

Hilo, Hawai'i  
Tuesday, September 15, 2009

The regular meeting of the Merit Appeals Board, County of Hawai'i, was held in the conference room of the Department of Human Resources, 101 Pauahi Street, Suite 2, Hilo, Hawai'i, on Tuesday, September 15, 2009.

**Present:**

**Mr. G. Rick Robinson, Chair**  
**Mr. Gary Yoshiyama, Vice Chair**  
**Mr. Henry "Hank" Silva, Member**  
**Mr. Brian J. De Lima, Member**  
**Mr. Kenneth M. Rowe, Member**  
**Mr. Michael R. Ben, Director of Human Resources**  
**Ms. Diane A. Noda, Deputy Corporation Counsel**  
**Ms. Velma Y. Menezes, Secretary-Reporter**  
**Ms. Yumi Nakamura, Clerk III**

Chair Robinson called the meeting to order at 9:34 a.m. Mr. Yoshiyama arrived at 10:05 a.m.

### MINUTES OF JUNE 16, 2009

**MOTION:** Mr. De Lima moved that the minutes of June 16, 2009 be approved as circulated. The motion was seconded by Mr. Rowe and unanimously carried.

### COMMUNICATIONS

**Communication No. 09-02**, dated August 4, 2009, from Lorena D. Kauhi, Union Agent, HGEA, notifying the Merit Appeals Board that the appeal filed on behalf of Leenelle Tomooka is withdrawn.

Ms. Noda noted that the parties filed a grievance on this matter. The communication was received and filed.

## **UNFINISHED BUSINESS**

### **Annual Evaluation of Director of Human Resources**

**Chair Robinson called the Board's attention to the September 15, 2009 letter that had been distributed and noted that this letter is just his recommendation. In the past, the evaluation for Mr. Ben had been done several ways, including sending out a questionnaire to department heads, which proved to be laborious as it was difficult to get anyone to fill it out or respond in a timely manner. As discussed among Board members, the crux is whether Mr. Ben met the expectations as the human resources director.**

**MOTION: Mr. De Lima moved to approve the Chair's "meets expectations" recommendation. The motion was seconded by Mr. Silva.**

#### **Discussion:**

**Mr. De Lima stated that he would defer to Chair Robinson and Mr. Silva, inasmuch as they had served on the Board during that period of time.**

**Chair Robinson noted that in a previous evaluation, communication concerns had been expressed, which Mr. Ben has addressed by establishing a greater understanding of what services he offers and going to extraordinary lengths to get departments to understand them.**

**The motion was voted on and carried unanimously. (Note that the motion carried unanimously with the votes of four members present at this time.)**

**Chair Robinson asked Ms. Menezes to finalize the letter and give it to Mr. Ben with a copy placed in his personnel file. Chair Robinson thanked Mr. Ben for all of his hard work.**

**Ms. Noda asked that the Chair outline for Mr. Ben the Board's expectations and standards for the next evaluation period, which would be July 2009 to June 2010.**

**Chair Robinson stated that the expectations they have are that Mr. Ben continue the good work that he's done. They've seen movement in several areas**

**in a very positive way this past year—one in the number of appeals, which have been reduced, and the second in the continued reduction in the workers’ compensation program under the Health & Safety Division. Another area is the training position that was previously unfilled but has since been filled with ongoing training being offered, which he believes is meeting the expectations of the County.**

**Therefore, he would say that they don’t have objective standards, such as the number of accidents, amount of workers’ comp claims, or the number of appeals filed before the Board, but rather it’s more of a subjective analysis of Mr. Ben’s performance during the course of the year. He believes they all make that subjective decision from reading the monthly reports that are distributed and seeing the numbers as they apply to the Board.**

**Chair Robinson stated that it would be very helpful if Mr. Ben would give the Board his expectations on what he intends to accomplish over the coming year, whether it be further reductions in the number of claims, the number of training sessions that will be conducted, interaction with the other departments on human resource matters, appeal matters, etc.**

