

**Protecting the Rights of All Public Sector Union Members:
Why UHPA Chose to Intervene in HSTA’s Hearings before the Hawaii Labor Relations Board**

As the exclusive representative to nearly 4,000 University of Hawaii faculty members statewide, the University of Hawaii Professional Assembly (UHPA) takes its role in promoting fair collective bargaining processes seriously. We are also keenly aware that what occurs with other public sector unions can impact UHPA members and the overall collective bargaining climate in Hawaii. When collective bargaining rights are violated or if there are decisions under consideration by the Hawaii Labor Relations Board (HLRB) that can potentially impact members of all Hawaii public sector unions, UHPA feels it has an obligation to intervene. For a union to intervene in an HLRB case is not out of the ordinary.

In response to the recent prohibited practice charge filed by the Hawaii State Teachers Association (HSTA), UHPA has voiced a number of concerns before the HLRB that are solidly backed by the Hawaii Revised Statutes (HRS) and arguments previously presented to the HLRB for UHPA’s own cases. Specifically,

- a) Limitations on the bargaining unit's right to strike, and
- b) The conditions under which an employer could implement a "last, best, final, offer"(LBFO) once the contract has expired.

Protecting the interests of the UH faculty members’ bargaining unit (UHPA) in these two critical areas compelled UHPA to be a party in this hearing, which led to our filing a motion to intervene. There are grave implications for every member of HSTA as well as for UHPA, HGEA and UPW.

HSTA opposed UHPA’s right to intervene in the HLRB case. However, in an August 10th hearing, the HLRB granted UHPA’s motion to intervene because UHPA successfully argued it has an “interest in the outcome of the case.” Herb Takahashi, HSTA’s attorney, has said HSTA’s leadership will take this issue to Circuit Court, appealing the HLRB decision allowing UHPA to intervene.

The following are highlights of UHPA’s positions on various aspects of this case that are being shared with the HLRB:

- The employer did not have the right to implement a LBFO
- HSTA has the right to strike
- The HLRB should grant an injunction or interlocutory relief to HSTA without regard for the prohibited practice charge
- The Governor’s letter requesting mediation sent to the HLRB, and copied to HSTA, was not “ex parte” communication and therefore not a violation of HRS Chapter 89

Last, Best, Final, Offer (LBFO)

UHPA maintains that nothing in HRS Chapter 89, or any HLRB decision, authorizes an employer to implement a LBFO; therefore, the employer did not have the right to implement an LBFO. Prior to July 1, 2011, no “public employer” had ever implemented a LBFO when negotiations failed to reach an agreement prior to the expiration date of the contract.

Right to Strike

HSTA maintains the teachers do not have the right to strike because of its pending prohibited practice charges, going back to 2008, even though some of the charges are unrelated to the conduct of the current negotiations. However, in past cases, HLRB has ruled that only certain prohibited practice charges directly related to the conduct of bargaining could prevent a strike after the expiration of the contract.

UHPA faced a similar problem before it went on strike in 2001. UHPA solved the problem by simply withdrawing its pending HLRB prohibited practice complaints and proceeded with its strike. Nothing is barring the HSTA from doing the same.

UHPA argues that the right to strike is afforded to unions under the law when the parties have not reached a new agreement after an existing contract has expired. Without this fundamental right to strike, unconditional authority would be conferred to the employer to act unilaterally, and does not provide an incentive for the employer to bargain in good faith.

UHPA holds the following positions:

- Virtually nothing should prevent a bargaining unit from exercising its right to strike at the expiration of a contract.
- There is no authority in Hawaii law that specifically grants the employer the right to change the terms and conditions of employment when the parties have reached impasse, even after the expiration of a contract. Further, should there be a time when the HLRB would rule that the employer has the right to implement a LBFO, then that should automatically trigger the union's right to strike in response.

Interlocutory Relief

HSTA asked the HLRB to issue an injunction, also known as "interlocutory relief," to stop the pay reductions and other terms from being imposed on Hawaii's teachers in the State's LBFO. They are basing their justification for relief on the claim of "bad faith bargaining" by the employer, which has given rise to their prohibited practice charges. The logic of the argument concludes by asserting they don't have the right to strike.

UHPA argued that the HLRB should grant interlocutory relief to HSTA pending the decision of the HLRB. UHPA bases this on our same legal challenge to the implementation of a payroll lag for faculty in 2001. Federal District Court adopted UHPA's argument that a relief was necessary to prevent the payroll lag from causing "irreparable financial harm" to individuals, e.g., the inability to pay a monthly mortgage that may cause foreclosure.

An Additional Issue: Ex Parte Communications

HSTA filed a complaint with the HLRB and the Ethics Commission claiming the Governor issued ex parte communications in a letter sent to the HLRB requesting that the Board send the parties to mediation. UHPA argued that the Governor's letter did not meet the standard of an "ex parte" communication and therefore did not violate Chapter 89.

The HLRB ruled the Governor had not violated Chapter 89 in sending the letter requesting that the Board require mediation between the parties since it was copied the same day to the HSTA President, Wil Okabe.

This is not strictly an HSTA issue and the decision has an impact on the latitude that can be afforded to both employers and the unions in how they communicate with the HLRB in the future.

Have others conspired against the HSTA?

HSTA's attorney alleges that the Governor, the leaders of the House and Senate, the State Superintendent of Schools, the Board of Education, and the public sector unions, including UHPA and HGEA, conspired to interfere in HSTA's bargaining by preventing the teachers from bargaining for more salary or lower employee contributions to the EUTF (health insurance). Elements of the conspiracy include the State Legislature's 2011 biennium budget, the Governor's appointment of two new members to the HLRB, HGEA's 2011 contract settlement that included a "most favorite nation clause," and UHPA's current contract provision stating that Bargaining Unit 7 shall not receive a smaller contribution to the EUTF than another bargaining unit.

As a part of the HSTA's legal strategy to prove a conspiracy, their attorney is seeking the unfettered right to gain disclosure of the confidential discussions between other public sector unions and the employer during periods of bargaining. In the case of HGEA, HSTA has also subpoenaed all the written records from the last round of bargaining between HGEA and the State, including the HGEA's caucus notes.

To support their theory, HSTA has already subpoenaed between 80 and 90 individuals, and kept their options open to call on even more individuals. HSTA has not given a clear description of what type of information they are seeking, although it is apparent that calling all of these witnesses will draw out the hearing into next year.

Legislative Implications

HSTA is either unaware or they do not care about the effect of this legal strategy. Unfortunately, simply delivering subpoenas to 80 plus individuals, including union leaders and legislators, has generated much ill will. Some are offended and feel their integrity is being called into question. Others are completely baffled as to why they are being subpoenaed at all. HSTA's strategies have caused some legislators, particularly those who have been subpoenaed, to start asking the question, "What's wrong with Chapter 89 and how can we change it?"

UHPA believes that HSTA has ignored a clear and direct path in arguing their case and instead chosen an unnecessarily circuitous route. HSTA can achieve its goals, and fulfill its duty to the teachers it represents, without resorting to strategies that can lead to decisions from the HLRB that erode our rights under Chapter 89 and invite legislative proposals that diminish collective bargaining for the public sector. Both UHPA and HGEA are also concerned that HSTA's protracted strategies will undermine the public's support of public sector collective bargaining.