



STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

HLRB-12
PETITION FOR DECLARATORY RULING

CASE NO. _____

INSTRUCTIONS. File the original¹ by File and ServeXpress, in person or U.S. Mail, to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly. Attach a memorandum of authorities, in support of your position and contentions with the Petition. Attach declaration of facts necessary to a proper consideration of the Petition.

1. **PETITIONER.** The Petitioner alleges that the following circumstances exist and requests the Hawaii Labor Relations Board pursuant to Hawaii Revised Statutes Chapter 91, and its Administrative Rules, issue a declaratory ruling based upon the matters alleged in this Petition and the supporting affidavits and memorandum of authorities submitted with it.
 - a. Name, address and telephone number of Petitioner.
University of Hawaii Professional Assembly
1017 Palm Drive
Honolulu, Hawai'i 96814
(808) 593-2157
 - b. Name, address and telephone number of the Petitioner's principal representative, if any, to whom correspondence is to be directed.
T. Anthony Gill, Esq.
Gill, Zukeran & Sgan
1164 Bishop Street, Suite 801
Honolulu, Hawai'i 96813
2. State nature of Petitioner's interest, including reasons for the submission of the Petition.
Please see attached.

¹ Notwithstanding Board rule 12-42-9(b), the Board only requires one copy of a petition.

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3. Designate the specific provision of the Hawaii Revised Statutes, Chapters 89, 377, or 396, the Board's Administrative Rules or Orders, the applicability of which is in question.

Please see attached.

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4. Indicate the appropriate bargaining unit(s) of employee(s) involved.

Please see attached.

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5. Provide a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position.

Please see attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD
DECLARATION IN LIEU OF AFFIDAVIT

Please select one:

I, _____, the Petitioner
 the Petitioner's principle representative
do declare under penalty of law that the foregoing is true and correct.

Date: _____

Signature - the person signing digitally above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.

Signor's email address

If you are not the Petitioner or listed as the principle representative in #1(b) and you are signing above, then please complete the contact information below.

Your address:

Your phone number: _____

Your relationship to the Petitioner:

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

If the Complainant or the principal representative is not registered with FSX and would like to electronically file this complaint through FSX, then complete the Board Agreement to E-File, FORM HLRB-25, found on the "Form" page of the HLRB Website.

Attachment to HLRB-12 PETITION FOR DECLARATORY RULING

Petitioner University of Hawaii Professional Assembly

May 28, 2021

2. UHPA is the Exclusive Representative of bargaining unit 7. The following matter affects a position in unit 7 and the incumbent of that position. Any bargaining unit or any public employee could be similarly affected in the future.

3. HB200 CD1 (2021) and incorporated worksheet

§ 89-3, HRS

§ 89-6 (d) (4)

§ 89-8, HRS

§ 89-9 (a), HRS

§ 89-9 (d), HRS

§ 89-13 (a) (7) and (8), HRS

§ 89-19, HRS

4. Unit 7, University of Hawaii Faculty.

5. **Background.**

UHPA seeks a declaration from the Board to the effect that if the Governor signs HB200 CD1 (the 2021 budget bill), an item in that bill will violate Chapter 89 in the ways set forth below. HB200 CD1 is a public document that can be found on the Hawaii State Legislature's website. The worksheet for that bill is also public and may be found via the "Legislative Information" button on the legislature's website, as file "EXEC HB200CD1". On that worksheet, at page 1133 of 1157, line item 2004-001, the budget bill purports to delete University position #86231 and its associated funding.

Position #86231 is a Unit 7 position, and it is occupied by a tenured senior 11-month researcher with many years of service, who is in good standing with the UH. On information and belief, the UH has no intention to terminate or discipline this faculty member and has neither requested nor acceded to a sweep of that position. To be clear, this is not a routine legislative sweep of vacant positions for budgetary economy. This is a legislative deletion of a specific occupied position.

First Argument (effect of § 89-19)

First, UHPA contends that the legislative deletion of a specific occupied position is not only a violation of the Hawaii Constitution Article X, § 6 (empowering the Board of Regents to exercise exclusive control over the internal structure, management, and operation of the university) -- a matter concededly not within the jurisdiction of the Board -- but is, on its face and without needing detailed factual inquiry, a violation of several provisions of Chapter 89, matters clearly within the jurisdiction of the Board.

Legislation that purports to delete an occupied bargaining unit position, would violate HRS § 89-19, which provides that Chapter 89 “shall take precedence over all conflicting statutes and shall preempt all contrary ... legislation ... adopted by the State....” The budget bill is certainly legislation, and it is “conflicting legislation” because HRS § 89-9 (d) provides, in pertinent part, that it is a management right -- a right possessed by the Public Employer under law -- to “(3) ... retain employees in positions...”, and “(5) Relieve an employee from duties...” for a legitimate reason. That management right is tempered by UHPA’s § 89-9 (d) right to negotiate over “the implementation of management decisions that affect terms and conditions of employment” and “procedures and criteria on promotions, transfers, assignments, demotions, layoffs... terminations...” and so forth. Accordingly, the listed matters are consigned by law to the collective bargaining parties, not the legislature. UH and UHPA have for decades exercised those rights, and have negotiated and contractualized implementation of promotion, tenuring, retention, and removal of faculty members. Legislation that would usurp the authority of the UH and UHPA to thus regulate these matters is flatly preempted under the literal terms of § 89-19. The Board should declare that

- Any item in a budget bill that purports to delete an occupied position is null and void pursuant to § 89-19.

