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Case No. 21-CE-05-961

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

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.

CASE NO. 21-CE-05-961

RESPONDENTS' BRIEFING ON THE
MERITS; CERTIFICATE OF SERVICE

RESPONDENTS' BRIEFING ON THE MERITS

Respondents Governor DAVID IGE (“Governor Ige”), Interim Superintendent KEITH T. HAYASHI, (“Superintendent”) of the Department of Education, State of Hawai‘i, BOARD OF EDUCATION (“BOE”) and DEPARTMENT OF EDUCATION, State of Hawai‘i (“DOE”) (collectively, “Respondents”), by and through their attorneys, Clare E. Connors, Attorney General, State of Hawai‘i, and Deputy Attorneys General James E. Halvorson and Richard H. Thomason, hereby submits its Briefing on the Merits.

I. STIPULATED FACT

Even though the only relevant issue actually raised in the Union’s Complaint is whether Respondents violated HRS Section 89-13(a)-8, when they declined to respond further to two of the Union’s grievances, the parties have nevertheless agreed simplify things as much as possible by stipulating to the following background facts.

1. On 8/5/21, Respondent Governor David Y. Ige issued an Emergency Proclamation 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:
 - a. 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);
 - b. Partially vaccinated (received one of a two-dose course of vaccination); or
 - c. Not vaccinated for COVID-19.

2. Respondent Ige renewed, supplemented, or supplanted his emergency proclamations related to the COVID-19 pandemic since 3/4/2020.

3. 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.” The emergency proclamation further stated that the vaccination and testing requirements “shall be enforceable through disciplinary action, up to and including termination.”

4. 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.
5. 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.” 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.”
6. 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).

7. 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 declined.
8. 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 CIBA's grievance procedure.
9. On 9/30/21, the Employer responded to HSTA's grievances that it will take no "further action on this matter."
10. On 10/1/21, the HSTA demanded arbitration in grievance Nos. O-22-04 and O-22-05.
11. 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."
12. On 10/8/21, the HSTA sent a letter to the Employer requesting additional information and clarification.
13. The Employer did not respond to HSTA's 10/8/21 request for additional information and/or clarification.

14. The Employer declined to take any further action in grievance Nos. O-22-04 and O-22-05.
15. The HSTA timely filed its prohibited practice complaint on 10/20/21.

II. ARGUMENT

HSTA Cannot Demonstrate Willfulness as a Matter of Law.

Due to the Union's choice of forum, it is required to demonstrate that Respondents *willfully* violated HRS Section 89-13(a)-8. Indeed, as noted by the Hawaii Supreme Court in Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Amador Casupang, 116 Hawaii 73, 99, 170 P.3d 324, 350 (2007):

Moreover, to reiterate, it is a "prohibited practice for a public employer or its designated representative willfully to" engage in an act enumerated in HRS § 89-13. **With respect to HRS Chapter 89, this court has said that "willfully" means "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89."** Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983). Thus, in assessing a violation of HRS § 89-13, **the Board was required to determine whether Respondents acted with the "conscious, knowing, and deliberate intent to violate the provisions" of HRS chapter 89 when it removed the campaign materials.** (Emphasis added).

As the Board knows, the Employer did in fact respond to the two grievances in question, though not in a way that satisfied the Union. But in point of fact, no further response from the Employer was mandated, either by the contract, or HRS Chapter 89. Rather, the ball was now in the hands of the *Union* to either request a list of arbitrators from this Board, or invoke HRS, Chapter 658A, neither of which took place. Willfulness simply cannot be *inferred* from such a fact pattern.

Moreover, whether Respondents acted with the “conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89” also cannot be inferred from a fact pattern where our Governor is issuing emergency proclamations purporting to suspend portions of HRS Chapter 89, and the contracts. The Board is keenly aware, of the fact that we are in uncharted legal territory as to the juxtaposition between Chapters 89 and 127A. The latter is an emergency management statute that (**obviously**) takes precedence over other laws during emergencies, and the former takes precedence under normal conditions. Because the various public sector Unions have all studiously avoided advancing to the proper tribunal, Respondents, HSTA, and this Board are devoid of any proper guidance on how to tread between these two statutes.¹ That being the case, an evaluation of willfulness becomes paramount, and the key point is this case is that Respondents have every right to *honestly believe* that the Governor’s emergency proclamations have the force and effect of law unless, and until a court of competent jurisdiction concludes otherwise. This situation is similar to the union dictum of “obey and grieve,” otherwise, we have industrial chaos. The government needs to *govern*, and accusing public employers of “willfully”, and “intentionally” committing prohibited practices merely by taking steps to comply with an emergency proclamation issued by our Governor under color of law does not fit in this circumstance.

As a final point on willfulness, it is useful to consider what the problem was with simply biting the bullet and engaging in effects bargaining in the midst of the frankly terrifying Delta surge. Well, the answers are basically *time and resources*. Please recall that we have three public

¹ Unlike HGEA, HSTA was wise enough to steer away from the argument that collective bargaining has precedence over emergency powers during a global pandemic, a claim that is so preposterous on its face that the State Respondents in that PPC basically ignored it rather than devolve into an involuntary fit of well deserved sarcasm.

unions, all with their specific concerns and demands. Then keep in mind that DOE alone has **259** individual schools with different needs and situations; then mix that up with all of the other executive departments, plus 37 unique charter schools to top it all off. That's far too many seats at the table in a gravely deepening global crisis where swift and decisive action was essential. Indeed, consider what effects bargaining actually is; it's *after the fact* bargaining. That being the case, why shouldn't it simply take place after the emergency is abated?

Obviously, these are arguments that should best be considered in the two underlying grievances, but context is helpful in this matter as well

DATED: Honolulu, Hawai'i, December 8, 2021.

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CERTIFICATE OF SERVICE

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I hereby certify that on this date, a copy of the foregoing document was duly served electronically via FileAndServeXpress, upon the following:

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