STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

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| In the Matter of<br><br>HUNTER C. HENKEL,<br><br>Petitioner<br><br>and<br><br>HAWAI‘I FIRE DEPARTMENT, COUNTY OF HAWAI‘I; AND HAWAI‘I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO<br><br>Intervenor(s). | CASE NO(S). 22-DR-13-119<br><br>ORDER NO. 3907<br><br>ORDER REFUSING TO ISSUE A DECLARATORY RULING |

# ORDER REFUSING TO ISSUE A DECLARATORY RULING

## 1. Introduction and Statement of the Case

Under Hawai‘i Revised Statutes (HRS) § 91-8, the Hawai‘i Labor Relations Board (Board) has the authority to issue a declaratory ruling regarding the applicability of any statutory provision upon the filing of a petition by an interested person. Under Hawai‘i Administrative Rules (HAR) § 12-42-9(f), the Board may refuse to issue a declaratory ruling for good cause. The Board finds that good cause exists in this case based on lack of jurisdiction under HAR § 12-42-9(f)(4) over the subject of the declaratory ruling petition: the last chance agreement (LCA).

Petitioner HUNTER C. HENKEL (Petitioner or Henkel) filed a Petition for Declaratory Ruling (DR Petition) with the Board. The DR Petition requests that the Board issue certain declaratory rulings as to whether the Intervenor HAWAI‘I FIRE DEPARTMENT, County of Hawai‘i (HFD-COH) violated certain provisions of HRS Chapters 89 and 377 by entering into the LCA with Henkel, which allowed HFD-COH to terminate him.

The Board received Petitions for Intervention (PFIs) from HFD-COH, HAWAI‘I GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), DEPARTMENT OF THE ATTORNEY GENERAL, State of Hawai‘i (State), the CITY AND

COUNTY OF HONOLULU (CCH), and the DEPARTMENT OF THE CORPORATION COUNSEL, County of Maui (Maui County).

By Order No. 3888, which memorialized a prior oral ruling, the Board granted, in part, HFD-COH's intervention request, granted HGEA's intervention request, and denied the remaining PFIs. The Board further ordered and set a deadline for the filing of briefs by the parties and amicus curiae.

Petitioner, HGEA, and HFD-COH submitted their briefs. CCH submitted an amicus curiae brief, which COM joined.

Henkel did not submit a written request for a hearing on the DR Petition under HAR § 12-42-9(h).[1] Therefore, the Board will resolve the issues presented without oral argument from the parties based on a review of the full record.

## 2. Issues

In the DR Petition and in his arguments, Petitioner requested that the Board declare that the LCA was an agreement under HRS § 89-10(a) and that his termination under this agreement violated HRS §§ 377-4 and 377-6(1), (5), and (6) and HRS § 89-13(a)(1). The Petitioner framed the issues in various ways in the DR Petition, in the Board Conference, and in his brief.

The threshhold question for the Board in any case is whether the issue(s) are within its jurisdiction. *See*, HRS §§ 89-14, 377-9; Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n. 3 (1983).

As the LCA is the focal point for all these issues, the initial issue is whether the Board has jurisdiction under HRS Chapter 377 and 89 to resolve issues involving the LCA. The Board finds that it does not.

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

## 3. Factual Background and Findings of Fact

Based on HAR § 12-42-9(i)[2], for purposes of the Board's Declaratory Ruling, all facts alleged in the DR Petition are deemed to be true, as are other relevant facts alleged by the parties, which are not in dispute. Accordingly, the Board finds the following facts.

During the relevant time, Petitioner Henkel was employed by HFD-COH as a Water Safety Officer II, and was an "employee" or "public employee" under HRS § 89-2.[3] In that role,

Henkel until 2020 was a member of bargaining unit 14 (BU 14).[4] After the creation of bargaining unit 15 (BU 15), Henkel was a member of BU 15.[5]

For the relevant time, HFD-COH was a "public employer"[6] under HRS § 89-2.

For the relevant time, Intervenor HGEA was the "exclusive representative" under HRS § 89-2 for both BU 14 and BU 15.[7]

On December 8, 2020, Henkel tested positive for marijuana, a controlled substance, based on a random drug test.

On December 16, 2020, HFD-COH gave Henkel a letter requiring him to sign the LCA.

Henkel and employer representative Robert R.K. Perreira signed the LCA, which provided, among other things, that Henkel "has tested positive for alcohol substance…for the first time[]" and "agrees to resign from employment…when the employee tests positive for alcohol for a second time within two (2) years of the first positive alcohol test[.]"

On December 8, 2021, Henkel tested positive again for marijuana, a controlled substance.

On December 22, 2021, HFD-COH gave Henkel a letter discharging him for his "second positive controlled substance test [] on December 8, 2021[]" based on the LCA.

## 4. Conclusions of Law and Discussion

### 4.1. Board's Jurisdiction over the LCA under HRS Chapter 377

HRS § 89-14 provides that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]" Therefore, HRS § 377-9 governs the procedural aspects of controversies related to prohibited practices. Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983); Asato v. Haw. Gov't Emp. Ass'n. Board Case No. 19-CU-03-375, Decision No. 504, at 3 (May 5, 2021) (https://labor.hawaii.gov/hlrb/files/2021/05/Decision-No.-504.pdf).

