

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Petitioner(s),

and

DEPARTMENT OF PUBLIC SAFETY,  
State of Hawai'i,

Intervenor(s).

CASE NO(S). 20-DR-10-116

ORDER NO. 3752

ORDER DECLINING TO ISSUE A  
DECLARATORY RULING

**ORDER DECLINING TO ISSUE A DECLARATORY RULING**

**1. Introduction and Statement of the Case**

Declaratory rulings have a unique and independent role in the statutory scheme; namely, declaratory rulings are determinations of whether and in what way a statute, agency rule, or order, applies to the factual situation raised by an interested person. *See Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Hawai'i 184, 197, 159 P.3d 143, 156 (*Citizens*). Declaratory rulings from the Hawai'i Labor Relations Board (Board) do not order parties to take particular actions. They consider only whether statutory provisions, Board rules, or Board orders apply to a particular set of facts. Hawai'i Administrative Rules (HAR) § 12-42-9.

In this Petition for Declaratory Ruling (Petition), Petitioner UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) requests that the Board issue declaratory rulings that UPW and Intervenor DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (PSD) "shall negotiate" over certain issues related to the COVID-19 pandemic. The Petition further references various sections in the bargaining unit 10 (BU 10) collective bargaining agreement (CBA) and a memorandum of understanding (MOU) on attendance that UPW believes have been affected by the COVID-19 pandemic.

The Board held a Board Hearing that both UPW and PSD attended. After clarifying the issues and based on a thorough review of the record and consideration of the arguments presented, the Board orally ruled that it would decline to issue a declaratory ruling.

UPW objected to the Board's oral ruling and orally requested a hearing and further briefing on the declaratory ruling. The Board denies these requests for the reasons articulated in this order.

## **2. Background**

UPW is the exclusive representative for BU 10, and PSD represents a member of the Employer group for BU 10. UPW and the BU 10 Employer group are parties to the BU 10 CBA and an MOU on attendance. Both the CBA and the MOU in question were negotiated prior to the start of the COVID-19 pandemic.

## **3. Discussion**

The Board has the authority to issue declaratory rulings. Hawai'i Revised Statutes (HRS) §§ 89-5(i)(5) and 91-8. The Board's procedures regarding Declaratory Rulings are contained in HAR § 12-42-9, Declaratory rulings by the board.

### **3.1. UPW is not Entitled to a Hearing Without Properly Requesting One**

In the usual course of proceeding with a petition for a declaratory ruling, the Board holds no formal hearing. HAR § 12-42-9(h)(1). The Board can typically resolve declaratory rulings through the memoranda, affidavits, and other written evidence submitted by the parties.

However, if a petitioner desires a hearing, the Board has established a procedure through which the petitioner can request one. *See* HAR § 12-42-9(h)(2). To do so, the petitioner must:

...set forth in detail **in a written request** the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such request for hearing is dependent upon factual assertion, shall accompany such request by an affidavit establishing such facts.

(Emphasis added).

UPW did not submit a written request for a hearing on the Petition and did not even raise a request orally until after the Board issued its oral ruling declining to issue a declaratory ruling. While raising the request for a hearing, UPW further requested that it be allowed to brief some of the issues raised at the Board hearing.

The Board finds it clear that UPW did not properly request a hearing on the petition for declaratory ruling. Further, in its oral request, UPW admitted that the matters it wished to raise at a hearing could be addressed through written evidence.

Accordingly, UPW is not entitled to a hearing on the Petition, and the Board declines to hold one.

### **3.2. UPW’s Prayer for Relief is Improper for a Declaratory Ruling Petition**

HAR § 12-42-9(f)<sup>i</sup> states that the Board has the right to refuse to issue a declaratory order for good cause and provides a non-exhaustive list of reasons why the Board may refuse to issue such an order. HAR § 12-42-9(f)(4) provides one of those reasons as the “matter is not within the jurisdiction of the board.”

UPW’s requested declaratory ruling is not a proper declaratory ruling request because it asks the Board to issue a ruling stating that the parties “shall” take certain actions. Declaratory rulings from the Board do not order parties to take particular actions. UPW appears to have misunderstood the purpose of a declaratory ruling.

A declaratory ruling petition is proper only when asking for a determination of whether and in what way a statute, agency rule, or order, applies to the factual situation raised by an interested person. Citizens, 114 Hawai‘i at 197, 159 P.3d at 156. Therefore, proper declaratory ruling petitions ask questions about whether certain statutes, rules, or orders apply to a specific situation. For example, the Board issued a declaratory ruling as to whether portions of HRS § 89-9 applied to a deferred compensation plan sponsored by UPW. *See, City and County of Honolulu and UPW et al*, Case Nos. DR-01-87a; DR-10-87b, Decision No. 434 (2002).

Here, UPW’s prayer for relief may have possibly been proper in a prohibited practice complaint, and the Board may have had the ability to issue an order mandating that the parties begin negotiations on certain issues in a prohibited practice case. However, in a declaratory ruling petition, the Board’s jurisdiction is more limited.

