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Case No. CE 06-859

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Complainant,

and

DAVID Y. IGE, Governor, State of Hawaii;
LANCE MIZUMOTO, Chairperson, Hawaii
State Board of Education; HAWAII STATE
BOARD OF EDUCATION; KATHRYN S.
MATAYOSHI, Superintendent, Department
of Education; NEIL DIETZ, Acting
Administrator, Labor Relations Section,
Department of Education; and
DEPARTMENT OF EDUCATION, State of
Hawaii,

Respondents.

CASE NO. CE-06-859

DECISION NO. 483

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

This prohibited practice case requires the Hawaii Labor Relations Board (Board) to determine whether an employer's rejection and return of a grievance without addressing the substance of the grievance amounts to a prohibited practice as defined in Hawai'i Revised Statutes (HRS) 89-13. In essence, the question before the Board is: Has the integrity of the class grievance process mandated by HRS Section 89-10.8.5(a) been compromised by the rejection and return of a class grievance by the employer?

As outlined below, in this particular case, the Board finds that the employer's rejection and return of a class grievance interfered with the class grievance process, and was a prohibited practice.

I. BACKGROUND.¹

This dispute arises out of the submission of a class grievance by the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Union) on March 16, 2015 by Irene L.A. Pu'uohau (Pu'uohau), Union Field Services Officer, to Kathryn Matayoshi, Superintendent of Education, Department of Education (DOE).² The Union Grievance Letter alleged that DOE attempted to unilaterally "change" Article 11 of the current BU 06 collective bargaining agreement (CBA) by inconsistently implementing the SARSA (School Administrator Recruitment, Selection and Appointment), deliberately ignoring the Union's request to consult/negotiate the SARSA, implementing a "new policy through the Board of Education that is in direct conflict with the Unit 6 contract" and waiving minimum qualifications for educational officer positions (SARSA Issue).³

By letter dated March 25, 2015 (DOE Rejection Letter),⁴ the DOE, acting through Neil Dietz (Dietz), the Acting Administrator, Labor Relations Section, essentially "rejected" the Union Grievance Letter and returned it to Pu'uohau without addressing the merits. In response, the Union, by letter dated March 25, 2015 from Pu'uohau to Superintendent Matayoshi (Union

¹ To the extent that the discussion contained in this background section of this decision and order may be considered to be a finding of fact, conclusion of law and/or mixed finding and conclusion, the same shall be treated as such.

² Pu'uohau's March 16, 2015 grievance letter shall be referred to herein as the Union Grievance Letter. The Union Grievance Letter was admitted into evidence at the Hearing (as defined below) as DOE Exhibit A.

³ The Union Grievance Letter also included a number of information requests related to the class grievance issues.

⁴ The DOE Rejection Letter was admitted into evidence at the Hearing as DOE Exhibit B.

Arbitration Letter),⁵ initiated an arbitration to address the SARSA Issues (Arbitration Proceeding).

On May 5, 2015, the Union filed a Prohibited Practice Complaint (Union Complaint)⁶ with the Board alleging, among other things, that the Respondents breached the CBA by rejecting and returning the Union Grievance Letter, and refusing to provide the information requested by the Union in the Union Grievance Letter. On May 11, 2015, DOE filed its Answer to Prohibited Practice Complaint Filed on May 6, 2015 (DOE Answer) and took the position that (1) since the Union failed to submit a valid grievance, DOE was not required to respond to the information requests set forth in the Union Grievance Letter, and (2) DOE had a right to "respond to any grievance it finds to be unintelligible, incomplete, late, illegal, or in some way faulty, by way of correspondence duly informing [the Union] of the defects."⁷ DOE also asserted that the Union "was *free* to either: 1) attempt to amend the grievance so that it was intelligible and complete (which, of course, would include enough information for the [DOE] to ascertain 'who, what, where, and particularly *when* [italics in original]'), or 2) forge blindly ahead by moving the grievance to the next level."⁸

On June 12, 2015, the DOE filed a Motion to Dismiss Prohibited Practices Complaint, or in the Alternative for Summary Judgment (DOE Motion). On June 26, 2015, the Union filed

⁵ The Union Arbitration Letter was admitted into evidence at the Hearing as DOE Exhibit C.

⁶ The Union Complaint attached a document entitled Prohibited Practice Complaint, and this document shall be referred to herein as the PPC. The PPC contains the Union's specific factual, legal and other allegations. In addition, the term "Respondents" shall collectively refer to David Y. Ige, Donald S. Horner, the Hawaii Board of Education (BOR), Kathryn S. Matayoshi (Matayoshi), Dietz and DOE.

⁷ DOE Answer at p. 3.

⁸ DOE Answer at p. 3. At this point, the Union, in pursuing its prohibited practice claims before the Board, did not provide the dates of any alleged violation(s) of the CBA or any further facts to support the claims asserted in the Union Grievance Letter.

a Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint, or in the Alternative Summary Judgment, and on July 6, 2015, DOE filed a Reply to HGEA's Opposition to Motion to Dismiss Prohibited Practice Complaint, or in the Alternative for Summary Judgment.

On June 12, 2015, the Union filed a Motion for Summary Judgment (Union Motion). On June 26, 2015, DOE filed its Memorandum in Opposition to HGEA's Motion for Summary Judgment, and on July 6, 2015, the Union filed its Reply Memorandum in Support of Its Motion for Summary Judgment.

Pursuant to the Board's Notice of Motions Hearing; Waiver of Section 377-9(b), HRS and §12-42-46(b). Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules dated May 26, 2015 (Motion Hearing Notice), a hearing was held on July 10, 2015 on the DOE and Union Motions. At the close of the hearing, "the Board took the motions under advisement pending the outcome of the underlying BU 06 Class Grievance [and] [b]oth parties orally stipulated that they reserved the right under Hawaii Revised Statutes Chapter 89 to request further assistance from the Board or a status conference or to move for a hearing *after completion of the class grievance.*" (Italics added.)⁹

On October 26, 2015, the Union filed a Motion to Schedule Hearing on the Merits. In his declaration, the Union's attorney advised that he "was informed that the underlying BU 06 Class Grievance had been withdrawn by HGEA/AFSCME" by letter dated September 17, 2015, "without withdrawing the present prohibited practices complaint."¹⁰ Apparently, DOE advised the Union that it was rescinding "its January 2014 consultation and [maintaining] the

⁹ The Board's Notice of Status Conference filed on October 30, 2015.