However, as HRS Chapter 377 is the Hawai'i Employment Relations Act, it does not apply to the County of Hawai'i as an employer.[8] HRS § 377-1; *see also*: Poe v. Haw. Lab. Rels. Bd., 2002 Haw. App. LEXIS 231 at 5* n.1. So, the substantive aspects of HRS Chapter 377 are not adopted wholesale in the implementation of HRS Chapter 89. *See* Victorino v. Ariyoshi, Board Case No. CE-01-96, Order No. 578, at *14 (January 27, 1986) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-578.pdf).

The Board holds that HRS Chapter 377 does not apply to this LCA between the HFD-COH and Petitioner. Therefore, the LCA cannot violate this law. Therefore, the Board has no jurisdiction over the LCA issues under HRS Chapter 377.

### 4.2. The Board's Jurisdiction over the LCA under HRS Chapter 89

HRS § 89-10(a) provides, in relevant part:

> (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned[.] Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopoined items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties….

Without any explanation, Petitioner submits that the LCA falls within "other agreements effective during the term of the collective bargaining agreement[.]" The Board disagrees because the LCA fails to meet the required criteria for these types of agreements.

On its face, the LCA contains no effective period limited to the term of the relevant collective bargaining agreement.

In addition, while in writing, both "parties" must execute the LCA. As "parties" is not defined in HRS Chapter 89, the Board must look to the Hawai'i appellate courts for guidance in interpreting this term.

The Hawai'i Supreme Court has used the doctrine of *noscitur a sociis* (words of a feather flock together) to guide interpretation of statutory provisions. This doctrine includes the principle that the meaning to be given to a writing is controlled by the context. Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 208-09, 347 P.3d 632, 638-09 (Haw. Ct. App. 2014) (*citing* Advertiser Publ'g Co. v. Fase, 43 Haw. 154, 161 (Haw. Terr. 1959). Further, "the more general and the more specific words of a statute must be considered together in determining the meaning of the statute, and the general words are restricted to a meaning that should not be inconsistent with the narrower meaning of the more specific words of the statute." *Id.* at 209, 347 P.3d at 639 (*citing* In re Pac. Marine & Supply Co, 55 Haw. at 578 n.5, 524 P.2d at 895 n.5 (Pac. Marine) (noting as to statutory construction that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole[.]")).

The context and consideration of the general and specific words of HRS § 89-10(a) compel the interpretation that "parties" are the employer and the exclusive representative referenced in HRS § 89-10(a). Therefore, because the HGEA, the exclusive representative for BU 15, did not execute the LCA, the LCA did not meet the requirements for an "other agreement[] effective during the term of the collective bargaining agreement" under HRS § 89-10(a).

This interpretation is also harmonious within the broader context of HRS Chapter 89 providing that written agreements be negotiated, entered into, and executed between the public employers and the exclusive representatives. *See, e.g.*, HRS § 89-1(b)(2);[9] HRS § 89-2 "collective bargaining";[10] Pac. Marine, 55 Haw. at 578 n.5, 524 P.2d at 895 n.5.

For these reasons, the Board finds that it has no jurisdiction over the LCA under either HRS Chapter 377 or HRS Chapter 89. Therefore, under HAR § 12-42-9(f)(4), the Board refuses to issue the declaratory order requested by the DR Petition.

This case is dismissed and closed.

DATED: Honolulu, Hawai'i, October 19, 2022.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

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[1] HAR § 12-42-9(h) provides:

(h) Hearing:

(1) Although in the usual course of processing a petition for a declaratory ruling no formal hearing shall be granted to the petitioner, the board may, in its discretion, order such proceeding set down for a hearing.

(2) Any petitioner who desires a hearing on a petition for declaratory ruling shall set forth in detail in a written request the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs of memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such request for hearing is dependent upon factual assertion, shall accompany such request by affidavit establishing such facts.

[2] HAR § 12-42-9(i) provides:

(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. Such order shall have the same force and effect as other orders issued by the board.

[3] HRS § 89-2 defines "public employee" as "any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)]."

[4] Although Henkel filed the DR Petition and listed himself as a member of bargaining unit 13, the Board finds that at the time Henkel signed the LCA, Henkel was a member of BU 14.

HRS § 89-6(a) (Supp. 2013) provides, in relevant part:

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

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(14) State law enforcement officers and state and county ocean safety and water officers.

[5] HRS § 89-6(a) provides, in relevant part:

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

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(15) State and county ocean safety and water safety officers.

BU 15 was created in 2020. *See* 2020 Haw. Sess. Laws, Act 31 §§ 1 and 6.

[6] HRS § 89-2 defines "employer" or "public employer" as "…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."

[7] *See* 2013 Haw. Sess. Laws, Act 137, § 3 and Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, et al., Board Case Nos. RA-03-239a; RA-04-239b; and RA-14-239c, Order No. 2949, *6 (Nov. 7, 2013) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2949.pdf); *see also* Haw. Gov't Emp. Ass'n, Board Case

Nos. 20-RA-14-245a; 20-RA-15-245b, Decision No. 500, *2 (January 7, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-500.pdf).

[8] HRS § 377-1 defines "employer" to mean "a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof[.]"

[9] HRS § 89-1(b)(2) provides in relevant part:

> (b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:
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> (2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment[.]

[10] HRS § 89-2 provides in relevant part:

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> "Collective bargaining" means the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawai'i employer-union health benefits trust fund, and other terms and conditions of employment[.]