

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

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

Complainant(s),

and

CHRISTINA M. KISHIMOTO,
Superintendent, Department of Education,
State of Hawai'i,

Respondent(s).

CASE NO(S). 20-CE-02-947a
 20-CE-03-947b
 20-CE-04-947c
 20-CE-06-947d
 20-CE-09-947e
 20-CE-13-947f

DECISION NO. 503

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

Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging that Respondent CHRISTINA M. KISHIMOTO, Superintendent, Department of Education, State of Hawai'i (Respondent or Kishimoto) committed prohibited practices with regard to a memorandum of agreement (MOA) entered into by Kishimoto and the Hawaii State Teachers Association (HSTA).

Kishimoto filed a Motion to Dismiss in Lieu of Answer to Prohibited Practice Complaint, arguing, among other things, that HGEA lacks standing to contest the agreements reached between the employer and another union and that the harm alleged by HGEA is speculative.

After hearing oral arguments, the Board issued Order No. 3638, a minute order granting the Motion to Dismiss based on HGEA's lack of standing because HGEA alleged a speculative, rather than an actual injury. Order No. 3638 further directed Kishimoto to file a Proposed Findings of Fact, Conclusions of Law, Decision and Order and provided HGEA with a period in which to submit any exceptions to Kishimoto's submission. HGEA did not submit any exceptions.

Accordingly, the Board now issues this final decision. Based on the entire record, the Board makes the below findings of fact and conclusions of law, decision and order.

Any finding of fact or conclusion of law submitted by Kishimoto but not adopted in this decision is deemed rejected. Any conclusion of law improperly designated as a finding of fact is deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law is deemed or construed as a finding of fact.

2. Findings of Fact and Allegations Accepted as True

2.1. Findings of Fact

As one of the public sector employee organizationsⁱ, HGEA serves as the exclusive representativeⁱⁱ for several bargaining units, including but not limited to bargaining units 2, 3, 4, 6, 9, and 13ⁱⁱⁱ. (BU 2, BU 3, BU 4, BU 6, BU 9, and BU 13 accordingly).

HSTA, another of the public sector employee organizations, serves as the exclusive representative for bargaining unit 5^{iv} (BU 5).

Kishimoto, as Superintendent, is an employer^v for BU 5 and BU 6^{vi}.

2.2. Other Allegations Accepted as True

For the purposes of considering the Motion to Dismiss, the Board accepts the allegations of the complaint as true and construes those allegations in the light most favorable to HGEA. Tupola v. Univ. of Hawaii Pro. Assembly, Board Case Nos. CU-07-330; CE-07-847, Board Order No. 3054, at *17 (2015) (Tupola).

Accordingly, for the purposes of considering the Motion to Dismiss, the Board accepts the following as true:

1. Respondent entered into an MOA with HSTA on March 19, 2020, and an addendum to that MOA on April 24, 2020.
2. Respondent effectuated a procedure on April 24, 2020 regarding the school closure procedures for school year 2019-20.
3. HGEA is not a party to the MOA or its addendum.
4. Respondent did not consult with or obtain the mutual consent of HGEA before effectuating the Agreement, its addendum, or the closure procedures.

5. On April 28, 2020, HGEA reminded senior agents of the Respondent of HGEA's position as to Respondent's duty to consult and/or obtain mutual consent from HGEA with regard to the MOA, its addendum, and the closure procedures.
6. Respondent has not taken affirmative steps to consult and/or obtain mutual consent from HGEA with regard to the MOA, its addendum, and the closure procedures.

3. Analysis and Conclusions of Law

When considering motions to dismiss, the contents of the complaint form the basis for motions to dismiss for lack of subject matter jurisdiction. The Board must accept the allegations of the complaint as true and construe those allegations in the light most favorable to the complainant. However, Hawai'i Rules of Civil Procedure Rule 12(b)(1) does not require the Board to accept conclusory allegations on the legal effect of the events alleged in the complaint. Paysek v. Sandvold, 127 Hawai'i 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)). The Board may only dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Hawai'i State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

For standing, the Board looks at whether the parties have the right to bring suit. Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994). In this case, the Board must consider whether HGEA has alleged a sufficient personal stake in the outcome to justify the exercise of the Board's remedial powers on the part's behalf. Tax Foundation of Hawaii vs. State, 144 Hawai'i 175, 188, 439 P.3d 140, 144 (2019) (Tax Foundation).

To that end, the Board turns to the three-part injury-in-fact test adopted in Akinaka v. Disciplinary Board, 91 Hawai'i 51, 979 P.2d 1077 (1999) (*overruled in part by* Tax Foundation) (Akinaka). All three prongs of the Akinaka test must be met to prove standing. *Id.*, 91 Hawai'i at 55, 979 P.2d at 1081.

The first part of the Akinaka test looks at whether HGEA suffered an actual or threatened injury as a result of Kishimoto's wrongful conduct. Akinaka, 91 Hawai'i at 55, 979 P.2d at 1081. With respect to this first prong of the test, HGEA must show an actual, direct, distinct injury to itself, and it cannot be an abstract, conjectural, or hypothetical injury. Hanabusa v. Lingle, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008); Akinaka, 91 Hawai'i at 55, 979 P.2d at 1081.

Even considering the allegations of the complaint in the light most favorable to HGEA and deeming the allegations of the Complaint to be true, the Board must conclude that HGEA

has not alleged an actual injury because of the MOA. HGEA puts forth potential issues that it believes may arise from the MOA, but when questioned at oral argument, HGEA admitted that none of its bargaining unit members had faced any discipline or hardships arising from the MOA, and there has been no threatened injury to any of HGEA's bargaining unit members. Instead, the only injury that HGEA can put forth is a potential possibility—not an actuality or a threatened probability.

Accordingly, as the Board cannot find that HGEA has standing and must dismiss the case.

4. Order

Based on the above, the Board dismisses the complaint in its entirety. This case is closed.

DATED: Honolulu, Hawai'i, _____ April 9, 2021 _____.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
James Halvorson, Deputy Attorney General

ⁱ HRS § 89-2 Definitions defines "employee organization" as:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the

State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

ii HRS § 89-2 Definitions 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.

iii HRS § 89-6 defines the applicable bargaining units as:

(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;

iv HRS § 89-6 defines BU 5 as, “Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent...”

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

“Employer” or “public employer” means...the board of education in the case of the department of education...and any individual who represents one of these employers or acts in their interest in dealing with public employees...

vi HRS § 89-6 defines the employer group for BU 5 and BU 6 as, “the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote...”