EFiled: Oct 31 2024 01:42PM HAST
Transaction ID 74924213
Case No. 23-CE-00-981, 23-CEE-00-004

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and TOMMY JOHNSON, Director, Department of Corrections and Rehabilitation, State of Hawai‘i; PATRICK “RICK” DE COSTA, Acting Civil Rights Compliance Officer, Department of Corrections and Rehabilitation, State of Hawai‘i; and DEPARTMENT OF CORRECTIONS AND REHABILITATION, State of Hawai‘i, Respondents.	CASE NOS. 23-CE-00-981 23-CEE-00-004 DECISION NO. 527 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

I. Introduction and Statement of the Case

On March 6, 2023, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant or HGEA) filed a prohibited practice complaint (Complaint) against Respondent TOMMY JOHNSON, Director, Department of Corrections and Rehabilitation, State of Hawai‘i; PATRICK “RICK” DE COSTA, Acting Civil Rights Compliance Officer, Department of Corrections and Rehabilitation, State of Hawai‘i; and DEPARTMENT OF CORRECTIONS AND REHABILITATION, State of Hawai‘i, (collectively, Respondents or Employer), with the Hawai‘i Labor Relations Board

(Board). HGEA's Complaint alleges, among other things, that Respondents committed prohibited practices by violating HRS §§ 89-13(a)(1), (2), and (7), and 89-13(b)(1) and (4) when they banned Brian Penner (Penner) from entering any Department of Corrections and Rehabilitation[1] (DCR) facility or property.

On March 6, 2024, Respondents filed a Motion for Summary Judgment. On March 18, 2024, Complainant filed its Opposition of Respondent State of Hawaii, Department of Corrections and Rehabilitation's Motion for Summary Judgment filed on March 6, 2024. On March 25, 2024, the Board orally denied the Motion for Summary Judgment finding that there were material facts in dispute.

A Hearing on the Merits was held before the Board on April 9 – 12, 2024, with the following issues before the Board:

1. Whether DCR committed prohibited practices by banning Penner from all facilities indefinitely in violation of HRS §§ 89-13(a)(1), (2), and (7).
2. Whether Patrick "Rick" De Costa committed a prohibited practice by banning Penner from all of its facilities, indefinitely, in violation of HRS § 89-13(b)(1) and (4).

At the conclusion of the Hearing on the Merits, Respondents and Complainant submitted post-hearing briefs on July 1, 2024 and July 3, 2024, respectively.

Upon review of the entire record, including the pleadings and arguments made in this case, the Board makes the following findings of fact, conclusions of law, and order concluding that DCR committed prohibited practices under HRS §§ 89-13(a)(1), (2) and (7) and Patrick "Rick" De Costa (De Costa) violated HRS §§ 89-13(b)(1) and (4). Any findings of fact

[1] Prior to January 1, 2024, the Department of Corrections and Rehabilitation was known as the Department of Public Safety (DPS).

improperly listed as conclusions of law are construed as findings of fact. Any conclusions of law improperly listed as findings of fact are construed as conclusions of law.

II. Background and Findings of Fact

On May 23, 2023, a meeting was held at HGEA's Hawaii Island District Office between Penner, HGEA Hawai'i Division Chief; Calla Luera (Luera); Jessica Peevyhouse (Peevyhouse), DCR employee; Melanie DeMotta (DeMotta), DCR employee; Stephanie Higa (Higa), supervisor at DCR; and Kevin Kamisato, M.D. (Dr. Kamisato), mediator. [2] The purpose of the meeting was to discuss Peevyhouse's and DeMotta's workplace complaints against Higa. This meeting was recorded. The meeting lasted approximately one hour and thirty minutes.

Shortly after the meeting concluded Higa filed a complaint against Penner with DCR alleging that Penner made offensive and derogatory comments towards her, i.e., that she had "personality disorder," "misfunction," "low spectrums," "inability to learn or understand," her behavior was "less than human," during the meeting. Dr. Kamisato also filed a report stating that Penner's behavior and statements made during the May 23, 2023 meeting were unwelcome and highly offensive.

On or around July 20, 2023, De Costa, Acting Civil Rights Compliance Officer at DCR, conducted an internal investigation into Penner's behavior. As part of his investigation, De Costa sent formal letters to Peevyhouse, Penner, and Luera requesting that they respond to various written questions regarding the May 23, 2023 meeting. In a July 20, 2023 letter to Peevyhouse, De Costa informed her that "[f]ailure to obey fully and faithfully may result in a recommendation for discipline up to and including termination for just cause." Peevyhouse was

[2] Peevyhouse, DeMotta, Higa, and Dr. Kamisato worked together at DCR Hawai'i Community Correctional Facility located in Hilo Hawai'i.

also instructed not to "under any circumstances discuss this complaint with Penner until the investigation is closed."