¹⁰ Declaration of Peter L. Trask attached to the Union's Motion to Schedule Hearing on the Merits (Trask Declaration) at Paragraph 7.

1988 SARSA process with the exception of including the changes outlined in the 2008 Superintendent Patricia Hamamoto memo."¹¹ In effect, the Arbitration Proceeding was withdrawn because the SARSA Issue was resolved.

As a result of the foregoing, a status conference was held on November 10, 2015, and the hearing on the merits of this case was scheduled for January 28, and 29, 2016 (Hearing).¹²

Subsequently, on April 29, 2016, the Union filed HGEA/AFSCME's Post Hearing Brief (Union Brief) and Respondents filed their Post Hearing Brief (Respondents Brief).

II. HEARING ON THE MERITS.

At the commencement of the Hearing, the Board announced that it denied the DOE and Union Motions, and directed the parties to proceed.¹³ The Hearing commenced at 9:00 a.m. on January 28, 2016, and was completed in one day. During the Hearing, the parties (1) identified and entered into evidence a total of sixteen (16) exhibits (some of which were duplicative) and (2) called only two witnesses.

During the Hearing, the following exhibits were admitted into evidence¹⁴:

Document	Exhibit Number
March 16, 2015 letter from Pu'uohau to Superintendent Matayoshi re Formal Class Grievance	Union Exhibit 1
March 25, 2015 letter from Dietz to Pu'uohau from Dietz with a "cover" e-mail string beginning with a March 24, 2015 e-mail from	Union Exhibit 2

¹¹ September 17, 2015 letter from the Union to DOE, a copy of which is attached to the Trask Declaration as Exhibit 1.

¹² The Board's Notice of Hearing and Deadlines filed on November 10, 2015. In addition, the Board advised the parties that the official record of the hearing would be the transcript of the Hearing transcribed by Donna Baba. TR-5, Lines 3-8. The transcript of the hearing shall be referred to as "TR-___".

¹³ TR-4, Line 20, to TR-5, Line 2.

¹⁴ Union Exhibits 1-5 at TR-5, DOE Exhibits A-I at TR-7 and DOE Exhibits J-K at TR-130.

Dietz to Pu'uohau and with an attached e-mail dated March 16, 2015 from Kevin Nakata to Superintendent Matayoshi	
March 25, 2015 letter from Pu'uohau to Superintendent Matayoshi and Dietz re Union Intent to Arbitrate	Union Exhibit 3
E-mail string beginning with e-mail dated March 25, 2015 from Kevin Nagata to Superintendent Matayoshi, Barbara Krieg and Annette Anderson	Union Exhibit 4
Excerpts from Unit 6 Contract, July 1, 2013-June 30, 2017 Thomason Letter (cover page, table of contents and Page 1 through 11)	Union Exhibit 5
March 16, 2015 letter from Pu'uohau to Superintendent Matayoshi re Formal Class Grievance	DOE Exhibit A
March 25, 2015 letter from Dietz to Pu'uohau from Dietz	DOE Exhibit B
March 25, 2015 letter from Pu'uohau to Superintendent Matayoshi and Dietz re Union Intent to Arbitrate	DOE Exhibit C
May 6, 2015 letter from Trask to Superintendent Matayoshi	DOE Exhibit D
May 14, 2015 letter from Pu'uohau to Superintendent Matayoshi re class grievance regarding travel guidelines	DOE Exhibit E
May 14, 2015 letter from Thomason to Trask	DOE Exhibit F
Hawaii Administrative Rules Sections 8-62-1, et seq.	DOE Exhibit G
Act 399	DOE Exhibit H
Portions of HRS Chapter 89	DOE Exhibit I
March 13, 2015 letter from Dietz to Erika Liashenko with attached materials	DOE Exhibit J
April 8, 2013 from Alvin Shima to Tehani Nunez with attached materials	DOE Exhibit K

Only two witnesses were called and each party had an opportunity to cross-examine the witnesses called by the other party and their testimony was as follows:

A. Dietz. On direct, cross and redirect (including questioning by members of the Board), Dietz testified as follows:

(1) For a little over a year, he was DOE's acting administrator of labor

relations. Previously, he was the chief negotiator for the State of Hawai'i's Office of Collective Bargaining (from March 2011 to taking his current position). Before becoming the State's chief negotiator, he was the port agent for the Seafarers International Union (SIU) in Hawai'i for fifteen years, and he was previously with SIU in Seattle, Washington. As port agent, he was responsible for operations, including the filing of grievances and moving them through the grievance process.¹⁵ In addition, Dietz testified that:

(a) The collective bargaining process is about "developing a relationship between workers and an employer ... I think it is about the relationship between the workers and the employer and all that encompasses."¹⁶

(b) HRS Chapter 89 "came about to involve employees in decision-making in the public process," and he believes in the concept of joint decision-making.¹⁷

(c) The CBA embodies the agreement between the Union and DOE as to how to collectively bargain.¹⁸ Dietz further testified that "[i]f there is a violation of the Collective Bargaining Agreement, then Article 15 would apply."¹⁹

(2) As the acting administrator of labor relations at DOE, his primary function was to provide "staff support for the discipline process within the Department; and for reviewing initial Step 2 grievances when they come in, making assignments of those grievances to staff as required; and acting as liaison with the Attorney General's Employment Law Division for any prohibited practices complaints, other matters that come; acting as the

¹⁵ TR-12 to Tr-15.

¹⁶ TR-60, Line 24, to TR-61, Line 12.

