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Case No. 21-CE-05-961**

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HSTA

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION (HSTA),

Complainant,

vs.

DAVID IGE, Governor, State of Hawaii;
DEPARTMENT OF EDUCATION, State of
Hawaii; BOARD OF EDUCATION, State of
Hawaii; KEITH T. HAYASHI, Interim
Superintendent, Department of Education,
State of Hawaii;

Respondents.

HLRB NO.: _____

PROHIBITED PRACTICE
COMPLAINT

PROHIBITED PRACTICE COMPLAINT

COMES NOW, Complainant HAWAII STATE TEACHERS ASSOCIATION

(“HSTA” or “Union”), and for a complaint against the above-identified Respondents, alleges and
avers as follows:

PARTIES

1. At all times relevant herein, Complainant HSTA was and is an employee organization as defined under Hawaii Revised Statutes (“HRS”) §89-2.
2. At all times relevant herein, Complainant HSTA was and is the certified exclusive representative and collective bargaining agent for all teachers and other personnel of the Department of Education, State of Hawaii, under the same pay schedule as that bargaining unit is defined under HRS §§89-2 and 89-6(a)(5) (“BU-5 employees”),¹ and has been so recognized and certified by the Hawaii Labor Relations Board (“HLRB” or “Board”), and its predecessor the Hawaii Public Employment Relations Board pursuant to HRS §89-8.
3. At all times relevant herein, Respondent David Ige (“Respondent Ige”) was and is the duly appointed Governor of the State of Hawaii, and an employer or public employer as defined under HRS §89-2 and the applicable collective bargaining agreement (“CBA”) covering the relevant periods.
4. Respondent Department of Education, State of Hawaii (“Respondent DOE”) is a political subdivision of the State of Hawaii, and a public employer under the applicable CBA covering the relevant periods.
5. Respondent Board of Education (“Respondent BOE”) is the executive head of Respondent DOE, empowered under Haw. Const. art. X, § 3 “to formulate statewide educational policy and appoint the superintendent of education as the chief executive officer of the public

¹ HSTA’s members include half-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent within the State of Hawaii under bargaining unit 5, Multi-Track Year-Round School teachers, and charter school teachers. A Multi-Track Year-Round School is defined by Article XVIII of the CBA as “a school operating year round under two or more instructional tracks because its student enrollment exceeds or is soon expected to exceed design capacity by 20% or more.”

school system”, and an employer or public employer as defined under HRS §89-2 and the applicable CBA covering the relevant periods.

6. Respondent Keith T. Hayashi, (“Respondent Hayashi”) is the Interim Superintendent of Respondent DOE and has served in that position since 8/1/21², and is an employer or public employer as defined under HRS §89-2 and the applicable CBA covering the relevant periods.

7. Respondents are collectively referred to as the Employer.

8. The HSTA and the Employer negotiated and agreed to a CBA that took effect on 7/1/21 and expires on 6/30/23 and which includes an agreed upon grievance procedure under Article V.

9. The HSTA brings this action as a signatory to the CBA, and in its capacity as the exclusive representative of BU-5 employees.

10. In this case, the Employer wilfully refused to comply with, adhere to, and process two (2) properly filed grievances through the agreed upon grievance procedure under Article V of the CBA.

11. The Employer’s actions and/or omission as described below are in violation of the CBA and constitute a prohibited practice under HRS §89-13(a)(8).

HAWAI’I COLLECTIVE BARGAINING LAWS

12. The HLRB under HRS Chapter 89 has exclusive original jurisdiction to resolve controversies under that chapter.

13. BU-5 employees of the State of Hawai’i are legally authorized to bargain

² Prior to Respondent Hayashi, Christina Kishimoto served as Superintendent.

collectively over wages, hours, and working conditions. Hawai'i Constitution, Art. XIII, Sec. 2, and HRS, Ch. 89.

14. Under HRS §89-14, the HLRB has “exclusive original jurisdiction over any controversy concerning prohibited practices.” See In re United Pub. Workers, AFSCME, Local 646, AFL-CIO, Union, 131 Haw. 142, 144, 315 P.3d 768, 770 (Ct. App. 2013), as corrected (Feb. 21, 2014).

15. HRS §89-5(i)(4) provides that the Board's powers and functions include the authority to “Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]” HRS §89-5(i)(4); In re Hawai'i Gov't Emps. Ass'n, Local 152, 116 Haw. 73, 97, 170 P.3d 324, 348 (2007) (“The legislature delegated to the HLRB exclusive original jurisdiction over controversies surrounding prohibited practices including ‘those powers which are reasonably necessary’ to make its jurisdiction effective.”)

16. The Hawai'i Supreme Court has held:

The wilful failure of an employer to observe the terms of a collective bargaining agreement is defined by §89-13(a)(8) as a prohibited practice, with respect to which §89-5(b)(4) empowers the Board, upon complaints by employers, employees and employee organizations, to “take such actions with respect thereto as it deems necessary and proper.”

Fasi v. State Pub. Employment Relations Bd., 60 Haw. 436, 443-45, 591 P.2d 113, 117-118 (1979) (emphasis added).

17. The Hawaii Legislature has declared under HRS §89-1(a) “that joint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working

conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.” The Legislature further declared under HRS §89-1(b) “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.”

18. 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, 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.”

19. HRS §89-10 provides in relevant part:

(a) Any collective bargaining agreement reached between the employer and the exclusive representative ... shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, **all provisions in the agreement** that are in conformance with this chapter, **including a grievance procedure** and an impasse procedure culminating in an arbitration decision, **shall be valid and enforceable** and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

...

(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other

personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

HRS §89-10 (emphasis added)

20. Under HRS §89-13(a)(8), it is a prohibited practice for a public employer to wilfully “[v]iolate the terms of a collective bargaining agreement[.]” HRS §89-13 (a)(8).

COLLECTIVE BARGAINING AGREEMENT

21. At all times relevant herein, the HSTA and the Employer were and are parties to a CBA, which contains various contracted terms and agreements.

22. Article 1.B. of the CBA provides:

Pursuant to certification by the Hawaii Labor Relations Board in Case Number 1, the Employer recognizes the Association for the purpose of collective bargaining pursuant to the Hawaii Public Employment Act, as the exclusive representative of a unit consisting of teachers and other personnel of the Department of Education (DOE) under the same salary schedule, pursuant to Section 302A-624, HRS.

23. Article V.A of the CBA states in relevant part:

Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement **shall be a grievance.**

(emphasis added).

24. Under the CBA, a grievance must be processed and decided through various steps, including an Informal Discussion (Article V.E), an optional mediation (Article V.F), a Step 1 meeting with the Complex Area Superintendent (“CAS”) or Assistant Superintendent (Article V.G), a Step 2 meeting with the Superintendent or designee (Article V.H), and “final and binding” arbitration (Article V.I).

25. Under the CBA, the HSTA has a right to pursue grievances. The Employer may disagree with the substance of a grievance but must permit the agreed upon grievance procedure

to move forward until its conclusion.

26. If the Employer believes that a grievance is not arbitrable, its remedy is not to refuse to honor or follow the agreed upon grievance procedure under the CBA. Instead, Article V(I)(1)(5) of the CBA provides:

If the Employer disputes the arbitrability of any grievance submitted to arbitration, **the arbitrator shall first determine the question of arbitrability.** If the arbitrator finds that it is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

(emphasis added).

SUBJECT INCIDENT

27. The World Health Organization is a specialized agency of the United Nations whose core functions include directing and coordinating “international health work by promoting collaboration, mobilizing partnerships and galvanizing efforts of different health actors to respond to national and global health challenges.”

28. According to the World Health Organization, it learned of an outbreak in Wuhan, China of an infectious disease caused by the coronavirus in December 2019.

29. The World Health Organization announced an official name for the discovered coronavirus as COVID-19.³

30. On 1/30/2020, the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

31. On 1/31/2020, the United States Secretary of Health and Human Services declared the outbreak of COVID-19 a public health emergency for the United States.

32. On 1/31/2020, the President of the United States declared a health emergency due

³ ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’ for disease.

to the outbreak of COVID-19.

33. On 3/4/2020, Respondent Ige issued an emergency proclamation for the State of Hawai'i wherein he suspended "Chapter 89, Hawaii Revised Statutes, collective bargaining in public employment" "to the extent necessary for county and state agencies to accomplish the emergency management functions contemplated under this Proclamation".

34. On 3/15/2020, Respondent DOE announced that it was extending spring break through 3/27/2020 for all public schools, and multi-track year-round schools were to be "off track" and students were not to report to school from 3/16/2020 to 3/27/2020. Further, 10-month blue, red, and green track teachers were not to report to work the week of 3/16/2020 to 3/20/2020. However, all multi-track teachers were still required to report to work on 3/23/2020 and normal school operations for all schools were to resume on 3/30/2020.

35. On 3/15/2020, Respondent DOE confirmed that 12-month multi-track teachers were "not expected to report to work from 3/16/2020 to 3/20/2020" but were "scheduled to report to school on 3/23/20[.]"

36. On 3/15/2020, following a telephone consultation, the HSTA requested an informal meeting with the Employer "as the recent announcements constitute a violation of the contract, in particular Article X - Teacher Protection[.]"

37. On 3/15/2020, the HSTA asked the Employer whether it would comply with Article X⁴ of the CBA and not require teachers to report to school due to the COVID-19 outbreak, amongst other things. Respondent DOE informed HSTA representatives that it would

⁴ Article X(G) of the CBA provides: "When students are sent home from school or are not required to attend due to emergencies which endanger health or safety, teachers will not be required to remain at, nor report to, said schools."

respond to their questions and concerns later that night or the following morning.

38. On the evening of 3/16/2020, without negotiating and/or reaching an agreement as required by HRS Chapter 89, Respondent DOE informed HSTA representatives that they were going “to continue with the schedule for next week for teachers and admin to come together” on 3/23/2020 at their respective schools.

39. On 3/17/2020, Respondent DOE notified the HSTA that it would now provide BU-5 employees with the option of working from home or reporting to their respective schools on 3/23/2020, but still required all teachers to report to work on 3/30/2020.

40. On 3/17/20, Respondent Ige announced during a press conference that BU-5 employees were required to report to work on 3/30/2020, explaining: “We believe that having schools that practice appropriate social distancing methods to create a safe and stable learning environment for our children is very important in this time for our entire community.”

Respondent Ige also announced changes to other various working conditions, including school schedules, class assignments, recess and lunch schedules, and offering student lunches in classrooms.

41. On 3/18/2020, the office of the Superintendent issued a press release stating:

HIDOE employees to begin remote work March 19, schools to close March 30. The Hawaii State Department of Education (HIDOE) will close its offices except for essential functions effective Thursday, March 19. Schools will close March 30 following the extension of spring break. Employee return dates will be staggered. Students are anticipated to return to school April 7. HIDOE employees will be working remotely and those who need to perform duties at a campus or office during this period will be limited to those tasks before returning to their telework arrangement. The Department will be meeting internally and with key stakeholders today to finalize logistics. Additional details will be made public at a press conference Thursday, March 19, 2020, 3 p.m.

42. Due to the Employer's actions and its refusal to bargain regarding the impact and changes in the working conditions of BU-5 employees, HSTA filed a prohibited practice complaint with the HLRB on 3/17/2020 in case No. 20-CE-05-942.

43. After the HSTA filed its prohibited practice complaint in case No. 20-CE-05-942, the Employer reversed its position and agreed to negotiate with the HSTA as required by HRS Chapter 89.

44. The Employer agreed to negotiate with the HSTA as required by HRS Chapter 89 despite Respondent Ige's emergency proclamation which purported to suspend "Chapter 89, Hawaii Revised Statutes, collective bargaining in public employment[.]"

