

STATE OF HAWAI‘I
HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

HUNTER C. HENKEL,

Petitioner.

CASE NO(S). 22-DR-13-119

ORDER NO. 3870

NOTICE OF FILING OF PETITION FOR
DECLARATORY RULING; NOTICE OF
DEADLINE FOR FILING PETITIONS FOR
INTERVENTION; NOTICE OF
EXTRAORDINARY CIRCUMSTANCES;
NOTICE OF FILING REQUIREMENTS;
NOTICE OF BOARD HEARING AND
STATUS CONFERENCE; ORDER
REGARDING STRUCTURE FOR REMOTE
HEARINGS

NOTICE OF FILING OF PETITION FOR DECLARATORY RULING

On July 11, 2022, Petitioner HUNTER C. HENKEL (Petitioner or Henkel) filed a Petition for Declaratory Ruling (Petition) with the Hawai‘i Labor Relations Board (Board), as allowed under Hawai‘i Administrative Rules (HAR) § 12-42-9. The Petition requests that the Board issue certain declaratory rulings regarding a Last Chance Agreement (LCA) entered into by Petitioner and the Hawai‘i Fire Department, County of Hawai‘i (HFD).

A copy of the Petition is attached to this Notice.

NOTICE OF DEADLINE FOR FILING PETITIONS FOR INTERVENTION

As allowed in HAR §§ 12-42-8(g)(14) and 12-42-9(e), interested parties may file a Petition for Intervention with the Board **no later than 4:30 pm on July 29, 2022.**

NOTICE OF EXTRAORDINARY CIRCUMSTANCES

Due to the current concerns regarding the COVID-19 Pandemic, the Board is holding remote, videographic hearings and is mandating electronic filing during this emergency period.

NOTICE OF FILING REQUIREMENTS

1) Electronic Filing

All filings in this case must be made electronically through the Board's filing service FileandServeXpress (FSX). There is no charge to the parties for use of this electronic filing service. Should any party not have access to the Internet, or for any other concerns or complications, please contact the Board via electronic mail or (808) 586-8616.

To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at <http://labor.hawaii.gov/hlrb/forms/>.

Questions regarding the Board's electronic filing system should be directed to the Board's staff at (808) 586-8616.

2) Filing Requirements Regarding Protection of Social Security Numbers and Personal Information

Before a party files or submits any pleading, correspondence, or other document (Documents) to the Board, whether electronically or manually, the party must make certain that all social security numbers and personal information are redacted or encrypted. "Personal information" includes social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board's consideration of this case, the submitting party must submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai'i Court Records Rules, as amended.

If a party submits a document that requires redaction of a page(s), the party must, by motion, request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document."

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply or a good faith attempt to comply.

3) Length of Memoranda

Memoranda in support of or in opposition to any motion must not exceed 25 pages in length, exclusive of table of contents, table of authorities, declarations, exhibits, and other attachments. Reply memoranda are not accepted and will not be considered by the Board.

Memoranda exceeding 10 pages must have a table of contents and a table of authorities.

Exhibits to memoranda may not include statutes; Board Orders or Decisions; publicly accessible court cases; or prior filings in the instant case, including exhibits presented in prior filings. Statutes, Board Orders and Decisions, court cases, and prior filings may be referenced in memoranda appropriately.

NOTICE OF BOARD HEARING AND STATUS CONFERENCE

NOTICE IS GIVEN that the Board will conduct a hearing to rule on any petitions for intervention that may be filed, and immediately after that hearing will hold a status conference to clarify the issues and establish further hearing dates, if any, and deadlines regarding the Petition for Declaratory Ruling on **Wednesday, August 10, 2022 at 9:00 a.m.** remotely via the Zoom platform. Parties will be provided with the relevant call-in information.

ORDER REGARDING STRUCTURE FOR REMOTE HEARINGS

The Board currently uses Zoom as its primary platform for online proceedings. The Board orders all parties to follow the requirements laid out in this Order for all Remote Hearings before the Board.

Parties and representatives must familiarize themselves with Zoom in preparation for all online Board proceedings. For security purposes, the Board will utilize the “waiting room” function.

Prior to the hearing:

1. The Board will provide Zoom login information to the parties in advance of the hearing.
2. Parties and witnesses are not permitted to utilize virtual backgrounds or any other technology that alters the Board’s ability to observe the area around the party/witness.
3. A party who shares the Zoom login information with any other group or individual (Sharing Party) must provide the Board and the other party/parties with a complete list of participants they have invited to attend the proceedings, including any support staff and witnesses. **This list must be emailed to the Board at dliir.laborboard@hawaii.gov prior to the start of the hearing.**

4. Any Sharing Party must inform non-witness participants:
 - 1) that they must keep their microphones muted at all times; and
 - 2) that they must keep their cameras off at all times.
5. Any Sharing Party must inform **all** participants:
 - 1) that they must submit their full name as their username when requesting entry to the Zoom conference, to allow the Board to ensure compliance with the witness exclusion rule, unless the party sets up a device specifically for witness use only, in which case that device may log in with the username “witness”; and
 - 2) **that they may not record, screen shot, record conversations, and/or use third party software to record the proceeding.**
6. Sharing Parties and their counsel or representatives are responsible for ensuring that all of their invitees abide by the requirements set forth in this Order. An invitee’s failure to comply with this order will be regarded as the Sharing Party and/or their counsel or representative’s failure to comply with this Order during a hearing.

