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Case No. 21-CE-02-962a-h

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Complainant,

and

JOSH GREEN, Governor, State of Hawai'i;
RICK BLANGIARDI, Mayor, City and
County of Honolulu; BOARD OF
EDUCATION, State of Hawai'i; KEITH T.
HAYASHI, Superintendent, Department of
Education, State of Hawai'i;

Respondents.

CASE NOS. 21-CE-02-962a
21-CE-03-962b
21-CE-04-962c
21-CE-06-962d
21-CE-09-962e
21-CE-13-962f
21-CE-14-962g
21-CE-15-962h

DECISION NO. 523

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

This case arises from a prohibited practice complaint filed by Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant or HGEA). HGEA argues, among other things, that Respondents JOSH GREEN, Governor, State of Hawai'i; BOARD OF EDUCATION, State of Hawai'i; KEITH T. HAYASHI, Superintendent, Department of Education, State of Hawai'i (collectively, State Respondents) and Respondent RICK BLANGIARDI, Mayor, City and County of Honolulu (Blangiardi, and collectively with State Respondents, Respondents), committed prohibited practices under Hawai'i Revised Statutes (HRS) §§ 89-13(a)(7) and (8).

Specifically, HGEA alleges that Respondents refused to participate in grievance procedures under applicable collective bargaining agreements and violated HRS §§ 89-10.8 and 89-19.

The Hawai'i Labor Relations Board (Board) commenced a hearing on the merits on November 24, 2021, at which time the Board heard oral arguments on Respondents' motions to

dismiss. The Board held the case in abeyance pending arbitration proceedings, *see* Board Order No. 3827, and issued a notice of intent to dismiss the case one year later to which HGEA objected.

At a pretrial conference on August 1, 2023, the Board, among other things, reheard oral arguments on Respondents' motions to dismiss and orally denied the motions. The Board also limited the issue in the case to whether Respondents violated HRS Chapter 89 when they refused to process HGEA's grievances. *See* Order No. 3980.

The Board held further hearing on the merits from August 8-10, 2023. HGEA called six witnesses and rested its case. State Respondents called no witnesses and rested their case. Blangiardi called one witness and rested his case.

Board Exhibits 1 through 7, HGEA Exhibits U-1 through U-10, and Blangiardi Exhibits CCH-1 through CCH-7 were entered into the record.

Blangiardi made a motion for directed verdict, which the Board orally denied as moot because any analysis of a motion for directed verdict made after the close of the hearing on the merits would follow the same analysis as the entire merits of the case. *See* Order No. 3982.

2. Relevant Background and Findings of Fact

2.1 Parties and Collective Bargaining Relationship

HGEA is the exclusive representative¹ for bargaining units 2, 3, 4, 6, 9, 13, 14, and 15 (BU 02, BU 03, BU 04, BU 06, BU 09, BU 13, BU 14, and BU 15, respectively).²

At all relevant times, HGEA was a party to collective bargaining agreements (CBAs) for BU 02, BU 03, BU 04, BU 06, BU 09, BU 13, BU 14, and BU 15 with the relevant employer groups.³

Respondents are public employers⁴ and the relevant employer groups for BU 02, BU 03, BU 04, BU 06, BU 09, BU 13, BU 14, and BU 15 (collectively, bargaining unit employees).

At all relevant times:

Scott Collins was a Field Services Officer with the HGEA.

Ryker Wada (Wada) was the Director for the State of Hawai'i Department of Human Resources Development (DHRD).

Noel T. Ono (Ono) was the Director for the City and County of Honolulu Department of Human Resources (City DHR).

Sanford Chun was an Executive Assistant for Field Services with the HGEA.

Brandon Lee (Lee) was the Labor Relations Administrator for the State of Hawai‘i Department of Education (DOE).

Joy Kuwabara was a Field Services Consultant with the HGEA.

Lissa Lau was the Human Resources Administrator for City and County of Honolulu.

2.2 Stipulated Facts Regarding COVID-19 Emergency Proclamations

Former Governor David Y. Ige, State of Hawai‘i, issued emergency proclamations related to the COVID-19 emergency, including but not limited to the Seventeenth Proclamation Related to the COVID-19 Emergency identified as U-10 in this case. These emergency proclamations were issued under the authority granted to the Governor’s office per HRS Chapter 127A.

Blangiardi issued emergency proclamations related to the COVID-19 emergency under the authority granted to the Mayor’s office per HRS Chapter 127A.

2.3 Respondents’ Handling of Grievances While COVID-19 Emergency Proclamations Were in Effect

All the relevant CBAs include agreed upon grievance procedures.

Between August 30, 2021 and September 9, 2021, HGEA filed three separate class grievances with Respondents on behalf of bargaining unit employees affected by Respondents’ mandatory COVID-19 vaccination and testing requirements (collectively, HGEA’s class grievances) at the Step 2 level pursuant to grievance procedures contained in the relevant CBAs. HGEA’s class grievances contained requests for relevant information.