45. On 3/29/2020, following negotiations between the Employer and the HSTA, the parties finalized the Coronavirus (COVID-19) Preparation and Response Agreement wherein the parties agreed that "teachers shall not be required to remain at nor report to schools or worksite and shall perform teacher-initiated activities and planning and collaboration activities in alignment with a school's instructional plan, from a remote location such as their home."

46. On 4/24/2020, following continued negotiations between the Employer and the HSTA, an Addendum to Coronavirus (COVID-19) Preparation and Response Agreement was entered into which stated in relevant part, "Because of the prolonged school closures, an addendum to the Coronavirus (COVID-19) Preparation and Response Agreement is necessary. Classroom teachers will continue to work from remote locations and provide students learning and enrichment activities for the rest of SY 2019-20."

47. On 5/28/2020, in a letter to the HSTA and despite Respondent Ige's purported suspension of HRS Chapter 89, the Employer confirmed:

The Department continues to engage in good faith impact bargaining with the HSTA since the start of COVID-19 to present, in an earnest attempt to forge mutual agreement with the HSTA and our teachers during this uncertain time. We will continue to partner with the HSTA and address this matter at our scheduled weekly meeting starting Tuesday, May 26, 2020 as we work towards reopening our schools on August 4, 2020.

48. On 6/9/2020, the HSTA filed its motion to withdraw its complaint in HLRB case No. 20-CE-05-942 because “Respondents withdrew its intent to order HSTA’s members back to work prior to the end of the school year and before the coronavirus (“COVID-19”) outbreak had ended or was controlled, and the parties have engaged in respectful and good faith bargaining with each other.”

49. On 6/26/2020, the Employer and the HSTA agreed upon and entered into a Memorandum of Understanding (“MOU”) wherein the parties acknowledged “that the coronavirus (‘COVID-19’) pandemic, has brought unprecedented challenges to our schools, our economy, and our families. In these challenging times, all of our employees, including teachers, have gone to extraordinary lengths to ensure some continuity of education to meet the needs of the whole child and to support students who depend on schools as a source of stability in uncertain times.”

50. One of the stated purposes of the MOU was to “[e]nsure teachers and the Union representatives’ involvement in the continuous improvement of systems as the COVID-19 pandemic response evolves and changes through a mechanism for collaboration between Association as the exclusive representative of teachers and the Employer.”

51. During a news conference on 7/20/2020, the Employer “confirmed the state’s plans to move ahead with school reopening for students on Tuesday, Aug. 4. Teachers return on Wednesday, July 29.”

52. In July 2020, Hawaii experienced a spike in COVID-19 cases.

53. On 7/30/2020, the “Hawaii State Board of Education (BOE) took action ... to approve an Aug. 17 start date for Hawaii State Department of Education (HIDOE) students” which “allows for nine additional days of staff training before students return.” The Employer announced, “[a]s the COVID-19 situation evolves or as new health guidance becomes available, HIDOE will adjust its Return to Learn: School Reopening Plan to ensure that a safe learning and working environment is provided for students, teachers and staff. Updates about the school year will continue to be posted on the Department’s website and social media platforms (Facebook, Twitter, Instagram and LinkedIn).”

54. On 8/6/2020, the HSTA requested “impact bargaining” with the Employer in regard to “needed added protections for employees given the large community spread” and to discuss the change in working conditions for HSTA’s members due to the increased danger associated with the spike and rapid spread of new COVID-19 cases.

55. On 8/7/2020, the Employer announced that “[s]tarting on Aug. 17, all Oahu public schools will be implementing full distance learning models.” However, “[d]uring the first week of school, students will physically return to campus on a coordinated and scheduled basis, determined by each individual school, to connect with their teacher, receive training on the distance learning platforms, and address issues with connectivity and access to technology. Special considerations will be given to vulnerable students and their families for more in-person access to the school and teachers.” Furthermore, teachers and staff were required to “report to their designated work sites for continued distance learning instruction. Special education services

that cannot be provided in a distance learning format will be available in person. Supervised in-person learning labs at schools will be available for students who do not have WiFi access.”

56. The Employer did not negotiate or bargain in good faith with the HSTA prior to its announcement, as required by HRS Chapter 89.

57. On 8/13/20, the HSTA filed its prohibited practice complaint and petition for declaratory order and injunctive relief in case Nos. 20-CE-05-950 and 20-DR-05-115.

58. On 8/20/20, Respondents in case Nos. 20-CE-05-950 and 20-DR-05-115 filed a motion to dismiss wherein they argued, in part, that:

Governor Ige has issued a series of emergency proclamations exercising the Governor’s plenary emergency power to temporarily suspend the operation of HRS chapter 89—the legal framework that provides jurisdiction to this Board which governs prohibited practice challenges under state law.

As discussed in more detail below, because the [sic] of the Governor’s repeated exercise of this power, this Board does not presently have subject matter jurisdiction over HSTA’s HRS Chapter 89 based claims. Respectfully, the only action this Board can take is to dismiss all aspects of this proceeding[.]

59. On 9/1/20, the Board denied Respondent’s motion to dismiss, explaining:

The Board’s authority is to determine issues under HRS Chapter 89. The Board is not here to interpret HRS Chapter 127A or emergency proclamations.

Therefore, the Board denies the Motion to Dismiss on this issue. In denying the Motion to Dismiss on this issue, the Board does not take a position on whether or not any portion of any Emergency Proclamation suspends any part of HRS Chapter 89, as the Board does not have jurisdiction to consider such a question[.]

HLRB Order No. 3644.

60. Thereafter, the Employer agreed to negotiate with the HSTA and on 9/10/20, the parties filed its Stipulation to Stay Proceedings Pending Continued Negotiations. See HLRB Order No. 3654.

61. On 3/14/21, and despite Respondent Ige’s emergency proclamation which purported to suspend “Chapter 89, Hawaii Revised Statutes, collective bargaining in public employment”, the HSTA and the Employer negotiated and agreed to an addendum to the MOU pursuant to HRS Chapter 89.

62. On 8/5/21, Respondent Ige issued an Emergency Proclamation⁵ Related to the State’s COVID-19 Response (Emergency Proclamation) which required State and County workers, including BU-5 employees, to attest to whether they were:

1. Fully vaccinated for COVID-19 (two weeks have passed since the second dose of a two-dose series or two weeks since a single-dose vaccine);
2. Partially vaccinated (received one of a two-dose course of vaccination); or
3. Not vaccinated for COVID-19.

63. Under the 8/5/21 Emergency Proclamation, State and County workers who were not fully vaccinated were “subject to regular COVID-19 testing and may also be subject to restrictions on official travel.”

64. Under the 8/5/21 Emergency Proclamation, the vaccination and testing requirements “shall be enforceable through disciplinary action, up to and including termination.”

65. Under the 8/5/21 Emergency Proclamation, Respondent Ige continued the suspension of certain sections of HRS chapter 89 as follows:

Section 89-9, HRS, **scope of negotiations; consultation**, section 89- 10(d)^[6], HRS, **written agreements; enforceability; cost items**, and section 89- 13, HRS,

⁵ Respondent Ige issued continuous emergency proclamations and supplements related to the COVID-19 pandemic since 3/5/2020.

⁶ HRS 89-10(d), entitled written agreements; enforceability; cost items, does not address the enforceability of an existing CBA but rather addresses new agreements.

prohibited practices, to the extent necessary to allow State and county departments, agencies, and other public entities to implement policies, practices, procedures, and to take other actions necessary to mitigate risks posed by COVID-19 and its variants, including but not limited to imposition of requirements pertaining to or requiring employee testing and/or vaccination. This suspension ensures government can provide essential services safely and is necessary for the execution of emergency functions, including the efficient execution of Section III.^[7]

66. Respondent Ige’s emergency proclamation did not suspend existing CBAs.

67. On 8/13/21, Respondent DOE issued a memorandum outlining the plan for compliance with the Governor’s Emergency Proclamation. In relevant part, the Memorandum stated that BU-5 employees were required to complete weekly testing beginning Monday, 8/23/21 (subsequently pushed back to 8/30/21), unless they attest to and provide proof of full vaccination for COVID-19, which included a process to request a religious or medical accommodation. Respondent DOE noted that that failure to comply with this requirement may result in disciplinary action, up to and including termination.

