

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

NARCIS D. SALERA,

Complainant(s),

and

WESLEY T. YOKOYAMA, Director,
Department of Environmental Services, City
and County of Honolulu,

Respondent(s).

CASE NO(S). 20-CE-01-952

ORDER NO. 3792

ORDER DISMISSING COUNTS VI AND
VII OF THE SECOND AMENDED
COMPLAINT FOR LACK OF
JURISDICTION

**ORDER DISMISSING COUNTS VI AND VII OF THE
SECOND AMENDED COMPLAINT FOR LACK OF JURISDICTION**

Complainant NARCIS D. SALERA (Salera) filed his Second Amended Prohibited Practice Complaint on July 27, 2021, with the Hawai'i Labor Relations Board (Board), which, among other things, alleged that Respondent WESLEY T. YOKOYAMA, Director, Department of Environmental Services, City and County of Honolulu (Director) committed certain prohibited practices, violated the Hawai'i Whistleblower Protection Act (HWPA), and violated Article XIII, Section 2 of the Hawai'i State Constitution (Constitution). Salera lists the alleged violation of the HWPA as Count VI in his Second Amended Prohibited Practice Complaint and the alleged violation of the Constitution as Count VII in the same.

The Board held a prehearing conference where, *sua sponte*, the Board dismissed the allegations of violations of the HWPA and the Constitution for lack of jurisdiction, as more thoroughly explained in this order.

For the Board to issue a valid judgment, it must have jurisdiction, Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees' Ret. Sys., 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (Chun)), and subject matter jurisdiction can never be waived by any party at any time. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 84, 222 P.3d 979, 1003 (2010) (citing Chun, 73 Hawai'i at 13, 828 P.2d at 263); In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986).

According to the Supreme Court of Hawai‘i (Court), the Board can only use powers that statute expressly or implicitly grants. Hawaii Government Employees Association v. Casupang, 116 Hawai‘i 73, 97, 170 P.3d 324, 348 (2007) (Casupang). The Board has original jurisdiction over controversies involving prohibited practices, so the Board has both the “express” power over such controversies and the “implied” powers that are “reasonably necessary” to make that express power effective. Id. at 97, 170 P.3d at 348. The Board may apply sections outside of Hawaii Revised Statutes (HRS) Chapter 89 to prohibited practice complaints if it is “necessary and proper” to do so to determine whether a prohibited practice has been committed. Id. at 98, 170 P.3d at 349.

To decide prohibited practice complaints, the Board must determine whether respondents act “wilfully”; that is, with the “conscious, knowing, and deliberate intent to violate the provisions of” HRS Chapter 89. Casupang, 116 Hawai‘i at 98, 170 P.3d at 350. This “wilfulness” inquiry may require the Board to apply other sections of the HRS to decide whether a prohibited practice occurred; however, this does not give the Board the ability to interpret those sections. Id. at 101, 170 P.3d at 352.

In this case, the Board “only has jurisdiction over issues related to HRS Chapter 89, such as collective bargaining and prohibited practice controversies, to the extent they do not violate merit principles.” United Public Workers v. Abercrombie, 133 Hawai‘i 188, 205, 325 P.3d 600, 617 (2014) (Abercrombie). Neither the HWPB nor the Constitution are within HRS Chapter 89. Constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints. Hawaii Gov’t Emp. Ass’n, AFSCME Local 152 v. Lingle, 124 Hawai‘i 197, 207, 239 P.3d 1, 11 (2010). Therefore, the Board does not have the jurisdiction to issue a determination as to a violation of the HWPB or the Constitution, and such analyses are unnecessary for the Board to determine the question of the prohibited practice cases before it.

The doctrine of primary jurisdiction is based on the issues raised by a claim, not the language of the claim. Abercrombie, 133 Hawai‘i at 202, 325 P.3d at 614. The issues in this case involve, among other things, retaliation claims that the Director “repeatedly threaten[ed] Salera with discharge and...discriminat[ed] against him regarding his terms and conditions of employment” due to Salera’s report of alleged violations of law by the Director. Based on the issues in this case raised by Salera, the doctrine of primary jurisdiction applies, and the issues must be first decided by the Board before it can move to the courts. *See* Abercrombie, 133 Hawai‘i at 202, 325 P.3d at 614.

Therefore, the Board accepts its role as the agency that “must be the first to pass on the motivations” for the Director’s actions regarding alleged retaliation. *See* Abercrombie, 133 Hawai‘i at 202, 325 P.3d at 614. Accordingly, the Board will determine whether, in this particular instance, this conduct constitutes a prohibited practice under HRS § 89-13. The Board’s determination as to the conduct will, necessarily, consider what the Director’s

motivations were. A court of competent jurisdiction will be able to review the Board's determination and consider whether additional claims that the Board does not have jurisdiction over would also be implicated by the Board's determination.

Accordingly, as the Board lacks jurisdiction over Counts VI and VII of the Second Amended Prohibited Practice Complaint, the Board will dismiss these Counts, *sua sponte*.

The Board will proceed in this case on all remaining counts.

DATED: Honolulu, Hawai'i, August 18, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

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