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Case No. 22-CE-09-971

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant(s), and HAWAI'I STATE HOSPITAL, Department of Health, State of Hawai'i, Respondent(s).	CASE NO(S). 22-CE-09-971 DECISION NO. 518 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

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1. Introduction and Statement of the Case

Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant, HGEA, or Union) filed the instant prohibited practice complaint (Complaint) against Respondent HAWAIʻI STATE HOSPITAL, Department of Health, State of Hawaiʻi (Respondent, HSH, or Employer) alleging, among other things, that HSH committed prohibited practices related to consultations and negotiations about a New Patient Facility (NPF) where bargaining unit 9 (BU 9) employees work.

The Hawaiʻi Labor Relations Board (Board) held a pretrial conference where the parties agreed to enter all proposed exhibits into evidence. The Board then held three days of hearings on the merits (HOMs).

Upon review of the entire record, the Board finds that HSH failed to meaningfully consult with HGEA and failed to negotiate with HGEA. Accordingly, HSH violated HRS § 89-9(c) and committed prohibited practices under HRS §§ 89-13(a)(5) and (7) and derivative prohibited practices under HRS § 89-13(a)(1). However, the Board further finds that HGEA did not exhaust its administrative remedies; accordingly, the Board cannot find that HSH committed a prohibited practice under HRS § 89-13(a)(8). Additionally, the Board finds that HGEA did not meet its burden of proof to show that HSH committed prohibited practices under HRS §§ 89-13(a)(2) or (4).

Any finding of fact improperly designated as a conclusion of law is a finding of fact. Any conclusion of law improperly designated as a finding of fact is a finding of fact.

2. Background and Findings of Fact

2.1. Parties

HGEA is the exclusive representative[1] for BU 9[2].

HSH is the relevant employer[3] for the BU 9 employees[4] at the NPF.

HGEA and the relevant employer group[5] for BU 9 are parties to a collective bargaining agreement (CBA) that covers BU 9 employees.

2.2. The NPF

In 2018, HSH began working towards opening an NPF. The NPF is a forensic facility, where approximately 99% of the patients are sent by the courts.

BU 9 members are tasked with staffing the NPF.

On or about April 2022, HSH opened the NPF.

The NPF is understaffed.

2.3. Consultations

By letter dated March 19, 2021, HSH requested consultation with HGEA over a variety of issues related to the NPF. Among other things, HSH noted that various trainings, policies, and procedures were being reviewed and developed.

By letter dated April 5, 2021, HGEA informed HSH that it considered the March 19, 2021 letter to be deficient as a consultation request because it did not contain sufficient information for HGEA to have a meaningful discussion with HSH about the NPF.

The parties exchanged a variety of letters regarding potential tours of the NPF, what the substance of the consultation might be, and answers given to other unions.

By letter dated August 27, 2021, HSH again requested to initiate consultation with HGEA. In the letter, among other things, HSH noted that the "specific policies and procedures [had] yet to be developed".

By letter dated November 29, 2021, HSH provided HGEA with draft policies and procedures.

By letter dated January 18, 2022, HSH requested that HGEA disregard the information provided in the November 29, 2021 letter and provided new drafts of policies and procedures.

The parties met on March 17, 2022, and the discussion at the meeting was memorialized with additional information by HSH's letter dated March 18, 2022.

By letter dated March 23, 2022, HGEA provided additional questions and comments regarding the consulted matters.

By letter dated April 1, 2022, HSH responded to HGEA's March 23, 2022 letter.

By letter dated April 7, 2022, HGEA provided additional questions and comments regarding the consulted maters. HGEA sent another letter dated April 14, 2022 with additional questions and comments.

HSH did not provide a response to the April 7, 2022 letter or the April 14, 2022 letter until HGEA prompted them to do so on April 22, 2022. The letter provided brief responses to HGEA's questions and comments.

By letter dated May 11, 2022, HGEA reminded HSH that it had not responded to all questions previously submitted to HSH and requested that HSH answer those questions. HGEA also requested additional information from HSH.

2.4. Negotiations

HGEA sent a letter to HSH dated May 3, 2022 stating that it was a "demand for bargaining" over issues related to a Safety Committee and temporary hazard pay.

By letter dated May 12, 2022, HSH responded to HGEA's letter by stating that it had two function teams and asking questions regarding HGEA's demand for bargaining over temporary hazard pay.

By letter dated June 6, 2022, HGEA reiterated that the Safety Committee had not been established.

By letter dated June 9, 2022, HSH reiterated that it has two Function Teams and asserted that those Function Teams suffice as the Safety Committee.

3. Analysis and Conclusions of Law

3.1. Jurisdiction and Burden of Proof

The Board must have jurisdiction to issue a valid judgment. Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Emp. Ret. Sys., 73 Haw. 9, 14, 828 P.2d 260, 263 (1992). Subject matter jurisdiction can never be waived by any party. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 84, 222 P.3d 979, 1003 (2010) (citing Chun v. Emp. Ret. Sys., 73 Haw. 9, 13, 828 P.2d 260, 263 (1992).

