

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

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

Complainant,

and

CHRISTINA KISHIMOTO,  
Superintendent, Department of Education,  
State of Hawai'i,

Respondent.

CASE NO. 17-CE-01-902

ORDER NO. 3529

ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, MOTION FOR  
SUMMARY JUDGMENT; AND  
DENYING UPW'S MOTION FOR  
SUMMARY JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS  
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY  
JUDGMENT; AND DENYING UPW'S MOTION FOR SUMMARY JUDGMENT

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

A. THE COMPLAINT

On October 23, 2017, UPW filed a Prohibited Practice Complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging violations of Hawai'i Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8) by Respondent, and it additionally alleges that Respondent undermined the grievance process by wilfully violating the statutory rights of employees under HRS §§ 89-3, 89-9(a), and 89-10.8.

The Complaint further alleges that on or about October 13, 2016, UPW filed a grievance (Grievance) involving the termination of an employee at Kailua High School who, at all relevant times, was an employee covered by the Unit 1 Agreement; that while the grievance was being processed through the various steps of the grievance procedure, the UPW orally requested the employer, through its Windward District Personnel Office, “to provide information it needed to properly investigate and process the matter in behalf of [grievant] on or about September 25, 2017 by its business agent”; on October 2, 2017, the UPW business agent was informed to submit any request for information to the office of the attorney general; on October 4, 2017, UPW through its legal counsel submitted a request for information pursuant to § 15.09 of the CBA to the deputy attorney general assigned to handle the matter for the DOE; on October 9, 2017, Respondent through its legal counsel requested to extend the deadline to respond to the October 4, 2017 request for information; on October 12, 2017, UPW declined to grant an extension and requested prompt, full, and complete responses within seven calendar days as required by § 15.09; on October 12, 2017, Respondent, through its legal counsel, stated it would make every effort to provide responses “as quickly as possible” and “not later than October 20, 2017”; on October 13, 2017, UPW again requested prompt, full, and complete responses to the request for information; on October 14, 2017, UPW sent another letter notifying Respondent of its failure and refusal to provide information and requested responses to “items 1 through 5 by October 16, 2017”; Respondent willfully refused and failed to provide any information within seven days of the October 4, 2017 request, contrary to its contractual and statutory duties; Respondent failed to provide any information from October 12, 2017 to time of filing (“present”); and Respondent even willfully disregarded its promise to provide information “as quickly as possible” and not later than October 20, 2017.

**B. THE MOTION TO DISMISS**

On November 13, 2017, Respondent filed Respondent’s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (Motion to Dismiss). The Motion to Dismiss asserts two primary arguments: first, that the Uniform Arbitration Act applies to information requests, thus preempting § 15.09 of the CBA; and second, that there is no evidence that the DOE willfully committed a prohibited practice.

In support of these two arguments, the Motion to Dismiss provides the following facts: that UPW gave notice of its intent to arbitrate the Grievance on September 19, 2017; on October 4, 2017, counsel for UPW sent a request for information letter to counsel for the DOE, requesting nine categories of documents, some of which date to 1998; UPW emailed the request to Neil Dietz, Personnel Specialist (Dietz) for a response; Dietz immediately sought to obtain the information by reviewing his records, contacting the Windward District Office’s Personnel Regional Offices to obtain information, and to seek information that may be held by other sections within the Office of Human Resources and Kailua High School; some of the information was so voluminous they could not be attached to an email message so Dietz had them downloaded on a CD and mailed to

DOE's counsel; on October 9, 2017, DOE's counsel sent a letter to UPW's counsel acknowledging receipt of October 4, 2017 request for information, and requesting 30 days to respond; by letter dated October 12, 2017, UPW's counsel acknowledged receipt of the request for extension, refused to give an extension, and threatened to file a prohibited practice complaint if he did not receive responses by 4:00 p.m. that day; by letter dated October 12, 2017, DOE's counsel notified UPW's counsel that "we will make every effort to provide the responses as quickly as possible. A response will be sent to you no later than October 20, 2017"; by letter dated October 13, 2017, UPW's counsel again demanded information; by letter dated October 14, 2017, UPW's counsel acknowledged receipt of the October 12, 2017 letter from DOE's counsel and asked for partial response; and on October 18, 2017, a set of responses was mailed to UPW's counsel.

On November 20, 2017, UPW filed UPW's Opposition to Respondent's Motion to Dismiss or, in the Alternative, Motions for Summary Judgment (Opposition to Motion to Dismiss), and makes three primary arguments: that the Revised Uniform Arbitration Act does not preempt prohibited practices under HRS chapter 89; that Respondent acted with conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89; and that the State is precluded from relitigating the issues of the applicability of Section 15.09 to Step 3 (Arbitration) of the grievance procedure.

#### C. THE MOTION FOR SUMMARY JUDGMENT

On November 13, 2017, UPW filed a Motion for Summary Judgment. UPW's primary arguments are that an employer's duty to bargain in good faith includes the duty to provide information, and extends to requests for information needed by a union during a grievance procedure; that based on the chronology of events the employer willfully breached its duty to bargain in good faith by failure to provide information, and unlawfully interfered with the rights of employees in the exercise of their rights under HRS chapter 89, including the rights to pursue and correct a grievance; that Respondent willfully violated § 15.09 of the CBA; and that the UPW should be awarded costs, attorney's fees, and civil penalties of \$10,000 per violation.

On November 20, 2017, Respondent filed Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment, asserting the UPW failed to show Respondent acted "willfully"; the UPW failed to address the Uniform Arbitration Act's preemption of Section 15.09 of the Unit 1 CBA; and that sanctions should be levied against the UPW to discourage UPW's abusive tactics.

