Questions and Answers:

Prohibited Practice Cases Before the Hawai‘i Labor Relations Board

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These questions and answers are provided as an aid to the public in understanding prohibited practice cases under the Collective Bargaining in Public Employment Act (CBPEA), Hawai‘i Revised Statutes (HRS), Chapter 89. The CBPEA is commonly referred to by employers and unions, as simply “Chapter 89.” This law recognizes the right of public employees to organize and engage in collective bargaining and establishes a uniform process for employees to join and be represented by labor organizations (a.k.a. unions) of their own choice. Chapter 89 also establishes a collective bargaining process for Hawai‘i’s public employers and unions representing public employees.

To protect employees’ rights and ensure good faith collective bargaining, Chapter 89 prohibits certain conduct as prohibited practices.

This document is intended only to provide assistance in understanding the basic processes and procedures in Chapter 89 prohibited practice cases. **This document is not legal authority and should never be cited as such. If you have legal questions, you must seek legal advice from your own attorney.**

This document is not an official statement of opinion by the Hawai‘i Labor Relations Board (HLRB). Presented below are commonly asked questions and answers intended to assist community members who wish to understand how Chapter 89 prohibited practice cases are processed.

The practices described in this guide may change from time to time as required by changes in the underlying law or changes in HLRB structure and practices. To the extent possible, notice of any changes will be provided through the HLRB website.

TABLE OF CONTENTS

A. Overview and Background

1. What laws govern collective bargaining in public employment?

The "Collective Bargaining in Public Employment Act" (CBPEA), Hawaii Revised Statutes (HRS), Chapter 89 is commonly referred to by employers and unions, as simply "Chapter 89." For consistency and to comport with custom and practice, "Chapter 89" will be used throughout this guide.

Chapter 89 recognizes the right of public employees to organize and engage in collective bargaining, and establishes a uniform process for employees to join and be represented by a union of their own choice. Chapter 89 also establishes a collective bargaining process for Hawai'i's public employers and unions representing public employees.

The full text of Chapter 89 and applicable rules are posted on the Hawai'i Labor Relations Board (HLRB or Board) website at https://labor.hawaii.gov/hlrb/find-a-law/.

2. Which public employers are covered under Chapter 89?

Employers covered under Chapter 89 include the State of Hawai'i, the City and County of Honolulu, the counties of Hawai'i, Maui, and Kauai, the Hawai'i State Judiciary, the Hawai'i State Department of Education, the University of Hawai'i, the Hawai'i Health Systems Corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. The Legislative Branch is not a public employer for purposes of Chapter 89.

3. Which public employees are covered under Chapter 89?

Chapter 89 covers any person employed by a public employer and in a bargaining unit position, except elected and appointed officials, persons appointed to serve on boards or commissions, and other employees who are excluded from coverage under HRS Section 89-6(f). Note that 89-day hires, certain part-time employees, and contract employees are not covered under Chapter 89.

4. Which employee organizations are covered under Chapter 89?

Chapter 89 covers any organization in which public employees participate and which exists for the primary purpose of dealing with public employers concerning terms and conditions of employment. Every public employee in a bargaining unit position is represented by an exclusive representative. "Exclusive representative" means the employee organization certified by the board under HRS Section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

The public employee exclusive representatives and the bargaining units they represent are:

Hawai‘i Government Employees’ Association (HGEA), AFSCME, Local 152, AFL-CIO represents public employees in nine of the 15 collective bargaining units in State and county governments.
Bargaining Unit 2 – Supervisory employees in blue-collar positions
Bargaining Unit 3 – Non-supervisory employees in white-collar positions
Bargaining Unit 4 – Supervisory employees in white-collar positions
Bargaining Unit 6 – Educational officers and other personnel under the same salary schedule
Bargaining Unit 8 – Administrative, professional, and technical employees of the University of Hawai‘i and the community colleges
Bargaining Unit 9 – Registered professional nurses
Bargaining Unit 13 – Professional and scientific employees
Bargaining Unit 14 – State law enforcement officers
Bargaining Unit 15 – State and county ocean safety and water safety officers

United Public Workers (UPW), AFSCME, Local 646, AFL-CIO represents non-supervisory employees in blue-collar positions and institutional, health, and correctional workers of the State and county governments.
Bargaining Unit 1 – Non-supervisory employees in blue-collar positions
Bargaining Unit 10 – Institutional, health, and correctional workers

Hawai‘i Fire Fighters Association (HFFA), Local 1463, International Association of Fire Fighters, AFL-CIO represents State and county fire fighters throughout Hawai‘i.
Bargaining Unit 11 – Firefighters

Hawai‘i State Teachers Association (HSTA) represents Hawai‘i’s State public school teachers.
Bargaining Unit 5 – Teachers and other personnel under the same salary schedule

University of Hawai‘i Professional Assembly (UHPA) represents all faculty members of the University of Hawai‘i System.
Bargaining Unit 7 – University of Hawai‘i and community college faculty

State of Hawai‘i Organization of Police Officers (SHOPO) represents the police officers of Hawai‘i’s four county governments.
Bargaining Unit 12 – Police

5. How is Chapter 89 administered?

HLRB administers the processes established under Chapter 89, and decides cases that are filed by employees in any one of the above bargaining units, unions, or employers seeking enforcement or interpretation of the provisions of Chapter 89. The most common type of case decided by the Board is called a “prohibited practice” case.

The Board consists of three full-time, quasi-judicial members who are appointed by the Governor and confirmed by the Senate. The Board operates under the provisions of HRS Chapters 89 (Collective Bargaining in Public Employment) and 377 (Hawai'i Employment Relations Act).

6. What laws are *not* administered by HLRB, and who can I call for more information about those laws?

HLRB does not administer federal labor laws, such as the National Labor Relations Act (NLRA) (which covers most private sector employees), the Federal Labor Relations Act (FLRA) (which covers federal government employees), and the Railway Labor Act (RLA) (which covers railway and airline employees).

- For more information about the NLRA, see the National Labor Relations Board website at https://www.nlrb.gov/.
- For more information about the FLRA, see the Federal Labor Relations Authority website at https://www.flra.gov/.
- For more information about the RLA, see the National Mediation Board website at http://www.nmb.gov/.

HLRB also does not administer other federal and state employment laws, such as laws that set wage and hour standards, provide for medical or sick leave, or prohibit discrimination on the basis of protected status, including race, color, sex, religion, sexual orientation, national origin, age, disability, and veteran status. For more information about other employment laws, please see the following agency websites:

- US Department of Labor (federal wage and hour laws), at https://www.dol.gov/.
- US Equal Employment Opportunity Commission (federal anti-discrimination laws), at https://www.eeoc.gov/.
- Hawai'i Civil Rights Commission (state anti-discrimination laws), at http://www.labor.hawaii.gov/hcrc/.
- Labor and Industrial Relations Appeals Board (workplace injuries), at http://www.labor.hawaii.gov/lirab/.
- Unemployment Insurance, at http://www.labor.hawaii.gov/ui/.

7. I am a private sector employee with questions related to union representation. Where can I get more information?

Most private sector employees are covered by the National Labor Relations Act, which is administered by the National Labor Relations Board. More information about the NLRA is available on the NLRB website at https://www.nlrb.gov/.

Some Hawai'i private sector employees who are not covered by the NLRA have the right to union representation and collective bargaining under Hawai'i's private sector labor-management relations law (HRS Chapter 377). If you are a private sector employee,

and you are not sure whether you are covered by the NLRA or Hawai‘i labor law, you can contact either the NLRB or HLRB for more information.