¹⁷ TR-61, Line 24, to TR-62, Line 10.

¹⁸ TR-63, Lines 14-18.

¹⁹ TR-63, Line 19, to TR-64, Line 22.

Department's representative before the Merit Appeals Board; and internal complaint processing as assigned."²⁰ In carrying out his functions, he would consult with various persons, including "regularly consulting with the Office of Attorney General, Employment Law Division."²¹

(3) His office (labor relations) handles all Step 2 grievances and "acts as the superintendent's designated representative in dealing with Step 2 grievances."²² As such, he is familiar with the grievance procedure contained in the CBA.²³ He understands that, according to the CBA, if there are questions of procedure, "they can be decided by an arbitrator" and "that an arbitrator makes decisions on arbitrability," whether procedural or substantive (i.e., the merits), and not him.²⁴

(4) He recalls receiving the Union Grievance Letter (Union Exhibit 1 and DOE Exhibit A) in the normal course of business.²⁵ In responding to the Union Grievance Letter, he questioned "the timeliness of the March 16, 2015 letter" in the DOE Rejection Letter (Union Exhibit 2 and DOE Exhibit B). After reviewing Article 15 of the CBA (Union Exhibit 5), he referred to Article 15, Section C, which provided that "the grievance must be filed with the appropriate superior within 20 days working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violations, then it must be filed with 20 working days after the alleged violation first became known to the educational officer involved, or the grievance may not be considered." In addition, Section G provided that the

²⁰ TR-17, Line 20, to TR-18, Line 4.

²¹ TR-16, Line 17, to TR-17, Line 13.

²² TR-18, Lines 20-25.

²³ TR-21, Lines 11-23.

²⁴ TR-24, Line 21, to TR-26, Line 4.

²⁵ TR-19, Line 14, to TR-20, Line 9.

same time limits applied to class grievances.²⁶ Thus, because of his timeliness concerns, "in accordance with the [sic] Article 15, Section C, the Employer has the ability to return the grievance." His belief is based on the language contained in Section 15.C that "the grievance may not be considered," which allowed him to reject and return a grievance if he had a concern about timeliness.²⁷

(5) He admits, however, that Section 15.C does not give the employer the right to circumvent the requirement that an arbitrator decide questions of procedural or substantive arbitrability. In defending his return of the Union Grievance Letter, he testified that his consideration was not circumventing the issue of arbitrability but, rather, was compliance with certain pleading requirements, i.e., "does [the Union Grievance letter] conform to the requirements of a grievance as outlined in the Collective Bargaining Agreement? If so, we know how to proceed one way. If not, we proceed a different way."²⁸ In effect, Dietz reviews a grievance letter, and makes an initial determination of "whether the document I was presented with was qualified as a grievance, met the requirements to be a grievance under the terms of the [CBA]." In effect, he considered himself to be a "gate keeper" with the ability to return or reject grievances, in spite of the fact he knew that the CBA required the arbitrator to be final judge of arbitrability.²⁹

(6) What was missing from the Union Grievance Letter was "any date of infraction" because "contained in Section C there is an inherent requirement to let the Employer know when the infraction occurred, otherwise ... the Employer has no ability to see if

²⁶ TR-21, Line 25, to TR-24, Line 5.

²⁷ TR-24, Lines 6-20.

²⁸ TR-26, Line 5, to TR-27, Line 5.

²⁹ TR-27, Lines 6-13.

it meets timeliness."³⁰ In essence, after looking "at the totality of the document that Ms. Puuohau sent me, I felt it was untimely, but absent an actual date, I could not definitively say it was untimely, which why when I wrote the reply to Ms. Puuohau I questioned the timeliness of the grievance," and took the position to return it and not consider it.³¹

(7) In addition to including a date, Dietz testified that "the grievance has to - - has to at least let the Employer know the specific provisions of the agreement that have been violated" and the Union Grievance letter "told me article numbers, but didn't tell us anything about what the violations were alleged or anything else like that." As an example of the specificity that Dietz believed was required, he testified that, in a discipline case, "they will say that the Employer did not have just and proper cause to terminate the employee. So there's a specificity because the article may cover multiple things." In Dietz's view, it was this specificity that the Union Grievance Letter lacked rather than allegations of specific facts and documents to support the alleged violation.³²

(8) Simply put, Dietz believed that he could determine whether a grievance submitted by the Union "met the requirements of being a grievance."³³ In effect, he acted as a gate keeper -- if the grievance "met the definition of a grievance," he would proceed with the grievance. However, if it did not, then "we didn't have to consider the document."³⁴ In effect,

³⁰ TR-27, Line 20, to TR-28, Line 13. Dietz also testified that, in drafting grievances as a port agent, he provided dates to establish timeliness. TR-47, Lines 4-15. He also testified that it was his experience that UPW, HSTA and HGEA generally provided dates of any alleged violations. TR-47, Line 16, to TR-48, Line 8.

³¹ TR-28, Line 21, to TR-29, Line 8.

³² TR-32, Line 6, to TR 33, Line 1. Dietz understood that Section 15.A provided only that the Union was specifically required only to allege that DOE's violations related to the interpretation and applications of specific provisions of the CBA to be a grievance. TR-33, Line 24, to TR-34, Line 4.

³³ TR-40, Lines 7-17.

³⁴ *Id.* See, also, TR-45, Line 12-17, where Dietz testified that he did not think the Union Grievance Letter was a Step 2 grievance because "I don't believe her submission met the requirements of being a grievance in

by taking this course of action, Dietz was determining arbitrability and ignoring the plain language of the CBA, and more importantly, HRS Section 89-10.8(a). Dietz also ignored the fact that class grievances, unlike individual grievances, had no "pleading" requirements.³⁵

(9) By treating a class grievance like an individual grievance, he was unilaterally modifying the terms of the CBA without negotiating the same with the Union in violation of, among other things, HRS Sections 89-13(a)(1) (preventing the right of the Union to resolve disputes through the grievance process), 89-13(a)(5) (refusing to bargain in good faith over any changes to the CBA), 89-13(a)(7) (refusing to comply with the provisions of HRS Chapter 89) and 89-13(a)(8) (violating the terms of the CBA).³⁶

(10) After determining that the Union Grievance Letter did not qualify as a grievance, Dietz took the position that the information requested in the Union Grievance Letter need not be provided.³⁷ He believed it was an attempt by the Union to "shift the burden of proof to [DOE] rather than the Union providing any specificity or proof as to their allegation."³⁸ As acting administrator, he has provided information to a potential grievant, but

accordance with the provisions of Article 15." Dietz believed that questions of timeliness allowed him to return a grievance (TR-45, Lines 18-24).

³⁵ Dietz testified that DOE had the right to determine if a grievance met "the contractual requirements of being an actual grievance [and] we don't have to consider it." TR-46, Lines 10-21. *See, also*, TR-57, Line 25, to TR-58, Line 10 ("my review of the document that was presented to us did not meet the requirements of a grievance under the CBA").

³⁶ Although Respondents argue that specific provisions of HRS Chapter 89 were not addressed in the Union Complaint or the attached PPC, the Board notes that the PPC raised the issue of whether Respondents' conduct "is a prohibited practice pursuant to Section 89-13(a), HRS." P. 2, Memorandum in Support of Motion for Summary Judgment attached to the Union Motion. Under these circumstances (e.g., the issues related to the integrity of the grievance process), the Board deems that this is sufficient to place Respondents on notice of the Union's claims.

³⁷ TR-29, Lines 9-11.

³⁸ TR-34, Lines 11-22, and TR-75, Line 5, to TR-76, Line 14. Since Dietz based his refusal to provide the requested information on his rejection and return of the Union Grievance Letter, and the gravamen of the Union's claims is DOE's failure to recognize and process the Union Grievance Letter, the Board need not reach the issue of whether DOE wrongfully refused to provide the requested information. By not addressing the issue, the Board does not condone Dietz's failure to respond to the Union's information request.

could not say whether this was a normal DOE practice.³⁹ However, while with SIU, he was never provided (pre-grievance) with any information by an employer. This was because there was a different grievance process.⁴⁰

(11) In attempting to justify what he did with the Union Grievance letter, Dietz testified that DOE's practice was to reject and return grievances that did not comply with the CBA.⁴¹ Dietz believed that CBA Section 15.E (individual grievances) required the Union to place dates of any alleged violation in its grievances, and that this section should be applicable to class grievances.⁴² In addition, Dietz testified that he did not intend to prevent the Union from proceeding to arbitration.⁴³ However, Dietz also testified that:

(a) CBA Article 15 dealt with disputes arising out of the violation of the CBA.⁴⁴ The grievance process was designed to take into account disagreements between employer and employee, including those reviewing a grievance at Step 1, Step 2 and in arbitration.⁴⁵

³⁹ TR-35, line 15, to TR-36, Line 9.

⁴⁰ TR-36, Line 19, to TR-37, Line 8.

⁴¹ TR-48, Line 9, to TR-49, Line 5.

⁴² TR-49, Line 12, to TR-50, Line 7. *See, also*, TR-59, Line 22, to TR-60, Line 8 (pleading requirements for individual grievances are applicable to class grievances and "there's still a requirement to provide us with information that includes a date of violation or when the Union first knew of the violation").

⁴³ TR-50, Line 16, to TR-51, Line 2. Because of Dietz's rejection of the Union Grievance Letter, the Union initiated an arbitration, and the arbitration was subsequently withdrawn as a result of a resolution of the issues which were originally raised in the Union Grievance Letter. TR-53, Lines 2-8.

⁴⁴ TR-64, Lines 21-22.

⁴⁵ TR-65, Lines 2-14.

(b) There is a difference between an individual grievance and a class grievance.⁴⁶ An individual grievance involves one person and a class grievance involves more than one person.⁴⁷ The grievance process for an individual grievance and a class grievance is "the same process [and] [t]he difference is what step it enters the grievance process."⁴⁸ However, Dietz admits that CBA Section 15.G (class grievances) does not specifically adopt the pleading requirements in individual grievances ("I don't see it in Section G").⁴⁹ In essence, Dietz does not dispute that the pleading requirements for individual grievances were not incorporated into CBA Section 15.G (class grievances), unlike the timeliness requirements (CBA Section 15.C). However, he believed (and still believes) that:

"the requirements of E [pleading requirements for Step 1 individual grievances] are the basic requirements of any grievance, so yeah, I think they're applicable to class grievance. Is that language in E specified in G [class grievances]? *I agree with you that I don't read it in G any more than you read it in G, but the language that's in E, I believe, is the basic information that should be contained in any grievance. (Italics added.)*"⁵⁰

(c) Dietz still believes that he "made the correct determination, but I am also am quite aware that there are other people who could take a look at the determination I

⁴⁶ TR-66, Lines 9-11. Dietz also testified that at DOE "I've had class grievances with a class as small as two, and then classes as large as 12,500." TR-82, line 23, to TR-83, Line 9. Thus, Dietz was familiar with class grievances.

⁴⁷ TR-66, Lines 12-20.

⁴⁸ TR-67, Lines 15-25.

⁴⁹ TR-70, Line 23, to TR-71, Line 7. *See, also*, TR-72, Lines 9-12.

