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Case No. 20-CU-06-379, 20-CE-06-940**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

ERIN K. KUSUMOTO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; and DEPARTMENT OF
EDUCATION, State of Hawai'i,

Respondent(s).

CASE NO(S). 20-CU-06-379
20-CE-06-940

ORDER NO. 3783

MINUTE ORDER

MINUTE ORDER

At the pretrial conference held in this case on July 22, 2021, the Hawai'i Labor Relations Board (Board) first noted that, due to the recusal of Board Member Sesnita A.D. Moepono, the Governor of the State of Hawai'i has appointed the Board's Hearings Officer, Midori K. Hirai, to serve as temporary acting Board member for this case. The relevant letters were filed on the Board's electronic filing system.

The Board reiterated that it bifurcated this hybrid case in Board Order No. 3745 and, accordingly, is proceeding solely on Complainant ERIN K. KUSUMOTO's (Complainant or Kusumoto) allegation that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) breached its duty of fair representation. Evidence related to Respondent DEPARTMENT OF EDUCATION, State of Hawai'i's (DOE) alleged breach of the collective bargaining agreement (CBA) in the termination of Kusumoto, accordingly, will not be admitted unless explicitly relevant. If the Board finds that a breach of the duty of fair representation has occurred, then the Board will move to the alleged breach of the collective bargaining agreement.

Following the outline of law presented in Order No. 3745, the Board noted that Kusumoto has alleged procedural or ministerial misconduct in this case by alleging that HGEA committed a procedural error by failing to abide by the grievance procedure. Kusumoto has further alleged that HGEA processed her grievance in a perfunctory manner. This alleged

misconduct will be considered as to whether HGEA acted arbitrarily. By law, mere negligence does not rise to the level of arbitrariness, and the act in question must require no exercise of judgment; have no rational or proper basis; have been in reckless disregard of the employee's rights; and have prejudiced a strong interest of the employee.

Further, Kusumoto has alleged that HGEA, in bad faith, failed to rationally consider Kusumoto's commitment to cover all costs of arbitration, including funding a private attorney. The bad faith allegation requires Kusumoto to prove that HGEA acted or failed to act because of an improper motive, and must show substantial evidence of fraud, deceit, or dishonest conduct by HGEA. The Board is considering whether HGEA made its decision rationally and in good faith and is not concerned with whether HGEA made the right or wrong decision.

DOE has determined that it will not put on a case-in-chief in this phase of the case, but they will be permitted to cross-examine witnesses, as they remain a party to the proceedings.

The Board took up the issue of HGEA's Motion to Revoke the *subpoena duces tecum* to the HGEA Custodian of Records for records related to Michael Nakasato's (Nakasato) grievance. The parties presented argument. After consideration, the Board **granted** the Motion to Revoke, in part, revoking the items 1 and 2 of the *subpoena duces tecum*, which both related to documents related to Nakasato's grievance.

The Board then took up the issue of the witnesses and noted that it is irregular to call opposing counsel as witnesses. After discussion on the witnesses, Kusumoto determined that Stacy Moniz would be the first witness to be called, followed by Debra Kagawa-Yogi and Joy Bulosan.

On the issue of exhibits, the parties agreed to enter the following exhibits into evidence:

- Joint Exhibits: JE-1, JE-2, JE-3, JE-4, JE-5, JE-6, JE-7, JE-8, JE-9, JE-10, JE-11, and JE-12; and
- Complainant Exhibits: B, E, and G.

In discussing one of HGEA's proposed exhibits, the Board **denied** Kusumoto's motion to enjoin HGEA from filing such document and **denied** Kusumoto's motion to redact such document when it becomes part of the official record.

All proposed exhibits not admitted into evidence were withdrawn from the official record. The parties do not need to take any further action on this withdrawal. The Board clerk will retain copies of all proposed exhibits in case they are introduced during the hearing on the merits.

Those proposed exhibits will be permitted to be introduced at the hearing on the merits, and objection and argument on those exhibits may proceed then.

In discussing the issue of the proposed exhibits, the Board noted that, for the purposes of the official record, those exhibits are still available to be introduced by parties at the HOM, and the withdrawal does not affect the parties' compliance with the Board's pretrial order to file these exhibits. Further, parties will not be expected to re-submit those proposed exhibits to the Board when those proposed exhibits are introduced.

However, those exhibits proposed but not admitted at the pretrial conference will not be part of the official record until such time as they are introduced at the HOM.

As noted in Board Order No. 3756, parties are required to ensure that their witnesses (i.e, those witnesses called by the party in their case-in-chief) have copies of all admitted exhibits and any exhibits that the party wishes to potentially introduce at the HOM. The Board requested that HGEA provide an electronic mailing address for Kusumoto to send the exhibits that she intends to use in her case in chief.

The Board further noted that Board Order No. 3756 lays out the procedures and conduct required during remote Zoom hearings.

DATED: Honolulu, Hawai'i, July 23, 2021.

HAWAI'I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Kusumoto

KUSUMOTO, Member

Midori K. Hirai

MIDORI K. HIRAI, Acting Board Member

Copies sent to:

- Miles Miyamoto, Esq.
- Peter Liholiho Trask, Esq.
- Miriam Loui, Deputy Attorney General