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HSTA

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION (HSTA),

Complainant,

vs.

DAVID Y. IGE, Governor, State of Hawai'i;
BOARD OF EDUCATION, State of Hawai'i;
KEITH T. HAYASHI, Interim
Superintendent, Department of Education,
State of Hawai'i; DEPARTMENT OF
EDUCATION, State of Hawai'i;

Respondents.

HLRB NO.: 21-CE-05-961

COMPLAINANT HSTA'S CLOSING
BRIEF ON THE MERITS OF THE
CASE; CERTIFICATE OF SERVICE

COMPLAINANT HSTA'S CLOSING BRIEF ON THE MERITS OF THE CASE

Complainant Hawaii State Teachers Association ("HSTA"), by and through its attorneys, the Law Offices of Vladimir P. Devens, LLC, respectfully submits its Closing Brief on the Merits of the Case.

I. INTRODUCTION

The Respondents¹ refuse to hear two (2) class grievances filed by the HSTA by standing on vague and ambiguous references to the COVID-19 pandemic and Respondent Governor David Y. Ige’s emergency proclamation, in clear violation of the collective bargaining agreement (“CBA”). The Respondents fail to put forth a valid explanation justifying its wilful and egregious conduct that strikes at the heart of collective bargaining, the CBA and its grievance procedure. Without the CBA and its grievance procedure, a union stands defenseless. Our country’s highest court explained:

A collective bargaining agreement is an effort to erect a system of industrial self-government... the **grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government**. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. **The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.**

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580–82, 80 S. Ct. 1347, 1351–53, 4 L.Ed.2d 1409 (1960) (emphasis added). The Respondents’ actions and inactions in this case represent a full-fledged attack on collective bargaining itself as they continue to operate with blatant disregard for the constitutional right to collectively bargain and the valid and enforceable contract between the HSTA and the Respondents. If allowed to refuse to process

¹ “Respondents” collectively refer to David Y. Ige, Governor, State of Hawai’i; Board of Education, State of Hawai’i; Keith T. Hayashi, Interim Superintendent, Department of Education, State of Hawai’i; Department of Education, State of Hawai’i.

grievances or follow the CBA at their whim as they have done here, collective bargaining will be turned on its head and the future of this constitutionally protected right as we know it will undoubtedly be in question. This cannot be allowed to happen.

The applicable CBA was the product of negotiations between the HSTA and the Respondents and its effective period runs from 1/1/21 to 6/30/23. See Exhibit² G. As part of the negotiations and incorporated into the CBA, the Respondents pledged to recognize the HSTA “as the exclusive representative of a unit consisting of teachers and other personnel of the Department of Education (DOE) under the same salary schedule” and agreed to abide by a grievance procedure under Article V wherein “teachers or their certified bargaining representative shall have the right to institute and process grievances[.]” See Exhibit G at 7.

In this case, the HSTA properly filed two class grievances pursuant to the CBA’s grievance procedure alleging that Respondents violated various provisions of the CBA. At each step of the grievance, the Employer refused to take action, which rendered the HSTA’s class grievances as good as dead and the CBA and its grievance procedure meaningless. The Respondents’ blatant disregard of the CBA and its grievance procedure was wilful and a clear cut prohibited practice.

The Respondents’ use of the COVID-19 pandemic as its justification to refuse to honor and follow the CBA is legally full of holes and logically full of hot air. The grievance process, which is intended to bring before a neutral arbitrator a disputed question on whether the contract was violated, in no way interferes with the emergency functions needed to combat the COVID-19 pandemic in an efficient and effective manner. Significantly, the Respondents have

² “Exhibit” refers to the documents referenced in and attached to the Joint Statement of Stipulated Issues, Facts and Documents and Waiver of Hearing on the Merits (“Stipulated Facts”), filed herein on 11/22/21, which the parties stipulated into evidence. See Stipulated Facts.

not offered an explanation that would support such a contention, which is not surprising because none exists.