8. I am a public employee and I am represented by a union, and I have a complaint against my employer. Where can I get more information?

If you are represented by a union and you believe your employer has violated the union contract, you may get more information about how to file a grievance from your union representative or by consulting your union contract.

If you believe your employer violated your union contract, and you believe that your union's conduct prevented you from pursuing your claim against your employer, then you might have prohibited practice claims against your union and employer. When an employee or complainant files such claims, the complaint is called a hybrid case where the employee is required to prove the union has breached their "duty of fair representation" and the employer has willfully committed a prohibited practice.

If your complaint is related to other employment rights, such as minimum wage, overtime, family medical leave, sick leave, or discrimination, you may find more information from other federal and state agencies. Links to some other agencies' websites are provided above, in Section A, Question 6. You may also have the option of filing an internal complaint with your employer.

9. I am a public employee, I am represented by a union, and I have a complaint against my union. Where can I get more information?

Chapter 89 imposes a "duty of fair representation" on unions that represent Hawai‘i public employees. An employee who believes that their union has violated the duty of fair representation may file an unfair labor practice complaint against the union with HLRB. This guide provides more information about prohibited practice complaints in general, and all of this information applies to hybrid cases.

You may also consider contacting your union representative or other union officers to see if they can resolve your complaint.

B. Prohibited Practice Complaints (PPC)

1. What is a prohibited practice?

When a public employer or a union that represents public employees engages in conduct that is prohibited under Chapter 89, it commits a "prohibited practice." Public employees can also commit certain types of prohibited practices, but those types of cases are quite rare. "Prohibited practice complaints" are commonly abbreviated as "PPC." The main purpose of this guide is to provide basic information about the PPC process and procedural rules. It is not possible to provide detailed information about what conduct is or is not a prohibited

practice. However, some very basic information about the types of conduct prohibited under Chapter 89 is provided in the questions below.

Under Chapter 89, a public employee, public employer, or public employee organization may file a prohibited practice complaint. HAR Section 12-43-61(c) requires that the complaint be prepared on a form provided by the Board." Form HLRB-4 is posted on the Board's website under "Forms."

All complaints must be filed within ninety (90) days of the date the complainant knew or should have known of the alleged violation, prohibited practice, or unfair labor practice.

2. What types of employer conduct are prohibited practices under Chapter 89?

Chapter 89 gives public employees "the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." HRS Section 89-3. Under HRS Section 89-13(a), it shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement;

(9) Replace any nonessential employee for participating in a labor dispute; or

(10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective

bargaining or mutual aid or protection through the labor organization involved in the dispute.

3. What types of union or employee conduct are prohibited practices under Chapter 89?

Under HRS Section 89-13(b), it shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

4. How can I learn more about what types of conduct violate Chapter 89?

You can learn more about the types of conduct that violate (or do not violate) Chapter 89 by reading HLRB orders and decisions in PPC cases. In each PPC case, HLRB determines whether the conduct at issue is a prohibited practice under Chapter 89. For each case, HLRB issues an order that describes the conduct at issue and explains its decision about whether that conduct was a prohibited practice. HLRB publishes its orders and decisions on its website.

5. What is the law that applies to Chapter 89 prohibited practice cases?

Chapter 89 is posted on HLRB's website under the "Find A Law" section. The Hawai'i Legislature also publishes the Hawai'i Revised Statutes on its website at https://capitol.hawaii.gov/hrsall/, and Chapter 89 sections can be found at https://www.capitol.hawaii.gov/hrscurrent/Vol02_Ch0046-0115/HRS0089/HRS_0089-.htm.

HLRB has rules that govern the processing of PPCs, which are part of the Hawai'i Administrative Rules. Citations to the Hawai'i Administrative Rules start with the abbreviation "HAR" and are followed by a specific section number. HLRB's rules may be found in HAR Chapter 43, posted on HLRB's website under the "Find A Law" section at https://labor.hawaii.gov/hlrb/files/2023/06/HLRB-Rules-from-LGs-ofc.pdf.

6. What impact do prior Board decisions have on my case?

As a general practice, HLRB follows the principles set in its prior cases or decisions issued by the appellate courts of the State of Hawai´i. As conditions in the workplace change over time, or for other compelling reasons, the Board may revise or even overturn principles stated in previous cases. On the whole, however, the Board tries to ensure that its decisions are consistent over time and can be relied upon by employees, unions, and employers.

7. What is the difference between a grievance arbitration and a prohibited practice case?

When employees are represented by a union, there is usually a collective bargaining agreement between the union and the employer. The collective bargaining agreement is often referred to as the "union contract" or "CBA." Most union contracts establish the terms and conditions of employment for the employees who are represented by the union. And, most union contracts give the union and/or an individual employee the right to file a grievance if they believe that the employer has violated the union contract. For example, if the contract says that the employer must give employees certain benefits, and the employer fails to do so, the employee can file a grievance with or without the help of the union. If the grievance cannot be resolved, then the employee can request that the union take the grievance to arbitration. That decision to take a grievance to arbitration rests with the union, within the parameters of the duty of fair representation owed to the employee.

Most union contracts allow for the grievance to be heard by a neutral third party called an "arbitrator." Similar to a judge, the arbitrator will conduct a hearing and issue a decision that resolves the grievance. That process is called "arbitration." Under Chapter 89, the employer and union are required to comply with the arbitrator's decision as specified in the agreement.

A prohibited practice happens when an employer, union, or public employee violates Chapter 89. For example, Chapter 89 requires both sides to bargain in good faith. If an employer or union believes the other side is not acting in good faith during collective bargaining negotiations, it may file a prohibited practice complaint. The party that files the complaint is the "complainant." The party that allegedly violated Chapter 89 is the "respondent." HLRB will process the complaint and determine whether the respondent committed a prohibited practice.

8. How do I know if my complaint is a grievance or a prohibited practice?

Generally speaking, if your complaint is that your employer is violating a contract or agreement with your union, then you have a grievance. You must file a grievance before you file a complaint with the Board. If your complaint is that an employer or a union is violating a right or duty established under Chapter 89, your complaint is for a prohibited practice.

Union contracts typically establish the terms and conditions of employment for a particular bargaining unit, such as their wages, benefits, and hours of work.

Chapter 89 establishes and protects the rights of employees related to union representation and their right to engage in union-related activities. Chapter 89 also establishes the process and fair rules for collective bargaining, which both employers and unions must follow.

Most grievances must be started by a certain deadline that is specified in the union contract, and that deadline can be very short. Additionally, under Chapter 89, a prohibited practice complaint must be filed within 90 days of the date of the alleged violation or the date that the complainant knew or should have known of the violation.

The Board is required to commence the hearing on the merits within forty (40) days from the date of the filing of the complaint.

Whether you believe you have a grievance or prohibited practice charge, you should file as soon as you become aware that a violation has occurred. Once the deadlines for filing have passed, you may lose your opportunity to pursue your case.

C. Prohibited Practice Remedies and Penalties

1. What kinds of remedies or penalties can HLRB order if it finds that a party has committed a prohibited practice?

HLRB has broad authority to grant appropriate remedies when it finds that a party has committed a prohibited practice.