HGEA has the burden of proving that jurisdiction exists. Ishida v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. 22-CU-01-387, Decision No. 516, at *4 (June 30, 2023) (https://labor.hawaii.gov/hlrb/files/2023/07/DECISION-516-Ishida-signed.pdf) (Ishida). The Board reviews evidence, including affidavits and testimony, to resolve factual disputes about whether the Board has jurisdiction to hear the case. Casumpang v. ILUW, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

The Board can only hear complaints filed within 90 days of the action that gave rise to the alleged prohibited practice. HRS § 377-9(l); Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983). The Board's administrative rules include this 90-day limit. HAR § 12-42-42(a).

The Board strictly construes the limitations period and, because the period is set by law, the Board cannot waive a defect of even a single day. Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *34 (February 21, 2023) (https://labor.hawaii.gov/hlrb/files/2023/02/Decision-No.-514.pdf) (Taum).

Several of HGEA's allegations fall outside the 90-day period. HGEA filed the Complaint on August 16, 2022. That means the relevant 90-day period began on May 18, 2022. Accordingly, all allegations that took place prior to that date are untimely.

3.2. HGEA Did Not Exhaust Its Administrative Remedies

The Board has consistently held that it does not have jurisdiction over complaints alleging violations of HRS § 89-13(a)(8) until after the complainant exhausts their contractual remedies, unless attempting to exhaust those remedies would be futile. *See* Kapesi v. Dep't. of Pub. Safety, Board Case Nos. 17-CE-10-908, 17-CU-10-359, Decision No. 510, at *9-10 (March 2, 2022) (https://labor.hawaii.gov/hlrb/files/2022/03/Decision-No.-510.pdf) (Kapesi). The Board rests this position on the Hawai'i Supreme Court's (HSC) decisions in Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe v. Haw. Lab. Rels. Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (Poe II). Kapesi, Decision No. 510, at *11.

Here, HGEA alleges that HSH violated Article 4B of the CBA. However, HGEA has not presented any evidence that it exhausted the grievance process. Accordingly, the Board dismisses the HRS § 89-13(a)(8) claim because HGEA does not have standing to pursue it.

3.3. No Other Employee Organization Was Involved

As explained in HGEA v. Governing Bd. of Kanuikapono Charter Sch., Board Case No. 19-CE-03-928, Decision No. 513 (October 19, 2022) (https://labor.hawaii.gov/hlrb/files/2022/10/Decision-No.-513.pdf) (Kanuikapono), the relevant test to determine if an employer committed a prohibited practice under HRS § 89-13(a)(2) requires two elements: 1) the involvement of an employee organization other than the exclusive representative; and 2) the employer's actions dominating, interfering, or assisting in the formation, administration, or organization of that non-exclusive representative employee organization. *Id.* Decision No. 513, at *23.

Here, HGEA has not alleged the involvement of such an employee organization. Accordingly, the Board must dismiss the HRS § 89-13(a)(2) claim.

3.4. HGEA Did Not Prove Discrimination

To prove a prohibited practice under HRS § 89-13(a)(4), HGEA must show: 1) HSH had an improper motive; 2) a causal connection between the improper motive and for engaging in

protected activity before the Board; and 3) the improper motive was the motivating factor for the adverse action. Kanuikapono, Decision No. 513, at *25.

Here, HGEA did not provide evidence related to any discrimination tied to a protected activity before the Board. While HGEA filed a prior prohibited practice complaint against HSH, HGEA presented no proof that the filing led to any discrimination. Accordingly, the Board dismisses the HRS § 89-13(a)(4) claim.

3.5. HGEA's Demand for Bargaining Did Not Meet the Requirements of HRS § 89-9(b)

The next issue before the Board is whether HSH was required to negotiate with HGEA based on the demands for bargaining. The Board finds that HGEA's demands for bargaining did not meet the requirements of HRS § 89-9(b); accordingly, HSH had no duty to negotiate with HGEA over the May 3, 2022 letter or the June 6, 2022 letter.

HRS § 89-9(b) describes how a party can initiate or request to initiate negotiations. HRS § 89-9(b) requires HGEA, as the party seeking to initiate negotiations, to notify the other party in writing that sets forth the time and place of the meeting desired, as well as the nature of the business to be discussed, and this writing must be sent sufficiently in advance of the meeting.

The May 3, 2022 letter and the June 6, 2022 letter both do not include times and places of the meeting desired. Therefore, the Board cannot find that those demands for bargaining met the requirements of HRS § 89-9(b).

While HGEA's April 12, 2022 letter did meet the requirements for a demand for bargaining, the Board cannot rule on that letter as it is untimely.