The HSTA is not interested in doing anything that could jeopardize the health and safety of its members or the public. Thus, when Respondents responded to the HSTA's class grievances by refusing to take action, the HSTA did not make a call to battle but instead attempted to work with the Employer and requested an explanation as to why or how complying with the CBA and its grievance procedure would interfere with the Respondents' emergency functions related to COVID-19. Instead of working together "to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government," the Respondents refused to respond. Bd. of Ed. v. Hawaii Pub. Employment Relations Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974). This not only violated a separate provision of the CBA which requires the Employer to provide such information, it is also a tell-tale sign that the Respondents have no legal justification for its actions.

For the reasons discussed below, the HSTA requests that the Hawaii Labor Relations Board ("HLRB" or "Board") find that the Respondents committed a prohibited practice pursuant to HRS §89-13(a)(8) by violating terms of the CBA, and grant the appropriate relief. The Board must send a clear and resounding message that Hawaii's collective bargaining laws guaranteed by our constitution will be protected.

II. ISSUE

The issue is whether the Respondents committed a prohibited practice under HRS § 89-13(a)(8) when it refused to process two (2) class grievances filed by the HSTA, including

following the appropriate steps, selecting an arbitrator and proceeding to arbitration, in violation of the CBA.

III. FACTUAL SUMMARY

The parties stipulated to the facts relevant to the issue before the Board.³ See Joint Statement of Stipulated Issues, Facts and Documents and Waiver of Hearing on the Merits (“Stipulated Facts”), filed herein on 11/22/21.⁴

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.

See Exhibit A at 6; Stipulated Facts at 1.

Under the 8/5/21 emergency proclamation, State and County workers not fully vaccinated were “subject to regular COVID-19 testing and may also be subject to restrictions on official travel.” See Exhibit A at 6; Stipulated Facts at 3. The emergency proclamation further

³ The merits of the underlying class grievances are not at issue. As stated above, the issue is whether the Employer committed a prohibited practice when it refused to process two (2) class grievances filed by the HSTA in violation of the CBA.

⁴ The Respondents filed a Motion to Dismiss on 11/12/21, and the HSTA filed its opposition on 11/19/21. Oral arguments were held before the Board on 11/24/21 and the Board’s decision on Respondent’s motion is still pending as of 12/8/21.

⁵ Respondent Ige renewed, supplemented, or supplanted his emergency proclamations related to the COVID-19 pandemic since 3/4/2020. See Exhibit A at 1. These emergency proclamations were issued pursuant to the Governor’s emergency powers under HRS Chapter 127A.

stated that the vaccination and testing requirements “shall be enforceable through disciplinary action, up to and including termination.” See Exhibit A at 6; Stipulated Facts at 3. The proclamation also purportedly suspended certain sections of HRS chapter 89 as follows:

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

See Exhibit A at 12-13 (emphasis in original). Respondent Ige’s emergency proclamation did not suspend existing CBAs.⁷

On 8/13/21, Respondent Department of Education (“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. See Exhibit B at 2; Stipulated Facts at 4.

⁶ Respondent Ige issued his Emergency Proclamation Related to the State’s COVID-19 Delta Responses on 10/1/21 which purported to suspend the same sections of HRS Chapter 89. See <https://governor.hawaii.gov/emergency-proclamations/>.

⁷ In its Answer, Respondents incorrectly asserted that “the Governor’s proclamation[s] did in fact suspend HRS, Section 89-10(a), written contracts; enforceability.” See Answer at 3. The emergency proclamation did not suspend HRS, Section 89-10(a). Instead, the proclamation purportedly suspended HRS 89-10(d). See HRS § 89-10(d); Exhibit A at 12 (“The following provisions of law are suspended, but only as explicitly set forth below and as allowed by federal law, pursuant to section 127A-13(a)(3), HRS....section 89-10(d)”).

On 8/29/21, in a letter entitled “Non-Compliance of Attestation of COVID-19 Testing or Vaccination”, Respondent Interim Superintendent Keith T. Hayashi confirmed that employees that did not comply with vaccination or testing requirements may be subject to “disciplinary action, up to and including termination.” See Exhibit C at 1; Stipulated Facts at 5. He further confirmed that “Employees covered by a collective bargaining agreement have the right to file a grievance, and **the grievance procedures shall be adhered to.**” See Exhibit C at 3 (emphasis added); Stipulated Facts at 5.

