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Case No. 21-DR-07-117

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY,

Petitioner(s),

and

DAVID Y. IGE, Governor, State of Hawai'i;
and UNIVERSITY OF HAWAII,

Intervenor(s).

CASE NO(S). 21-DR-07-117

ORDER NO. 3764

ORDER GRANTING PETITIONS FOR
INTERVENTION AND REFUSING TO
ISSUE A DECLARATORY RULING

ORDER REFUSING TO ISSUE A DECLARATORY RULING

1. Introduction and Statement of the Case

Petitioner UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a Petition for Declaratory Ruling (Petition) with the Hawai'i Labor Relations Board (Board), asking three questions regarding, among other things, the State of Hawai'i's (State) 2021 budget bill, House Bill 200 (HB 200), passed by the Hawai'i State Legislature (Legislature) and a particular line item in HB 200's budget worksheets.

UHPA presents three questions:

1. Whether the legislative deletion of a specific occupied bargaining unit position violates Hawai'i Revised Statutes (HRS) Chapter 89ⁱ, specifically whether any item in a budget bill that purports to delete an occupied position is null and void based on HRS § 89-19;
2. Whether, if DAVID Y. IGE, Governor, State of Hawai'i (Governor) signs HB 200 into law, he has committed a prohibited practice as a public employer due to the legislative deletion of a specific occupied bargaining unit positionⁱⁱ, specifically whether it would be a prohibited practice under HRS § 89-13[a](7) for the Governor to sign HB 200, based on HRS §§ 89-3 and 89-8, and/or a prohibited practice under HRS § 89-13[a](8); and

3. Whether, if the Governor signs HB 200 into law, when HB 200 contains the legislative deletion of a specific occupied bargaining unit position, any animus of a Hawai'i State Legislator (Legislator) may be attributed to the Governor, and, if the Legislator's animus is of an exacerbated type, it would justify an extraordinary corrective order from the Board.

1.1. Statement of the Case

The Board, after providing notice of the Petition to various interested parties, received Petitions from Intervention from the Governor and UNIVERSITY OF HAWAI'I (UH) (Petitions for Intervention).

The Board held a hearing on the Petition. UHPA did not object to the Petitions for Intervention, and, after considering such Petitions for Intervention, the Board orally granted both.

After hearing from the parties regarding their positions on the issues, UHPA acknowledged that the first question, as stated, may be too broad and, therefore, agreed to narrow the scope of the first question to the specific facts unique to this situation.

Upon considering the positions and arguments of the parties, the Board determined that the first question and third questions are outside of the Board's jurisdiction and that the second question asks the Board to predetermine whether a set of circumstances would constitute a prohibited practice, which is not an appropriate issue for a declaratory ruling.

Accordingly, the Board refuses to issue a declaratory ruling on any of the three questions presented by UHPA for the reasons articulated in this order.

Any conclusion of law that is improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

2. Background and Findings of Fact

UHPA is the exclusive representativeⁱⁱⁱ for bargaining unit 7^{iv} (BU 7). BU 7 is comprised of public employees.

The employer group for BU 7 consists of the Governor, the Board of Regents of UH, and the President of UH.^v

UHPA and the employer group have a collective bargaining agreement currently in effect for BU 7.

The Legislature, created by Article III of the Hawai‘i State Constitution (Constitution), represents one of the three branches of government, namely, the legislative branch. The Legislature is comprised of twenty-five senators and fifty-one members of the house of representatives, all of whom are elected or appointed officials.

The Legislature and legislators are not public employers or public employees^{vi} within the definition of HRS § 89-2.

The Legislature passes various bills every year, including budget bills that set forth the budget for the State of Hawai‘i (State).

The Constitution lays out the procedures through which bills become laws or do not, including specifications for any budget bills.

HB 200, Relating to the State Budget, is a bill passed by the Legislature that “Appropriates funds for the operating and capital improvement budget of the Executive Branch for fiscal years 2021-2022 and 2022-2023.” Page 1133 of the budget worksheets for HB 200 includes line item 2004-001, which deletes position number 86231 and its associated funding.

Position number 86231 is a position that is currently filled by a BU 7 member in good standing with UH.