Failure to comply with this Order may be grounds for the Board to commence proceedings regarding that party’s counsel or representative under HAR § 12-42-8(g)(9)(A).

DATED: Honolulu, Hawai‘i, _____ July 12, 2022 _____.

HAWAI‘I LABOR RELATIONS BOARD
(dlir.laborboard@hawaii.gov)

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Enclosures: PETITION FOR DECLARATORY ORDER

Copies sent to:

Ted Hong, Esq.

Kazuo S.K.L. Todd, Fire Chief, Hawai'i Fire Department, County of Hawai'i

Randy Perreira, Executive Director, HGEA

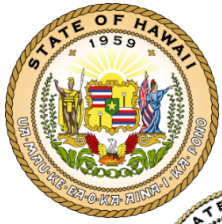
Stacy Moniz, Advocacy Chief, HGEA

Elizabeth A. Strance, Corporation Counsel, County of Hawai'i

HUNTER C. HENKEL

CASE NO(S). 22-DR-13-119

NOTICE OF FILING OF PETITION FOR DECLARATORY RULING; NOTICE OF
DEADLINE FOR FILING PETITIONS FOR INTERVENTION; NOTICE OF
EXTRAORDINARY CIRCUMSTANCES; NOTICE OF FILING REQUIREMENTS; NOTICE
OF BOARD HEARING AND STATUS CONFERENCE; ORDER REGARDING
STRUCTURE FOR REMOTE HEARINGS
ORDER NO. 3870



EFiled: Jul 11 2022 10:04AM HAST
Transaction ID 67809789
Case No. 22-DR-13-119

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

HLRB-12
PETITION FOR DECLARATORY RULING

CASE NO. _____

INSTRUCTIONS. File the original¹ by File and ServeXpress, in person or U.S. Mail, to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly. Attach a memorandum of authorities, in support of your position and contentions with the Petition. Attach declaration of facts necessary to a proper consideration of the Petition.

1. PETITIONER. The Petitioner alleges that the following circumstances exist and requests the Hawaii Labor Relations Board pursuant to Hawaii Revised Statutes Chapter 91, and its Administrative Rules, issue a declaratory ruling based upon the matters alleged in this Petition and the supporting affidavits and memorandum of authorities submitted with it.

- a. Name, address and telephone number of Petitioner.

Hunter C. Henkel
RR2 Box 6260
Pahoa, HI 96788

- b. Name, address and telephone number of the Petitioner's principal representative, if any, to whom correspondence is to be directed.

Ted H. S. Hong, #3569 ted@tedhonglaw.com
P. O. Box 4217
Hilo, Hawaii 96720
808.933.1919

-
2. State nature of Petitioner's interest, including reasons for the submission of the Petition.

Petitioner had a Last Chance Agreement with the Respondent, County of Hawaii. The Last Chance Agreement was negotiated between the Complainant and the Respondent without a request for union representation or involvement. The Respondent County of Hawaii violated the Petitioner's right to bargain collectively and violated the terms of the Last Chance Agreement.

¹ Notwithstanding Board rule 12-42-9(b), the Board only requires one copy of a petition.

-
3. Designate the specific provision of the Hawaii Revised Statutes, Chapters 89, 377, or 396, the Board's Administrative Rules or Orders, the applicability of which is in question.

Sections 8910(a), HRS; 89-13(a)(1) and (8), HRS; 377-7, HRS; 377-6(1), HRS; Sec. 377-6(5), HRS; Sec. 377-6(6), HRS.

-
4. Indicate the appropriate bargaining unit(s) of employee(s) involved.

BU-13

-
5. Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position.

Please refer to the attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD
DECLARATION IN LIEU OF AFFIDAVIT

Please select one:

I, Ted H. S. Hong, ☐ the Petitioner
☒ the Petitioner's principle representative
do declare under penalty of law that the foregoing is true and correct.

Date: July 11, 2022

/s/ Ted H. S. Hong

Signature - the person signing digitally above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.

ted@tedhonglaw.com
Signor's email address

If you are not the Petitioner or listed as the principle representative in #1(b) and you are signing above, then please complete the contact information below.

Your address:

Your phone number:

Your relationship to the Petitioner:

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

If the Complainant or the principal representative is not registered with FSX and would like to electronically file this complaint through FSX, then complete the Board Agreement to E-File, FORM HLRB-25, found on the "Form" page of the HLRB Website.

5. Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position.

A. Factual Background.

(1) At all times relevant herein, the Petitioner was employed by the Respondent County of Hawaii, Fire Department (hereinafter referred to as “HFD”).

(2) At all times relevant herein, the Petitioner was employed as a Water Safety Officer II, rescue water craft operator, and an “Employee” as defined in Sec. 377-1, Hawaii Revised Statutes (“HRS”), and Sec. 89-2, HRS.

(3) On or about December 9, 2020, the Petitioner tested positive for a controlled substance following the results of a Random Drug test.