The Board's finding that the May 3, 2022 letter and the June 6, 2022 letter do not meet the requirements of HRS § 89-9(b) does not preclude HGEA from demanding bargaining over the same issues if they still remain.

Accordingly, in this case, the Board cannot find that HGEA met its burden to properly demand bargaining.

3.6. HSH Failed to Meaningfully Consult with HGEA

The first substantial issue before the Board is whether HSH fulfilled its obligation to consult with HGEA over the changes to the policies and procedures affecting BU 9 employees, as required by HRS § 89-9(c). The Board must find that HSH did not fulfill this obligation.

The Board adopted Arbitrator Ted T. Tsukiyama's test for a valid consultation in HGEA v. Cayetano, Board Case Nos. CE-02-387a-e, Decision No. 394, at *32-33 (1998)

(https://labor.hawaii.gov/hlrb/files/2020/10/Decision-No-394.pdf) (Kapolei). The Kapolei test requires:

> …(1) notice to the union, (2) of the proposed personnel practices and polices of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advise or input of the Union thereto, (5) listening to, comparing views and deliberating together thereon (i.e., "meaningful dialog"), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

Id.

Here, while HSH began consulting with HGEA on several of the issues related to the NPF, those consultations started and restarted multiple times. Further, HSH failed to provide those policies and practices in reasonable completeness and detail—in multiple cases, those policies had not been formulated prior to the beginning of "consultation".

Without access to the policies and practices in reasonable completeness and detail, the parties could not engage in meaningful dialog over the impacts of those policies and practices on the BU 9 members.

Nothing in the Kapolei test provides exceptions for situations where the employer wishes to expedite the timeline or where consultation is inconvenient due to other factors. As the Board Majority in a prior case observed, "…HRS § 89-9(c) requires consultation. The 'management right' exclusions in HRS § 89-9(d) do not alter the employer's duty to consult with the exclusive representative over the effects of employers exercising those rights." Haw. Gov't Emps. Ass'n v. Kawakami, Board Case Nos. 20-CE-03-946a-c, Decision No. 505, at *24 (June 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-506.pdf) (Kawakami).

Because the parties are not required to reach an agreement on the policies and practices, the Employer can consult in a short timeframe when necessary—the primary issue is whether the consultation is *meaningful*.

To the extent that the HSH did provide HGEA with policies and procedures, the Board finds that the resulting conversations did not constitute meaningful dialog. HSH appeared to treat the May 3, 2022 letter as a consultation letter and sent its response to "consultationsteam@hgea.org". However, the responses HSH provided do not show meaningful dialog.

Although the Board has not adopted any formal test to determine when consultation is meaningful, the facts in this case are clear. HSH generally did not provide HGEA with the

policies and procedures in reasonable completion and detail, and HSH did not engage in meaningful dialog about the effects these policies and procedures would have on BU 9 members. Therefore, the Board finds that HSH committed prohibited practices under HRS § 89-13(a)(7) by violating HRS § 89-9(c) and failing to consult with HGEA.

4. Order

Based on the above, the Board finds that HSH committed prohibited practices under HRS § 89-13(a)(7) by violating HRS § 89-9(c) and orders:

1. HSH must cease and desist from failing to properly consult with HGEA over issues arising from the NPF;

2. HSH must complete consultations with HGEA before implementing new policies or procedures at the NPF. To the extent that the parties wish to rely on the new policies or procedures while completing consultations, the parties may enter into a written agreement to temporarily allow the usage of the new policies or procedures pending the completion of consultation;

3. HSH must post at the NPF, copies of this Decision and Order for sixty (60) consecutive days in places where notices to employees are customarily posted. In addition to physical posting of paper notices, HSH must electronically distribute the Decision and Order, such as by posting it on an intranet or an internet site or other electronic means where HSH customarily communicates with its employees; and

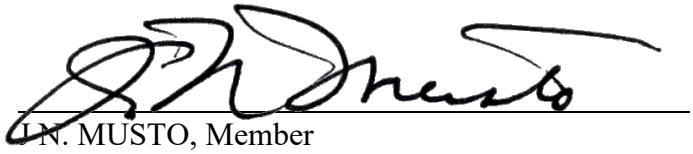
4. HSH must notify the Board of the steps to comply with this Order within 45 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai‘i, August 15, 2023.

HAWAI‘I LABOR RELATIONS BOARD

MARK R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member



J.N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
James Halvorson, Deputy Attorney General

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[1] HRS § 89-2 defines "exclusive representative" as "the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employer organization membership."

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

> **HRS § 89-6 Appropriate bargaining units.** (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> ***
>
> (9) Registered professional nurses[.]

[3] HRS § 89-2 defines "employer" or "public employer" as "…the governor…and any individual who represents one of these employers or acts in their interest in dealing with public employees."

[4] 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)]."

[5] HRS § 89-6(d)(1) defines the relevant employer group as, "…the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit."