

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

In the Matter of

HENRY H. YANG, M.D.,

Petitioner(s),

and

DEPARTMENT OF HEALTH, State of
Hawai'i,

Intervenor(s).

CASE NO(S). DR-13-102

ORDER NO. 3772

ORDER REFUSING TO ISSUE A
DECLARATORY RULING

ORDER REFUSING TO ISSUE A DECLARATORY RULING

I. INTRODUCTION

The Hawai'i Labor Relations Board (Board) issued a Proposed Order Refusing to Issue a Declaratory Ruling (Proposed Order) in this case on June 18, 2021. The Proposed Order, among other things, declined to issue a declaratory ruling based on Hawai'i Administrative Rules (HAR) §§ 12-42-9(f)(3), 12-42-42(f), and 12-42-42(g). The Proposed Order further provided, in relevant part:

VI. FILING OF EXCEPTIONS

Any person adversely affected by the above Proposed Order may file exceptions with the Board, as laid out in HRS §91-11, within ten days after service of a certified copy of this document. The exceptions must specify which findings or conclusions are being excepted to with citations to the factual and legal authorities for such exceptions. A hearing for the presentation of oral arguments will be scheduled if such exceptions are filed, and the parties will be notified of such hearing.

Petitioner HENRY H. YANG, M.D. (Yang) submitted exceptions, and the Board held a hearing on such exceptions. After considering Yang's exceptions, the Board hereby **DECLINES** to issue a declaratory ruling.

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

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 25, 2011, at 12:00 p.m., Petitioner HENRY H. YANG, M.D. (Dr. Yang or Petitioner) filed the instant Petition for Declaratory Ruling (DR Petition) with the Board. Petitioner seeks the following remedy:

- (1) Declare and affirm that the Employer had a legal duty to consult with the [Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA)], [bargaining unit (BU)] 13 representative on changes to terms and conditions of the Petitioner's workplace, including but not limited to:
 - a. Unilateral changes to the work schedule;
 - b. Changing an existing past practice concerning work schedules;
 - c. That the scope of work performed by the Petitioner was customarily performed by civil servants;
 - d. Abolishing the Petitioner's position;
 - e. The Employer violated the terms and conditions of the applicable collective bargaining agreement and state law by unlawfully privatizing the Petitioner's former position, without consultation.

- (2) Order Petitioner's reinstatement, including back pay and reinstatement of any seniority rights including fringe benefits and any further equitable relief as the Board deems appropriate.

On November 29, 2011, the Board issued its Notice of Filing of Petition for Declaratory Ruling and Notice of Deadline for Filing Petitions for Intervention in this matter (DR Notice). The DR Notice, among other things, sets the deadline for interested persons to intervene in the proceeding by 4:30 p.m. on December 16, 2011.

On December 8, 2011, Intervenor DEPARTMENT OF HEALTH, State of Hawai'i, (Intervenor, Respondent, or DOH) filed a Petition for Intervention with the Board. The DOH alleges in its Petition for Intervention that Intervenor is an employer and its rights as an employer could be violated by a decision in this matter and contends that: (1) the Board does not have

subject matter jurisdiction to address Dr. Yang's allegations by way of a motion for declaratory ruling; (2) Dr. Yang does not have standing to bring this action; (3) the DR Petition seeks adjudication of identical claims raised in Dr. Yang's prohibited practice complaint (PPC); and (4) Dr. Yang's PPC is untimely, and this action is an attempt to avoid the statute of limitations for filing a prohibited practice complaint.

The Board received no opposition to the DOH's Petition for Intervention.

On January 9, 2012, the Board issued Order No. 2827, Granting Department of Health, State of Hawai'i's Petition for Intervention filed on December 8, 2011 and Notice of Board Conference (Order No. 2827). In Order No. 2827, the Board found that the DOH had alleged a sufficient interest to intervene in this case pursuant to Hawai'i Administrative Rules (HAR) §§ 12-42-8(g)(14) and 12-42-9(e).

On January 17, 2012, Petitioner filed Petitioner's Pre-Hearing Statement containing the same alleged facts in the Petition.

On January 19, 2012, the Board held a conference and continued this case until the Board rendered a final decision in Henry H. Yang, M.D. v. Bruce Anderson, Ph.D., Director, Department of Health, State of Hawai'i, CE-13-788 (2011).¹

In 2020, the Board issued Order Nos. 3595, 3605, and 3647 in response to the Governor's Emergency Orders due to the COVID-19 pandemic.