(4) On or about December 16, 2020, the Respondent hand delivered a letter requiring the Petitioner to sign a Last Chance Agreement.

(5) The Petitioner did not contact the HGEA Business Agent because he was told that the Agreement was only between himself and the Respondent employer.

(6) On or about December 16, 2020, the Petitioner signed the Last Chance Agreement. See, Exhibit “1,” attached hereto.

(7) In relevant part, the Last Chance Agreement included the following terms and conditions:

* * *

1. The employee has **tested positive for alcohol substance** as provided in this DTA for the first time.
2. The employee agrees to sign Exhibit B **instead of being discharged** and whereby the employee agrees to resign from employment in the event of a **second positive alcohol test** occurring within two (2) years of the first positive test.

* * *

4. The employee agrees to resign from employment on a no-fault basis **when the employee tests positive for alcohol for a second time within two (2) years of the first positive alcohol test** effected on the date of the second positive test.
5. The employee agrees that **Exhibit B has been carefully read and voluntarily accepts Exhibit B with full knowledge and understanding of its contents and meaning.** (Emphases added)

* * *

See, Exhibit “1,” attached hereto.

(8) The Petitioner and representative of the Respondent discussed the contents, terms and conditions of the Last Chance Agreement.

(9) The Petitioner and Respondent’s representative understood that the Last Chance Agreement applied only to any future alcohol abuse and future positive alcohol tests.

(10) At all times throughout the course of his employment, the Petitioner never tested positive on a random test, for alcohol.

(11) At all times throughout the course of his employment, the Petitioner had not tested positive for alcohol abuse and positive alcohol tests.

(12) On or about December 8, 2021, the Petitioner tested positive for the presence of marijuana.

(13) On or about December 22, 2021, the Respondent hand delivered a letter to the Petitioner demanding his resignation, which stated in relevant part:

Your **first positive test controlled substance test was on December 9, 2020**, and your second positive controlled substance test was on December 8, 2021.

I have **attached a copy of the Last Chance Agreement that you signed on December 16, 2020**. The Last Chance Agreement states that you agreed to sign

the Last Change [sic] Agreement instead of being discharged, and **agreed to resign from employment on a no-fault basis in the event of a second positive controlled substance test occurring within two (2) years of the first positive test**. Further, you agreed that your resignation **deprives you of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation**.

Based on the tests [sic] results from your December 8, 2021 test and the Last Chance Agreement signed on December 16, 2020, we are processing your resignation effective close of business on December 22, 2021. (Emphases added)

Exhibit “2,” attached hereto.

(14) According to the Last Chance Agreement (Exhibit “1,”), the Petitioner’s employment was terminated on December 22, 2021.

(15) The Petitioner repeatedly spoke to the Respondent’s representatives about the language in the Last Chance Agreement.

(16) The Respondent’s representatives refused to reconsider the Petitioner’s forced resignation.

(17) On May 11, 2022, the Petitioner’s representative met with the Hawaii County Fire Chief.

(18) The Petitioner’s representative asked the Hawaii County Fire Chief to rescind the Petitioner’s forced termination because the express terms and conditions of the Last Chance Agreement only applied to the presence of alcohol and not any other controlled substance.

(19) Despite the language in the Last Chance Agreement, the Respondent, Hawaii County Fire Chief refused to rescind the Petitioner’s forced resignation, under the Last Chance Agreement.

B. Causes of Action.

Count I: Unlawful labor practice (Chapter 377, HRS).

(20) Petitioner incorporates as if realleged, paragraphs 1 through 19, herein and incorporates the same by reference as though set forth fully herein.

(21) Article XIII, Sec. 2, of the Hawaii State Constitution, recognizes that public employees, including the Petitioner, the right to organize for the purposes of collective bargaining.

(22) Section 377-6(1), HRS, states that an employer commits an “unfair labor practice” if it interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Sec. 377-4, HRS.

(23) Section 377-4, HRS, states that the Petitioner, had the right to bargain collectively and engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(24) The subject Last Chance Agreement (Ex. “1,”), states in relevant part:

6. **The employee agrees** that the employee’s resignation from employment **deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement** or challenge the resignation. (Emphases added)

Exhibit “1,” attached hereto.

(25) The subject Last Chance Agreement, violated the Petitioner’s right to bargain collectively and wrongfully deprived him of mutual aid or protection.

(26) As a member of a collective bargaining unit and agreement, the Petitioner cannot individually, or unilaterally, negotiate or agree to anything separate and apart from the terms and

conditions of the applicable collective bargaining unit.

(27) Respondent's Last Chance Agreement coerced the Petitioner into agreeing to violate and supercede the terms and conditions of the applicable collective bargaining agreement by superimposing a new type of disciplinary process and discipline, separate and apart from the Respondent's agreement with the applicable bargaining unit representative in violation of Sec. 377-6(5), HRS.

(28) Respondent violated Sec. 377-6(1), HRS, by coercing the Petitioner to circumvent the disciplinary and grievance process set out in the applicable collective bargaining agreement.