On 8/29/21, Respondent Hayashi issued a letter addressed to DOE Assistant Superintendents, Complex Area Superintendent, Principals, School Administrative Services Assistants and Secretaries which 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 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).

See Exhibit D (emphasis added); Stipulated Facts at 6.⁸

The HSTA demanded negotiations regarding the impact of the Employer’s COVID-19 related policies and actions to the extent that it changed or affected the working conditions of its members, but the Employer refused. See Exhibit E; Stipulated Facts at 7.

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

⁸ Respondents appear to have hand-selected which provisions of the CBA have been suspended, and which have not.

directly to Step 2 under the CBA's grievance procedure. See Exhibit E at 1-4; Exhibit G; Stipulated Facts at 8.

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

See Exhibit E at 1-2.

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

See Exhibit E at 2-4.

On 9/30/21, the Employer responded to HSTA’s grievances that it will take no “further action on this matter.” See Stipulated Facts at 9. 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.**

See Exhibit E at 5 (emphasis added).

On 10/1/21, the HSTA demanded arbitration in grievance Nos. O-22-04 and O-22-05. See Exhibit E at 6-7; Stipulated Facts at 10.

On 10/4/21, the Employer responded to the HSTA’s demand for arbitration, stating: “[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.” See Exhibit E at 8-11; Stipulated Facts at 11.

On 10/8/21, the HSTA sent a letter to the Employer requesting additional information and clarification. See Stipulated Facts at 12. 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).

See Exhibit F. The Employer did not respond to HSTA’s 10/8/21 request for additional information and/or clarification. See Stipulated Facts at 13.

The Employer refused to take any further action in grievance Nos. O-22-04 and O-22-05. See Stipulated Facts at 14. As such, the HSTA timely filed its prohibited practice complaint on 10/20/21. See Stipulated Facts at 15.

IV. RELEVANT CBA PROVISIONS

Article V of the CBA contains the mandatory grievance procedure which the Employer must follow when the HSTA or a teacher allege “a violation, misinterpretation or misapplication of a specific term or terms of this Agreement[.]” See Exhibit G at 7.

As stated above, the parties stipulated that 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 alleging violations of various provisions of the CBA[,] which proceeded directly to Step 2 under the CBA’s grievance procedure.” See Stipulated Facts at 8.

Article V(H) of the CBA, entitled Step 2, provides in relevant part:

(1) Any grievance involving suspensions, terminations, or class grievances involving teachers from more than one school shall be filed with the Superintendent or designee in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved. The Superintendent or designee shall hold a meeting within five (5) days.

...

(5) The Superintendent or designee’s answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the meeting.

See Exhibit G at 11 (emphasis added).

Here, the “Superintendent or designee” did not “hold a meeting within five (5) days” and did not provide its “answers to the grievance” “in writing and delivered to the grieving party within five (5) days after the meeting.” Instead, the Employer responded to the HSTA on 9/30/21 that it will take no “further action on this matter.” See Stipulated Facts at 4.

Following Step II, Article V(I) of the CBA, entitled Arbitration, provides:

If a claim made by the Association or teacher has not been satisfactorily resolved, the Association may present a request for arbitration of the grievance within ten (10) days after the receipt of the decision.

See Exhibit G at 11.

The HSTA timely submitted its requests for arbitration on 10/1/21. See Stipulated Facts at 10. Once a request for arbitration is made, Article V(I)(1) provides:

(1) Representatives of the parties shall immediately attempt to select an arbitrator. If the parties have not appointed an arbitrator within two (2) weeks from the receipt of the request for arbitration, the parties will request from the Hawaii Labor Relations Board a list of five (5) names from the register of arbitrators.

...

The arbitration hearing shall commence within forty-five (45) days from the Association's official notification to the Employer that the case is going to arbitration. The parties may mutually agree to a written waiver of the timelines. The arbitrator(s) to be selected must agree to the schedule.

See Exhibit G at 11-12 (emphasis added).

Under the CBA, the parties are required to work together to select an arbitrator and if an arbitrator is not selected with two (2) weeks, the parties are together required to request a list of five (5) arbitrators from the Board. Instead of selecting an arbitrator, the Employer responded to the HSTA on 10/4/21 that its “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.” See Exhibit E at 8; Stipulated Facts at 11. The Employer further declined to take *any further action* in grievance Nos. O-22-04 and O-22-05. See Stipulated Facts at 14.

If the Employer believes that a grievance is not arbitrable, Article V(I)(5) of the CBA provides:

(5) 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.

See Exhibit G at 12. Here, the Employer not only refused to proceed to arbitration or select an arbitrator, but also failed to submit its dispute on the arbitrability of the class grievances to an arbitrator as required by the CBA.

On 10/8/21, the HSTA sent a letter to the Employer requesting additional information and clarification. See Exhibit F. Article IV(A) of the CBA provides:

In addition to any obligation under Chapter 89, HRS, to furnish information in its possession, **the Employer will furnish such other information in its possession, in response to reasonable requests by the Association which will assist the Association in effectively representing the teacher in the collective bargaining process and in the processing of grievances.** Any information personal in nature and confidential to any particular teacher and which the Employer is not obligated to furnish under Chapter 89, HRS, may not be disclosed by the Employer unless written prior approval of the individual concerned has been given. The Employer need not perform compilation of facts or information for the purpose of responding to such Association requests.

See Exhibit G at 3 (emphasis added). The “Employer did not respond to HSTA’s 10/8/21 request for additional information and/or clarification” and “declined to take any further action in grievance Nos. O-22-04 and O-22-05.” See Stipulated Facts at 13-14.

V. **ARGUMENT**

A. **This matter is properly before the Board**

The HSTA alleges that Respondents violated HRS § 89-13(a)(8). See Prohibited Practice Complaint. HRS § 89-13(a)(8) states:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(8) Violate the terms of a collective bargaining agreement;

HRS § 89-13 (a)(8). Violations of HRS § 89-13(a)(8) are under the exclusive jurisdiction of the Board because the contractual remedies i.e., the grievance process, were exhausted by the HSTA,⁹ as explained in the factual summary above.

⁹ Respondents’ response at each step of the grievance procedure was that it would take no further action and therefore additional steps by the HSTA to process its class grievances, if any, were futile. The Hawaii Supreme Court has explained:

The doctrine of exhaustion is not absolute. “[E]xceptions to this doctrine exist, such as when pursuing the contractual remedy would be futile.” *Poe v. Hawaii Labor Relations Bd.*, 97 Hawai‘i 528, 536, 40 P.3d 930, 938 (2002). Likewise, “[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist.” *Hokama*, 92 Hawai‘i at 273, 990 P.2d at 1155.

In general, the Board has been delegated with broad authority and jurisdiction to adjudicate prohibited practice complaints in their entirety. 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.”). The Board is in no way limited in exercising its statutory authority to take action with respect to prohibited practices. Indeed, the Hawaii Intermediate Court of Appeals (“ICA”) has explained:

... the Board had jurisdiction to declare whether the particular action presented in the petition might constitute a prohibited practice, because the Board has the authority to take action with respect to prohibited practices. While noting the limited effect of such a ruling, the supreme court viewed this action as being within the jurisdiction of the Board, regardless of whether the same question was or was not subject to arbitration, and regardless of whether the Board’s ruling might or might not have been significant to the outcome of the arbitration.

In re United Pub. Workers, AFSCME, Local 646, AFL-CIO, Union, 131 Hawai‘i 142, 151–52, 315 P.3d 768, 777–78 (Ct. App. 2013), as corrected (Feb. 21, 2014) (emphasis added).

Similarly, 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.” Since the

Furthermore, “[a]s a general proposition ... the contractual grievance procedure does not apply to tort actions.” *Id.* (internal citations omitted). Finally, policy interests underlying the exhaustion doctrine may be outweighed by other interests.

Williams v. Aona, 121 Hawai‘i 1, 11, 210 P.3d 501, 511 (2009)

meaning and effect of a provision of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between C&C and UPW was a question which related to an action which the Board might take in the exercise of its powers.

...

The declaratory ruling granted upon C&C's petition, therefore, expressed the Board's opinion that a violation of the seniority clause of the agreement by C& C would constitute a prohibited practice under s 89-13. We think it is not arguable that any collective bargaining agreement could deprive the Board of its statutory authority to take action with respect to prohibited practices, although the terms of existing agreements might well be relevant to the determination whether a prohibited practice existed. If the Board had jurisdiction to take action with respect to a prohibited practice, it had jurisdiction to declare what would constitute a prohibited practice. The arguments advanced with respect to the effect of the arbitration provision, therefore, were for the consideration of the Board in arriving at its ruling and were not relevant to the question whether the Board had jurisdiction of C&C's petition.

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

Thus, the Board is authorized to adjudicate claims made pursuant to HRS § 89-13(a)(8) and/or which relate to terms of a collective bargaining agreement in determining whether a prohibited practice occurred.

B. Respondents' actions constitute a prohibited practice

The stipulated facts present a clear case. The Respondents undisputedly violated the CBA's grievance procedure as discussed in detail above, which constitutes a prohibited practice under HRS § 89-13(a)(8).

Similar cases regarding the Employer's refusal to follow a CBA's grievance procedure have come before this Board and the Board "has repeatedly recognized that an Employer's failure to appoint arbitrators within the contractually required time frame may constitute a prohibited practice." United Public Workers, AFSCME, Local 646, AFL-CIO, Case

No. CE-01-507, Order No. 2115 (“Okuma-Sepe II”). As this Board explained, “subject to the requisite finding of wilfulness, a prohibited practice will be found unless the Employer is somehow excused from its contractual obligation.” Id.

The Board’s decision in Okuma-Sepe II presents a factually similar case.

In Okuma-Sepe II, the union filed a prohibited practice complaint alleging that the Employer failed to select an arbitrator within 14 calendar days after notification by the Union of its intent to proceed to arbitration in violation of HRS § 89-13(a)(1) and (8). See Okuma-Sepe II at 1. The Employer refused to select an arbitrator because it contended that the grievance was not arbitrable and therefore it was permitted to take no further action after the union filed its notice of intent to arbitrate. The Board rejected the Employer’s argument, finding that under the CBA, if the Employer disputed the arbitrability of a grievance, it was required to submit that question to an arbitrator and not take unilateral action to dispose of the grievance itself. The Board explained:

The Employer argues that no prohibited practice occurred because the Union failed to request arbitration within the time required by the collective bargaining agreement so that the grievance was not arbitrable. **This dispute over the grievance’s arbitrability does not, however, excuse the employer of its obligation to proceed with the naming of an arbitrator.** See, Order No. 2052, Order Granting UPW’s Motion for Summary Judgment, dated 1/14/02, United Public Workers, AFSCME, Local 646, AFL-CIO, where the Board held **when collective bargaining agreement provides that question of arbitrability is to be decided by an arbitrator, it is a prohibited practice for the employer to refuse to select an arbitrator because of a dispute regarding arbitrability.** Thus, the Employer’s failure to comply with the contractual deadline is unexcused.

See Okuma-Sepe II at 4 (emphasis added).

This case presents similar circumstances. Here, the Respondents refused to proceed with arbitration, including selecting an arbitrator, because it unilaterally concluded that the HSTA’s class grievances were not arbitrable. However, the HSTA’s CBA contains the same

or a substantially similar arbitrability clause as the one presented to the Board in Okuma-Sepe II, and like the Employer there, the Respondents' unilateral decision to put a halt to the grievance process instead of presenting its dispute of arbitrability to an arbitrator constitutes a prohibited practice.

The next question is whether the Employer had a legal excuse for violating the CBA. For the reasons discussed below, it did not.

1) Respondents were well aware that the Board would not consider or interpret the emergency proclamation or HRS Chapter 127A when processing a prohibited practice complaint.

The Respondents only explanation for violating the CBA was a reference to Respondent Ige's emergency proclamation in its 9/30/21 letter, although it did not explain how the emergency proclamation applied and refused to respond to the HSTA's request for clarification. See Exhibit E at 5.