HGEA agreed to participate and cooperate with the investigation over the May 23, 2023 incident. Upon the conclusion of the investigation, De Costa found Penner's behavior during the May 23, 2023 meeting as harassing and in violation of Department of Human Resources Development (DHRD) policy 601.001. As a result, on August 8, 2023, De Costa recommend that DCR ban Penner for an indefinite period from any and all facilities and property at the Hawai'i Community Correctional Center (HCCC). On August 14, 2023, DCR Director Tommy Johnson (Johnson) confirmed the indefinite ban and expanded it to prohibit "Penner from entering any DCR workplace."

III. Principals of Law

Section 89-3, HRS, states in relevant part:

> Employees shall have 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.

Emphasis added.

HRS § 89-13 provides:

(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

* * *

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

* * *

(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;

* * *

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

IV. Analysis and Conclusions of Law

A. Burden of Proof

HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Board's rules under Hawai'i Administrative Rule (HAR) § 12-43-34 also state that the complainant asserting a violation of an HRS Chapter 89 claim has "the burden of proving the allegations by a preponderance of the evidence."

Preponderance of the evidence is defined as "proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence." Minnich v. Admin. Dir. of the Courts, 109 Hawai'i 220, 228 (2005). The Board requires that the party carrying the burden of proof must produce sufficient evidence "and support that evidence with arguments in applying the relevant legal principles." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

B. DCR And De Costa Committed a Prohibited Practice When It Banned Penner From All Facilities

1. DCR Wilfully Violated HRS § 89-13(a)(1).

Under HRS § 89-13(a)(1), an employer commits a prohibited practice by wilfully "interfering, restraining, or coercing any employee in the exercise of any right guaranteed" under HRS Chapter 89. The test in determining a prohibited practice under HRS § 89-13(a)(1) is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. United Pub. Workers, AFSCME. Local 646, AFL-CIO v. Takushi, Board Case Nos. CE-01-374a and CE-10-374b, Decision No. 404, at *49 (2000) (citing Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984)). However, only interference with a lawful employee activity, or discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under the statute. Haw. State Tchr. Ass'n v. Haw. Pub. Emp. Rels. Bd., 60 Haw. 361, 364, 590 P.2d 993, 996 (1979).

To constitute a prohibited practice, the Board must decide whether DCR acted wilfuly, in other words, did DCR act with the "conscious, knowing, and deliberate intent to violate the provisions of" Chapter 89 of the Hawaii Revised Statutes when it banned Penner indefinitely from all DCR facilities. Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007).

Respondents argue that its indefinite ban was based on Penner's conduct and statements made during the meeting. Specifically, Respondents allege that Penner called Higa "low spectrum", having a "personality disorder", and her behavior was "less than human[3]." De Costa and Director Tommy Johnson testified that the ban was necessary to protect DCR employees and

[3] Johnson specifically testified that "he [Penner] said things like she was subhuman, she was slow."

prevent further harassment and unprofessionalism. However, Penner denied making any such statements. Peevyhouse also testified that she did not recall Penner making such statements.

A review of the video and transcript of the May 23, 2023 meeting supports Peevyhouse and Penner's testimony that Penner never told Higa she had a personality disorder, was low spectrum, nor made statements of her behavior as less than human as alleged by Respondents. Respondents' statements directly contravene the evidence in the record.

In falsely asserting that Penner's behavior was threatening and offensive, DCR consciously, knowingly, and deliberately removed Penner's ability to represent Peevyhouse and any other bargaining unit member when it banned Penner from all DCR facilities. Peevyhouse was also denied representation based on false allegations against Penner. Therefore, based on the totality of the evidence, the Board finds that DCR's ban was wilful. As such, the Board finds that DCR committed a prohibited practice violating HRS § 89-13(a)(1).

2. DCR's Ban Violated HRS §§ 89-3 and 89-8(a) When It Denied Peevyhouse Her Right To Representation Of Her Own Choosing Thus Violating HRS §§ 89-13(a)(2) and (7)

Additionally, employees have statutory protected rights established in other HRS Chapter 89 provisions. This includes rights enumerated in HRS §§ 89-3 and 89-8(a). Pursuant to HRS § 89-3, employees shall have 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. HRS § 89-3 (emphasis added).