(29) Respondent violated Sec. 377-4, HRS, by depriving the Petitioner the right to mutual aid and protection by imposing a disciplinary process separate and apart from the applicable collective bargaining agreement.

(30) In the alternative, Respondent's Last Chance Agreement (Ex. "1"), was a written agreement between the Respondent and the Petitioner.

(31) The Respondent's termination of the Petitioner's employment violated Sec. 377-6(6), HRS. The express terms and conditions of the Last Chance Agreement (Ex. "1.") clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit "1," attached hereto.

(32) The Respondent forced the Petitioner to resign because he tested positive for the presence of marijuana. See Exhibit "2," attached hereto.

(33) The Respondent violated the terms and conditions of its own Last Chance Agreement.

Count II: Violation of a Collective Bargaining Agreement (Chapter 89, HRS).

(34) Petitioner incorporates as if realleged, paragraphs 1 through 33, herein and incorporates the same by reference as though set forth fully herein.

(35) Article XIII, Sec. 2, of the Hawaii State Constitution, recognizes that public employees, including the Petitioner, the right to organize for the purposes of collective bargaining.

(36) Section 89-13(a)(1), states that an employer commits a “prohibited practice” if it interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Chapter 89, HRS.

(37) Section 89-3, HRS, states that the Petitioner, had the right to bargain collectively and engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(38) The subject Last Chance Agreement (Ex. “1,”), states in relevant part:

6. **The employee agrees** that the employee’s resignation from employment **deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement** or challenge the resignation. (Emphases added)

Exhibit “1,” attached hereto.

(39) The subject Last Chance Agreement, violated the Petitioner’s right to bargain collectively and wrongfully deprived him of any mutual aid or protection.

(40) As a member of a collective bargaining unit and agreement, the Petitioner cannot individually, or unilaterally, negotiate or agree to anything separate and apart from the terms and conditions of the applicable collective bargaining unit.

(41) Respondent's Last Chance Agreement coerced the Petitioner into agreeing to violate and supercede the terms and conditions of the applicable collective bargaining agreement by superimposing a new type of disciplinary process and discipline, separate and apart from the Respondent's agreement with the applicable bargaining unit representative in violation of Sec. 89-9, HRS.

(42) Respondent violated Sec. 89-13(a)(1), HRS, by coercing the Petitioner to circumvent the disciplinary and grievance process set out in the applicable collective bargaining agreement.

(43) Respondent violated Sec. 89-3, HRS, by depriving the Petitioner the right to mutual aid and protection by imposing a disciplinary process separate and apart from the applicable collective bargaining agreement.

(44) In the alternative, Respondent's Last Chance Agreement (Ex. "1"), was a written agreement between the Respondent and the Petitioner.

(45) The Respondent's termination of the Petitioner's employment violated Sec. 89-10(a), HRS. The Respondent's Last Chance Agreement (Ex. "1.") was a written agreement as defined under Sec. 89-10(a), HRS.

(46) The Respondent's Last Chance Agreement is "other agreements effective during the term of the collective bargaining agreement, whether a supplement agreement, an agreement on reopened items, or a memorandum of agreement," pursuant to Sec. 89-10(a), HRS.

(47) The express terms and conditions of the Last Chance Agreement (Ex. "1.") clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit "1," attached hereto.

(48) The Respondent forced the Petitioner to resign because he tested positive for the

presence of marijuana. See Exhibit “2,” attached hereto.

(49) The Respondent violated the terms and conditions of its own Last Chance Agreement.

C. Remedy Sought:

(50) Petitioner incorporates as if realleged, paragraphs 1 through 49, herein and incorporates the same by reference as though set forth fully herein.

(51) That the Board find as a matter of law, that:

(A) The Respondent’s Last Chance Agreement, unlawfully infringes on the Petitioner’s and other public employees, right to bargain collectively and wrongfully deprived him of any mutual aid or protection and is invalid, under Sec. 377-4, HRS, Sec. 377-6(1), (5) and (6), HRS and/or Sec. 89-13(a)(1), HRS ;

(B) In the alternative, find that the Respondent’s Last Chance Agreement (Ex. “1”), was a written agreement between the Respondent and the Petitioner.

(C) The Respondent’s Last Chance Agreement is “other agreements effective during the term of the collective bargaining agreement, whether a supplement agreement, an agreement on reopened items, or a memorandum of agreement,” pursuant to Sec. 89-10(a), HRS.

(D) The express terms and conditions of the Last Chance Agreement (Ex. “1.”) clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit “1,” attached hereto.

(E) The Respondent forced the Petitioner to resign because he tested

positive for the presence of marijuana. See Exhibit “2,” attached hereto.

(F) The HLRB find that Respondent’s termination of the Petitioner’s employment based on the Respondent’s Last Chance Agreement, violated Sec. Sec. 377-4, HRS, Sec. 377-6 (1), (5) and (6), HRS and/or Sec. 89-13(a), HRS.

(G) Respondent violated the terms and conditions of its own Last Chance Agreement.