Between September 23, 2021 and September 30, 2021, Respondents replied to HGEA’s class grievances by stating that they would be taking “no further action on this matter.”

On or about October 8, 2021, HGEA sent correspondence to Respondents requesting information and clarification of Respondents’ position regarding HGEA’s class grievances. HGEA did not receive any response from Respondents.

Respondents processed grievances other than HGEA’s class grievances while COVID-19 emergency proclamations issued by Governor Ige and Blangiardi were in effect. Some grievances processed by Respondents during that time were related to COVID-19.

3. Analysis and Conclusions of Law

3.1 Respondents' Motions to Dismiss

Respondents argued that the Board should dismiss the case on jurisdictional grounds because HGEA failed to exhaust its contractual remedies and an emergency proclamation partially suspended HRS Chapter 89. However, the Board denied Respondents' motions to dismiss for the reasons stated below.

3.1.1. HRS Chapter 127A Jurisdictional Issues

As the Board has noted in a variety of cases, the Board does not have jurisdiction to interpret HRS Chapter 127A. *See, e.g., Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kawakami*, Board Case Nos. 20-CE-03-946a-c, Decision No. 506, at *15-16 (June 23, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-506.pdf>).

The Board can only use powers that statute expressly or implicitly grants. *Haw. Gov't Emp. Ass'n v. Casupang*, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007) (*Casupang*). The Board has original jurisdiction over controversies involving prohibited practices, so the Board has both the "express" power over such controversies and the "implied" powers that are "reasonably necessary" to make that express power effective. *Id.*, 170 P.3d at 348. The Board may apply sections outside of HRS Chapter 89 to prohibited practice complaints if it is "necessary and proper" to do so to determine whether a prohibited practice has been committed. *Id.* at 98, 170 P.3d at 349.

The Board "only has jurisdiction over issues related to HRS Chapter 89, such as collective bargaining and prohibited practice controversies, to the extent they do not violate merit principles." *United Pub. Workers v. Abercrombie*, 133 Hawai'i 188, 205, 325 P.3d 600, 617 (2014) (*Abercrombie*). Neither HRS Chapter 127A nor the emergency proclamations are within HRS Chapter 89. Therefore, the Board does not have the jurisdiction to issue a determination as to the applicability of HRS Chapter 127A or the emergency proclamation to this case. *See Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Adult Mental Health Division*, Board Case Nos. 20-CE-03-980a-c, Decision No. 519, at *6 (November 7, 2023) (<https://labor.hawaii.gov/hlrp/files/2023/11/Decision-No.-519-signed.pdf>).

However, the Board has jurisdiction to consider what issues it has the authority to adjudicate. *See HOH Corp. v. Motor Vehicle Industry Licensing Bd.*, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987). Therefore, the Board has the discretion to determine which issues it may and may not consider.

In this case, the Board determined that it has jurisdiction to consider whether Respondents violated HRS Chapter 89 when they refused to process HGEA's class grievances.

3.1.2. Exhaustion

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 *11 (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 decisions in *Poe v. Haw. Lab. Rels. Bd.*, 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002).

Here, Respondents declined to participate in grievance procedures under the applicable CBAs based on their position that portions of HRS Chapter 89 were suspended. Respondents expressly indicated to HGEA at the initial Step 2 level that they would take no further action on HGEA's class grievances. Accordingly, the Board found that any attempt by HGEA to exhaust its contractual remedies was futile.

3.2 Respondents Violated HRS Chapter 89

HGEA alleges that Respondents committed prohibited practices under HRS §§ 89-13(a)(7) and 89-13(a)(8) by wilfully refusing to comply with the grievance procedures in the relevant CBAs in violation of the CBAs and HRS §§ 89-10.8 and 89-19. Respondents relied on COVID-19 emergency proclamations to justify their decision not to participate in the grievance procedures.

3.2.1. Respondents Violated HRS § 89-10.8

HGEA contends that Respondents violated HRS § 89-10.8 when they refused to process HGEA's class grievances. Respondents countered that they did not have to process HGEA's class grievances because Governor Ige's COVID-19 emergency proclamation, in effect at the time HGEA's class grievances were filed, suspended portions of HRS Chapter 89, specifically, HRS §§ 89-9, 89-10(d), and 89-13.

HRS § 89-10.8 provides in relevant part:

(a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable[.]

HRS § 89-10.8 was not suspended by Governor Ige's COVID-19 emergency proclamation in effect at the time HGEA's class grievances were filed. Therefore, per

HRS § 89-10.8, the grievance procedures in the applicable CBAs were valid and enforceable.

Wada explained that DHRD's guidance to all executive branch departments was to follow the grievance process as best as they could. However, a decision was made not to process HGEA's class grievances. To be consistent, DHRD took the lead in responding to HGEA's initial class grievance, and Ono from the City DHR and Lee from the DOE followed DHRD's lead. Respondents acknowledged receipt of HGEA's class grievances but took no further action on the matter.