**Mr. Ben noted that the departmental program objectives are contained in the annual budget that they prepare for the Council; and with the department being more of a staff function, they are limited in the amount of spending they can do. They can’t really take on new projects that involve additional expenses so they’re continuing to maintain their regular standards of measurement. This time around, they are facing serious challenges given the \$44.8 million shortfall that’s expected for next fiscal year. The department will be challenged with reducing its operating cost to the extent possible and assisting departments in controlling their operating costs, such as overtime and temporary assignments (TA); training them to exercise their management prerogatives, as the contracts provide, which means don’t automatically give overtime or automatically TA an employee just cause somebody goes out for a day. With proper planning, a lot of those costs can be avoided, and HR will be assisting departments with that.**

**Mr. Ben will continue with the County’s drug testing program. Coverage has been expanded to all of bargaining unit 01, and unfortunately there have been quite a few positives, which may affect costs with the employee assistance program. The biggest concern now is planning on how to do more with less, which Mr. Ben and his department have been working on.**

**In response to queries about the County's drug testing program, Mr. Ben provided the following information:**

**He administers the drug testing program for everybody except Police and notifies the department's representative of the testing. For Fire and CDL drivers, he uses the random selection spreadsheet off his PC; for the rest of the bargaining units, the union insisted that it be a third party, so the random selection is contracted out, which costs \$55 every time a pull is requested.**

**The employees are tested for the five major drugs, such as marijuana, opiates, and methamphetamines. All the results come to Mr. Ben and are filed in the Department of Human Resources. Departments are instructed not to keep the results in their files, as drug testing involves constitutional issues and he wants it centralized with the responsibility falling on him should any issues arise.**

**Fire fighters have two strikes; they can't have a second positive within seven years of the first positive. For CDL drivers, the second positive within two years results in termination; and for BU 01, it's the third positive in two years before termination. The penalties all had to be negotiated with the various unions.**

**When an employee tests positive, the employee is referred to the substance abuse professional who is licensed to make an analysis of the extent of the rehabilitation program that the person needs to attend; and the person is kept away from work until completion of the rehabilitation program. The substance abuse professional then recommends return-to-duty. A return-to-duty test is administered that the employee has to pass. In addition, the substance abuse professional recommends a follow-up test schedule of at least six tests per year for a five-year period in addition to the random test that the employee is subject to. The County has had two to three terminations because of second positives. The substance abuse professional is contracted through our EAP.**

**In a year's time, we test close to 255 fire fighters, 80 CDL drivers out of about 140, and for the rest of the bargaining units at least 25% of approximately 300 employees.**

**Mr. Silva shared that in the Police Department, in the past, the detectives and sergeants could be laterally transferred. Generally speaking, police officers going to the ranks learn how to be police officers and investigators, but they**

don't learn how to be supervisors and leaders. He's noticed, now that there are classes in leadership and supervision, how it's been making a difference.

Mr. Ben thanked Mr. Silva and said that he would pass it on to the trainer who has developed an extensive supervisory course that spans several modules.

At this point, Chair Robinson asked Ms. Noda to brief the Board on the Botelho hearing before Judge Hara.

Ms. Noda informed the Board that she was ill last month, so Mike Udovic covered the hearing for her. Judge Hara ruled that the Merit Appeals Board has jurisdiction to consider the appeal of a probationary employee. Ms. Noda believes that Deputy Attorney General Julian White needs to prepare a draft of the proposed order. That was part one of the County's appeal. Part two is the substantive hearing for which she has not yet met with the client department but intends to do so this week regarding the next step.

It is Ms. Noda's understanding that Ms. Botelho's probation has been extended for the remaining month-and-a-half of the maximum 12 months of probation.

### NEW BUSINESS

A) Communication No. 09-03, petition of appeal, received September 1, 2009, from Jarnett Lono, HGEA, filed on behalf of JoAnne Koi Lee, appealing Deputy Director of Human Resources Ronald K. Takahashi's denial of a reallocation of Ms. Lee's position from Clerical Services Supervisor II, SR-16, to Clerical Services Supervisor III, SR-18.

The Board scheduled the hearing for October 20, 2009, at 10:00 a.m.