III. RELEVANT BACKGROUND AND FINDINGS OF FACT

A. Relevant Shared Facts and Remedies of the Petition and the Prohibited Practice Complaint (Complaint).

On or about May 20, 2008, the Petitioner and another psychiatrist were hired by the Intervenor through its Adult Mental Health Division, Department of Health, East Hawai'i Adult Mental Health Center on a half time basis to fill a full-time civil service exempt psychiatrist position. The duties and responsibilities of the position required the Petitioner to provide psychiatric hospital treatment for patients that were registered with the Adult Mental Health Center, the forensic population, the uninsured and registered patients with the Care Hawai'i program and Adult Protective Services.

On or about March, 2009, the Intervenor agreed to a Memorandum of Understanding with the HGEA, that included the Petitioner as an exempt employee in Bargaining Unit 13, and subject to the terms and conditions of the BU 13 agreement.

On or about May 31, 2011, Intervenor terminated Petitioner.

On or about July 1, 2011, the Intervenor, with the Petitioner present, held a meeting with representatives of the Hilo Medical Center and stated that the Intervenor was terminating their legal and medical responsibility for any and all patients that were receiving treatment and transferring them to the Hilo Medical Center. The Intervenor terminated its program for treatment and care for its patients.

The DR Petition and the PPC were filed on November 25, 2011.

The Petition and the PPC both stated the following causes of action:

1. At all times relevant herein, the Respondent failed to consult with the HGEA concerning Dr. Yang's transfer of duties and responsibilities, the abolition of his position in violation of Section 89-9(c), [HRS].
2. At all times relevant, the Respondent failed to consult with the HGEA concerning changes to his terms and conditions of work, to wit, the work schedule and taking away any and all private insurance patients and/or patients not covered by or eligible under the Respondent's programs in violation of Section 89-9(c), HRS.
3. At all times relevant, the Respondent deliberately, intentionally and fraudulently planned and executed the unauthorized privatization of the Petitioner's position through wholesale transfer of the Petitioner's functions to the Hilo Medical Center in violation of Sec. 89-13(a)(1), (3) and (7), HRS.
4. At all times relevant, the Respondent deliberately, intentionally and fraudulently planned and executed the unauthorized privatization of the Petitioner's position through the wholesale transfer of the Petitioner's functions to the Hilo Medical Center in order to discourage the Petitioner from membership in and participating in collective bargaining activities in violation of Sec. 89-13(a)(1), (3) and (7), HRS.
5. At all times relevant, the Respondent violated Sec. 89-13(a)(7), HRS

because it failed to consult with the change in the conditions of work and the change in the scope of duties and responsibilities of the Petitioner's position under Sec. 89-13(8), HRS.

6. At all times relevant, the Respondent violated Sec. 89-13(a)(8), HRS, because it failed to follow an accepted "past practice" without the required consultation with the HGEA and/or Petitioner.

The following remedies were requested in the DR Petition and the PPC:

Reinstatement, back pay and reinstatement of any seniority including fringe benefits. Any further equitable relief as the Board deems appropriate.²

B. Disposition of the Prohibited Practice Complaint

On July 2, 2019, the Board issued Order No. 3534 "Final Order Adopting Proposed Order Granting Respondent's Motion to Dismiss Prohibited Practice Complaint, filed November 25, 2011" (Order No. 3534). Order No. 3534 dismisses Board Case No. CE-13-788 because the complaint was not filed within the statutory deadline under HRS § 377-9, which requires a complaint to be filed within 90 days of the occurrence of when the employee knew or should have known of his termination. Consequently, the Board ruled that it lacked jurisdiction to proceed with Case No. CE-13-788.

Petitioner filed an appeal from this decision to the Third Circuit in Civil No. 19-1-0208. This appeal is currently active.

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. HAR § 12-42-42(f)

This DR Petition was filed the same day and eighteen minutes later after the PPC in Board Case No. CE-13-788, which contains essentially the same causes of actions and remedies.

HAR § 12-42-42(f) provides that, "[o]nly one complaint shall issue against a party with respect to a single controversy." While not technically a "complaint", the DR Petition allegations and request for remedies is essentially the same as the PPC. Therefore, the Board finds and holds that the DR Petition runs afoul of HAR § 12-42-42(f); and therefore, should be denied for this reason.

B. HAR § 12-42-9

Further, the Board has jurisdiction over this DR Petition under HRS §§ 89-5(i)(5)³, 91-8⁴, and HAR § 12-42-9, which authorizes the Board to decide declaratory ruling petitions. However, the Board's authority under HAR § 12-42-9(f) specifically includes the Board's discretion to refuse to issue a declaratory order for reasons including but not limited to the following:

(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.

(Emphasis added)

The Supreme Court of Hawai'i (SCOH) has articulated and applied a similar principle in decisions. In Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 953 P.2d 1315 (1998) (Korean Buddhist), the SCOH held that an agency authorized by statutes, ordinances, and administrative rules, may refuse to issue a declaratory ruling that may adversely affect the interests of that agency in any litigation pending or may reasonably be expected to arise.