At a minimum, HLRB will order the party to stop its unlawful action, which is known as a "cease and desist order." Depending on the circumstances, HLRB may order other remedies. For example, HLRB may order the party to post a notice explaining HLRB's order to affected employees or reinstate an employee who was unlawfully discharged. In a case where the prohibited practice caused financial damage, HLRB may order compensation for the damage, such as back pay. If an employer unlawfully changed employees' work terms or conditions, HLRB may order the employer to rescind the change and make the employees whole.

Under certain circumstances and upon proper request, HLRB can also order the reimbursement of attorney's fees.

When filing a complaint, the complainant should identify all of the remedies that it would like HLRB to consider ordering, including any special remedies.

2. What are "attorney's fees," and how does HLRB award attorney's fees?

Where the HLRB finds that the respondent committed a prohibited practice, the HLRB may award attorney's fees to a prevailing employee. These fees must be paid to a licensed attorney.

D. How to File a Prohibited Practice Complaint

1. How do you initiate a prohibited practice complaint?

A prohibited practice complaint is the document that alleges a violation under Chapter 89. To initiate a prohibited practice case, you must file a complaint. The requirements for filing a complaint are described in more detail throughout this section.

2. What do the terms "complainant" and "respondent" mean?

The complainant is the party that files the complaint. The respondent is the party that the complaint has been filed against. In a prohibited practice complaint, the complainant alleges that the respondent has engaged in conduct that is prohibited by Chapter 89.

3. What is the difference between a prohibited practice complaint and a petition for declaratory ruling?

There is a significant difference between a prohibited practice complaint and a petition for a declaratory ruling.

In a prohibited practice complaint, the complainant claims that an employer or union engaged in conduct that is a prohibited practice, *i.e.,* violated the complainant's rights. By filing the complaint, the complainant is asking HLRB to determine whether a prohibited practice occurred, and if so, to order a remedy.

In a petition for declaratory ruling, the petitioner (an employer, union, or employee) asks HLRB to answer a particular, hypothetical question of law. Two or more parties (such as a union and employer) can jointly petition HLRB for a declaratory ruling. Unlike a prohibited practice case, HLRB does not determine whether someone violated the law. Instead, HLRB provides guidance to the parties that may help them understand their legal duties and avoid engaging in prohibited practice conduct. For example, a party may file a petition seeking a ruling on whether a particular proposal is a mandatory subject of bargaining.

Filing a petition for a declaratory ruling can be an efficient way for parties to obtain a ruling on a subject of disagreement and avoid a greater dispute. However, a declaratory ruling is only an opinion and will not lead to any remedy. It does not apply to specific allegations of prohibited conduct in a particular case.

No fees are required for any of HLRB's filings.

4. Do you have to be an attorney to file a prohibited practice complaint?

No. A party does not have to be represented by an attorney to file a prohibited practice complaint. You can represent yourself in a prohibited practice case. An individual who represents himself/herself (without an attorney) is called a "self-represented litigant" (SRL). Similarly, a union can be represented by an officer or staff member, and a public employer can be represented by a human resources manager or other management representative, even if the individual is not an attorney.

Most, but not all, complainants and respondents are represented by attorneys. An attorney may be helpful in explaining your rights and the procedures. **HLRB can provide basic information about the process, but HLRB must remain neutral in every case and cannot provide legal advice or assistance to any party. HLRB does not refer SRLs to particular attorneys.**

5. Do I need to use a form to file a prohibited practice complaint?

Yes, you must fill out the appropriate complaint form when filing a prohibited practice complaint.

The prohibited practice complaint form, Form HLRB-4, and instructions are available on the HLRB website.

On the complaint form, you must provide your contact information, and information about the respondent. You also must identify all of the sections and subsections of Chapter 89 that you believe the respondent has violated. You also must sign and date the form.

In addition to filling out the complaint form, you must write a statement of allegations (see this Section D, Question 7).

6. What are the requirements for a prohibited practice complaint?

As explained in more detail below, each prohibited practice complaint must include the following:

- A complete PPC form, identifying the complainant, the respondent, and the specific sections and subsections of Chapter 89 that the respondent allegedly violated; and
- A statement of allegations (see this Section D, Question 7).

The prohibited practice complaint form is to be completed for the following types of cases:

1) complaints against public employers;

2) complaints against unions or public employees; and

3) public employees' complaints against unions for alleged duty of fair representation violations (which may also include related claims against the employers).

7. How do I write the statement of allegations referred to in the prohibited practice complaint form?

Each prohibited practice complaint must include a statement of allegations. Typically, complainants fill out the prohibited practice complaint form and then attach a typed statement of allegations. In the statement of allegations, you should provide basic background information about who is involved (such as the employer, the union, and the affected employees), and describe the events that led to the complaint. Most importantly, you must describe the conduct or actions that you believe violated Chapter 89. You should include specific dates, names, and places.

The statement of allegations should also include a specific reference to each section and subsection of the relevant statutes that you allege the respondent has violated. Typically, each statement or paragraph in the complaint is numbered (For lists of the relevant Chapter 89 sections and subsections, see Section B, Questions 2 & 3.) If you believe that a certain action violated more than one section and subsection of Chapter 89, you should list all of them and explain that in the statement of allegations.

You should also explain which remedies or penalties you would like HLRB to order if you win. For more information about remedies and penalties, see Section C.

If you refer to documents in your statement of claims, or if there are documents you consider central to your claims, it is helpful to HLRB if you attach copies to the statement of claims (but you do not have to).

Do *not* include anyone's Social Security Number or similarly private or confidential information in the prohibited practice complaint or the statement of allegations. If such information appears on any documents you feel are necessary for your case, please redact that information before submitting the documents to HLRB. You can redact information by blacking it out or otherwise making it unreadable.

To the extent any personal information is relevant to the Board's consideration of the case, the submitting party must submit the confidential information on Form 2 of the Hawai'i Court Records Rules, as amended.

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.

8. Is there a time deadline for filing a prohibited practice complaint?

Yes. Chapter 89 imposes a complaint filing deadline. Under Chapter 89, a prohibited practice complaint must be filed within 90 days of the date of the alleged violation or the date that the complainant knew or should have known of the violation.

HLRB must receive the complaint before the filing deadline, or your complaint may be dismissed as untimely.

9. How can I submit my prohibited practice complaint to HLRB?

You can submit a prohibited practice complaint to HLRB through the Board's *File&ServeXpress* (FSX) system or by mail (U.S. mail or other delivery service). You can also hand deliver a copy to the HLRB office, located at 830 Punchbowl Street, Room 434, Honolulu, HI 96813. The office address is listed on the prohibited practice complaint form. Instructions for online filing through the FSX system are provided on the HLRB Forms Page. In order to file any documents online, you must first create an FSX account by completing form HLRB-25, provided on the HLRB website. Each case is separate and access to the case documents are available only to the parties. There is no service fee to parties filing or accessing their case file. The Board strongly recommends that all new complaints and other documents for cases before the Board be filed electronically through the FSX system.

10. Do I need to send multiple copies of the complaint to HLRB?

No. If mailing or hand-delivering, please send only the original or one copy of the prohibited practice complaint to HLRB.

11. Do I need to serve the complaint on the respondent?

No. The Board will serve a copy of the complaint upon the respondent(s).

12. Is a prohibited practice complaint a public record or otherwise available to the public?

Yes, generally speaking, prohibited practice complaints are public records and hearings are public proceedings. In some cases, there may be special circumstances that cause part of a complaint or case file to be confidential and not subject to public disclosure. For more information about how to handle confidential information in your complaint, see this Section D, Question 7.

