

STATE OF HAWAI‘I
HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

HUNTER C. HENKEL,

Petitioner(s).

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

ORDER NO. 3888

ORDER REGARDING PETITIONS FOR
INTERVENTION AND SCHEDULING OF
BRIEFS

ORDER REGARDING PETITIONS FOR INTERVENTION

On July 11, 2022, Petitioner HUNTER C. HENKEL (Petitioner or Henkel) filed a Petition for Declaratory Ruling (DR Petition) with the Hawai‘i Labor Relations Board (Board), as allowed under Hawai‘i Administrative Rules (HAR) § 12-42-9. The DR Petition requests that the Board issue certain declaratory rulings as to whether the Hawai‘i Fire Department, County of Hawai‘i (HFD) violated certain provisions of Hawai‘i Revised Statutes (HRS) Chapters 89 and 377 when it entered into a Last Chance Agreement (LCA) with Henkel and used the LCA to terminate Henkel.

The Board issued Order No. 3870, which among other things, provided notice of the filing of the DR Petition and of a deadline of July 29, 2022 at 4:30 p.m. for any interested parties to file a Petition for Intervention.

The Board received four Petitions for Intervention (PFIs) from the HFD, HAWAI‘I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), DEPARTMENT OF THE ATTORNEY GENERAL, State of Hawai‘i (State), and the CITY AND COUNTY OF HONOLULU (CCH) by the deadline in Order No. 3870. The DEPARTMENT OF THE CORPORATION COUNSEL, County of Maui (Maui County and collectively with HGEA, State, and CCH, Intervention Petitioners) filed a PFI after the deadline.

The Petitioner did not file any responses to the PFIs within the five days permitted under HAR § 12-42-8(g)(3)(C)(iii)¹. At the Status Conference held on September 6, 2022, Henkel presented oral argument on the PFIs, and the Intervention Petitioners did not respond to Henkel’s oral argument when given the opportunity.

After reviewing and hearing the PFIs, the Board grants the PFI from HFD, grants, in part, the PFI from HGEA, and denies the PFIs from the State, the CCH, and Maui County.

In considering PFIs, the Board looks to its own rules for guidance. HAR § 12-42-9(e)² provides the Board with discretion to allow any party to intervene in a declaratory ruling proceeding based on the factors given in HAR § 12-42-8(g)(14)³. *See, e.g., Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kawakami*, Board Case No. 20-CE-03-946a, Decision No. 505, at *18 (June 23, 2021) (*citing see, e.g. Merit Appeals Board v. Taylor, et. al.*, Board Case Nos. DR-00-103, DR-00-104, Order No. 2993, at *13 (June 2, 2014)).

Looking at the HFD's and HGEA's PFIs, the Board finds, in its discretion, that they have met the required factors laid out in HAR § 12-42-8(g)(14).

HFD has statutory rights as a public employer under HRS Chapter 89⁴. HAR § 12-42-8(g)(14)(B)(i). The Mayor of the County of Hawai'i is a public employer for both bargaining units 13⁵ and 15⁶ (BU 13 and BU 15 respectively), one of which Henkel is a member, for collective bargaining purposes. HRS § 89-6(d)(1). As a department under the Mayor, HFD would be a public employer for these bargaining units. HRS § 89-2⁷. HFD alleges that it has a right to intervene in this proceeding because of its status as a public employer, that the Henkel's LCA is between HFD and Henkel, that HFD has a substantial public interest an alcohol and drug free workplace, and that its participation would assist in the development of a sound record.

The Board finds that, as a public employer for the bargaining unit of which Henkel is a member and a party to the Henkel LCA, HFD's participation in the proceeding would assist in the development of a sound record. Therefore, HFD is permitted to intervene in this proceeding.

Likewise, based on its assertions, as the exclusive representative for Henkel's bargaining unit and a party to the collective bargaining agreement covering this bargaining unit, HGEA's participation will assist in the development of a sound record regarding to what extent Henkel's rights, as an HGEA represented bargaining unit employee, were violated by his termination under the LCA.

HGEA further asserts in its PFI that its collective bargaining rights are at stake in the DR proceeding because HFD's actions eliminate the Union's recourse for CBA and HRS Chapter 89 violations. However, the Board limits the issues presented to those contained in the DR Petition and cannot allow HGEA to expand the scope of the current DR Petition into its collective bargaining rights.

While the Board recognizes that HGEA may have the rights raised, the Board is compelled to point out that the DR Petition is limited to a determination of whether Henkel's rights were violated under HRS Chapter 89 and 377 by entering into and terminated under the LCA. Should HGEA seek a determination regarding whether its rights as the exclusive representative were violated by HFD's handling of Henkel's LCA, HGEA must take appropriate action to raise these issues.

Regarding the remaining PFIs, none of them are parties to this particular LCA or related to Henkel's employment. The Board acknowledges that they are all public employers under HRS Chapter 89, are all parties to the collective bargaining agreements for BU 13 and BU 15, and have argued that an adverse order issued in this case on affirmative relief will significantly undermine the collective bargaining grievance process and mechanism and an adverse impact regarding all bargaining unit employees.