HRS § 89-8 states, in relevant part, that:

> the employee organization that has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate

> agreements covering all employees in the unit and shall be responsible for representing the interests of the employees without discrimination and without regard to employee organization membership.

Pursuant to HRS § 89-8, HGEA is the exclusive bargaining representative of members in Bargaining Units (BU) 2, 3, 4, 9, and 13 at all DCR facilities. Because Peevyhouse is a member of BU 9, HGEA is the exclusive representative for her and she has a statutorily protected right, under HRS § 89-3, to choose a representative of her own choosing to assist her on employment matters. Thus, the right of an employee to communicate with the employee's exclusive representative is a fundamental right guaranteed under HRS § 89-3.

Penner testified that as a result of the ban, it affected his representation of union members because he could not enter any DCR facility. He further testified that if an issue arose at a DCR facility, he would not be able to "go in and attend to it" as a result of the ban.

Peevyhouse requested that Penner represent her during this investigation. However, Peevyhouse testified that she felt that she could not contact HGEA to assist her during De Costa's investigation. She testified that her only contact at HGEA was Penner; therefore, she felt that she could not contact HGEA because she was told that she could not contact Penner during the pendency of De Costa's investigation. Peevyhouse also testified that it did not occur to her that she could have a different person from HGEA besides Penner represent her in her investigation. Peevyhouse further testified that she believed that Penner's subsequent investigation and ban was a form of retaliation against her for complaining about Higa. The record shows that during the course of the investigation into Penner, Peevyhouse was informed that her failure to participate in the investigation against Penner "may result in a recommendation for discipline up to and including termination for just cause."

While Peevyhouse was informed that she could discuss any other matter with her union representative, she was prohibited from discussing the investigation with Penner or any other person who "might be a potential . . . witness." Peevyhouse was not informed who other potential witnesses would be. Consequently, Peevyhouse was forced to participate in an investigation against her union representative, threatened with discipline should she refuse to participate, and unable to have her chosen representative advise her on a matter where her inaction could result in discipline. The Board therefore finds that Penner's investigation and subsequent ban violated Peevyhouse's statutory rights enumerated under HRS §§ 89-3 and 89-8.

Furthermore, the Board finds that by indefinitely banning Penner from all of DCR's facilities, it interferes with Peevyhouse's and all the other BU 2, 3, 4, 9, and 13 members' Weingarten rights. The United States Supreme Court recognized that bargaining union employees have a right to the presence of a union representative at investigatory interviews that could lead to discipline. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). An employee's Weingarten right arises where the employee requests representation. Once an employee requests for their representative, they are not required to repeat that request. Furthermore, an employee may choose their own representative and employers are required to honor the employee's request.

The Supreme Court held that the denial of an employee's right to union representation in an investigation that may result in discipline tends to interfere, restrain, or coerce an employee in the exercise of their rights.

> Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in

> our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 257, 95 S. Ct. 959, 963, 43 L.Ed.2d 171, 177-78 (1975) (emphasis added).

Peevyhouse was required to participate in an investigation against her chosen representative and warned that her refusal to do so could result in discipline that included termination. Peevyhouse was allowed to seek assistance from her union, but was informed not to inform any "potential witnesses about the investigation." This instruction alone denied Peevyhouse the ability to access union representation, as all union representatives could serve as DCR's potential witnesses in DCR's investigation into Penner. Therefore, Peevyhouse was denied the ability to select her chosen representative.

Peevyhouse believed DCR's investigation into Penner was retaliation of her complaint filed against Higa. Even if her belief was incorrect, the potential adverse impact against Peevyhouse where she was informed that she may be disciplined up to and including termination, should have afforded her the right to union representation of her choosing. With the possibility of termination, Peevyhouse should have been "afforded the safeguard of [her] representative's presence" under Weingarten. Id. at 420 U.S. 251, 259, 95 S. Ct. 959, 964, 43 L.Ed.2d 171, 179 (1975). DCR's ban against Penner resulted in a wholesale denial of Peevyhouse's rights under HRS §§ 89-3 and 89-8. Consequently, the Board finds that DCR violated HRS §§ 89-3 and 89-8, and as such, the ban is a violation of HRS §§ 89-13(a)(2) and (7).

3. De Costa's Actions Violated HRS §§ 89-13(b)(1) and (4).

Under HRS § 89-13(b)(1), a public employee commits a prohibited practice by "interfering, restraining, or coercing any employee in the exercise of any right guaranteed" under

HRS Chapter 89. The test in determining a prohibited practice under HRS § 89-13(b)(1) is whether the prohibited practice was wilful. "It has been the Board's position that a prohibited practice under Section 89-13(b), HRS, is committed when a conscious, knowing and deliberate intent to violate the provisions of Chapter 89, HRS, is proven." Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007).