The Board will recall that the same Employer/Respondents¹⁰ filed a motion to dismiss against the HSTA in a separate case last year in HLRB Case No. 20-CE-05-950 based on the Governor's COVID-19 emergency proclamation that he issued pursuant to HRS Chapter 127A. The Respondents argued there, as it did here in its previously filed motion to dismiss, that the Board did not have jurisdiction to hear and decide prohibited practice complaints due to the Governor's suspension of Chapter 89. See HSTA vs. Ige, et al., Case No. 20-CE-05-950 (Order No. 3644, 9/1/20). The Board will also recall that it denied Respondents' motion and allowed HSTA's prohibited practice complaint to proceed.¹¹

¹⁰ The DOE Superintendent at that time was Christina M. Kishimoto. See Exhibit A.

¹¹ The parties later stipulated to stay the matter and returned to negotiations related to COVID-19.

In HLRB Case. No. 20-CE-05-950, the HSTA filed a prohibited practice complaint against the Respondents alleging that they “committed certain prohibited practices by requiring bargaining unit 5 (BU 5) members to return to their worksites in the midst of the Coronavirus Disease 2019 (COVID-19) pandemic and/or when those named Respondents did not negotiate with HSTA over the impact of a change in working conditions.” See Id. at 1. During the proceedings in that case, Respondents filed a motion to dismiss similar to the one filed here, asking this Board to determine “Whether the Board has jurisdiction to hear this case, given the COVID-19 pandemic and the Emergency Proclamations issued regarding it[.]” See Id. Following briefing and oral arguments, the Board ruled:

... that **it has jurisdiction to consider the Complaint** because it has original jurisdiction to consider prohibited practice complaints, even where there may be constitutional or other statutory issues that the Board may not consider.

Any issues related to the constitutionality of other sections of the HRS cannot be brought before the Board. Those are issues that can be raised on appeal. The Board has the authority to hear the HRS Chapter 89 issues when there are constitutional issues or issues under other sections of the HRS under the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Lingle (2010).

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;

See Id. at 2-3.

Respondents were fully aware of the Board’s position on this issue and yet it still elected to violate the CBA. This paints a clear picture of the Respondents’ conscious, knowing, and deliberate intent to violate the CBA and HRS Chapter 89 as it knew the limits of the Board’s

jurisdiction.¹² The Board made clear that the emergency proclamation and HRS 127A were no defense to a prohibited practice claim. Therefore, the Respondents cannot rely on the emergency proclamation as an excuse to violate the CBA.

2) **The Governor’s emergency proclamation did not suspend the existing CBA.**

Even if the Board did consider the emergency proclamation in determining whether the Respondents committed a prohibited practice complaint (or acted wilfully in doing so), the emergency proclamation did not suspend the existing CBA or any part thereof, and therefore the Respondents’ reliance on the proclamation as a legal excuse to violate the CBA completely misses the mark.

In its Answer filed herein, the Respondents incorrectly assert that “the Governor’s proclamation[s] did in fact suspend HRS, Section 89-10(**a**), written contracts; enforceability.”¹³ See Answer at 3 (emphasis added). This is an incorrect reading of the Governor’s emergency proclamation, which purportedly suspends HRS § 89-10(**d**) and not HRS § 89-10(**a**).

HRS § 89-10(a) provides:

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the

¹² This also supports a finding that Respondents acted willfully in committing the alleged prohibited practice.

¹³ Even if the Governor’s emergency proclamation suspended HRS § 89-10(a) instead of HRS § 89-10(d), the Governor is still prohibited from impairing a valid, binding, and extant contract between the HSTA and Respondents. The HSTA is legally authorized to bargain collectively over wages, hours, and working conditions, and to enter into binding CBAs with the Employer pursuant to Hawai’i Constitution, Art. XIII, Sec. 2, and HRS Chapter 89. Respondents are not free to manipulate or impair contracts or laws affecting existing contracts, which would violate HSTA’s collective bargaining rights and the United States Constitution, Article I, Section 10 (Contract Clause).

collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement 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.