13. Can I change or amend the complaint after I file it?

Yes. You can file a motion to amend your complaint showing good cause at any time before the Board has issued a final order. If the request is granted, the amended complaint replaces the original complaint. However, for purposes of timeliness, the amended complaint relates back to the date of the filing of the original complaint.

Generally, showing "good cause" means that you have to explain the reasons for the proposed amendments, and explain why the changes were not made earlier and should be permitted. If the Board decides to permit the amendment, the Board must give the respondent a reasonable amount of time to amend its formal answer.

14. Can I withdraw my complaint?

You can request to withdraw your complaint, either orally or in writing, or by stipulation with the opposing party at any time before the Board has issued a final order. If the Board approves the withdrawal of the complaint, your case will be closed.

E. How to File an Answer to a Prohibited Practice Complaint

1. After the complaint is filed, what steps will take place?

Once the complaint is filed, the Board will issue a Pretrial order to all parties which governs the course of the proceedings and procedural requirements and sets the schedule of deadlines and hearing dates. This Pretrial order contains the Notice to Respondent of Prohibited Practice Complaint which directs the respondent to file a written answer to the complaint.

2. What is the respondent's deadline for filing the answer?

A respondent is required to file a written answer to the complaint, amended complaint or a motion to dismiss in lieu of answer within ten (10) days after service of the complaint.

3. Does the respondent need to serve the answer on the complainant when filing it?

Yes. By using the Board's electronic filing system, the respondent's answer will be automatically served upon the complainant.

The procedure for online electronic filing through the Board's *File&ServeXpress* (FSX) system can be found on the HLRB website. Self-represented litigants (SRLs) who are exempted from using the Board's electronic filing system are required to file all documents by first class mail or hand-delivery at the Board's office and serve all documents to the other parties in the case by first class mail or hand-delivery at the party's last known address.

4. What is an answer? What information should be in the answer?

The answer is the document in which the respondent responds to all of the allegations in the complaint. For each allegation in the complaint, the respondent must admit or deny that the allegation is true.

The respondent may also attach any documentary evidence that may be relevant to the issues raised by the complaint or answer. (If you attach documents to your answer, you should redact private or confidential information, such as social security numbers.)

The respondent must also identify affirmative defenses, if any, in the answer, and state the facts that support those defenses. For more information about affirmative defenses, see this Section E, Question 6.

Typically, each statement or paragraph in the answer is numbered. If the factual allegations in the complaint are numbered, the respondent usually follows that numbering in the answer (but it is not required to do so). For example, the respondent typically addresses the complaint's "paragraph number 2" in the answer's "paragraph number 2."

5. How should the respondent respond to the allegations in the complaint?

In the answer, the respondent must respond to each allegation in the complaint.

The respondent must admit any allegations that are true. For example, if paragraph number 2 of the complaint states, "The Respondent is a public employer," and the respondent has no basis for disputing that allegation, the respondent must admit that allegation in the answer. The respondent could state, "Respondent admits paragraph 2," or "In response to paragraph 2, Respondent admits that it is a public employer." If the respondent admits that an allegation is true in the answer, the parties do not have to prove that allegation by submitting evidence at the hearing.

If the respondent disputes any of the allegations in the complaint, the respondent must say so in the answer. The respondent can deny an individual allegation or a group of allegations. For example, the respondent can state, "Respondent denies the allegations in paragraph 2."

If the respondent cannot admit or deny an allegation due to lack of knowledge about that allegation, the respondent must explain that in the answer. For example, the respondent can state, "Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 2."

6. What is an affirmative defense?

An affirmative defense is a special type of defense that a respondent can raise by listing the defense in the answer. If the respondent raises and ultimately proves an affirmative defense, then the respondent will prevail in the case, even assuming that everything the complainant alleges is true. For example, if the complainant alleges that the respondent unlawfully refused to bargain, but the respondent can prove that the complainant waived its right to bargain, then the respondent has an affirmative defense. The respondent has the burden of proving any affirmative defenses it raises.

Neither Chapter 89 nor the Board's rules identify all of the possible affirmative defenses. Affirmative defenses commonly raised in prohibited practice cases include timeliness (the complaint was filed after the filing deadline), untimely demand to bargain, waiver of the right to bargain, failure to exhaust a contractual grievance process, privilege, business necessity, and emergency.

7. What happens if the respondent fails to respond to an allegation or fails to identify an affirmative defense in the answer?

If the respondent fails to respond to an allegation made in the complaint, the Board will deem that allegation to be true, unless the respondent shows good cause. "Good cause" means providing a compelling, well-supported reason for the omission.

8. What happens if the respondent does not file an answer or files late?

If a respondent fails to submit an answer or misses the filing deadline, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

In circumstances involving excusable neglect, the Board may extend the time within which the answer shall be filed.

9. Can the respondent amend or change its answer after it is filed?

Yes. The Board may permit the respondent to amend its answer for good cause shown at any time before or during the hearing.

F. Preparing for the Hearing and Prehearing Procedures

1. Generally, what happens before the evidentiary hearing in a prohibited practice case?

After the respondent has filed its answer, the parties then proceed according to the requirements and schedule set forth in the Pretrial order. Specifically, the Pretrial order will set dates for the Prehearing Conference, Dispositive Motions deadline, Response to the Dispositive Motions deadline, Pretrial Statement, Pretrial Conference, Hearing on Dispositive Motions, and Hearing on the Merits.

The Hearing on the Merits shall be held not less than ten (10) nor more than forty (40) days after the filing of the complaint or amendment thereof.

To comply with the Pretrial order, the parties must immediately proceed to: 1) meet and confer among themselves regarding possible settlement and/or discovery needs, and 2) commence the discovery process without any further notice. The methods, scope, limits, and timing of discovery and answers to discovery requests are provided in the applicable rules of the Hawai‘i Rules of Civil Procedure.

The parties also should confer about various hearing-related matters, well in advance of the hearing. The parties may also participate in mediation and try to negotiate a settlement.

2. How do I ask to postpone a hearing?

To request a postponement of a hearing, you may first confer with the other party's representative and find out if they will agree to a postponement. The other party can agree to the postponement, not object to your request, or object. After you find out the other party's position, you must submit a written motion to the Board requesting the postponement. In the motion, you must state your reasons for requesting the postponement, confirm that you conferred with the other party, and state their position. The Board has the discretion to grant or deny the request. For more information about how to file a motion, see Section G, Questions 2-3.

3. Can I obtain documents from the other side before the hearing?

In prohibited practice cases, there are several potential methods for obtaining documents from the other side:

- Demand for information under Chapter 89: employers and unions have a duty to provide information to each other under Chapter 89.
- Subpoena: for more information about subpoenas, see this Section F, Question 5.
- Public records law: you may request to review and pay for copies of documents which the Board determines are public records and are in the Board's possession.

  See HAR 12-43-4—Government records and HRS Section 92F-3 (definition of "government record")

4. Can I compel a witness to testify at the prohibited practice hearing?

Yes, a witness who has knowledge that is relevant to the prohibited practice case may be compelled to testify by subpoena.

Note that in some cases, subpoenas may not be necessary if a witness is employed by a party who may offer to produce a witness or documents. So, *before* you request a subpoena for this type of witness, it is usually helpful to contact the other party to see if the other party will voluntarily make the witness available or provide the documents.