The Director declined to enter the requested declaratory ruling, stating that 'the Petition raises substantially the same legal and constitutional issues that have been raised in the Temple's variance petition. Those issues, we believe, will soon be the subject of a ZBA appeal, and possible court review.' In connection with his ruling, the Director relied on DLU Rules Relating to Administrative Practice and Procedure (RRAPP) Rule 3-5(3)

(1993), which authorizes him to refuse to enter a declaration where ‘the issuance of a declaratory ruling may adversely affect the interests of the city in any litigation which is pending or may reasonable be expected to arise.’

Id. at 226, 953 P.2d at 1324.

In Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai‘i 184, 159 P.3d 143 (2007) (CARD), the issues concerned a decision by the Director of the Department of Planning and Permitting (DPP) granting a conditional use permit (CUP), which the petitioners appealed to the City & County of Honolulu’s Zoning Board of Appeals (ZBA). The ZBA dismissed petitioners’ two appeals on the ground that they were not filed within a mandatory filing deadline.

The petitioners subsequently filed a declaratory ruling requesting the Director of DPP to rule on essentially the same issues that were contained in their appeals. The SCOH upheld the Director’s refusal to issue a declaratory ruling stating that, “Moreover, the Director’s stated reasons for the denial are in accord with the basic notion of our holding here, that the declaratory ruling procedure may not be used as a means for review of issues that have come before the board and properly decided.” Ibid at 200, 159. It is important to note that the SCOH also cited the Director’s reasons that a ruling would circumvent a mandatory filing deadline and give a petitioner “a second bite at the same apple” in footnote 21.

²¹The “good cause” reasons cited by the Director to issue a declaratory ruling included the following: (1) the Petitioner had already filed appeals to the ZBA but missed the appeals deadline, (2) ‘Section 22-7 of the ZBA rules prevents any waiver of the mandatory appeal filing deadline,’ and (3) ‘If the Director were to grant a declaratory ruling on an matter related to the CUP, then the Petitioners would in essence be provided an opportunity to circumvent the ZBA’s mandatory appeal filing deadline and the LUO, effectively achieving a ‘second bite at the same apple.’ To hold otherwise would violate the purpose and intent of the ZBA’s mandatory appeal filing deadline and the LUO. And, this would certainly open the floodgates for a review of any action ever taken by the director, merely by requesting a declaratory ruling on the matter.

Ibid.

As stated above, in Order No. 3534, the Board dismissed Dr. Yang’s PPC filed in Board Case No. CE-13-788 for lack of jurisdiction based on a failure to meet the mandatory statutory deadline required in HRS § 377-9(l). This Section requires that a prohibited practice complaint be filed within ninety days of its occurrence or when the complainant should have known. It is well settled law that when a complainant fails to file a complaint within ninety days of the occurrence of the alleged violation, the Board does not have jurisdiction to hear the complaint.

Dr. Yang appealed Order No. 3534 in Civil No. 19-1-0208, which is pending before the Third Circuit Court. As a party to that appeal, the Board’s issuance of a declaratory order, as requested by the DR Petition, may adversely affect the Board’s interests. Therefore, applying HAR § 12-42-9(f) and the principles established by Korean Buddhist and CARD, the Board’s only conclusion is to refuse to issue a declaratory ruling, as requested by the DR Petition.

V. ORDER

Based on the above and pursuant to HAR § 12-42-9(f)(3) the Board finds “good cause” to refuse to issue a declaratory order because the issuance of the declaratory order may adversely affect the interests of the Board in litigation that is pending in circuit court. The Board further denies the DR Petition under HAR § 12-42-42(f) because the DR Petition constitutes a second complaint in violation of HAR § 12-42-42(g), which permits only one complaint on the same controversy. This case is dismissed and closed.

DATED: Honolulu, Hawai‘i, June 30, 2021.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPOONO, Member

J N. MUSTO, Member

Copies sent to:

Ted H.S. Hong, Esq.

Richard H. Thomason, Deputy Attorney General

¹ On November 25, 2011 at 11:42 a.m., Dr. Yang filed his prohibited practice complaint (CE-13-788) against Loretta J. Fuddy, Director of Health, Department of Health, State of Hawai'i.

² The PPC also sought an additional remedy requiring the Employer to consult with the HGEA, BU 13 representatives on changes to terms and conditions of the workplace.

³ HRS § 89-5(i)(5) states:

- (i) In addition to the powers and functions provided in other sections of this chapter, the Board shall:

- (5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions.

⁴ HRS § 91-8, Declaratory rulings by agencies, states:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Order disposing of petitions in such cases shall have the same status as other agency orders.

(Emphasis added)