Second Argument (Prohibited practices resulting from breach of Chapter 89 and the collective bargaining agreement)

Second, UHPA contends that the legislative deletion of an occupied bargaining unit position is not only a violation of Hawaii Constitution Art. XIII, § 2, (ensuring the right of public employees to collective bargaining) -- a matter concededly not within the jurisdiction of the Board -- but if signed by the Governor, would be a prohibited practice by a Public Employer under § 89-13 (a) (7) and (a) (8). The Governor is a signatory to the Unit 7 collective bargaining agreement because § 89-6 (d) (4) gives the governor half the votes of the Public Employer. § 89-13 (a), HRS, makes it a prohibited practice for “a public employer or its designated representative wilfully to” perform certain actions. The Governor is “a public employer or its designated representative” within the meaning of §89-13 (a). § 89-13 (a) will not allow the Governor to “(7) Refuse or fail to comply with any provision of this chapter” or “(8) Violate the terms of a collective bargaining agreement.” Undermining the rights of the UH and UHPA to regulate retention of employees would be a failure to comply with a provision of Chapter 89.

Moreover, it would be an attempted circumvention of or violation of a collective bargaining agreement. The Board should declare that

- It would be a prohibited practice under § 89-13 (7) and (8) for the Governor to sign a bill deleting an occupied position.

Additionally, use of an external law (one outside Chapter 89) to delete a position within the jurisdiction of the UHPA would circumvent or abrogate UHPA's authority as Exclusive Representative under § 89-8, and UHPA's power to negotiate under § 89-9 (a), which would be another refusal to comply with a provision of Chapter 89, hence another prohibited practice. Even more fundamentally, the same action would violate the rights of bargaining unit 7 employees to self-organization implemented by § 89-3, and thus constitute another prohibited practice; employees have the right to organize and bargain "collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in ... collective bargaining ... free from interference...." The Board should declare that

- It would be a prohibited practice under § 89-13 (7) for the Governor to sign a bill deleting an occupied position because to do so would violate employee and union rights under §§ 89-3 and 89-8.

Request for expedited treatment of the first two arguments.

UHPA directs the Board's attention to the April 27, 2021, enrollment of the budget bill to the Governor. The Governor's time to evaluate and react to the bill is running. UHPA requests that the Board handle the foregoing matters, which are not factually intensive, on an EXPEDITED BASIS, so that the Board's declarations of law may be of use to the UHPA and other affected parties while the Governor is evaluating the budget. UHPA has served this Petition on the Governor through the A.G.'s Employment Relations division, and the UH Regents and the UH President (also signatories to the governing CBA and constituents of the Public Employer of unit 7) through the UH Office of General Counsel. UHPA has also provided party-to-party notice to appropriate administrators.

Third Argument (Invidious motivation attributable to Public Employer; aggravated prohibited practice justifying extraordinary relief).

The following third argument is distinguishable from the foregoing because it is based on additional facts that are neither in the public record nor in easily-accessible documentation. UHPA has no preference as to the scheduling of this matter but intends to request a factual hearing.

Third, the purported deletion of position #86231 is a direct and personal attack on the incumbent by a Senator who misused her position to insert this item into the conference

committee's final budget worksheet. She knew the position was occupied, knew who she was attacking, traced the incumbent to a particular position count, and has now escalated her multi-year campaign to evict the incumbent from UH employment by introducing a line in the budget bill. The insertion of this item constitutes a clear and extraordinary attempt to violate the provisions of Chapter 89 as presented above, but it also demonstrates the Senator's personal and invidious animus against the incumbent. In furtherance of her campaign against the incumbent, the Senator used her position on a germane legislative committee and concomitant influence over UH budgetary matters to attempt to gather personally-identifiable information about the incumbent and other similarly-situated faculty, attempted to obtain employment documents from the UHPA that were not UHPA's to disclose, attempted to craft general legislation that would have the effect of constraining the incumbent's wages, and attempted to convince the UH to dismiss the incumbent. When such attempts failed, the Senator succeeded in inserting the subject item in the budget worksheet, notwithstanding that neither the Governor nor the UH had requested any such thing, and without any communication with affected parties. Indeed, the Senator ignored over sixty vacant positions that arguably might have been swept, to much greater financial advantage to the State, and focused on deleting the incumbent's position; illustrating the absence of economic motive and the presence of invidious motive. The attempt to have the incumbent dismissed from position #86231 is a particular component of her broader strategy to undermine the authority of the Regents, the President, and UHPA, *inter alia*, by regulating the employment of researchers and their wages through legislation. The Board should declare that

- If Governor enacts the budget bill including the deletion of position #86231 and its associated funding, the animus of the Senator against the incumbent may be attributed to any Public Employer effectuating said deletion.

- The animus of the Senator against the incumbent is of an exacerbated type, demonstrating extraordinary wilfulness and intention to violate the law. If effectuated by the Public Employer, it would justify an extraordinary corrective order by the Board.

The UHPA submits that this matter is suitable for declaratory ruling because, with a bill on the Governor's desk, it is neither hypothetical nor clearly covered by prior rulings of the Board. A declaratory ruling may enable affected parties to conform their behavior to the requirements of the law. Further briefings and affidavits will be filed pursuant to any scheduling order.