3. Analysis and Conclusions of Law

3.1. Petitions for Intervention

The Board’s rules permit the Board to allow petitions for intervention in cases when the petitions are reasonably relevant to the issues already presented in the case and the petitions do not unduly broaden those issues.

When considering petitions for intervention, the Board looks at the factors laid out in HAR § 12-42-8(g)(14)^{vii}, and the Board has discretion to grant or deny a request for permissive intervention. (*See, e.g., Merit Appeals Board v. Taylor, et. al*, Board Case Nos. DR-00-103, DR-00-104, Order No. 2993, at *13 (June 2, 2014)).

UHPA did not object to the Petitions for Intervention submitted by the Governor and UH and stated that it believed that the Governor and UH would be correct intervenors. The Board, after review of the Petitions for Intervention, agrees that, based on the factors listed in HAR § 12-42-8(g)(14), the Governor and UH have both presented reasonably relevant interests in this case that do not unduly broaden those issues.

Accordingly, the Board grants the Petitions for Intervention.

3.2. General Principles of Jurisdiction

The Board was created to administer HRS Chapter 89 “in an effort to promote cooperative relations between the government and its employees and to protect the public by ensuring orderly government operations.” Lingle, 124 Hawai‘i at 204, 239 P.3d at 8 (2010). Accordingly, the Legislature’s policy in enacting HRS Chapter 89 was to promote cooperative relations between government and its employees. United Pub. Workers v. Abercrombie, 133 Hawai‘i 188, 200, 325 P.3d 600, 611 (2014) (Abercrombie).

For the Board to issue a valid ruling, it must have jurisdiction, Tamashiro v. Dep’t of Human Servs., 112 Hawai‘i 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees’ Ret. Sys., 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (Chun), and subject matter jurisdiction can never be waived by any party at any time. Koga Eng’g & Constr., Inc. v. State, 122 Hawai‘i 60, 84, 222 P.3d 979, 1003 (2010) (citing Chun, 73 Hawai‘i at 13, 828 P.2d at 263; In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986)).

The Board has no jurisdiction to render a decision on constitutional issues. See, e.g., Lingle, 124 Hawai‘i at 207, 239 P.3d at 11. Constitutional analyses are unnecessary for the Board to decide statutory issues presented under HRS Chapter 89. Id. at 207, 239 P.3d at 11.

The Board has exclusive original jurisdiction over any controversy concerning prohibited practices. Hawai‘i Gov’t Empls. Ass’n v. Casupang, 116 Hawai‘i 73, 97,170 P.3d 324, 348 (2007) (Casupang).

The Board further has primary jurisdiction where enforcement of a claim requires the resolution of issues which, under a regulatory scheme, have been placed in the Board’s special competence. Abercrombie, 133 Hawai‘i at 196-97, 325 P.3d at 608-09. The specific regulatory scheme given to the Board under HRS Chapter 89 contemplates that issues concerning governmental and employee relations should first be considered by the Board. Id., 133 Hawai‘i at 202, 325 P.3d at 614.

The Board has the authority to issue declaratory rulings. HRS §§ 89-5(i)(5) and 91-8. The Board’s procedures regarding Declaratory Rulings are contained in HAR § 12-42-9, Declaratory rulings by the board. Under HAR § 12-42-9(f)(3) and (4), the Board may refuse to issue a declaratory order for good cause, which includes but is not limited to where “the issuance of the declaratory order may adversely affect the interests of the board... in a litigation that may reasonably be expected to arise” and where the matter is not within Board jurisdiction.^{viii}

3.3. Question One

The first question that UHPA asks relates to a particular legislative deletion and how HRS § 89-19 may or may not affect such a deletion. More specified to the facts of this case, the

first question asks whether the legislative deletion of position number 86231, a filled, BU 7 position, violates HRS Chapter 89 and is null and void based on HRS § 89-19.

Preliminarily, the Board notes that given that the Legislature is not a public employer and does not consist of public employees in bargaining units, it cannot be found to commit prohibited practices. *See* HRS §§ 89-2, 89-13.

In its first argument, UHPA first raises the issue of whether the legislative deletion would violate Article X, § 6 of the Constitution. The Board, as discussed above, has no jurisdiction over the question of such a violation, which UHPA does not dispute.