#### D. THE HEARING ON THE MOTIONS

On December 1, 2017, the Board heard oral arguments on Respondent's Motion to Dismiss and on the UPW's Motion for Summary Judgment. The Board then took the two motions under advisement.

## E. THE PARTIES

At all relevant times in the instant case, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) was, and is, an employee organization,<sup>i</sup> as defined in HRS § 89-2, and was the exclusive representative<sup>ii</sup> and collective bargaining agent for Unit 01, defined in HRS § 89-6(a)(1) as “Nonsupervisory employees in blue collar positions.”

At all relevant times in the instant case, Respondent CHRISTINA KISHIMOTO (Kishimoto), Superintendent, Department of Education, State of Hawai‘i (Respondent or DOE), was, and is, the Superintendent of the DOE. In that capacity, Kishimoto was, and is, an “employer” or “public employer” under HRS § 89-2<sup>iii</sup>.

UPW and Respondent are, and have been, for all relevant times, parties to a collective bargaining unit for Unit 1 (Unit 1 Agreement or CBA). Such CBA is required by HRS § 89-10.8(a) to contain a grievance procedure that culminates in a final and binding decision.

## II. STANDARD OF REVIEW

The Board follows the legal standards set forth by the Hawai‘i appellate courts for motions to dismiss under the Hawai‘i Rules of Civil Procedure (HRCP) Rule 12(b)<sup>iv</sup>.

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint. The allegations of the complaint must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai‘i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 7, 175 P.3d 111, 117 (App. 2007).

## III. CONCLUSIONS OF LAW

The Board has generally held that an employer must provide a union with relevant information necessary for the performance of its duties, including the processing of a grievance. Veincent v. Matayoshi, 2 HPERB 494, 502 (1980) (*citing* NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 567-68 (1967)). If the requested data is relevant and therefore reasonably necessary to a union’s role as bargaining agent in the administration of a collective bargaining agreement, it is a prohibited practice for an employer to refuse to furnish the requested data. *Id.* at 494-506 (*citing* Curtiss-Wright Corp., Wright Aero. Div. v. NLRB, 347 F.2d 61, 68 (1965)). However, the Board has previously declined to entertain matters that are deferrable to

arbitration, consistent with the strong public policy favoring arbitration under HRS Chapter 658A. *See, e.g., UPW v. Arakawa and Tavares*, Board Case No. CE-01-655, Order No. 2499 (April 14, 2008).

Under HRS § 89-5, the Board resolves controversies under chapter 89, and conducts proceedings on prohibited practice complaints. Further, while, according to HRS § 89-19, “[chapter 89] shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, or rules adopted by the State, a county, or any department or agency thereof...[,]” Chapter 658A is not a “conflicting statute.” Rather, HRS § 89-10.8(a)<sup>v</sup> specifically allows the parties to enter into an agreement that sets forth a grievance procedure culminating in arbitration. Further, it is well-established that the Hawai‘i appellate courts have consistently applied chapter 658A to such arbitration proceedings arising out of a grievance procedure in a collective bargaining agreement. *See, e.g., Hawai‘i State Teachers Ass’n v. Univ. Lab. School*, 132 Hawai‘i 426, 322 P.3d 966 (2014).

Pursuant to HRS § 658A-9, “[a] person initiates an arbitration proceeding by giving notice in a record to the other party to the agreement to arbitrate in the agreed manner between the parties[.]”

The parties do not dispute that on September 19, 2017, UPW gave notice of its intent to arbitrate the Grievance. Accordingly, even viewing UPW’s allegations in the light most favorable to the Complainant, the Board finds that the Grievance at issue here was in arbitration at the time the September 25, 2017 information request was made and at the time the Complaint was filed. As laid out in HRS § 658A-17, an arbitrator controls discovery during arbitration. Therefore, the issue of information requests that occurs during the arbitration stage of a grievance, including UPW’s requests of September 25, 2017, is properly within the jurisdiction of the arbitrator. Accordingly, the Board finds that it does not have jurisdiction over the instant complaint and thus must dismiss the case.

### ORDER

For the reasons discussed above, the Board:

1. Grants Respondent’s Motion to Dismiss on the basis that UPW’s information requests of September 25, 2017 is properly within the jurisdiction of the arbitrator and that the Board does not have jurisdiction over the instant complaint.
2. Denies or does not reach a conclusion on the remaining issues in the dispositive motions and claims as moot.

This case is hereby dismissed and closed.

DATED: Honolulu, Hawai'i, \_\_\_\_\_ June 25, 2019 \_\_\_\_\_.

HAWAII LABOR RELATIONS BOARD



*Marcus R. Oshiro*

MARCUS R. OSHIRO, Chair

*Sesnita A. D. Moepono*

SESNITA A.D. MOEPONO, Member

*N. Musto*

N. MUSTO, Member

Copies sent to:

Herbert Takahashi, Esq.  
Henry S. Kim, Deputy Attorney General

<sup>i</sup> HRS § 89-2 Definitions defines “employee organization” as:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

<sup>ii</sup> HRS § 89-2 Definitions defines “exclusive representative” as:

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

<sup>iii</sup> HRS § 89-2 Definitions defines “employer” or “public employer”, in relevant part, as follows:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest when dealing with public employees...

<sup>iv</sup> When the Board rules are silent or ambiguous on procedural matters, the Board then may look for guidance to similar provisions of court rules. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1 (CE), Order No. 1978 at \*5 (January 11, 2001).

<sup>v</sup> HRS § 89-10.8(a) provides in relevant part:

A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.