### DIRECTOR'S REPORT

Mr. Ben reported the following:

1) They had their County-wide budget meeting to start preparing for the 2011 budget. It was reported that the County will be short \$44.8 million going into the fiscal year. In addition to the \$44.8 million, the Mayor announced that the County will probably lose the TAT, which means another \$18 million,

**totaling \$62.8 million. The departments are not being asked to cut a specific percentage of their budgets; they're being asked to cut everything they possibly can cut, then the budget people will re-evaluate the situation. The concern is for the small departments, such as Mr. Ben's, where at least 75% of the budget is for salaries and wages. If they were to tell his department to cut 20% of its budget, that would mean cutting people to accomplish that objective, so the Mayor's directive was to seriously look at operating costs first. They're not touching people at this point in time. Each department has to determine where they are going to cut in their operating costs and start setting up priorities as to which programs might have to be eliminated. The impact to the public will be the biggest controlling factor. The department will submit its budget November 16, and each department will then meet with the Department of Finance beginning in January 2010. The first budget gets submitted to the Council on March 1, 2010.**

**2) HGEA has just gone through its arbitration process with seven full days of hearing, and it hasn't been completed. It will be continued in October. UPW, Unit 1, is the unit that can go on strike.**

**3) The City and County of Honolulu Merit Appeals Board appointed Ms. Virtta Hite as the Chair, Ms. Lynn Ching as the Vice Chair, and Ms. Gwen Rulona and Mr. Kinglsey Ah You are members. They did not report having a fifth member.**

**4) A big project involves Act 10, Session Laws 2008, which has to do with government records, social security numbers, and the breach of confidentiality issues. It required all kinds of things to be done by certain deadlines, some of which have been met and some of which haven't. The State was supposed to set up a Security Council to help guide them, but they haven't heard anything from them. The report is supposed to be submitted to the Legislature by January 2010 by the Security Council so Mr. Ben wanted to alert the Board of this situation in case anything arises. Basically they've implemented procedures on releasing social security numbers and on redacting confidential information in their records. They have one assignment that really shouldn't be theirs, and he doesn't know how they will accomplish that yet. They're responsible for the security of all the data that's in the computer systems, and they had testified that they had nothing to do with that. Nevertheless, by this law they're mandated to develop security procedures for all that information so that's something they will have to work closely with Data Systems, and that's one of the items that's due by the end of this year.**

**5) As an item of interest in the Botelho case, the Department of Human Resources was not able to place the employee who took Ms. Botelho's job when she was initially terminated. The employee had acquired civil service status, so the end result was they terminated that employee. He filed a grievance, and it's now going to arbitration. They'll be working to resolve it, but the worst case scenario is that an arbitrator can also award that person the same position they put Ms. Botelho back in. Mr. Ben doesn't have the answer to that potential problem, but they're watching it closely and are monitoring it.**

**Normally the arbitrator won't say terminate Ms. Botelho and put the other person in, just like the Board didn't say terminate the employee who was there. The Board just ordered reinstatement. Likewise, the arbitrator will leave it up to the employer.**

**Mr. De Lima noted that the employee still got civil service status even though Ms. Botelho had her appeal going and asked why the department hadn't extended the probationary period. Mr. De Lima also asked if the money comes out of the department to satisfy any of the obligations as to arbitration awards or monetary damages to the terminated employee.**

**Mr. Ben responded that the money does come from the department; and to answer his first question, they do not stay any action pending any kind of appeal because of the slow pace at which government sometimes moves with extensions that causes delays. The person selected should have the same rights to become permanent, and he personally believes that when a department takes action they should be doing it with full confidence that they are doing it correctly and it will stand up.**

**Employees are on probation for six months. With the Merit Appeals Board, it's safe to say that the appeal process can be done within six months to a year of the probationary period. However, when it comes to collective bargaining, it has gone anywhere from one to three years before an appeal has been decided. In this case, civil service status was given to the employee after six months. The remedy being sought is to be reinstated.**

**Mr. De Lima noted that there's only one position. He questioned whether arbitration could create a position, as that would take legislative action, and it's a separation of powers.**

**Mr. Ben responded that they can see the potential of what can happen, so they're doing what they can to avoid that worst case scenario.**

**NEXT MEETING DATE**

**The Board scheduled its next meeting for October 20, 2009 at 9:30 a.m. followed by JoAnne Koi Lee's appeal hearing at 10:00 a.m.**

**ADJOURNMENT**

**MOTION: Mr. De Lima moved to adjourn the meeting. The motion was seconded by Mr. Yoshiyama and unanimously carried.**

**The meeting adjourned at 10:14 a.m.**

**Respectfully submitted,**

**Secretary, Merit Appeals Board**

**APPROVED:**

**G. Rick Robinson  
Chair**

**vym**