⁵⁰ TR-72, Lines 16-24. Dietz, even when faced with difference between individual and class grievances and the fact that CBA Section 15.G does not incorporate the pleading requirements for individual grievances, is adamant that "[i]ts clear to me that the Employer should be provided a date of violation or a date that the Union became aware of the alleged violation. TR-72, Line 25, to TR-73, Line 4.

made and judge that I made an incorrect determination, and I have to live by that decision."⁵¹ Further, Dietz returned the Union Grievance Letter based on the failure of the Union to allege a violation date based on the phrase "or the grievance may not be considered" contained in CBA Section 15.C (timeliness).⁵² Dietz agrees, however, that CBA Section 15.C does not specify who may disregard the grievance. While it could be the arbitrator and does not mention the parties, "it is reasonable when you're talking about a grievance that has been filed, that the consideration is then the party to whom the grievance has been filed, and *it's up to that party whether or not to consider the grievance.*" (Italics added.)⁵³

(d) Despite the foregoing, Dietz agreed that HRS Section 10-8.5(a) provides that an arbitrator issues a final and binding decision in a grievance and he does not have the authority to decide whether a case will go to arbitration or not.⁵⁴ Furthermore, Dietz agreed that he should not be a "gate keeper" or hinder a case going to arbitration.⁵⁵

(12) The Board notes and finds that Dietz's reliance on the handling of prior grievances filed by the Union or individual employees to justify his rejection of the Union Grievance Letter was misplaced. The examples provided by the Respondents were in the context of individual grievances and not class grievances, and more importantly, were not brought to the Board's attention. Thus, neither Dietz's testimony nor the Respondents' exhibits established a "past practice" allowing Respondents to reject a *class* grievance.⁵⁶

⁵¹ TR-68, Lines 1-25.

⁵² TR-79, Lines 5-9.

⁵³ TR-79, Line 10, to TR-80, Line 1.

⁵⁴ TR-80, Line 2, to TR-81, Line 9.

⁵⁵ *Id.*

⁵⁶ Without deciding, the Board does caution that even in the context of an individual grievance,

B. Pu'uohau. On direct, cross and redirect (including questioning by members of the Board), Pu'uohau testified as follows:

(1) Since January 20, 2016, she has been an independent contractor with the Union and with the Hawaii Nurses Association (HNA).⁵⁷ Previously, she was the assistant for collective bargaining under the executive director's office at the Union (taking care of collective bargaining issues), a field services officer with the Union, director of field services with HNA, a union agent with the Union and business agent with UPW.⁵⁸

(2) Unit 6 (the bargaining unit involved here) is significantly different from any other unit within the Union. This is because "[t]he Unit 6 member is an employee of the Department, but they also act as the arm or voice, if you will, of the Board of Education of the Department of Education. At the school level it is the principals, the vice-principals, the athletic directors ... [and they include] district or state educational officers."⁵⁹ In essence, Unit 6 members are both employees and employers.⁶⁰

(3) Over about four years, Unit 6 members have filed "maybe six" grievances.⁶¹ She understands that, "if this group was going to be unionized, that it would not be represented in a way of a traditional representation that you would see in other bargaining units, that we would make every effort to be collaborative. In fact, the HGEA does have a

Respondents are cautioned as to who ultimately decides whether an individual grievance meets the pleading requirements of CBA Article 15.

⁵⁷ TR-84, Line 3, to TR-87, Line 2.

⁵⁸ *Id.*

⁵⁹ TR-88, Line 5, to TR-89, Line 25.

⁶⁰ *Id.*

⁶¹ TR-90, Lines 6-11.

memorandum of understanding that defines collaboration between the parties that we use to work through the CESA, the evaluation system for the principals, and so when issues arise, we try to discuss it, we try to resolve it."⁶² Thus, the Union is careful in filing grievances for Unit 6 because "what could be a grievance for one could negatively impact another, so it's very important to determine what the issue is and go forward that way, and not be -- hastily go through, you know, try to -- filing a grievance all the time whenever an issue comes up without making that effort [collaboration] does not serve the schools or the students ultimately."⁶³

(4) The CBA has grievance procedures for both individual and class grievances.⁶⁴

(5) The Union Grievance Letter arose out of complaints discussed at a Unit 6 board meeting regarding alleged violations or complaints from school, district and state level educational officers "on the manner by which interviews were being handled, appointments were being made, and minimum qualifications not being required."⁶⁵ The Unit 6 board decided to file a grievance, and the Union Grievance Letter was submitted to the DOE superintendent.⁶⁶ No date of alleged violation was alleged in the Union Grievance Letter because "of fear of retaliation of some of the complainants" and ascertain whether the complaints had merit.⁶⁷

⁶² TR-90, Line 12, to TR-91, Line 5.

⁶³ TR-91, Lines 6-18.

⁶⁴ TR-91, Line 19, to TR-92, Line 14.

⁶⁵ TR-93, Lines 9-21.

⁶⁶ TR-94, Lines 4-13.

⁶⁷ TR-94, Line 21, to TR-95, Line 98, Line 18. Pu'uohau admitted that with respect to an individual grievance, the Union could not omit the date of an alleged occurrence even though the individual feared retaliation. TR-110, Line 23, to TR-111, Line 4.

(6) Pu'uohau understood that an employer had a right to contest the timeliness, and the merits, of any grievance.⁶⁸ It is up to the arbitrator to determine issues of arbitrability.⁶⁹ The employer does not have a right to terminate the grievance procedure for lack of timeliness or other reason.⁷⁰

(7) As a result of Dietz rejecting and returning the Union Grievance Letter, Pu'uohau believed that "the Union was being deprived of its right to the grievance process."⁷¹ After receiving the DOE Rejection Letter, Pu'uohau sent the Union Arbitration Letter demanding arbitration to "preserve the rights of the members."⁷² Pu'uohau believed that if she did not act, then it would "set a precedent ... that the Union would accept that the Department has an authority that we don't believe they have to return or reject a grievance."⁷³ Pu'uohau did not consider amending the Union Grievance Letter because "there's no process that speaks to amending after a return or rejection."⁷⁴ Pu'uohau did not respond to the DOE Rejection Letter to explain why the Union Grievance Letter was drafted in a particular manner because the Union felt DOE did not have the authority to reject a grievance and stopping the grievance process, and thus, "we went straight to arbitration."⁷⁵ Pu'uohau felt that:

⁶⁸ TR-100, Lines 14-25.

⁶⁹ TR-101, Lines 8-16.

⁷⁰ TR-101, Line 17, to TR-102, Line 6.

⁷¹ TR-102, Line 18, to TR-103, Line 5.