The primary argument UHPA makes is that this legislative deletion usurps the employers' management rights found in HRS § 89-9(d) and, therefore, must be void under the precedence of HRS Chapter 89 as laid out in HRS § 89-19^{ix}.

The Board finds that as creatively as UHPA makes the question, it is not properly within the Board's jurisdiction. To the extent that it may be within the Board's jurisdiction, it is not within the Board's exclusive, original jurisdiction.

While HRS § 89-5(i)(3) tasks the Board with resolving controversies arising under HRS Chapter 89, this does not allow the Board to answer every question that touches HRS Chapter 89. Rather, the Board must consider "whether the controversy raises policy issues concerning matters that ought to be considered by the HLRB in the interests of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89." *Abercrombie*, 133 Hawai'i at 199, 325 P.3d at 611. The Board finds that UHPA's question does not raise such issues.

As found above, HB 200 appropriates funds for the entirety of the Executive Branch for a period of two fiscal years (2021-2022 and 2022-2023). UHPA is challenging a single line item in over 1100 pages of budget worksheets. The majority of HB 200, therefore, UHPA admits that it does not find objectionable.

To the extent that any line item in the budget bill may be void, the Board finds that this question more appropriately belongs before the courts, rather than the Board. UHPA appears to be asking a question related to challenging HB 200, which is outside of the Board's authority to interpret.

While UHPA's question about the employers' management rights is a question that does fall under the Board's primary jurisdiction, the Board finds that this particular question is not actually about the employers' management rights, thus taking it outside of the Board's jurisdiction. UHPA is not asking about the employers' management rights so much as it is

asking about the Legislature's rights to make a legislative decision that may require the employers to take certain actions to be compliant with the relevant CBA.

The Board does not have the authority to order the Legislature to take or not take any action because, as noted above, the Legislature is not a public employer and does not consist of public employees in bargaining units, meaning that the Legislature, by its own design, cannot commit prohibited practices.

The Legislature's actions do not alter the CBA's requirements or the employers' ability to exercise its management rights to retain or terminate the particular employee currently in position number 86231. This particular employee may have rights under the CBA that would require the employers to move them to a different position, rather than terminate them. While it is true that this may cause complications for the employers, UHPA's actual issue at the heart of the first question has to do with Legislature's right to take certain budgetary actions.

If UHPA were to go directly to the circuit court, UHPA could potentially bring a constitutional challenge or other challenge to HB 200 that does not relate to HRS Chapter 89 at all, based on questions of the budget, UH's authority, the Governor's authority, etc., and this challenge would likely be more appropriate. UHPA's attempt to frame this issue as an HRS Chapter 89 question is, again, creative, but not appropriate.

Accordingly, the Board refuses to issue a declaratory ruling as to Question 1, for good cause and lack of jurisdiction. See, HAR § 12-42-9(f)(4).

3.4. Question Two

In Question Two, UHPA asks the Board to predetermine whether a set of circumstances would constitute a prohibited practice. The Board declines to do so.

A review of the petition shows that UHPA seeks an order from the Board finding violations of HRS § 89-13 before the underlying actions have occurred in what the Board can only interpret as an attempt to try to keep the Governor from signing the State Budget into law.

A declaratory ruling petition is an inappropriate vehicle to allege violations of HRS Chapter 89 or prohibited practices. *See, In re: Poe*, Case No. DR-03-77, Order No. 1748, at *2-3 (August 16, 1999) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1748.pdf>). If UHPA wants the Board to consider whether there are prohibited practice violations by the employers regarding H.B. 200, the proper procedure is to file a prohibited practice complaint.

Accordingly, the Board refuses to issue a declaratory ruling as to Question 2, for good cause under HAR § 12-42-9(f)(3).

3.5. Question Three

As discussed in Section 3.3 above, the Board cannot find that the Legislature or any Legislator has committed a prohibited practice, as they are not public employers or public employees within the definitions of HRS Chapter 89. In Question 3, UHPA seeks to attribute the alleged personal animus of a Legislator to the public employer due to the Governor's enactment of a bill that funds the entire state and includes a particular legislative deletion that UHPA has issues with, as discussed in the two questions above.