However, as discussed above, the Board's order on this DR Petition will be limited to the circumstances of Henkel's LCA and the parties to this proceeding, which the State and the CCH acknowledge are only Henkel and the primary "target," HFD. Therefore, contrary to their assertions, any adverse order issued in this case on affirmative relief will have no effect on other petitioners not parties to this case or other agreements not involved. HAR § 12-42-9(i)⁸.

The State, the CCH, and Maui County offer to provide examples of last chance agreements that they have entered into with public employees and unions and address how disputes are handled through the grievance process and procedures. The Board further finds that the addition of other last chance agreements would significantly broaden the issue and delay the proceedings to the detriment of establishing a sound record on the DR Petition before the Board. HAR § 12-42-8(g)(14)(v) and (vi).

For these reasons, the Board denies the interventions of the State, the CCH, and Maui County⁹.

The State, the CCH, and Maui County have represented that they would act in the role akin to an *amicus curiae* in the proceeding. While the Board administrative rules do not formally provide for *amicus curiae* in DR proceedings, the Board is authorized to order submission of briefs where warranted by the nature of the proceeding or the particular issues involved. HAR § 12-42-8(g)(17)(C)¹⁰.

The Board will, therefore, accept any *amicus curiae* briefs from these Petitioners denied intervention in this case as laid out below.

ORDER REGARDING SCHEDULING OF BRIEFS

The Board orders:

1. Henkel, HGEA, and HFD must file their briefs on the merits of this case on or by **October 7, 2022 at 4:30 p.m.** Briefs filed by Henkel, HGEA, and HFD **must not exceed 25 pages** in length, exclusive of table of contents, table of authorities, declarations, exhibits, and other attachments.

2. The State, the CCH, and Maui County must file their *amicus* briefs on the merits of this case on or by **October 7, 2022 at 4:30 p.m.** Amicus briefs **must not exceed 15 pages** in length, exclusive of table of contents, table of authorities, declarations, exhibits, and other attachments.
3. Any brief exceeding **10 pages** must include a table of contents and a table of authorities.
4. Exhibits to briefs may not include statutes; Board Orders or Decisions; publicly accessible court cases, pleadings, or transcripts; arbitration decisions, pleadings, or transcripts that are not specifically factually relevant; or prior filings in the instant case. Statutes, Board Orders and Decisions, court cases, and prior filings may be referenced in briefs appropriately.

DATED: Honolulu, Hawai'i, _____ September 7, 2022 _____.

HAWAI'I LABOR RELATIONS BOARD
(dlr.laborboard@hawaii.gov)

MARCUS R. OSHIRO, Chair

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¹ HAR § 12-42-8(g)(3)(C)(iii) provides:

(3) Motions:

(c) All motions other than those made during a hearing shall be subject to the following:

(iii) Answering affidavits, if any, shall be served on all parties...with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

² HAR § 12-42-9(e) provides:

(e) Any party may intervene subject to the provisions of section 12-42-8(g)(14) insofar as they are applicable.

³ HAR § 12-42-8(g)(14) provides:

(14) Intervention in proceeding:

(A) In any proceeding other than representation proceedings, a petition to intervene and become a party thereto shall be submitted in writing to the board.

(B) The petition shall contain the following:

(i) Nature of petitioner's statutory or other right.

(ii) Nature and extent of petitioner's interest.

(iii) Effect of any decision in the proceeding on petitioner's

(iv) Other means available whereby petitioner's interest may be protected.

(v) Extent petitioner's interest may be represented by existing parties.

(vi) Extent petitioner's participation can assist in development of a sound record.

(vii) Extent petitioner's participation will broaden the issue or delay the proceeding.

(viii) Extent petitioner's interest in the proceeding differs from that of the general public.

(ix) How the petitioner's intervention would serve the public interest.

(C) The original and five copies of the petition with certificate of service on all parties, shall be filed with the board.

(D) Intervention shall not be granted except on averments which are reasonably pertinent to the issues already presented but do not unduly broaden them. If intervention is granted, the petitioner thereby becomes an intervenor and a party to the proceeding to the degree indicated by the order allowing intervention.

⁴ HRS § 89-2 specifically includes the county mayors within the definition of “employer” or “public employer” under HRS Chapter 89.

⁵ The DR Petition claims that Henkel’s appropriate bargaining unit is BU 13.

⁶ The HFD PFI claims that the appropriate bargaining unit for water safety officers, such as Henkel, is BU 15.

⁷ Under HRS § 89-2, “the respective mayors in the case of the counties...and any individual who represents one of these employers or acts in their interest in dealing with public employees.

⁸ HAR § 12-42-9(i) provides in relevant part:

(i) An order disposing of a petition shall be applicable only to the factual situation alleged in the petition or set forth in the order. The order shall not be applicable to different factual situations or where additional facts not considered in the order exist...

⁹ The Board further denies Maui County’s PFI because it was filed past the deadline for submission.

¹⁰ HAR § 12-42-8(g)(17)(C) provides:

The board may direct oral argument or the filing of briefs or proposed findings of facts, conclusions of law, or both, when it deems the submission of briefs or proposed findings, or both, is warranted by the nature of the proceeding or the particular issues therein.