(H) That the Petitioner be reinstated immediately, without loss in seniority, fringe benefits and back pay from the date of his termination to the entry of the Order in this case;

(I) That the Petitioner be awarded against Respondent, general and special damages in amounts to be shown at the hearing;

(J) Award Petitioner compensatory damages against the Respondents;

(K) Award Petitioner his costs and attorney's fees;

(L) Award Petitioner any pre and post judgment interest;

(M) Grant such other relief as it may deem just and proper.

EXHIBIT “1”


EXHIBIT B

LAST CHANCE AGREEMENT

This Agreement entered into this 16 day of December, 2020 by and between the employee Hunter C. Henkel and the Employer.

1. The employee has tested positive for alcohol substance as provided in this DTA for the first time.
2. The employee agrees to sign Exhibit B instead of being discharged and whereby the employee agrees to resign from employment in the event of a second positive alcohol test occurring within two (2) years of the first positive test.
3. The employee agrees that when the employee signs Exhibit B the employee shall be suspended for twenty (20) working days instead of being discharged.
4. The employee agrees to resign from employment on a no-fault basis when the employee tests positive for alcohol for a second time within two (2) years of the first positive alcohol test effective on the date of the second positive test.
5. The employee agrees that Exhibit B has been carefully read and voluntarily accepts Exhibit B with full knowledge and understanding of its contents and meaning.
6. The employee agrees that the employee's resignation from employment deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation.
7. The Employer agrees that the employee's resignation from employment as provided in this DTA shall be reported in the employee's personnel file as a resignation without fault.
8. Exhibit B shall be confidential, except as may be necessary to ensure compliance with its terms.

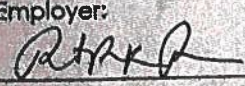
Employee:


Signature

Hunter C. Henkel

Date: 12/16/2020

Employer:


Signature

Robert R.K. Pereira

Date: 12/16/2020

COPY

EXHIBIT “2”

Mitchell D. Roth
Mayor

Lee E. Lord
Managing Director



Kazuo S. K. L. Todd
Fire Chief

Eric H. Moller
Deputy Fire Chief

County of Hawai'i
HAWAII FIRE DEPARTMENT
25 Aupuni Street • Suite 2501 • Hilo, Hawai'i 96720
(808) 932-2900 • Fax (808) 932-2928

December 22, 2021

HAND DELIVERED

WSO II Hunter C. Henkel
RR2 Box 6260
Pahoa, HI 96778

RE: RESIGNATION PER LAST CHANCE AGREEMENT

Dear WSO II Henkel:

The Department of Human Resources has informed us that you tested positive for the drug(s) indicated on the enclosed Results of Controlled Substance Test during your follow up controlled substance test on December 8, 2021.

Your first positive controlled substance test was on December 9, 2020, and your second positive controlled substance test was on December 8, 2021.

I have attached a copy of the Last Chance Agreement that you signed on December 16, 2020. The Last Chance Agreement states that you agreed to sign the Last Chance Agreement instead of being discharged, and agreed to resign from employment on a no-fault basis in the event of a second positive controlled substance test occurring within two (2) years of the first positive test. Further, you agreed that your resignation deprives you of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation.

Based on the tests results from your December 8, 2021 test and the Last Chance Agreement signed on December 16, 2020, we are processing your resignation effective close of business on December 22, 2021.

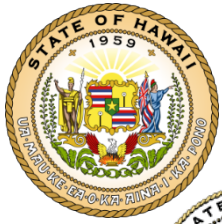
Although you have resigned from employment we want to advise you of the following resources available for evaluating and resolving problems associated with the use of a controlled substance:

Employee Assistance of the Pacific (EAP) at 1-877-597-8222

Hawai'i County is an Equal Opportunity Provider and Employer.



EXHIBIT "2"



EFiled: Jul 11 2022 10:04AM HAST
Transaction ID 67809789
Case No. 22-DR-13-119

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

HLRB-12
PETITION FOR DECLARATORY RULING

CASE NO. _____

INSTRUCTIONS. File the original¹ by File and ServeXpress, in person or U.S. Mail, to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly. Attach a memorandum of authorities, in support of your position and contentions with the Petition. Attach declaration of facts necessary to a proper consideration of the Petition.

1. **PETITIONER.** The Petitioner alleges that the following circumstances exist and requests the Hawaii Labor Relations Board pursuant to Hawaii Revised Statutes Chapter 91, and its Administrative Rules, issue a declaratory ruling based upon the matters alleged in this Petition and the supporting affidavits and memorandum of authorities submitted with it.

- a. Name, address and telephone number of Petitioner.

Hunter C. Henkel
RR2 Box 6260
Pahoa, HI 96788

- b. Name, address and telephone number of the Petitioner's principal representative, if any, to whom correspondence is to be directed.

Ted H. S. Hong, #3569 ted@tedhonglaw.com
P. O. Box 4217
Hilo, Hawaii 96720
808.933.1919

-
2. State nature of Petitioner's interest, including reasons for the submission of the Petition.

Petitioner had a Last Chance Agreement with the Respondent, County of Hawaii. The Last Chance Agreement was negotiated between the Complainant and the Respondent without a request for union representation or involvement. The Respondent County of Hawaii violated the Petitioner's right to bargain collectively and violated the terms of the Last Chance Agreement.