The Board consistently held that "[o]nly interference with a lawful employee activity, or restraint, coercion, or discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under Chapter 89, HRS." Blanchard v. HGEA and Kunimura, CU-13-51, Dec. 258.

The facts of the record clearly establish that De Costa conducted an investigation against Penner's alleged behavior at the May 23, 2023 meeting due to a complaint submitted by Higa. De Costa sent formal letters to Peevyhouse, Penner, and Luera as part of his investigation against Penner. De Costa's investigation was to determine whether Penner, an HGEA agent, violated DHRD policy 601.001, even though Penner is not employed by Respondents and would not be obligated to follow Respondent's policies.

The evidence in the record supports De Costa's wilful interference with Peevyhouse's protected rights. On June 27, 2023, De Costa submitted a request to Johnson to investigate the matter of Penner's alleged actions and recommended "that Penner be banned from all [DCR] workplaces pending investigation due to the alleged severity." On August 9, 2023, De Costa emailed HGEA Deputy Executive Director Debra Kagawa-Yogi (Kagawa-Yogi) acknowledging his receipt of the recording of the May 23, 2023 meeting. On August 15, 2023, De Costa emailed Kagawa-Yogi asking who recorded the video and stated "neither [Penner or Luera] is a [DCR]

employee from whom my office can compel truthful testimony. I sincerely hope that as their employer and [DCR]'s negotiating partner you would choose to."

On August 15, 2023, De Costa emailed a questionnaire for Penner concerning the May 23, 2023 meeting. In this questionnaire, De Costa stated "[t]he scope of this investigation will be per the State of Hawaii Department of Human Resources Development policy 601.001 . . . This policy requires [DCR] to protect our employees from protected-class harassment even by non-employees and even where the harassment does not rise to the level of unlawfulness. Per HRS 378-2 or Title VII of the Civil Rights Act of 1964." On August 21, 2023, De Costa emailed Kagawa-Yogi with more questions about the recording. On August 30, 2023, De Costa emailed Kagawa-Yogi requesting for follow-up questions for Penner and Luera.

The Board concludes that De Costa reviewed the video recording of the May 23, 2023 meeting and examined the responses from Penner and Luera. De Costa also knew that Penner and Luera were not DCR employees and were not bound by DHRD's policy. Nonetheless, De Costa believed that he had authority to pursue an investigation against Penner even where the harassment did not rise to any level of unlawfulness and recommended that DCR ban him from its facilities.

Peevyhouse testified that during the period of De Costa's investigation of Penner, she did not feel that she could contact HGEA for representation or discuss her employment issues with them. She elaborated that she felt "completely cut off" from HGEA and believed that she would lose her job if she talked to HGEA. This was based on an employment document she felt forced to sign, which prohibited her from contacting Penner during the pendency of De Costa's investigation and the statements in the questionnaire she received from De Costa regarding the May 23, 2023 meeting.

De Costa informed Peevyhouse in a letter dated July 20, 2023 that she could not discuss the investigation with Penner and that her refusal to cooperate in his investigation against Penner could result in discipline that included termination. De Costa received the recording of the May 23, 2023 meeting on or about August 9, 2023. As stated above, the recording of the May 23, 2023 meeting and transcript did not support the allegations against Penner. Nonetheless, De Costa continued to pursue his investigation into a non-DCR employee that he admittedly had no authority over, and continued to prevent him from being on DCR premises. De Costa's prolonged investigation into Penner appear to be pretextual and his actions in effect prevented Peevyhouse and other bargaining unit members from obtaining representation from their union agent.

Therefore, the Board finds that De Costa wilfully violated HRS § 89-13(b)(1) when he, a public employee, recommended that Penner, a non-DCR employee that he had no authority over, be banned from DCR premises

C. The Board Has Jurisdiction Over the Instant Case

The Board disagrees with Respondents' contention that it does not have jurisdiction over the instant case. It is well settled that the Board has jurisdiction to hear this case, as well as any case alleging a violation of HRS Chapter 89. In prior cases, the Board has consistently articulated its reasoning for retaining jurisdiction over cases involving HRS Chapter 89 and will not reiterate it here. *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 (June 23, 2021); Haw. Gov't. Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Green et. al., Board Case No. 21-CE-02-962a, Decision No. 523 (April 30, 2024); and Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Adult Mental Health Div, Case No. 23-CE-980a, Decision No. 519 (Nov., 7, 2023).

V. Order

Based on the above, the Board orders:

1. DCR immediately rescind their order banning Penner from entering any DCR facility;
2. DCR post copies of this Decision and Order for 60 consecutive days in places where notices to employees are customarily placed. In addition, to physically posting of paper notices, notices must be distributed electronically, such as by posting on an intranet or an internet site or other means that DCR customarily uses to communicate with HGEA bargaining unit members; and
3. DCR shall notify the Board of the steps taken to comply with this Order within 30 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai'i, October 31, 2024.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

//

//

//

//

//

//

//

CONCURRING OPINION OF BOARD MEMBER STACY MONIZ

I agree that prohibited practices were committed by Respondents. To that end, I concur with the Decision and Order of Board Chair Oshiro, and I join in his opinion.

However, I believe it is of public importance and necessary to clarify for all government employers, employees, and exclusive representatives, that the issue raised by Respondents concerning HRS Chapter 89 and its jurisdictional applicability, in light of a potentially conflicting statute, be addressed.

In their closing brief, Respondents assert, in part, that the Board's jurisdiction pursuant to HRS Chapter 89 has been suspended by HRS Chapter 127A. The Board decided when it conducted the hearing on the merits that it had jurisdiction pursuant to HRS Chapter 89 to decide this matter. The Board has previously held that the jurisdictional reach of HRS Chapter 127A is beyond the jurisdiction of the Board. The Board, however, has concluded it has jurisdiction over issues related to HRS Chapter 89. Yet, in determining jurisdictional preemption due to a conflicting statute, as raised by Respondents, it is necessary to conduct an analysis pursuant to HRS Chapter 89 to determine whether there is in fact a conflict and whether HRS Chapter 89 has preemptive effect. The Board decides prohibited practice issues under HRS Chapter 89. However, the Board first must have jurisdiction to decide the prohibited practice issues. *See* HRS § 89-14, which provides that the Board has exclusive original jurisdiction over prohibited practice controversies under HRS Chapter 89. With all due respect to the office of the governor and offices of the mayors of each of the counties, I answer in the affirmative that the Board does have jurisdiction to decide the prohibited practices issues in this matter.

The Board has jurisdiction to consider whether it has jurisdiction, as well as jurisdiction to decide, which issues it has authority to adjudicate. *See* HOH Corp. v. Motor Vehicle Industry

Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987). Thus, it is within the Board's discretion to decide which issues it has and does not have jurisdiction to consider.

Respondents argue that HRS Chapter 89 was suspended by the Governor through invocation of another chapter of HRS, specifically HRS Chapter 127A. My analysis is limited by the Board's exclusive original jurisdiction and thus will focus primarily on the interpretation of HRS Chapter 89.[4]

Any analysis must begin with a review of HRS §§ 89-19 and 89-20. HRS §89-19 states:

> **§89-19 Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary** local ordinances, **executive orders**, **legislation, or rules** adopted by the **State, a county, or any department or agency thereof**, including the departments of human resources development or of personnel services or the civil service commission. [emphasis added].

The Hawai‘i State Legislature (Legislature) made clear that any conflicting statute concerning the subject matter of HRS Chapter 89 is preempted by HRS Chapter 89. That appears to be the case since 1970 when HRS Chapter 89 was enacted by the Legislature. HRS Chapter 89 also preempts any legislation, executive orders, or rules adopted by the State, county, or any subdivision thereof. If a conflicting statute is utilized to attempt preemption of HRS Chapter 89, it must fail under the clear and unambiguous language of HRS § 89-19. Specific to the argument raised by Respondents, I believe it is conclusive that an emergency proclamation, regardless of content, signed by a governor is an executive order and that HRS Chapter 127A is legislation.

Respondents argue that HRS Chapter 89 is suspended pursuant to an emergency proclamation (Executive Order) issued by the Governor. That Executive Order is issued pursuant

[4] HRS Chapter 89's foundation is Article XIII Section 2 of the Hawai‘i State Constitution that preserves and protects the right to collective bargaining for public employees in this State.

to a statute passed subsequent to HRS Chapter 89. It must be presumed that the Legislature was fully aware of the language of HRS § 89-19 when it passed a subsequent statute that could conflict or has the potential to conflict with HRS Chapter 89. Likewise, this Board must presume the Legislature was aware of HRS Chapter 89 in 2014 when it passed H.B. No. 849, H.D. 2, S.D. 2, C.D. 1, which became Act 111, Session Laws of Hawai‘i 2014, implementing HRS Chapter 127A. *See* Peer News LLC v. City & County of Honolulu, 138 Haw. 53, 69, 376 P.3d 1, 17 (2016) ("The legislature is presumed to know the law when it enacts statutes, including this court's decisions, and agency interpretations."). In this case, in my opinion, the other statute does in fact conflict with HRS Chapter 89 because it purports to authorize the suspension of HRS Chapter 89 and its subject matter. Importantly, no admissible evidence was introduced by Respondents to reflect the specific language of the Executive Order upon which it relies. The Executive Order referred to by Respondents was never introduced into evidence and the Board was never asked to take judicial notice of it. This fact alone is fatal to Respondents' argument.