HRS § 89-10(a)(emphasis added). As stated by its plain terms, HRS § 89-10(a) addresses the validity and enforceability of an existing contract, including its “grievance procedure[.]” This provision of HRS § 89-10 therefore most closely resembles Respondents’ claim that the Governor’s emergency proclamation suspended the CBA and the grievance procedure contained therein, which may be why the Respondents’ incorrectly asserted in its Answer that the proclamation suspended HRS Section 89-10(a). The emergency proclamation did not suspend HRS Section 89-10(a). Instead, the proclamation purportedly suspended HRS 89-10(**d**), which provides:

(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(d); Exhibit C at 12 (“The following provisions of law are suspended, but only as explicitly set forth below and as allowed by federal law, pursuant to section 127A-13(a)(3), HRS....section 89-10(d)”). Respondents have not argued that its rules or procedures conflict with the CBA. Instead, it relies on and incorrectly cites to HRS 89-10(a) which was not suspended by the emergency proclamation. This critical error by the Respondents completely undermines its excuse for violating the CBA.

3) **HRS Chapter 89 takes precedence over conflicting executive orders.**

Assuming *arguendo* that the emergency proclamation is considered by the Board, and that it did in fact suspend the CBA (which it did not), HRS Chapter 89 and the CBA still take precedence over conflicting executive orders like the emergency proclamation which the Respondents rely upon. 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.

HRS § 89-19 (emphasis added). Again, Respondent Ige's emergency proclamation did not suspend the CBA. However, even if it attempted to, such an order would be contrary to HRS Chapter 89 and therefore Chapter 89 would take precedence over the executive order based on the plain language of HRS § 89-19. Thus, even if the emergency proclamation did purport to suspend HRS Chapter 89 and the CBA, it would have no effect on the matters presented here.

For these reasons, the Respondents do not have a valid excuse for violating the CBA and its actions therefore constitute a prohibited practice. The only remaining question therefore is whether the Respondents were wilful in committing these acts.

C. **The Respondents acted wilfully.**

In order to find that a violation of a CBA constitutes a prohibited practice, the Board must conclude that the violation was wilful; "that is, with the 'conscious, knowing, and deliberate intent to violate the provisions of' HRS Chapter 89." HGEA vs. Kawakami, 2021 WL 2662000, at *12, Decision No. 505 (citing Casupang, 116 Hawai'i at 98, 170 P.3d at 350.) In this case, the "wilful" requirement is easily met. The Respondents admitted that the HSTA timely filed class grievances which alleged violations of the CBA, and that it responded at each of step

of the grievance procedure that it would take no further action. See Stipulated Facts (“14. The Employer declined to take any further action in grievance Nos. O-22-04 and O-22-05.”) The Respondents have therefore admitted that its actions were conscious, knowing, and with deliberate intent.

Respondents have argued that its willful violation of the CBA was justified by Respondent Ige’s emergency proclamation which he issued under HRS Chapter 127A. For the reasons discussed in the preceding section, its justification claims should be soundly rejected.

At minimum, the Board has held that wilfulness will be “presumed only when there is substantial evidence that a respondent’s failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations.” United Public Workers vs. Okume-Sepe, Case No. CE-01-509 (Decision No. 449, 6/15/04) at 3. The Respondents’ actions here were in conscious derogation and indifference to its contractual obligations. As explained above, its excuses for violating the CBA are baseless and hold no water. Therefore, willfulness may be presumed.

VI. CONCLUSION

The grievance procedure contained in the CBA is the heart of collective bargaining and the Employer here is attempting to place a dagger through it. This is a clear prohibited practice and the Respondents have acted wilfully in executing this attack. For the foregoing reasons, HSTA respectfully requests that the Board find that the Respondents committed a prohibited practice pursuant to HRS §89-13(a)(8) and grant appropriate relief and award damages in favor of Complainant and against the above-named Respondents.

DATED: Honolulu, Hawaii, December 8, 2021.

/s/Keani Alapa
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Attorneys for Complainant
HSTA

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION (HSTA),

Complainant,

vs.

DAVID Y. IGE, Governor, State of Hawai'i;
BOARD OF EDUCATION, State of Hawai'i;
KEITH T. HAYASHI, Interim
Superintendent, Department of Education,
State of Hawai'i; DEPARTMENT OF
EDUCATION, State of Hawai'i;

Respondents.

HLRB NO.: 21-CE-05-961

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served upon the below named individuals by electronic service and/or hand-delivery on the date indicated below:

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