¹ Notwithstanding Board rule 12-42-9(b), the Board only requires one copy of a petition.

-
3. Designate the specific provision of the Hawaii Revised Statutes, Chapters 89, 377, or 396, the Board's Administrative Rules or Orders, the applicability of which is in question.

Sections 8910(a), HRS; 89-13(a)(1) and (8), HRS; 377-7, HRS; 377-6(1), HRS; Sec. 377-6(5), HRS; Sec. 377-6(6), HRS.

-
4. Indicate the appropriate bargaining unit(s) of employee(s) involved.

BU-13

-
5. Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position.

Please refer to the attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD
DECLARATION IN LIEU OF AFFIDAVIT

Please select one:

I, Ted H. S. Hong, ☐ the Petitioner
☒ the Petitioner's principle representative
do declare under penalty of law that the foregoing is true and correct.

Date: July 11, 2022

/s/ Ted H. S. Hong

Signature - the person signing digitally above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.

ted@tedhonglaw.com
Signor's email address

If you are not the Petitioner or listed as the principle representative in #1(b) and you are signing above, then please complete the contact information below.

Your address:

Your phone number:

Your relationship to the Petitioner:

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

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5. Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position.

A. Factual Background.

(1) At all times relevant herein, the Petitioner was employed by the Respondent County of Hawaii, Fire Department (hereinafter referred to as “HFD”).

(2) At all times relevant herein, the Petitioner was employed as a Water Safety Officer II, rescue water craft operator, and an “Employee” as defined in Sec. 377-1, Hawaii Revised Statutes (“HRS”), and Sec. 89-2, HRS.

(3) On or about December 9, 2020, the Petitioner tested positive for a controlled substance following the results of a Random Drug test.

(4) On or about December 16, 2020, the Respondent hand delivered a letter requiring the Petitioner to sign a Last Chance Agreement.

(5) The Petitioner did not contact the HGEA Business Agent because he was told that the Agreement was only between himself and the Respondent employer.

(6) On or about December 16, 2020, the Petitioner signed the Last Chance Agreement. See, Exhibit “1,” attached hereto.

(7) In relevant part, the Last Chance Agreement included the following terms and conditions:

* * *

1. The employee has **tested positive for alcohol substance** as provided in this DTA for the first time.
2. The employee agrees to sign Exhibit B **instead of being discharged** and whereby the employee agrees to resign from employment in the event of a **second positive alcohol test** occurring within two (2) years of the first positive test.

* * *

4. The employee agrees to resign from employment on a no-fault basis **when the employee tests positive for alcohol for a second time within two (2) years of the first positive alcohol test** effected on the date of the second positive test.
5. The employee agrees that **Exhibit B has been carefully read and voluntarily accepts Exhibit B with full knowledge and understanding of its contents and meaning.** (Emphases added)

* * *

See, Exhibit “1,” attached hereto.

(8) The Petitioner and representative of the Respondent discussed the contents, terms and conditions of the Last Chance Agreement.

(9) The Petitioner and Respondent’s representative understood that the Last Chance Agreement applied only to any future alcohol abuse and future positive alcohol tests.

(10) At all times throughout the course of his employment, the Petitioner never tested positive on a random test, for alcohol.

(11) At all times throughout the course of his employment, the Petitioner had not tested positive for alcohol abuse and positive alcohol tests.

(12) On or about December 8, 2021, the Petitioner tested positive for the presence of marijuana.

(13) On or about December 22, 2021, the Respondent hand delivered a letter to the Petitioner demanding his resignation, which stated in relevant part:

Your **first positive test controlled substance test was on December 9, 2020**, and your second positive controlled substance test was on December 8, 2021.

I have **attached a copy of the Last Chance Agreement that you signed on December 16, 2020**. The Last Chance Agreement states that you agreed to sign

the Last Change [sic] Agreement instead of being discharged, and **agreed to resign from employment on a no-fault basis in the event of a second positive controlled substance test occurring within two (2) years of the first positive test**. Further, you agreed that your resignation **deprives you of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation**.

Based on the tests [sic] results from your December 8, 2021 test and the Last Chance Agreement signed on December 16, 2020, we are processing your resignation effective close of business on December 22, 2021. (Emphases added)

Exhibit “2,” attached hereto.

(14) According to the Last Chance Agreement (Exhibit “1,”), the Petitioner’s employment was terminated on December 22, 2021.

(15) The Petitioner repeatedly spoke to the Respondent’s representatives about the language in the Last Chance Agreement.

(16) The Respondent’s representatives refused to reconsider the Petitioner’s forced resignation.

(17) On May 11, 2022, the Petitioner’s representative met with the Hawaii County Fire Chief.

(18) The Petitioner’s representative asked the Hawaii County Fire Chief to rescind the Petitioner’s forced termination because the express terms and conditions of the Last Chance Agreement only applied to the presence of alcohol and not any other controlled substance.

(19) Despite the language in the Last Chance Agreement, the Respondent, Hawaii County Fire Chief refused to rescind the Petitioner’s forced resignation, under the Last Chance Agreement.

B. Causes of Action.

Count I: Unlawful labor practice (Chapter 377, HRS).