68. On 8/29/21, in a letter entitled “Non-Compliance of Attestation of COVID-19 Testing or Vaccination”, Respondent Hayashi confirmed that “Employees covered by a collective bargaining agreement have the right to file a grievance, and the grievance procedures shall be adhered to.”

69. On 8/29/21, Respondent Hayashi issued a letter addressed to the Assistant Superintendents, CASs, Principals (All), School Administrative Services Assistants and Secretaries that stated in part:

The Department is implementing a robust, comprehensive COVID-19 testing plan that endeavors to protect the health and well-being of everyone. Therefore, there

⁷ Respondent Ige issued his Emergency Proclamation Related to the State’s COVID-19 Delta Responses on 9/1/21 which purported to suspend the same sections of HRS Chapter 89.

may be times that an employee may have to take a leave of absence due to COVID-19 related matters. Attached is a high-level overview of the current leaves that can be applied toward COVID-19 related leaves of absence.

Employees are encouraged to take the COVID-19 test during non-work hours; however, an employee may request a leave of absence if unable to. As a reminder, an employee must request a leave of absence, and the Administrator approves or disapproves **in accordance with the collective bargaining agreement** and/or School Code provisions (Certificated).

(emphasis added).

70. On 9/3/21, the HSTA timely filed class grievances in accordance with Article V (Grievance Procedure) of the CBA in grievance Nos. O-22-04 and O-22-05, which proceeded directly to Step 2 of the CBA's grievance procedure.

71. Grievance No. O-22-04 alleged that:

The increase of positive COVID-19 cases and employer's failure to consistently implement health and safety guidelines have created an unsafe working environment for HSTA's members. The Employer has required thousands of staff and students to quarantine which in turn has required employees to engage in telework while on leave, increased their working hours to implement blended instructional delivery (simultaneous instruction), and caused other substantive changes in the working conditions of bargaining unit 05 employees. The employer is violating the collective bargaining agreement by refusing to negotiate the impact of the changing working conditions.

2. Specific term or provision of the Agreement allegedly violated:

Article I - Recognition

Article II - Non-Discrimination

Article VI - Teaching Conditions and Hours

Article VII - Assignments and Transfers

Article VIII - Teacher Performance

Article X - Teacher Protection

Article XII - Leaves

Article XVI - Work Year

Article XVII - 12-Month Teacher Compensation and Sick/Vacation Accumulation

Article XVIII - Multi-Track Year-Round Schools

Article XXIV - Miscellaneous

Article XXV - Maintenance of Benefits

Article XXVII - Entirety Clause

72. Grievance No. O-22-05 alleged that:

The Department of Education (“DOE”) directed all employees to be tested every week for COVID-19 or provide proof of COVID-19 vaccination by August 30, 2021, without impact bargaining over the implementation of this new directive. As a result of this new directive, employees who are unvaccinated have been required to undergo a medical examination to show that they are negative for COVID-19 at their own expense. The DOE’s actions violate the HSTA Collective Bargaining Agreement

2. Specific term or provision of the Agreement allegedly violated:

Article I - Recognition

Article II - Non-Discrimination

Article IV - Association Rights

Article VI - Teaching Conditions and Hours

Article VII - Assignments and Transfers

Article XII - Leaves

Article XVI - Work Year

Article XVII - 12-Month Teacher Compensation and Sick/Vacation Accumulation

Article XVIII - Multi-Track Year-Round Schools

Article XXIV - Miscellaneous

Article XXV - Maintenance of Benefits

Article XXVII - Entirety Clause

73. On 9/30/21, the Employer responded to HSTA’s grievances, stating that it will not take any “further action on this matter.” The Employer explained:

We are in receipt of the above referenced grievances dated September 3, 2021, sent to Interim Superintendent Keith Hayashi. Please be advised that the Governor’s Emergency Proclamation dated August 5, 2021, suspended the following provisions of law, but only as explicitly set forth below and as allowed by federal law, pursuant to section 127 A-13(a)(3): HRS section 89-9, scope of negotiations; consultation, section 89-10(d), written agreements; enforceability; cost items, and section 89-13, prohibited practices, evidence of bad faith, to the extent necessary to allow State and county departments, agencies, and other public entities to implement policies, practice, procedures, and to take other actions necessary to mitigate risks posed by COVID-19 and its variants, including but not limited to, imposition of requirements pertaining to or requiring employee testing. This suspension ensures government can provide essential services safely

and is necessary for the execution of emergency functions. As such, we are taking no further action on this matter.

74. On 10/1/21, the HSTA demanded arbitration in HSTA grievance Nos. O-22-04 and O-22-05.

75. On 10/4/21, the Employer responded to the HSTA's demand for arbitration, stating that "[o]ur 'no further action' included in the Step 2 acknowledgment for this we sent near the end of last week still remains our Department's position for now."

76. On 10/8/21, the HSTA sent a letter to the Employer requesting additional information. The HSTA explained, in part:

To better understand your position, please explain how impact bargaining or the attempt to collectively negotiate those impacts in any way impedes, tends to impede, conflicts or is in any way detrimental to the expeditious and efficient execution of the State's emergency functions relating to COVID-19. Is it also your position that the CBA has been suspended, and if so, is it your position that it has been suspended in its entirety or only select parts? If it is the latter, please state which terms of the CBA have been suspended. Would you also please cite for us the legal authority that suspended the applicable CBA or any terms or provisions contained therein, including the right to pursue a grievance as set forth in the CBA.

We request a response to the information requested above no later than Friday, October 15, 2021. This information is critical for HSTA to understand the specific basis and grounds to bypass collective negotiations, and your contention that "This suspension ensures government can provide essential services safely and is necessary for the execution of emergency functions," given that neither you, nor the Employer has provided any of this information (emphasis added).

77. The Employer has not responded to HSTA's 10/8/21 request for additional information and/or clarification.

78. The Employer has refused to take any further action in grievance Nos. O-22-04 and O-22-05.

79. Respondents' conduct, actions and inactions constitute a prohibited practice

pursuant to HRS §89-13(a)(8), and wilfully and intentionally violated the terms of the applicable CBA and the rights of HSTA's members.

WHEREFORE, Complainant HSTA respectfully requests that this Honorable Board grant appropriate relief and award damages in favor of Complainant and against the above-named Respondents, including, but not limited to, the following:

- a. That an order issue from the Board finding that Respondents have committed a prohibited practice pursuant to HRS §89-13(a)(8);
- b. That a declaratory order issue from the Board finding that Respondents' refusal to comply with and follow the grievance procedure under the CBA is a prohibited practice pursuant to HRS §89-13(a)(8);
- c. That an order issue from the Board directing Respondents to post for publication, in all locations where HSTA members may review and gather, for 60 days, the decision of the Board finding that Respondents' refusal to comply with and follow the grievance procedure under the CBA is a prohibited practice pursuant to HRS §89-13(a)(8), with proof of compliance being made to the Board and the HSTA;
- d. A cease and desist order prohibiting violations of HRS §89-13(a)(8);
- e. Interlocutory relief prohibiting continuing violations by the Respondents of the contractual rights of the public employees of BU-5;
- f. That an order issue from the Board requiring Respondents to comply with and follow the grievance procedure under the CBA in grievance Nos. O-22-04 and O-22-05;
- g. Make whole relief including, but not limited to, all costs and all reasonable attorney's fees incurred by the HSTA in bringing and prosecuting this complaint before the Board;
- h. That an order issue from the Board ordering Respondents to pay civil penalties of \$10,000.00 per violation for wilfully committing prohibited practices under HRS §89-13(a)(8); and
- i. That an order issue from the Board against Respondents, and each of them, for such other and further relief as the Board deems appropriate and proper.

DATED: Honolulu, Hawaii, October 20, 2021.

/s/ Keani Alapa
KEANI ALAPA

Attorney for Complainant