Accordingly, the Board must decline to issue the declaratory ruling specifically requested by UPW.

### **3.3. UPW’s Petition for Declaratory Ruling Asks a Question so Broad as to be Speculative or Hypothetical**

The Board adheres to the notice pleading standard established by the Hawai‘i appellate courts. Paio et al. v. UPW, Case Nos. 16-CU-10-344; 16-CU-10-345, Decision No. 497, at \*26 (2/21/20); Condon v. Ota, Board Case No. CU-10-263, Order No. 2511, at \*2 n. 2 (6/2/08). Accordingly, the Board will liberally construe UPW’s petition and consider the other issues potentially raised by the Petition.

To the extent that the Petition raises a proper question that the Board can answer, the Board interprets the Petition to ask whether the COVID-19 pandemic and its effects constitute a mandatory or permissive subject of bargaining under HRS § 89-9 and to what extent

management rights apply. This question is so broad as to be speculative or hypothetical, and so, the Board also declines to issue a declaratory ruling as to this question. *See*, HAR § 12-42-9(f)(1).

The Board recognizes that there may be portions of the effects of the COVID-19 pandemic that implicate mandatory or permissive subjects of bargaining. However, the Board cannot possibly be expected to issue a ruling on the entirety of the COVID-19 pandemic and its effects without more specificity. Accordingly, the question presented is so broad as to be speculative or hypothetical.

### **3.4. The Board May Not Issue Declaratory Rulings on CBA or MOU Provisions**

To the extent that the Petition contains greater specificity as to what UPW believes may be subject to bargaining, UPW references particular sections of the BU 10 CBA and an MOU. UPW represents that UPW and the Employer group negotiated the CBA and the MOU prior to the COVID-19 outbreak and that, accordingly, the CBA and MOU have sections that UPW believes should be renegotiated. Further, UPW argues that the language in the CBA and/or MOU could potentially lead to discipline for its members.

The Board lacks jurisdiction to issue a declaratory ruling over a purely contractual interpretation of a CBA or MOU. Hawaii State Teachers Association v. Biven, et al., Board Case No. DR-05-99, Order No. 2554, at 11, (10/6/08). Accordingly, the Board cannot issue a DR as to the interpretations of the CBA or the MOU in light of the COVID-19 pandemic. HAR § 12-42-9(f)(4).

As far as the question of whether those sections referenced by UPW must be renegotiated in the light of COVID-19, the Board declines to make a ruling on this issue, as the issuance of such a ruling could adversely affect the Board's ability to issue a ruling should a prohibited practice case arise from these negotiations. HAR § 12-42-9(f)(3).

### **3.5. Procedures and Criteria on Disciplinary Actions is a Permissive, not Mandatory Subject of Bargaining**

Even if the Board were to rule on whether certain effects arising from the COVID-19 pandemic implicated bargaining subjects, such a ruling would not necessarily implicate any mandatory subjects of bargaining.

In one of UPW's most specific discussions regarding the effects of COVID-19 on BU 10 members, UPW references an MOU regarding attendance. UPW raises concerns that, under the MOU, BU 10 members may be subject to discipline up to and including termination based on calling in sick without sick leave credits.

However, “procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions” are subjects of *permissive*, not mandatory bargaining. State of Hawaii Organization of Police Officers (SHOPO) v. County of Kauai, 134 Hawai‘i 155, 164, 338 P.3d 1170, 1179 (2014) (County of Kaua‘i). Therefore, even if UPW wishes to engage in bargaining over disciplinary actions amid the COVID-19 pandemic, the Employer group has no obligation to engage in that bargaining. If the Employer group has no obligation to engage in such bargaining, the Board cannot require them to so engage.

HRS § 89-9(d) states in relevant part:

This subsection...shall not preclude negotiations over the implementation of management decisions that affect terms and conditions of employment that are subject to collective bargaining. Further, this subsection shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as subjects of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement; provided that such obligation shall not compel either party to agree to a proposal or make a concession.

However, when the Hawai‘i State Legislature (Legislature) added this language to HRS § 89-9(d), the Legislature noted that a purpose of the bill was “to establish clear distinctions between mandatory, excluded, and permissive subjects of bargaining” and to “allow[] a public employer to negotiate over procedures and criteria on...disciplinary actions.” H. Stand. Comm. Rep. No. 1910, in 2007 House Journal, at 1716. Therefore, while negotiations over disciplinary actions are not precluded, procedures and criteria on disciplinary actions are a permissive not a mandatory subject of bargaining.

#### **4. Order**

For the reasons set forth above, the Board hereby declines to issue a declaratory ruling for good cause in accordance with HAR § 12-42-9. This case is closed.

DATED: Honolulu, Hawai‘i, May 26, 2021.

HAWAI‘I LABOR RELATIONS BOARD

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MARCUS R. OSHIRO, Chair

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SESNITA A.D. MOEPONO, Member

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J N. MUSTO, Member

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<sup>i</sup> HAR § 12-42-9(f) states:

- (f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:
- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future.
  - (2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.
  - (3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.
  - (4) The matter is not within the jurisdiction of the board.