(20) Petitioner incorporates as if realleged, paragraphs 1 through 19, herein and incorporates the same by reference as though set forth fully herein.

(21) Article XIII, Sec. 2, of the Hawaii State Constitution, recognizes that public employees, including the Petitioner, the right to organize for the purposes of collective bargaining.

(22) Section 377-6(1), HRS, states that an employer commits an “unfair labor practice” if it interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Sec. 377-4, HRS.

(23) Section 377-4, HRS, states that the Petitioner, had the right to bargain collectively and engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(24) The subject Last Chance Agreement (Ex. “1,”), states in relevant part:

6. **The employee agrees** that the employee’s resignation from employment **deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement** or challenge the resignation. (Emphases added)

Exhibit “1,” attached hereto.

(25) The subject Last Chance Agreement, violated the Petitioner’s right to bargain collectively and wrongfully deprived him of mutual aid or protection.

(26) As a member of a collective bargaining unit and agreement, the Petitioner cannot individually, or unilaterally, negotiate or agree to anything separate and apart from the terms and

conditions of the applicable collective bargaining unit.

(27) Respondent's Last Chance Agreement coerced the Petitioner into agreeing to violate and supercede the terms and conditions of the applicable collective bargaining agreement by superimposing a new type of disciplinary process and discipline, separate and apart from the Respondent's agreement with the applicable bargaining unit representative in violation of Sec. 377-6(5), HRS.

(28) Respondent violated Sec. 377-6(1), HRS, by coercing the Petitioner to circumvent the disciplinary and grievance process set out in the applicable collective bargaining agreement.

(29) Respondent violated Sec. 377-4, HRS, by depriving the Petitioner the right to mutual aid and protection by imposing a disciplinary process separate and apart from the applicable collective bargaining agreement.

(30) In the alternative, Respondent's Last Chance Agreement (Ex. "1"), was a written agreement between the Respondent and the Petitioner.

(31) The Respondent's termination of the Petitioner's employment violated Sec. 377-6(6), HRS. The express terms and conditions of the Last Chance Agreement (Ex. "1.") clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit "1," attached hereto.

(32) The Respondent forced the Petitioner to resign because he tested positive for the presence of marijuana. See Exhibit "2," attached hereto.

(33) The Respondent violated the terms and conditions of its own Last Chance Agreement.

Count II: Violation of a Collective Bargaining Agreement (Chapter 89, HRS).

(34) Petitioner incorporates as if realleged, paragraphs 1 through 33, herein and incorporates the same by reference as though set forth fully herein.

(35) Article XIII, Sec. 2, of the Hawaii State Constitution, recognizes that public employees, including the Petitioner, the right to organize for the purposes of collective bargaining.

(36) Section 89-13(a)(1), states that an employer commits a “prohibited practice” if it interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Chapter 89, HRS.

(37) Section 89-3, HRS, states that the Petitioner, had the right to bargain collectively and engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(38) The subject Last Chance Agreement (Ex. “1,”), states in relevant part:

6. **The employee agrees** that the employee’s resignation from employment **deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement** or challenge the resignation. (Emphases added)

Exhibit “1,” attached hereto.

(39) The subject Last Chance Agreement, violated the Petitioner’s right to bargain collectively and wrongfully deprived him of any mutual aid or protection.

(40) As a member of a collective bargaining unit and agreement, the Petitioner cannot individually, or unilaterally, negotiate or agree to anything separate and apart from the terms and conditions of the applicable collective bargaining unit.

(41) Respondent's Last Chance Agreement coerced the Petitioner into agreeing to violate and supercede the terms and conditions of the applicable collective bargaining agreement by superimposing a new type of disciplinary process and discipline, separate and apart from the Respondent's agreement with the applicable bargaining unit representative in violation of Sec. 89-9, HRS.

(42) Respondent violated Sec. 89-13(a)(1), HRS, by coercing the Petitioner to circumvent the disciplinary and grievance process set out in the applicable collective bargaining agreement.

(43) Respondent violated Sec. 89-3, HRS, by depriving the Petitioner the right to mutual aid and protection by imposing a disciplinary process separate and apart from the applicable collective bargaining agreement.

(44) In the alternative, Respondent's Last Chance Agreement (Ex. "1"), was a written agreement between the Respondent and the Petitioner.

(45) The Respondent's termination of the Petitioner's employment violated Sec. 89-10(a), HRS. The Respondent's Last Chance Agreement (Ex. "1.") was a written agreement as defined under Sec. 89-10(a), HRS.

(46) The Respondent's Last Chance Agreement is "other agreements effective during the term of the collective bargaining agreement, whether a supplement agreement, an agreement on reopened items, or a memorandum of agreement," pursuant to Sec. 89-10(a), HRS.

(47) The express terms and conditions of the Last Chance Agreement (Ex. "1.") clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit "1," attached hereto.

(48) The Respondent forced the Petitioner to resign because he tested positive for the

presence of marijuana. See Exhibit “2,” attached hereto.

(49) The Respondent violated the terms and conditions of its own Last Chance Agreement.

C. Remedy Sought:

(50) Petitioner incorporates as if realleged, paragraphs 1 through 49, herein and incorporates the same by reference as though set forth fully herein.