⁷² TR-104, Line 15, to TR-105, Line 15.

⁷³ TR-105, Lines 15-21.

⁷⁴ TR-116, Line 23, to TR-117, Line 18. Pu'uohau filed an amended grievance previously in connection with an individual grievance for a terminated employee. TR-118, lines 6-18.

⁷⁵ TR-122, Line 17, to TR-123, Line 3.

"My state of mind back then was based upon what I view as a very aggressive adversarial employer, and from my view of the capacity of the leadership at that time, and specifically with -- and the tenure, the duration of the tenure of Mr. Dietz, and the relationship between Article 11 and the substance of our grievance and his situation, that we would not be able to discuss or -- you know, that the Department made it very clear that they wanted nothing to do with the Union, or discussion or collaboration of any kind, and was not interested in listening to the reasons why, especially when the grievance that was filed ten days later without no call or no questions -- my grievance says, *please, if you have any questions, contact me, I got no questions whatsoever, but I got a rejection.*" (Italics added.)⁷⁶

(8) Pu'uohau testified that she included in the Union Grievance Letter a request for information. She had not previously requested the information.⁷⁷ The dispute that was the subject of the Union Grievance and Union Arbitration Letters were ultimately resolved.⁷⁸

III. FINDINGS OF FACT; CONCLUSIONS OF LAW.

Based on (1) all of the matters which are part of the record on this case (e.g., all transcripts, pleadings, declarations, exhibits, notices and orders filed with the Board), (2) all exhibits admitted into evidence at the Hearing, (3) the testimony of each witness (whether elicited on direct, cross or redirect examination) and the Board's determination of the credibility, and the weight to be given to the testimony, of each witness, (4) the arguments of counsel (including the arguments made in their respective closing briefs), and (5) such other

⁷⁶ TR-124, Lines 4-18.

⁷⁷ TR-132, Line 25, to TR-133, Line 6.

⁷⁸ TR-108, Line 7, to TR-109, Line 6.

matters which the Board is allowed to consider, including any matters which the Board is allowed to take notice of pursuant to HRS Chapters 89, 91 and 377⁷⁹, and in addition to any findings or conclusions contained in Parts I and II above (which are hereby incorporated herein by reference), the Board adopts and enters the following Findings of Fact and Conclusions of Law (if it should be determined that any finding of fact should be considered as a conclusion of law or any conclusion as a finding or as mixed findings and conclusions, then they shall be treated to be as such).

A. Findings of Fact. The Board adopts the following findings of fact:

(1) The Union was, and is, at all times relevant herein (a) an employee organization within the meaning of HRS Section 89-2, and (b) the duly certified exclusive bargaining representative of educational officers and other personnel of the DOE (bargaining unit 6 or BU 06).

(2) Each of the following respondents is an "employer" within the meaning of HRS Section 89-2: David Y. Ige, Governor, State of Hawai'i; Donald G. Horner, Chair of the Board of Education⁸⁰; BOE; Kathryn S. Matayoshi, Superintendent of the Department of Education; Neil Dietz, Acting Administrator, Labor Relations Section, Department of Education; and the DOE.

(3) The applicable collective bargaining agreement is the Unit 6 Contract (July 1, 2013 - June 30, 2017).⁸¹

⁷⁹ Pursuant to HRS Section 91-10(4), for example, the Board "may take notice of judicially recognized facts." The Board has not taken notice of any "generally recognized technical or scientific facts within [its] specialized knowledge", and therefore, the notice requirement of HRS Section 91-10(4) is not applicable.

⁸⁰ The Board notes that Mr. Horner was replaced as chair by Lance A. Mizumoto, and since Mr. Horner was named solely in his capacity as chair, references to Mr. Horner are deemed to be references to Mr. Mizumoto solely in his capacity as chair of the Board of Education.

⁸¹ Relevant provisions of the CBA were admitted into evidence during the Hearing as Union Exhibit 5.

(4) CBA Article 15 (Grievance Procedure) provides that:

"A. The term "grievance" as used in this Agreement shall mean a complaint filed by a bargaining unit educational officer covered hereunder or on an educational officer's behalf by the Union alleging a violation concerning the interpretation or application of this Agreement occurring after its effective date. Any relevant information specifically identified by the grievant or the Union in the possession of the Board needed by the grievant or the Union to investigate and process a grievance shall be provided to them within seven (7) working days.

B. An individual educational officer may present a grievance to the immediate supervisor and have the grievance heard without intervention of the Union, provided that the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement.

C. The grievance must be filed with the appropriate superior within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be considered.

For school level officers all time limits herein shall consist of school days, Monday through Friday, except when a grievance is submitted on or after the last work day of the school year, and before the first work day of the next school year, time limits shall consist of all work days, Monday through Friday, except holidays.

D. Discussion Stage. A grievance shall, whenever possible, be discussed informally between the educational officer and the immediate supervisor within twenty (20) working days as provided for in paragraph C of this Article.

E. Step 1. If the matter is not settled on an

informal basis in a manner satisfactory to the educational officer involved, then the educational officer or the Union may file a formal grievance by setting forth in writing on a form provided by the Board, the nature of the complaint, the specific provisions(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought within the twenty (20) working days specified in paragraph C above in accordance with the following procedure:

1. If the grievant is an educational officer in a district, the grievance shall be submitted to the District Superintendent.

2. If the grievant is an educational officer in a State Office, the grievance shall be submitted to the Assistant Superintendent.

3. If the grievant is an educational officer in the Office of the Superintendent, the grievance shall be submitted to the Deputy Superintendent.

A meeting shall be held between the grievant and a Union representative with the appropriate representative of the Board within seven (7) working days after the written grievance is received. Either side may present witnesses. The Board representative shall submit a written answer to the grievant and the Union within seven (7) working days after the meeting.

Time Limits: By mutual consent of the Union and the Employer, any time limits may be extended after filing at Step 1.

F. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the Superintendent or the Superintendent's designee, within seven (7) working days after receiving the written answer. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Superintendent or the Superintendent's designee shall reply in writing to the grievant and the Union within seven (7) working days after the meeting.

G. If the Union has a class grievance, it may submit the grievance in writing as follows:

1. To the appropriate District Superintendent if the grievance involves educational officers in one district.

2. To the appropriate Assistant Superintendent if it involves educational officers in the same State Office.

3. To the Superintendent in the case of all other class grievances.

4. Time limits shall be the same as in individual grievances, and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2.

H. If a grievance involving the interpretation or application of this Agreement is not satisfactorily resolved in Step 2, the Union may submit to the Superintendent a request for arbitration of the grievance within twenty (20) working days after receipt of the answer at Step 2.

I. Representatives of the parties shall immediately thereafter attempt to select an arbitrator. If agreement on an arbitrator is not reached within ten (10) days after the request for arbitration is submitted, either party may request the Hawai'i Labor Relations Board to submit a list of five (5) arbitrators. Selection of an arbitrator shall be made by each party alternatively deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the arbitrator. The decision of the arbitrator shall be final and binding upon the Union, its members, the educational officers involved in the grievance, and the Board; provided, however, that the arbitrator shall have no jurisdiction to alter, amend, or modify the terms of this Agreement.

J. The arbitrator shall not consider an alleged violation of any provision of the Agreement which was not presented in Step 2 of the grievance appeal.

K. The fees and expenses of the arbitrator shall be shared equally by the Board and the Union, including the cost of the arbitrator's transcript if one is supplied.

Each party will pay the cost of presenting its own case.

L. If the Board 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 arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

M. When the arbitrator finds that any disciplinary action was improper, the action may be set aside, reduced, or otherwise modified by the arbitrator. The arbitrator may award back pay to compensate the educational officer wholly or partially for any salary lost."

5. HRS Section 89-14 provides in pertinent part that:

"Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have *exclusive original jurisdiction* over such controversy."

6. HRS Section 89-13(a) provides in pertinent part that:

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

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in Section 89-9;

(7) Refuse or fail to comply with any provision of this chapter;

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

7. Pursuant to CBA Article 15, there are two different types of grievances.

Individual grievances involve grievances filed by an individual educational officer with or without the participation of the Union.⁸² Class grievances are not filed by an individual

⁸² CBA Section 15.B.

educational officer or the Union representing an individual educational officer, but by the Union on behalf of a group or class of educational officers.⁸³ Article 15 treats individual and class grievances differently. These differences include:

(a) Individual grievances must be filed "on a form provided by the [Board of Education], the nature of the complaint, the specific provisions(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought."⁸⁴ There is no similar provision for class grievances.

(b) Step 1 of an individual grievance must be preceded by an attempt, whenever possible, to informally discuss the grievance.⁸⁵ There is no similar provision for class grievances.

(c) An individual grievance must go through the informal discussion stage, Step 1 and Step 2 before going to arbitration.⁸⁶ A class grievance has only a single "step" before reaching the arbitration stage.⁸⁷

8. A class grievance, however, is subject to the same time limitations as individual grievances.⁸⁸ Both must be filed "within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be

⁸³ CBA Section 15.G.

⁸⁴ CBA Section 15.E.

⁸⁵ CBA Section 15.D.

⁸⁶ CBA Sections 15.D, E., F and H.

⁸⁷ CBA Section 15.G and H.

⁸⁸ CBA Section 15.G.4.

heard."⁸⁹ Like an individual grievance, a class grievance may also be appealed to an arbitrator.⁹⁰

9. The CBA also provides that, if the DOE "disputes the arbitrability of any grievance submitted to arbitration, the arbitrator shall *first* determine the question of arbitrability."⁹¹ In other words, for example, the employer and union agreed in the CBA that, if the employer disputes the timeliness of the filing of a grievance, individual or class, it is the arbitrator who ultimately determines whether the filing of the grievance was timely, and thus, arbitrable. Even Dietz agreed that he did not have the authority to declare that a grievance was untimely -- it is a decision that the arbitrator ultimately makes pursuant to the CBA.⁹²

10. In addition, the CBA has no formalistic pleading requirements for a class grievance. Unlike an individual grievance, when filing a class grievance, the Union need not (a) use a form provided by DOE, (b) specifically allege what provisions of the CBA are being violated, and (c) provide a date(s) upon which the alleged violation(s) occurred.

11. Given Dietz's background in labor relations, both on the labor and management sides, and his participation in class grievances while with DOE, Dietz was familiar with the foregoing concepts regarding the difference between individual and class grievances. More importantly, Dietz, as the former head of the SIU, and as the State of Hawaii's Chief Negotiator, was or should have been familiar with the necessity of preserving

⁸⁹ CBA Section 15.C.

⁹⁰ CBA Section 15.G.4.

⁹¹ Section 15.L, CBA. Italics added.

⁹² Because it found that Dietz and DOE should not have rejected and returned the Union Grievance Letter based on pleading requirements, the Board need not reach the issue of what was meant or intended by the parties by the phrase "or the grievance may not considered" in CBA Section 15.C in the context of a class grievance. The ultimate issue of arbitrability should be decided by the arbitrators.

the integrity of the grievance process and to comply with the provisions of the CBA. While not finding that Dietz had a special or extraordinary duty or obligation in this matter, the Board finds that Dietz should have been more cognizant of, and sensitive to, the necessity of making certain the handling of the Union's initiation of a class grievance was in accordance with the CBA.