5. What is a subpoena, and how are subpoenas issued?

A subpoena is a document that compels the recipient to appear and testify or produce particular documents on the day and at the time stated in the subpoena. There are required forms on the HLRB website for an Application for Issuance of Subpoenas (Form HLRB-14), Subpoena (Form HLRB-15) and Subpoena Duces Tecum (Form HLRB-16).

Any party may file a written application for subpoenas with the Board before the hearing. If you subpoena a witness, you must pay the witness fees and mileage as required by statute. See HRS Section 607-12 (Witness' fees, mileage; taxation)

If you submit a subpoena request to the Board you must identify your prohibited practice case by title and case number, and identify the specific witnesses and/or documents you are seeking. If the Board issues the subpoena, the Board will give the subpoena document to you. Then, *you* must serve the subpoena on the person who is supposed to testify or produce documents. (The Board will not serve the subpoena for you.)

The subpoena must be served by a non-party to the case on the witness at least seven business days before the hearing or attendance or production date, so that the recipient has enough time to respond. As a practical matter, you should have someone who is not a party to the case serve the subpoena as soon as possible.

6. Can the party who receives a subpoena contest it?

Yes. A subpoenaed witness or the non-issuing party in the case may contest the subpoena. To contest a subpoena, a party must file a motion to quash or revoke the subpoena with the Board within three days from the date of service of the subpoena. The Board will give notice of the filing of the motion to the applicant for the subpoena.

If a motion to quash is filed, the Board will decide the motion. The Board may revoke a subpoena on the grounds that the subpoena does not reasonably relate to any matter under investigation, inquiry, or hearing; that the subpoena does not describe with sufficient particularity the evidence sought or that the evidence sought from the witness is privileged under the law; that the subpoena is harassing; or for other good cause shown.

7. Can a party take a deposition in a prohibited practice case?

A deposition is a formal procedure during which a party questions a witness under oath. A deposition must take place before an officer authorized to administer oaths under state law,

typically a court reporter. The court reporter will also prepare a transcript of the deposition, and then the transcript may be admitted as evidence at the hearing.

It is uncommon for parties in prohibited practice cases to take depositions. Additionally, you cannot take a deposition in a prohibited practice case unless the Board permits it.

To take a deposition, you must file a written application and for good cause shown, the Board may permit the parties to take depositions upon oral examination or written interrogatories as set forth in the Hawai'i Rules of Civil Procedure. In the deposition request, you must identify the name and address of the witness, explain why their testimony is material to the case and specify the date and time that the deposition will be completed. The Board will decide whether to allow you to take the deposition.

The request must be filed far enough in advance to allow time for the deposition to take place and a written transcript to be prepared before the hearing date (unless everyone agrees to postpone the hearing). As a practical matter, you should submit a deposition request as soon as possible.

The Board will not issue subpoenas requiring parties to appear for depositions. Depositions may be taken on a strictly voluntary basis, and no party is required to submit to a deposition.

8. I want to offer evidence or call a witness to testify at the hearing by electronic device (such as telephone or video). What do I need to do?

You should always check the Board's Pretrial order, as it includes more specific instructions that you must follow. Typically, the Pretrial order requires the requesting party to do the following:

In the Pretrial Statement, each party must provide a Witness List. This list shall include a brief summary of the nature of the testimony expected, and the order in which the witnesses are expected to be called. Failure to include individualized summaries for any witness may be grounds for the Board to strike that witness and not allow them to testify at the *de novo* hearing.

The witness list must also include information regarding the location where the party expects the witness to testify from. This location may include the witness' home, a party's office, or any other location from which the witness can testify remotely, without assistance or interference, and can access the relevant exhibits.

The hearing may be held by interactive conference technology that allows interaction by the agency, any party, and counsel if retained by the party, and the notice identifies electronic contact information for each agency, party, and counsel if retained by the party. "Interactive conference technology" means any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the agency, any party, and counsel if retained by the party.

9. There are confidential documents involved in my case. How do I handle that?

Before a party files or submits any pleading, correspondence, or other document 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. (You can redact information by blacking it out or otherwise making it unreadable.)

If you believe that you must include confidential documents or information as evidence in your case, it is best to confer with the other party and the Board about how to address confidentiality issues well in advance of the hearing. If there is confidential information in an evidentiary exhibit or other case documents, the parties may use motions for protective orders, confidentiality agreements, or other approaches to protect the confidentiality of the documents. The parties may also present documents to the Board to address the confidentiality of certain information. To the extent any personal information is relevant to the Board's consideration of the case, the submitting party must submit the confidential information on Form 2 of the Hawai'i Court Records Rules, as amended.

10. What are stipulated facts? Should I agree to submit stipulated facts?

The parties may stipulate to facts to make the hearing more efficient. Stipulated facts are facts that the parties agree are true, and thus do not need to be proved by submission of evidence at hearing. If parties agree about any stipulated facts, they list all of the stipulated facts in a written document that is signed by both parties and submitted to the Board, typically before the hearing begins. The stipulated facts are binding on both parties, and they can be cited as evidence in the prohibited practice case.

Typically, the parties can stipulate to at least some facts. For example, they can usually agree that the employer is a public employer covered under Chapter 89, the union is a labor organization as defined by Chapter 89, there is a collective bargaining agreement, and certain events occurred on certain dates.

Whether to agree to submit stipulated facts is a decision for each party in each case. Parties typically consider whether the presentation of facts through a written stipulation will be more efficient and cost-effective. Often, stipulating to the undisputed facts can reduce the amount of hearing time needed in a case, and allow the parties and the Board to focus on the facts that are genuinely in dispute.

11. How should I organize and label my exhibits?

The Board's pretrial order will include instructions that explain how to organize and label exhibits. (This guide provides some general information, but if you receive instructions from the Board that are different from this guide, you should follow the Board's instructions.)

You must prepare a document called an "exhibit list" that identifies each of your exhibits, listed in the order you have organized and numbered them.

If a party intends to file a request for a subpoena duces tecum for any of its exhibits, that request must be concurrently filed with the Pretrial Statement, and a notation that a request is being made must be listed in the exhibit list.

Generally, each document you would like to offer as evidence should be treated as a separate exhibit. To assist the Board and the witnesses, the exhibits should be organized in a logical manner, such as chronological order or grouped by topic.

Each exhibit must be marked for identification. The Board's pretrial order contains instructions for marking exhibits. Each exhibit must be marked with the appropriate letter and number, and each page number of every exhibit must be marked. (The Board typically will provide more specific instructions about how to mark exhibits.) Numbering each page of the exhibit allows the parties, the witnesses, and the Board to find the specific portion of an exhibit quickly.

The complainant must identify their exhibits using alphabetical letters (A, B, C, etc.). Union respondent(s) must identify its exhibits using numerical designations preceded by U (e.g., U-1, U-2, U-3, etc.).

If there are any duplicative exhibits, the parties may designate them as Joint Exhibits. If filing Joint Exhibits, the parties shall decide which party will file these exhibits, and the exhibits must be marked with numerical designations preceded by J (e.g., J-1, J-2, J-3, etc.).

All exhibits are to be Bates-stamped in the upper right-hand corner.

For more information about how exhibits are offered and received at the hearing, see Section H Question 9.

12. Am I required to exchange exhibit lists and exhibits with the other side *before* the hearing? If so, when?

The pretrial order will include the deadlines for documents a party is required to file before the hearing on the merits. For example, the Pretrial Statement is due on the date set forth in the pretrial order. It must include the Statement of Issues, Witness List and Exhibit List. The Exhibit List for each party must include copies of the proposed exhibits.