Collective bargaining by and through HRS Chapter 89 is a fundamental principle of public employment in this State. HRS Chapter 89 guides employers, employees, and exclusive representatives in their operations and conduct. If the Legislature had desired to allow an executive order issued pursuant to HRS Chapter 127A or any other statute to suspend HRS Chapter 89, it could have said so. The Legislature chose not to. HRS Chapter 127A was enacted by the Legislature in 2014 and amended in part as recently as 2022. The Legislature to date has not amended HRS Chapter 89 to require HRS Chapter 89 to be constrained by HRS Chapter 127A nor has any court to the Board's knowledge so ruled. Thus, the Board's jurisdiction pursuant to HRS Chapter 89 remains clear, along with its duty to maintain the Board's exclusive jurisdiction over HRS Chapter 89 matters, even during the issuance of an

executive order issued pursuant to HRS Chapter 127A that allegedly suspends HRS Chapter 89. Whether HRS Chapter 89 is suspended or not is for the Board to decide. HRS § 89-19 consists of plain and unambiguous language. That clear reading mandates that HRS § 89-19 controls on the issue of preemption and precedence. It leads to the inescapable conclusion that HRS Chapter 89 cannot be suspended by an executive order issued pursuant to HRS Chapter 127A. Exclusive representatives and public employees do not become disenfranchised, losing their statutory rights under HRS Chapter 89, due to an asserted emergency by a governor or mayor.

To lend further support to the position expressed herein, HRS § 89-20 specifically provides the ONLY circumstances under which HRS Chapter 89 becomes inoperative. HRS § 89-20 states:

> **§89-20 Chapter inoperative, when.** (a) If any provision of this chapter jeopardizes the receipt by the State or any county of any federal grant-in-aid or other federal allotment of money, the provision shall, insofar as the fund is jeopardized, be deemed to be inoperative.
>
> (b) The federal Pro-Children Act, as it relates to smoking at public school indoor facilities, shall preempt this chapter to the extent the federal act imposes mandatory restrictions on smoking in the workplace.

Neither exception has been argued by Respondents nor was any evidence introduced that either of these two exceptions are applicable. Likewise, the Legislature chose not to amend this section of HRS Chapter 89 by adding an exception for any executive order pursuant to HRS Chapter 127A declaring an emergency.

The Board cannot presume that the Legislature simply overlooked or forgot to amend HRS Chapter 89 to conform to Respondents' argument. There is no rational basis to reach such an extreme result. There has been no evidence in the record that the Legislature expressly repealed HRS § 89-19 by the passage of HRS Chapter 127A. Neither Chapter has a repealing clause specific to HRS Chapter 89. I presume the Legislature intended "every word, phrase and

provision" in the statute "to have meaning and to perform a useful function." Garcia v. McCutchen, 16 Cal.4th 469, 476 (1997). Finally, and critically, I do not lightly imply that the Legislature intended to repeal a statute. Instead, "[a]ll presumptions are against a repeal by implication." *See, e.g.,* State Dept. of Public Health v. Superior Court, 60 Cal.4th 940, 955, 342 P.3d 1217, 1226 (2015); Mahiai v. Suwa, 69 Haw. 349, 356-57, 742 P.2d 359, 366 (1987). As stated in Richardson v. City and County of Honolulu, 76 Haw. 46, 57, 868 P.2d 1193, 1204 (1994), "Courts [and this Board] cannot amend statutes in the guise of interpreting them, and they must presume that [the legislature] meant what it said . . .", citing Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring).