Because Respondents failed to follow agreed upon grievance procedures in the applicable CBAs, the Board finds that Respondents violated HRS § 89-10.8.

3.2.2 Respondents Violated Grievance Procedures Under the Applicable CBAs

Each of the applicable CBAs in this case contain mandatory grievance procedures that were agreed upon by Respondents and the HGEA. *See* CBAs for BU 2, BU 3, BU 4, and BU 13 (Article 11 – Grievance Procedure); BU 6 (Article 15 – Grievance Procedure); BU 9 (Article 14 – Grievance Procedure); and BU 14 and BU 15 (Article 10 – Grievance Procedure). Specifically, each of the applicable CBAs allow for the filing of class grievances and provide specified time limits for requests for relevant information, meetings with appropriate employer designees, and submission of written answers to the Union [HGEA]. *Id.*

Here, Respondents did not provide relevant information to HGEA as requested, did not hold meetings with HGEA, and did not provide written answers to HGEA's class grievances. Instead, each of the Respondents responded to HGEA that they would take "no further action on this matter." Even after HGEA issued its intent to proceed to arbitration, Respondents continued to refuse to take any action on HGEA's class grievances as required by the CBAs.⁵

Accordingly, the Board finds that Respondents violated grievance procedures under each of the applicable CBAs.

3.2.3. Respondents' Conduct Was Wilful

To determine if Respondents committed a prohibited practice, the Board must determine whether Respondents acted with the conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89. Haw. Gov't Emp. Ass'n v. Casupang, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007). Respondents' omission or failure to act may support a conclusion that there was some wilful misconduct. Aio v. Hamada, 66 Haw. 401, 409 n. 8, 664 P.2d 727, 732 n. 8 (1983) (*citing Trombley*, 31 Cal.2d 801, 807, 193 P.2d 734, 739).

The Board finds the requisite wilfulness in this case.

Respondents acknowledge that grievances other than HGEA’s class grievances, including some COVID-19-related grievances, were processed while COVID-19 emergency proclamations issued by Governor Ige and Blangiardi were in effect. Respondents’ coordinated decision to take no action on HGEA’s class grievances shows a deliberate intent to ignore and minimize the HRS Chapter 89 rights of HGEA bargaining unit members.

Accordingly, the Board finds Respondents’ conduct in violating HRS § 89-10.8 and the grievance procedures in the applicable CBAs was wilful.

All other issues raised by HGEA in its prohibited practice complaint are moot.

4. Order

Based on the above, the Board finds that Respondents committed prohibited practices under HRS § 89-13(a)(7) and HRS § 89-13(a)(8) by wilfully violating HRS § 89-10.8 and wilfully refusing to participate in grievance procedures under the applicable CBAs.

Accordingly, the Board orders:

1. Respondents must cease and desist from violating HRS §89-10.8 and refusing to participate in agreed upon grievance procedures under the applicable CBAs;
2. Respondents must post 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, notices must be distributed electronically, such as by posting on an intranet or an internet site or by other means that Respondents customarily use to communicate with their employees; and
3. Respondents 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, _____ April 30, 2024 _____.

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



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

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Ernest Nomura, Deputy Corporation Counsel

¹ HRS § 89-2 defines exclusive representative as:

“Exclusive representative” means 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 employee organization membership.

² HRS § 89-6(a) defines BU 02, BU 03, BU 04, BU 06, BU 09, BU 13, BU 14, and BU 15 as:

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

- (2) Supervisory employees in blue collar positions;
- (3) Nonsupervisory employees in white collar positions;
- (4) Supervisory employees in white collar positions;

- (6) Educational officers and other personnel of the department of education under the same pay schedule;

- (9) Registered professional nurses; [and]

- (13) Professional and scientific employees, who cannot be included in any of the other bargaining units;
- (14) State law enforcement officers; and
- (15) State and county ocean safety and water safety officers.

³ HRS § 89-6(d) defines the employer groups for BU 02, BU 03, BU 04, BU 06, BU 09, BU 13, BU 14, and BU 15 as:

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

(1) For bargaining units...(2), (3), (4),...(9),...(13), (14) and (15), 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;

(3) For bargaining units...(6), the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote;

⁴ HRS § 89-2 defines “employer” or “public employer” as:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

⁵ On March 2, 2022, the Board held this case in abeyance based, in part, on HGEA’s representation to the Board at the hearing on the merits held on November 24, 2021, that it had requested that HGEA’s class grievances proceed to arbitration. *See* Order No. 3827. The Board noted that the provisions of the Governor’s Emergency Proclamation Related to COVID-19, issued on November 29, 2021, that applied to a suspension of any part of HRS Chapter 89 expired on January 15, 2022, and that the Governor’s Emergency Proclamation Related to COVID-19 (Omicron variant), issued on January 26, 2022, did not contain any suspension of any part of HRS Chapter 89. *Id.*