The parties are required to use the *FileandServeXpress* (FSX) e-filing system to file the exhibits before or by 4:30 pm. (HST) on the deadline day, as set forth in the Pretrial order. The exhibits must be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes, with each exhibit bookmarked.

All documents must be filed through the FSX e-filing system with a Certificate of Service listing all parties. The system will post the documents which have been filed and the parties will be thus notified and served with the filing.

13. Can I communicate privately with a Board member and *not* include the other party?

No. The Board's rules require disclosure to the other party of private communications (also known as "ex parte communications"). Such communications are prohibited except in limited circumstances.

G. Filing Motions and Submitting Documents to HLRB

1. What is a motion?

Motions are requests to the Board. A motion can request a ruling, order, or other relief in a case. Examples of motions include a motion to extend the deadline for filing a brief, postpone a hearing, exclude evidence, dismiss a case, or quash a subpoena.

The party that is filing the motion is called the "moving party." The other party is called the "non-moving party."

2. What are the requirements for a motion?

Generally, you must put a motion in writing and submit it directly to the Board. In the motion, the moving party must state their name, explain their request by specifically identifying what they would like the Board to do, and explain why they believe the request should be granted.

All motions must be filed with a certificate of service on all other parties.

Under certain circumstances, a party can make an oral motion on the record at a hearing. The Board may rule upon the motion at that time or request the moving party to submit a written motion which the Board would decide at a later date.

Generally, if there is no objection to a motion from the opposing party, the Board will grant the motion.

3. Do I have to confer with the other party before I file a motion?

No. The moving party may make a good-faith effort to confer with the non-moving party and try to resolve the issue *before* filing the motion. Then, in the motion, the moving party can describe their efforts to confer and the result of those efforts.

4. What does "filing" a document mean?

Filing a document means submitting it to the Board for filing under the Board's electronic filing *FileandServeXpress* (FSX) system or through first class mail or hand delivery.

In PPC cases, a document is not officially filed until it is *received* by the Board and file-stamped for entry into the FSX system. The official filing date is not the date the document was sent or postmarked. If mailing, the use of a Certificate of Mailing or Proof of Mailing is recommended.

An electronically filed document is deemed to be filed as of the date and time affixed on the document by the board's electronic filing system; provided that for purposes of computing time for any other party to respond or for meeting a filing deadline, any document electronically filed on a day or at a time when the board is not open for business is filed on the next date or time the board is open for business. Thus, if HLRB receives a document after 4:30 p.m., it will not be considered filed until the following business day. This means that if there is a filing deadline, you should make sure that HLRB *receives* the document before 4:30 p.m. on the date of the deadline.

5. How do I "file" or "submit" documents to HLRB?

Documents may be filed through the Board's filing service, *FileandServeXpress* (FSX), or submitted to the Board by first class mail or hand-delivery.

There is no charge to the parties for use of this electronic filing system. Basic usage includes electronically filing and electronically serving case documents, viewing your or your firms' case docket and the documents filed in those cases.

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.Hawai'i .gov/hlrb/forms/.

Board staff shall electronically file any paper document submitted to the Board by mail or hand-delivered and upload the document to the FSX system. The receipt date and time stamp reflected on the conventionally filed document shall be deemed the filing date. Once electronically filed, the staff shall not retain the paper document. However, original exhibits can be returned by the Board at the party's request.

Documents received after 4:30 p.m. are deemed filed the next business day.

Filing and Electronic Service. All registered parties or their representatives shall file all documents through FSX, which shall have the same legal effect as the filing of an original paper document. Parties who register with FSX consent to receive electronic service of documents via FSX's system from the Board and any other registered party. All registered parties may use e-service for electronic service on other registered parties electronically through FSX. If a party or party's designee has not registered with FSX, then a registered party shall make service to a non-registered party personally or via United States Postal Service (USPS) mail at the registered party's expense.

The certificate of service shall state whether the document was served electronically or by mail or hand-delivered.

If you are not registered with FSX, then when you file or submit a document to HLRB, you must also serve a copy on all other parties and include proof of service with your filing.

Mail or deliver documents to:

Hawai'i Labor Relations Board
830 Punchbowl St., Room 434
Honolulu, HI 96813
Telephone: (808) 586-8610
Fax: (808) 586-8613

6. How do I "serve" a document on another party?

To serve a document, deliver a copy to the other party's representative. If you are required to serve the other party when filing a document with the Board, that simply means you must give a copy of the document to the other party at the same time that you file it with the Board. If there are multiple parties in your case, you must serve all of the other parties.

The electronic service of a pleading or other document on a party registered with FSX shall be considered valid and effective service and shall have the same legal effect as the service of a paper document. E-service shall be deemed complete at the time the FSX's system receives

the document as reflected by the authorized date and time appearing on the confirmation provided.

If the other party is self-represented and not registered with FSX to receive service, you must send a copy directly to the self-represented party. Documents may be served by first class mail or in person.

7. What is "proof of service"?

Your filing must also include a Certificate of Service, a document that identifies when the filing party served the other party and by what method (electronically through the FSX system, by first class mail, or hand-delivery). HLRB has no special formatting requirements for the proof of service. The Certificate of Service is a separate document or written statement that is attached to the last page of the document that is being filed. A Certificate of Service typically states, "I certify that on (date) I served the (name of document) in (name of case) on the following persons (electronically, by first class mail or hand-delivery): (name and address/fax number/email of each opposing party or attorney)." The filing party e-signs or physically signs the Certificate of Service to certify that they served the opposing party as indicated in the proof of service.

Filing by email is not an acceptable method.

8. How do I respond to a motion filed by the other party?

You do not have to respond to a motion unless you oppose it and want to explain your reasons for opposing the motion to the Board. If you wish to oppose the motion, then you must file a written response by the response deadline. The response deadline for dispositive motions is set forth in the Board's pretrial notice and order. Other written responses in opposition shall be filed with the board within five business days after service of the motion papers, unless otherwise directed by the board.

9. I filed a motion, and the other side filed a response. Can I file a reply to the response?

Generally, no. The moving party cannot file a reply, unless they request and obtain permission from the Board, or if the Board invites the moving party to submit a reply.

Reply memoranda, if permitted by the board, shall be filed within three days after service of answering memoranda, unless otherwise directed by the board.

10. Can I get an extension of time to file a brief or other document?

Generally, you may *ask* for an extension of time to file a document by filing a motion, but the Board has the discretion to grant or deny the request. (You cannot get an extension of the 90-day deadline to file a complaint.)

As a practical matter, it is best to request an extension of time as soon as you can, and to explain why you need the extension.

H. Hearing Procedures

1. What is the purpose of a PPC hearing?

The purpose of the hearing in a prohibited practice case is to give the parties an opportunity to submit evidence on the issues raised by the complaint and answer.

2. Are PPC hearings open to the public?

Prohibited practice complaint hearings are open to the public and any hearing may be conducted by remote access unless otherwise provided by law.

3. Are PPC hearings recorded?

Yes. HLRB will make a recording of the hearing.

The recording is a public record. You can order a copy of the audio recording from HLRB. In most cases, the parties will receive a link to the hearing.

HLRB does not arrange for a court reporter to be present at the hearing. There are several ways to obtain a hearing transcript.

If a party knows in advance of the hearing that they would like a certified transcript, they may arrange for a court reporter to attend the hearing, but that party must make the arrangements, pay the court reporter's fees, and pay to provide a copy of the certified transcript to HLRB (at no charge to HLRB).