The preemption provision of HRS Chapter 89 is expressed and mandatory. There is nothing in HRS Chapter 89 which explicitly subjects its provisions to preemption by any other statute concerning the same subject matter. HRS Chapter 89 is a specific statutory framework passed by the Legislature pursuant to Article XIII Section 2 of the Hawai‘i State Constitution and signed into law by the Governor addressing collective bargaining in public employment. As a result, the general rule of statutory construction is that a specific statute takes precedence over a general statute, *i.e.*, HRS Chapter 127A, in applying statutory construction principles. *See* State v. Kamanao, 118 Haw. 210, 217 fn.14, 188 P.3d 724, 731 fn.14 (2008). HRS Chapter 89 is a specific statute as compared to general powers listed in other statutes such as HRS Chapter 127A. I am mindful of the principle of statutory construction that where there is a "plainly irreconcilable" conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. Mahiai, *supra,* at 356.

It should also be noted that HRS Chapter 127A does not include the term "statutes" in its definition of "Laws." So, when "Laws" are suspended by an emergency order pursuant to HRS Chapter 127A, a plain reading would exclude statutes. Therefore, HRS Chapter 89, as a statute cannot be suspended by HRS Chapter 127A.[5]

The potential conflict arises upon examination of HRS §127A-32, which states:

> **Effect of this chapter on other laws. All laws** inconsistent with the provisions of this chapter, or of any rule issued under the authority of this chapter, shall be suspended during the period of time and to the extent that the emergency or disaster exists, and may be, by the governor for all **laws,** or mayor for county **laws,** designated as so suspended. [emphasis added].

HRS § 127A-2 defines "Laws" as follows:

> "Laws" includes ordinances, rules, regulations, and orders prescribed under federal, state, or county laws or ordinances and having the force and effect of law.

The phrase **"statutes" is <u>not referenced</u>** in the definition of "Laws." In fact, by its omission, statutes are specifically excluded. The definition of "Laws" is not vague and ambiguous. The result is that an emergency proclamation, by law, cannot suspend any portion of HRS Chapter 89 because HRS Chapter 127A does not empower the Governor to do so. Black's Law Dictionary, 12th Edition (2024) defines **"Statute"** as "[a] law enacted by a legislative body; specif., legislation enacted by any lawmaking body, such as a legislature. . . ."

---

[5] For comparison, see § 8571 of the California Emergency Services Act, which provides:

> **8571.** During a state of war emergency or a state of emergency the Governor **may suspend any regulatory statute, or statute** prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any **statute**, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.

Ca. Gov. Code § 8571.

Clearly, HRS Chapter 89 is a statute and **not** an ordinance, order, regulation, or rule, as it was formally enacted by the Legislature. *See also* Stenberg v. Carhart, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Again, it must be presumed that the Legislature knows the law when enacting statutes. *See* Peer News, *supra*, at 69. When the Legislature passed HRS Chapter 127A in 2014, and then amended HRS § 127A-2 in 2019, and again in 2022, without including "statute" or "statutes" in its definition of "Laws" or without amending HRS § 89-19 or HRS § 89-20, it can only be presumed that the Legislature intended HRS Chapter 89 to be operative despite a HRS Chapter 127A executive order.

Respondents argue that HRS § 89-19 was repealed by implication since HRS Chapter 127A was passed subsequent to HRS Chapter 89 being implemented. This argument is misplaced. It is undisputed that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." Ledezma-Galicia v. Holder, 636 F.3d 1059, 1069 (9th Cir. 2010) (quoting National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007). Such conditions do not exist here.

The Legislature could have included "statutes" in the definition of "Laws." It did not. The Legislature could have stated that HRS Chapter 127A took precedence specifically over HRS Chapter 89. It did not. The Legislature could have amended HRS §89-19 and/or HRS § 89-20 to address HRS Chapter 127A. It did not. There is only one conclusion: HRS Chapter 89 is not and cannot be suspended by an executive order issued through HRS Chapter 127A.

I submit that: (1) HRS § 89-19 clearly and unambiguously requires that HRS Chapter 89 preempt and take precedence over all conflicting statutes with respect to the terms and conditions of public employment; and (2) based upon a plain reading, provisions of HRS Chapter 89 may conflict with, and therefore preempt, provisions of HRS Chapter 127A.

In analyzing statutes, the following must be applied:

> The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews *de novo.* In addition, our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. **And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.** [emphasis added].

State v. Baron, 80 Haw. 107, 113, 905 P.2d 613, 619 (1995), *reconsideration granted in part and denied in part,* 80 Haw. 187, 907 P.2d 773 (1995).