The Legislature and the Executive Branch, represented by the Governor, are two separate branches of government. UHPA, in Question 3, seeks to have the Board take the position that the alleged state of mind of one be imputed to the other.

The Board refuses to make such a ruling for good cause, as this is a political question that cannot be answered by the Board, and is thus, outside of the Board's jurisdiction. HAR § 12-42-9(f)(4).

While there is no specific definition of what a "political question" is, the Hawai'i Supreme Court (HSC) has noted that political questions include those that have an "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" and those that have "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." Trs. Of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 169-70, 737 P.2d 446, 455 (1987).

Here, UHPA sets forth a question that requires the Board to first make a policy determination as to the Governor's intentions in performing his constitutionally required duties related to the State Budget, and then asks the Board to alter the Legislature's role by making it, essentially, a representative of the Executive Branch. The Board cannot do so without making a judgment not susceptible to the Board's usual tools of judicial methodology. See, Kaho'ohanohano v. State, 114 Hawaii 302, 335, 162 P.3d 696, 729 (2007).

Even if the Board were to find that Question Three was not a political question, the Board recognizes that this question requires a constitutional consideration of the Governor's role when signing the State budget. As noted above, constitutional questions are outside of the Board's jurisdiction.

Question Three is another question that, if not considered a political question, would be more appropriate for the courts to answer. The Board has no ability to determine the relationship between the Governor and the Legislature when it comes to enacting the budget bill. The Board has no authority over the Legislature and its actions and no authority to weigh the personal feelings of any Legislator. Even if not a political question, Question 3 is outside of HRS Chapter 89 and the Board's jurisdiction.

Accordingly, the Board refuses to issue a declaratory ruling as to Question Three for good cause and lack of jurisdiction. HAR § 12-42-9(f)(4).

4. Order

For the reasons set forth above, the Board grants the Petitions for Intervention submitted by the Governor and UH and hereby refuses to issue a declaratory ruling for good cause in accordance with HAR § 12-42-9. This case is closed.

DATED: Honolulu, Hawai'i, June 10, 2021.

HAWAII LABOR RELATIONS BOARD





MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



IN MUSTO, Member

Copies sent to:

T. Anthony Gill, Esq.
James Halvorson, Deputy Attorney General
Elisabeth A.K. Contrades, Associate General Counsel

ⁱ UHPA also asks certain constitutional questions related to this issue; however, the Board has no jurisdiction to issue a decision on constitutional issues, and such analyses are unnecessary for the Board to determine the statutory issues presented. Hawaii Gov't Emp. Ass'n, AFSCME Local 152 v. Lingle, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010) (Lingle).

ⁱⁱ Again, UHPA brings additional constitutional questions related to this issue; however, the Board cannot decide such constitutional issues. See Lingle, endnote i above.

ⁱⁱⁱ 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.

^{iv} HRS § 89-6 defines BU 7 as “Faculty of the University of Hawaii and the community college system.”

^v See HRS § 89-6(d)(4), which provides in relevant part:

(4) For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote.

^{vi} HRS § 89-2 Definitions defines “employee” or “public employee” as:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

^{vii} HAR § 12-42-8(g)(14) permits intervention into proceedings before the Board, excepting representation proceedings, under certain circumstances. In considering a Petition for Intervention, the Board looks at the issues required by such a petition, namely:

- (i) Nature of petitioner’s statutory or other right.
- (ii) Nature and extent of petitioner’s interest.
- (iii) Effect of any decision in the proceeding on petitioner’s interest.
- (iv) Other means available whereby petitioner’s interest may be protected.
- (v) Extent petitioner’s interest may be represented by existing parties.
- (vi) Extent petitioner’s participation can assist in development of a sound record.
- (vii) Extent petitioner’s participation will broaden the issue or delay the proceeding.
- (viii) Extent petitioner’s interest in the proceeding differs from that of the general public.
- (ix) How the petitioner’s intervention would serve the public interest.

^{viii} HAR § 12-42-9(f) states in pertinent part:

(f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:

- (3) The issuance of the declaratory order may adversely affect the interests of the board or any of its officers or employees in a litigation which is pending or may reasonably be expected to arise.
- (4) The matter is not within the jurisdiction of the board.

^{ix} HRS § 89-19 provides:

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.