A party may also obtain a transcript by ordering a copy of HLRB's audio recording and sending it to a certified transcriptionist. If a party chooses to have a certified transcript of the hearing prepared in this manner, the party must also provide a certified copy of the transcript to HLRB (at no charge to HLRB).

4. How will the PPC hearing be conducted?

It is helpful to an orderly hearing if the parties arrive at the hearing, whether in person or from a remote location, approximately ten to fifteen minutes before the official start time of the hearing. Arriving early gives the parties time to get settled and ensures that the hearing will start on time. Also, before the hearing officially starts, the parties can discuss the admission of exhibits, resolve any logistical questions (for example, how to accommodate a witness who needs to be called out of order), and any other concerns that will aid in an efficient and orderly hearing.

Typically, each party has one attorney or representative and may also have a "client representative" at the hearing. The attorney or representative will present exhibits and question witnesses. The client representative observes the hearing and may provide information or assistance to the attorney or representative. The client representative may serve as a witness and is exempt from being sequestered (excluded from the hearing while other witnesses testify).

The Board members will sit in the hearing room or appear via *Zoom*.

The parties should confer with each other about all prehearing issues well in advance of the hearing whenever possible, as directed by the Pretrial order. Sometimes, however, it may be

useful for the parties to confer before the start of the hearing, for example, to resolve any outstanding issues or confirm the witness schedule. The Board Chair may also ask the parties if they have any matters to discuss off the record before the hearing begins.

Any Board member can preside over the hearing. The presiding member swears in the witnesses, rules on evidentiary objections and any motions, and makes other decisions about the conduct of the hearing, such as when to start and stop the hearing, when to take breaks, and whether to reschedule or continue a hearing to another day. The Board Chair and Board members may also question the witnesses.

The Board applies the witness exclusion rule where all witnesses are excluded from the hearing until it is their turn to testify with the exceptions previously stated. A common exception is when the witness is also the party's representative.

The presiding member will permit the parties to make opening statements. In PPC cases, the complainant almost always presents its case-in-chief first. This means that the complainant's witnesses will testify first. The parties can agree, or the presiding member can grant a request, to permit a party's witness to testify out of order, for example, to accommodate a scheduling conflict. The presiding member may also change the order in which the parties present their evidence if appropriate. After the complainant finishes presenting its case-in-chief, the respondent presents its case. After the respondent finishes, the complainant may call rebuttal witnesses only on the issues that the respondent has raised.

5. Are there rules of conduct that apply during PPC hearings?

Yes. All parties, attorneys, and spectators must conduct themselves in a respectful manner at hearings. Professionalism and civility are expected. Everyone (including the parties, attorneys, witnesses, observers, and members of the press) must follow the Board's directions regarding appropriate conduct. The Board may remove from the hearing any person who does not comply with the Board's effort to retain order.

An SRL is held to the same standards as a party who is represented by an attorney or another authorized person, which includes complying with the Board's Administrative Rules under HAR Chapter 12-43.

Failure to behave with the required courtesy and civility may be grounds for the Board to impose sanctions for contemptuous conduct under HAR Section 12-43-18.

6. What is the burden of proof and who has it?

The burden of proof is the obligation to prove a position or fact related to a contested issue.

In prohibited practice hearings, the complainant has the burden of proving the allegations and claims in the complaint. The respondent has the burden of proving any affirmative defenses raised in the answer. The evidence standard that applies in PPC cases is stated in HAR Section 12-43-34:

12-43-34 Burden of proof. Unless otherwise ordered or provided by law or statute, the party initiating the proceeding shall have the initial burden of proof, including the burden of producing evidence and the burden of persuasion. The degree or quantum of proof shall be a

preponderance of the evidence. If the initiating party meets its initial burden of proof, the burden of proof may shift as provided by law.

7. What is an opening statement? Do I have to present an opening statement?

In an opening statement, a party briefly explains to the Board what the case is about and its position, and summarizes the facts that they intend to prove at the hearing. Opening statements are not required, but they can be helpful because they tell the Board what to expect.

In a PPC case, the complainant gives an opening statement first, before any witnesses testify. The respondent may give its opening statement immediately after the complainant or may choose to wait until the complainant's case-in-chief is done and the respondent is ready to present its own case.

8. What is a rebuttal case? Do I have to present a rebuttal case?

A rebuttal case is evidence presented by the party with the burden of proof *after* the responding party puts on its case. In a PPC case, the complainant typically has the burden of proof. This means that the complainant will present its case and witnesses first. Then, the respondent will present its case and witnesses. After the respondent's witnesses testify, the complainant may call rebuttal witnesses or offer additional exhibits to respond to an issue that the respondent raised. During the rebuttal case, the presiding member may allow a party to recall a witness who has already testified or introduce a new witness or exhibit. On rebuttal, the presiding member may allow a party to present a witness or exhibit that was not included in their original exhibit or witness list, for example, if the party needs to respond to an issue that arose unexpectedly.

A party does not have to present a rebuttal case.

9. What does it mean to "offer" and "receive" exhibits at the hearing? How do I get my exhibits to be part of the official record in my case?

An exhibit is not officially evidence in a case until it is both "offered" *and* "received" by the Board. When an exhibit is received, it becomes part of the official record, and it may be considered by HLRB as evidence in the case.

To offer an exhibit, you must start by including it on your exhibit list and in your exhibit binder. Typically, all exhibits are filed before the pretrial conference and discussed during the pretrial conference where the Board will ask the parties if they intend to object to any of the exhibits offered by the other party. If the opposing party does not object to an exhibit that you have offered, the Board will receive that exhibit. Exhibits are received in evidence at the pretrial conference or the hearing on the merits.

If the opposing party objects to an exhibit that you have offered, the Board will not receive the exhibit or may tentatively receive the evidence and rule on the objection later during the hearing. Instead, you must ask a witness to testify about what the exhibit is, and then ask the

Board to receive the exhibit. If the opposing party still objects to the exhibit, they must say so and state the reason for the objection at that time (before the Board decides whether to receive the exhibit). You should be prepared to explain why the exhibit is relevant to the case, material (important or necessary), and/or not unduly repetitive of other evidence that has already been admitted in the case. The Board will rule on the objection immediately. If the Board decides to overrule the objection, the Board will receive the exhibit. If the Board sustains the objection, the exhibit will not be part of the official record.

10. How do I object to evidence (an exhibit or witness testimony)?

To object to the admission of particular evidence (an exhibit or a witness's answer to a particular question or line of questioning), you must object on the record during the hearing. Generally, you must raise your objection promptly, at the time that the exhibit is offered, or when the question is asked (*before* the witness answers). You simply need to state that you object and then very briefly explain the reason for your objection. For example, if you think that the other side is asking a question that is irrelevant, you could simply say, "objection, irrelevant." If necessary, the Board may give you and the other side the opportunity to briefly explain your positions.

The Board may immediately rule on the objection or may tentatively receive the evidence and rule on the objection later. If the Board tentatively receives evidence and later rules that the evidence should be excluded, the Board will not consider the evidence when deciding the case.

11. How do I prepare and present my witnesses?

The Board Chair will expect both parties to present their cases without breaks between witnesses.

All witnesses must testify in person or by remote access unless ordered otherwise by the Board.

The parties should have testifying witnesses ready and available on the day they are to testify by remote access (located in a separate room) or in person outside of the Board hearing room (if testifying in person) under the witness exclusion rule.