(51) That the Board find as a matter of law, that:

(A) The Respondent’s Last Chance Agreement, unlawfully infringes on the Petitioner’s and other public employees, right to bargain collectively and wrongfully deprived him of any mutual aid or protection and is invalid, under Sec. 377-4, HRS, Sec. 377-6(1), (5) and (6), HRS and/or Sec. 89-13(a)(1), HRS ;

(B) In the alternative, find that the Respondent’s Last Chance Agreement (Ex. “1”), was a written agreement between the Respondent and the Petitioner.

(C) The Respondent’s Last Chance Agreement is “other agreements effective during the term of the collective bargaining agreement, whether a supplement agreement, an agreement on reopened items, or a memorandum of agreement,” pursuant to Sec. 89-10(a), HRS.

(D) The express terms and conditions of the Last Chance Agreement (Ex. “1.”) clearly and unambiguously required the Petitioner to voluntarily resign only in the event of any future positive tests for the presence of alcohol. See, Exhibit “1,” attached hereto.

(E) The Respondent forced the Petitioner to resign because he tested

positive for the presence of marijuana. See Exhibit “2,” attached hereto.

(F) The HLRB find that Respondent’s termination of the Petitioner’s employment based on the Respondent’s Last Chance Agreement, violated Sec. Sec. 377-4, HRS, Sec. 377-6 (1), (5) and (6), HRS and/or Sec. 89-13(a), HRS.

(G) Respondent violated the terms and conditions of its own Last Chance Agreement.

(H) That the Petitioner be reinstated immediately, without loss in seniority, fringe benefits and back pay from the date of his termination to the entry of the Order in this case;

(I) That the Petitioner be awarded against Respondent, general and special damages in amounts to be shown at the hearing;

(J) Award Petitioner compensatory damages against the Respondents;

(K) Award Petitioner his costs and attorney's fees;

(L) Award Petitioner any pre and post judgment interest;

(M) Grant such other relief as it may deem just and proper.

EXHIBIT “1”

EXHIBIT B

LAST CHANCE AGREEMENT

This Agreement entered into this 16 day of December, 2020 by and between the employee Hunter C. Henkel and the Employer.

1. The employee has tested positive for alcohol substance as provided in this DTA for the first time.
2. The employee agrees to sign Exhibit B instead of being discharged and whereby the employee agrees to resign from employment in the event of a second positive alcohol test occurring within two (2) years of the first positive test.
3. The employee agrees that when the employee signs Exhibit B the employee shall be suspended for twenty (20) working days instead of being discharged.
4. The employee agrees to resign from employment on a no-fault basis when the employee tests positive for alcohol for a second time within two (2) years of the first positive alcohol test effective on the date of the second positive test.
5. The employee agrees that Exhibit B has been carefully read and voluntarily accepts Exhibit B with full knowledge and understanding of its contents and meaning.
6. The employee agrees that the employee's resignation from employment deprives the employee of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation.
7. The Employer agrees that the employee's resignation from employment as provided in this DTA shall be reported in the employee's personnel file as a resignation without fault.
8. Exhibit B shall be confidential, except as may be necessary to ensure compliance with its terms.

Employee:

Signature

Hunter C. Henkel

Date: 12/16/2020

Employer:

Signature

Robert R.K. Pereira

Date: 12/16/2020

COPY

EXHIBIT “2”

Mitchell D. Roth
Mayor

Lee E. Lord
Managing Director



Kazuo S. K. L. Todd
Fire Chief

Eric H. Moller
Deputy Fire Chief

County of Hawai'i
HAWAI'I FIRE DEPARTMENT
25 Aupuni Street • Suite 2501 • Hilo, Hawai'i 96720
(808) 932-2900 • Fax (808) 932-2928

December 22, 2021

HAND DELIVERED

WSO II Hunter C. Henkel
RR2 Box 6260
Pahoa, HI 96778

RE: RESIGNATION PER LAST CHANCE AGREEMENT

Dear WSO II Henkel:

The Department of Human Resources has informed us that you tested positive for the drug(s) indicated on the enclosed Results of Controlled Substance Test during your follow up controlled substance test on December 8, 2021.

Your first positive controlled substance test was on December 9, 2020, and your second positive controlled substance test was on December 8, 2021.

I have attached a copy of the Last Chance Agreement that you signed on December 16, 2020. The Last Chance Agreement states that you agreed to sign the Last Chance Agreement instead of being discharged, and agreed to resign from employment on a no-fault basis in the event of a second positive controlled substance test occurring within two (2) years of the first positive test. Further, you agreed that your resignation deprives you of the right to grieve as provided in the grievance section of the applicable bargaining unit agreement or challenge the resignation.

Based on the tests results from your December 8, 2021 test and the Last Chance Agreement signed on December 16, 2020, we are processing your resignation effective close of business on December 22, 2021.

Although you have resigned from employment we want to advise you of the following resources available for evaluating and resolving problems associated with the use of a controlled substance:

Employee Assistance of the Pacific (EAP) at 1-877-597-8222

Hawai'i County is an Equal Opportunity Provider and Employer.



EXHIBIT "2"