First, by the express language of HRS § 89-19, HRS Chapter 89 takes precedence over "all conflicting statutes concerning this subject matter." The subject matter of HRS Chapter 89 is stated in its title, "Collective Bargaining in Public Employment." HRS § 89-1 provides in pertinent part:

> **§89-1 Statement of findings and policy.**
>
> * * *
>
> (b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These are best effectuated by:
>
> (1) Recognizing the right of public employees to organize for the purpose of collective bargaining;
>
> **(2) Requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other**

> **conditions of employment,** while, at the same time, maintaining the merit principle pursuant to section 76-1; and
> (3) Creating a labor relations board to administer the provisions of chapter 89 and 377. [emphasis added]

HRS Chapter 89 is explicitly contrary to, or inconsistent with, provisions of HRS Chapter 127A if used to suspend the public policy rights mentioned in paragraphs (1), (2), and (3). *See also* HRS § 89-9 (Scope of negotiations; consultation).

Specifically, HRS Chapter 89 requires negotiation on matters of wages, hours, and other conditions of employment. Suspending that right pursuant to HRS Chapter 127A or another statute should have no legal effect based upon the plain language of HRS § 89-19. Respondents must comply with the bargained for terms as stated in the applicable collective bargaining agreements and with the language of HRS Chapter 89. The only time HRS Chapter 89 is inoperative is listed in HRS § 89-20. Neither exception listed therein applies here. No other conditions are referenced to render HRS Chapter 89 inoperative. The language of the statute is plain and unambiguous. It does not reference HRS Chapter 127A or any "emergency" situation. By its own language, HRS §89-19 accords preemptive effect to the provisions of HRS Chapter 89 in relationship to HRS Chapter 127A.

Further, this matter has nothing to do with the Board applying or deciding any issue under HRS Chapter 127A. This is about the Board enforcing its exclusive jurisdiction that it is required by law to do and enforce HRS Chapter 89. In doing so, this analysis is taken pursuant to HRS § 89-19. To determine if there is a conflict, the Board must look at the allegedly conflicting statute. That is the path that must be taken to determine the Board's jurisdiction.

It is the provisions of HRS Chapter 89 itself that are accorded preemptive effect against all other conflicting statutes or executive orders on the same subject matter. If the Governor

specified that he was suspending portions of HRS Chapter 89 pursuant to HRS Chapter 127A, then unless Respondents can clearly prove that the Governor was imposing the suspension under the two conditions listed in HRS § 89-20, then his suspension is *void ab initio.* Respondents' argument to the contrary is mistaken and requires the unfounded rejection of the plain and unambiguous language of HRS § 89-19.

As stated in Sierra Club v. Castle & Cooke Homes, 132 Haw. 184, 191-92, 320 P.3d 849, 856-57 (2013):

> "Under general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation." Saranillio v. Silva, 78 Haw. 1, 10, 889 P.2d 685, 694 (1995). *See* HRS § 1-14 (2009) ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."). "[I]t must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted. . . ." In re Taxes of Johnson, 44 Haw. 519, 530, 356 P.2d 1028, 1034 (1960).

The Legislature has had multiple opportunities to amend HRS Chapter 127A to expressly address a governor's or mayors' use of emergency powers (or otherwise) in relation to HRS Chapter 89. It has not. *See generally* State v. Hussein, 122 Haw. 495, 529, 229 P.3d 313, 347 (2010) (legislative inaction may indicate tacit approval of statutory interpretation). There is only one conclusion, HRS Chapter 89 is not and cannot be suspended by an executive order issued through HRS Chapter 127A (except under the provisions of HRS § 89-20) and that the Board maintains its jurisdiction even in the presence of such an executive order. What a governor or a mayor does pursuant to Chapter 127A is not the Board's concern unless it infringes upon HRS Chapter 89 and its parameters.

For all of the above reasons, I conclude, first, that HRS Chapter 89 requires the Board to exercise and defend its jurisdiction against any conflicting statute unless the provisions of HRS § 89-20 are met; and second, that HRS Chapter 89 should not be repealed by the latter enactment of HRS Chapter 127A by implication, because doing so would violate both the presumption against implied repeals and the presumption against retroactively applied statutes. *See* National Ass'n of Home Builders, *supra*, at 662-64; Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). This Board is compelled by statute to exercise its exclusive jurisdiction and issue a final decision and order in this matter. Unchecked, any emergency proclamation would pose a potential threat to collective bargaining rights that are codified in HRS Chapter 89 and embedded in the Hawai'i State Constitution.

DATED: Honolulu, Hawai'i, October 31, 2024.

HAWAI'I LABOR RELATIONS BOARD

STACY MONIZ, Member

Copies sent to:

Ted H.S. Hong, Esq., Attorney for Complainant
Amanda L. Donlin, Deputy Attorney General, Attorney for Respondents
Shannon B. Pae, Deputy Attorney General, Attorney for Respondents