The party calling a witness is responsible for providing the witness with any of the proposed exhibits at the proceeding.

The pretrial order requires that the parties inform their witnesses of the specific conditions to be followed before and during their testimony. These are listed in the pretrial order. For example, the witness may not look at any notes or other documents other than the case exhibits and may not have any communication with third parties while testifying. The parties are responsible for providing their witnesses with the exhibits in the case prior to their testimony.

If a witness needs to be called out of order or at a specific time, the parties are encouraged to work cooperatively to accommodate the witness' needs.

It can be difficult to predict how much time each witness' testimony will take. It may be helpful to explain to your witnesses that they might have to wait for some period of time before they testify.

12. How are witnesses questioned at the hearing?

The party that calls a witness to testify questions the witness first; this questioning is referred to as the "direct examination." When the direct examination is over, the other party may question the witness; this questioning is referred to as the "cross examination' on the same issues raised in the direct examination." After the cross examination, the party that called the witness may ask more questions to address issues that arose during the cross; this is called "redirect." The presiding member may stop the questioning if it becomes repetitive, harassing, or irrelevant. The Board members may also question the witness.

13. What is a closing argument or brief?

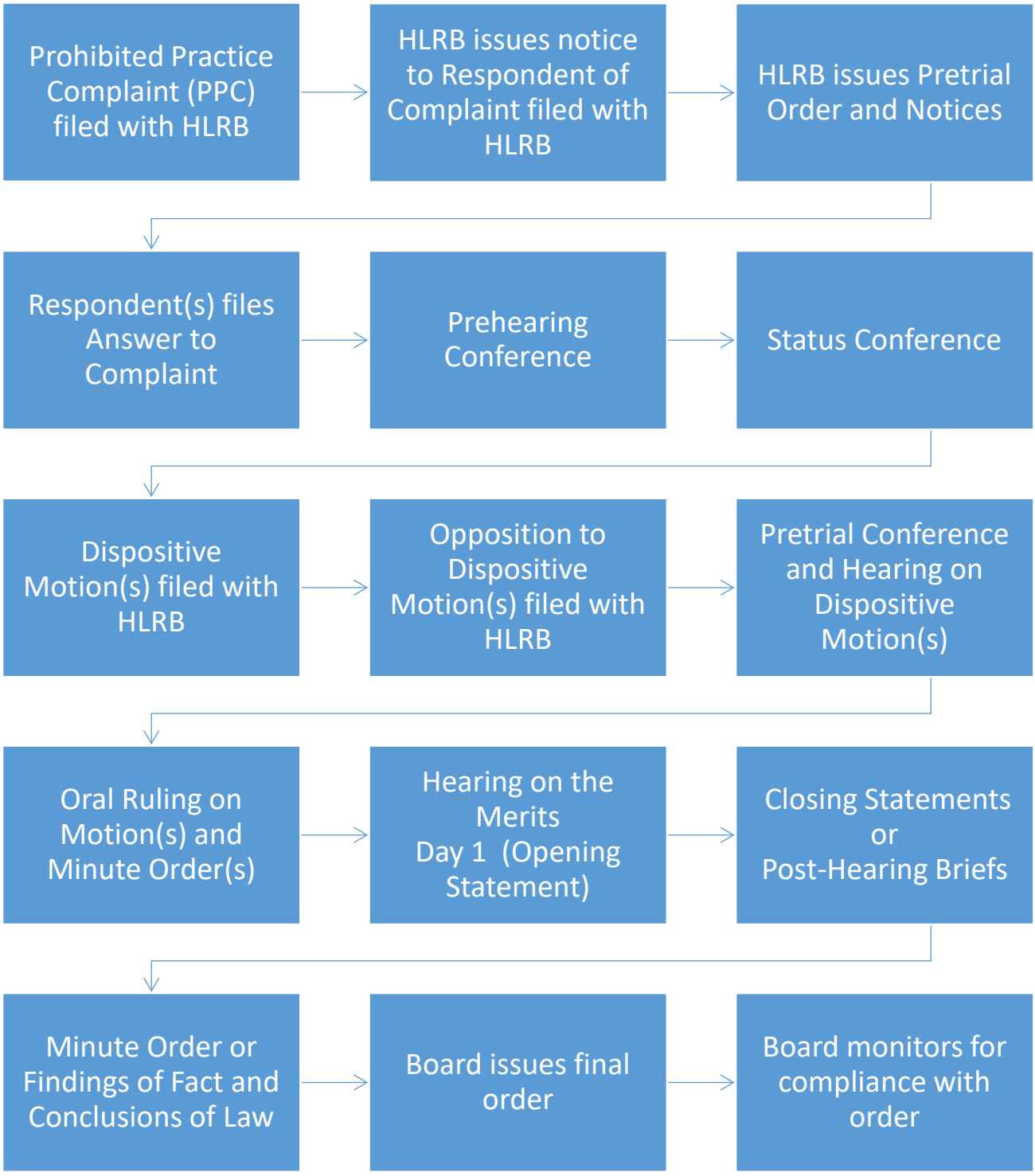
In a closing argument, a party describes the facts that they believe have been proven by the evidence in the case, and makes legal arguments based on the proven facts. For each fact, the party should identify the specific evidence (testimony and/or exhibits) that supports that fact. Then, the party should explain how those facts establish its legal claims or defenses and cite the legal authority that supports its position.

In the closing arguments, each party should address all of their claims or defenses, any evidentiary objections that they wish to pursue, and their requests for remedies.

After all parties have rested their cases at the hearing, a party may file a post-hearing brief in lieu of final oral argument made before the close of hearing, either upon request by the parties or by order of the Board.

Generally, the closing brief should include the following sections: 1) a brief statement of the pertinent facts, 2) a statement and discussion of the issues, supported by citations to precedential HLRB orders or court cases, and 3) a concise summary of the reasons you believe HLRB should grant the requested relief.

I. The Typical Prohibited Practice Case



This chart reflects the order of events and processes in a typical Prohibited Practice case. Each case is unique, however, and some cases are resolved differently. The Complainant(s) and Respondent(s) also affect how a case may proceed and the length of proceedings.

J. Forms

HLRB posts forms and instructions on the HLRB's website as listed below. You may check the HLRB's website to access these forms and the most up-to-date resources.

FORMS

- HLRB-1
  Petition for Certification
- HLRB-2
  Petition for Clarification or Amendment of Appropriate Bargaining Unit
- HLRB-3
  Petition for Decertification
- HLRB-4
  Prohibited Practice Complaint
- HLRB-5
  Petition for Review of Refunds
- HLRB-6
  Statement of Objections to Conduct of Election
- HLRB-7
  Petition Relating to Financial Report of Employee Organization
- HLRB-8
  Petition for Determination of Collective Bargaining Unit and Election
- HLRB-9
  Petition for Referendum
- HLRB-10
  Petition for Decertification
- HLRB-11
  Unfair Labor Practice Complaint
- HLRB-12
  Petition for Declaratory Ruling
- HLRB-13
  Petition for Intervention
- HLRB-14
  Application for Issuance of Subpoenas
- HLRB-15
  Subpoena
- HLRB-16
  Subpoena Duces Tecum

- HLRB-17
  Sample Format for HIOSH Initial Conference Statement
- HLRB-18
  Sample Format for Prehearing Conference Statement
- HLRB-25
  HLRB E-Filing Consent Form and Protocols for E-Filing