basic ground rules of negotiations; violated the CBAs §§ 66 and 68 and interfered, restrained, and coerced employees regarding their HRS Chapter 89 rights by submitting proposals to modify renewed provisions of the CBAs; threatened the layoff of employees contrary to the renewed CBA provisions and in retaliation to the lawful exercise of protected concerted activities under HRS § 89-3; and undermined the process of multi-employer bargaining needed to ensure a uniform statewide Unit 1 and 10 CBAs under HRS § 89-6(d).

On the other hand, the prohibited practice allegations in the 720 Amended Complaint involve violations of HRS §§ 89-3, 89-9(a), (c), and (d), and 89-13(a)(1), (3), (5), (7), and (8) that Respondents allegedly committed by, among other things, the unilateral implementation of the statewide furlough plan and the impending layoffs, the threats of mass layoffs and of the shutdown of some programs if the union blocked furloughs; the Kulani closure; the failure to negotiate on the implementation of the Kulani closure and to notice, consult, or negotiate on the reduction in force and layoff procedures; and the failure to provide adequate responses to requests for

information. Many of these issues present in the 720 case have already been resolved. Most significantly, the issue addressed by the Abercrombie decision^{iv} regarding that the issue of retaliation is within the Board's primary jurisdiction was addressed and resolved almost 10 years ago in favor of the Respondents by the conclusions of law in Order No. 2656, as laid out above. Regarding the other issues, as noted by the Board in Order No. 3494, most of them appear to have been resolved by Order No. 2656 and the November 18, 2009 oral order issued by the Board to bargain over the effects of the Kulani closure. Further, the Board concludes that the remaining issues in the 720 Amended Complaint are not the same as those in the 710 Complaint, and there is nothing in the Abercrombie holding, which requires consolidation of these cases. Therefore, the Board concurs with Respondents that a review of the Complaints and the records in the cases shows that the issues are dissimilar in CE-01-710a & b and CE-01-720a & b based on the scope and on the factual and prohibited practice allegations.

More importantly, these prohibited practice cases are in very different procedural stages.

In Case No. CE-01-710a& b, there are numerous pending motions, including the UPW's Motion for Interlocutory Relief, the State's MTD/MSJ, the City's MTD/MSJ, UPW's Motion to Withdraw Complaint, Motion to Stay Grievances, and the UPW's Motion to Amend Complaint. As pointed out by Respondents in their Opposition to Consolidation, some of these pending motions could potentially dispose of the case, in whole or in part.

In contrast, Case No. CE-01-720a & b is not only more substantively but also procedurally more advanced. The Board issued Order No. 2656, which granted summary judgment on all of the issues in this case, except for the HRS § 89-13(a)(7) violations regarding the alleged violation of HRS § 89-9(c) and HRS § 89-13(a)(8) (other than the alleged failure to negotiate or bargain, discrimination, retaliation, adherence to the layoff procedures, or interference, restraint, or coercion, such as employee discipline or leaves of absence). The case then proceeded to five days of HOMs on the remaining issues at which a dozen witnesses provided testimony. At the November 19, 2009 HOM, the Board orally ruled that there is a duty to bargain over the effects of the Kulani closure, resulting in a proposed resolution awaiting the Governor's approval. Earlier this year, the Board held two status conferences to clarify the remaining issues and the required actions to resolve this case. The parties raised a mediation order made after the Abercrombie case, which is presently with Ikeda and believed to have stayed the proceedings. In Order No. 3494, the Board found that the only unresolved issues in this case appear to be certain alleged CBA violations. However, due to the pending matters before Ikeda and possible stay of the proceedings, the Board requested clarification of the remaining issues and information regarding the status of this case. Accordingly, the Board ordered the parties to submit a Statement of Clarification on specific issues enumerated in the Order. The deadline for filing these Statements is July 1, 2019 for UPW and August 30, 2019 for the State Respondents.

The Board finds that given the dissimilar issues and the disparate procedural stages of the Cases CE-01-710a & b and CE-01-720a & b and the issues of the effects of Ikeda mediation on CE-01-720a & b, consolidation of the proceedings in these cases will not be conducive to the proper dispatch of the Board's business.

ORDER

For the reasons set forth above, the Board denies the Motion to Consolidate.

DATED: Honolulu, Hawai'i, June 20, 2019.

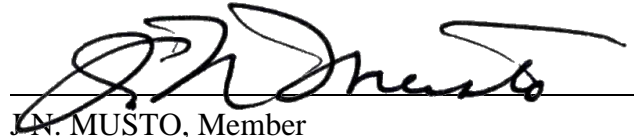
HAWAI'I LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



J.N. MUSTO, Member



Copies sent to:

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Jeffrey A. Keating, Deputy Attorney General

Duane W.H. Pang, Deputy Corporation Counsel

¹ Governor David Y. Ige, the current Governor, State of Hawai'i, is substituted for former Governor Linda Lingle. However, for purposes of this discussion, the references to Lingle will remain. Pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 25(d)(1), when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party; proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. The Board has applied the HRCP where its administrative rules are silent. Dep't of Public Safety, State of Hawai'i v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-10-322, Order No. 2944, at *2 n. 2 (2013).

ⁱⁱ Ryker Wada, the current DHRD Director for the State of Hawai‘i, is substituted for Laderta for reasons similar to those set forth in endnote 1, *supra*.

ⁱⁱⁱ Kirk Caldwell, the current Mayor for the City and County of Honolulu, is substituted for former Mayor Mufi Hannemann for reasons similar to those set forth in endnote 1, *supra*.

^{iv} In Abercrombie, the issue presented on appeal by the UPW was whether the Hawai‘i Intermediate Court of Appeals (ICA) erred by ordering the circuit court to stay this case under the doctrine of “primary jurisdiction” even though the claims are within the original jurisdiction of the circuit courts and do not present issues committed to the specialized administrative expertise of the Board. The Court held that the UPW’s retaliation claims are originally cognizable in the circuit courts, however, the ICA correctly ruled that pursuant to the doctrine of primary jurisdiction, the enforcement of UPW’s retaliation claims requires the resolution of issues that have been placed within the special competence of the Board under HRS Chapter 89. Further that the ICA also correctly ruled that the circuit court should have stayed rather than dismissed the UPW’s retaliation claims pending the HLRB’s determination of issues within UPW’s claims that were within the HLRP’s special competence. In addition, the Court held that pursuant to Konno v. County of Hawai‘i, 85 Hawai‘i 61, 937 P.2d 397 (1997), however, the primary jurisdiction doctrine does not apply to UPW’s privatization claims.