12. On March 16, 2015, Pu'uohau submitted the Union Grievance Letter to Superintendent Matayoshi (as required by CBA Section 15.G.3) to initiate a class grievance. The subject of the class grievance was the SARSA Issue. On March 25, 2015, Dietz, acting on behalf of DOE, sent the DOE Rejection Letter to Pu'uohau and advised the Union that (a) it did not accept the Union Grievance Letter, (b) would not process the class grievance pursuant to the terms and conditions of Article 15 of the CBA and (c) because the class grievance was not proper, it would not respond to the Union's numerous requests for information. In addition, Dietz advised Pu'uohau that (a) there was no allegation of the dates of any alleged violation of the CBA, (b) the "claim is not supported by any actions you allege Employer has taken," and (c) "provides no support for the Union's contention that the Department violated Articles 1, 3, 4, 8, 11 and 12. It is the Union's initial burden to provide *evidence of a contractual violation* in this case (italics added)." Based on the foregoing Dietz concluded that:

"It is clear from the Department's review of your submission as well as Article 15 of the current collective bargaining agreement that your letter of March 16, 2015 is not a Step 2 grievance. Accordingly, as the Superintendent's designated representative in this matter, I am required to return that submission to you."⁹³

13. In essence, Dietz treated the Union's class grievance as an individual grievance, and before he would process the Union Grievance Letter, required the Union to, in

⁹³ In addition to rejecting and returning the Union Grievance Letter, DOE refused to respond to the Union's information requests.

effect, comply with the formal pleading requirements for an individual grievance. By doing so, Dietz "read into" CBA Section 15.G (class grievance section) the specific pleading requirements for an individual grievance (CBA Section 15.E). However, there is nothing in CBA Section 15.G which incorporates the pleading requirements for an individual grievance. Unlike the time limitation provisions applicable to individual grievances (CBA Section 15.C) which are specifically applicable to class grievances,⁹⁴ the pleading requirements for individual grievances (CBA Section 15.E) are not applicable to class grievances.

14. As noted above, Dietz was the State of Hawaii's Chief Negotiator and was the head of the SIU. Thus, he was familiar with labor relations, collective bargaining agreements (private and public) and the grievance process (and the importance of the grievance process) from both management and labor perspectives. He was also familiar with the grievance process at DOE, and was involved in class grievances at DOE. As Chief Negotiator, Dietz knew or should have known that one of the purposes of HRS Chapter 89 is to "provide a *rational method* for dealing with *disputes*."⁹⁵ HRS Section 89-10.8(a) specifically provides that [a] public employer shall enter into written agreement with the exclusive representative *setting forth a grievance procedure culminating in a final and binding decision ... [t]he grievance procedure shall be valid and enforceable.*" (Italics added.) Finally, all provisions of a collective bargaining agreement "that are in conformance with [Chapter 89], *including a grievance procedure [which] shall be valid and enforceable and shall be effective as specified in the agreement.*"⁹⁶

⁹⁴ CBA Section 15.G.4 specifically states that "[t]ime limits shall be the same as in individual grievances".

⁹⁵ HRS Section 89-1; italics added.

⁹⁶ HRS Section 89-10(a); italics added.

15. Thus, Dietz knew that (a) CBA Article 15 was valid and enforceable, (b) he could not unilaterally modify or amend any provision of the CBA, (c) Article 15 was "a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement"⁹⁷ and (d) CBA Article 15 was the "rational method for dealing with disputes"⁹⁸ between DOE and its educational officers or the Union.

16. By rejecting the Union Grievance Letter based on the lack of a date and specificity, Dietz was trying to modify or amend the CBA by unilaterally incorporating into the class grievance provisions (CBA Section 15.G) the specific pleading requirements for individual grievances (CBA Section 15.E). Dietz testified that (a) he assumed that the general pleading requirements for individual grievances (CBA Section 15.E) also applied to class grievances and (b) he acknowledged that nothing in CBA Section 15.G incorporated the pleading requirements of CBA Section 15.E (unlike the time limitations applicable to individual grievances set forth in CBA Section 15.C which was specifically incorporated into CBA Section 15.G⁹⁹). By doing so and without any basis for doing so, Dietz disrupted and interfered with a negotiated and longstanding agreement on how to resolve disputes. i.e., through the grievance process outlined in CBA Article 15.

17. Further, as evidenced by his testimony, Dietz, to this day, believes that he acted correctly. He still takes the position, after admitting that the pleading requirements for individual grievances are not specifically incorporated into the class grievance provisions, that

⁹⁷ HRS Section 89-10.8(a).

⁹⁸ HRS Section 89-1(a).

⁹⁹ CBA Section 15.G.4.

the Union must comply with the individual grievance pleading requirements when filing a class grievance, and more importantly, he has the right to determine whether the pleading requirements were met and can reject a class grievance. The Board finds that Dietz acted wilfully, i.e., "with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89" when he rejected the Union Grievance Letter.¹⁰⁰ Here, Dietz's actions were clearly wrong -- he had no right to unilaterally amend the CBA to include a pleading requirement for the filing of class grievances, but he did so, and testified that he would continue to do so. This is a case where "wilfulness can be presumed where a violation occurs as a natural consequence of a party's action. (Cite omitted.)"¹⁰¹

Moreover, as a person experienced in labor relations, Dietz knew or should have known that he could not unilaterally amend the CBA. Yet, he deliberately, consciously, knowingly and unilaterally determined that CBA Article 15 required the Union to meet certain pleading requirements for class grievances after admitting that nothing in the CBA did so (he unilaterally amended the CBA), and based on his unilateral amendment of the CBA, rejected the Union Grievance Letter without allowing an arbitrator to decide arbitrability. Thus, the Board finds that Dietz acted wilfully.

18. Based on the foregoing, the Board finds and determines that Dietz's action(s):

- (a) Was contrary to the plain language of CBA Section 15.G;

¹⁰⁰ *Hawaii Government Employees Association, AFSCME, Local 152, AFL0CIO v. Casupang*, 116 Hawai'i 73, 99 (2007).

¹⁰¹ *United Public Workers and Benjamin J. Cayetano, et al.*, 5 HLRB No. 385, p. 701 at p. 704 (1997).

(b) Resulted in the frustration of, interference with, the grievance process by the unilateral imposition of a change to the terms of CBA Section 15.G in violation of HRS Sections 89-13(a)(5) and 89-13(a)(7);

(c) Was a willful, i.e., conscious, knowing and deliberate, violation of the CBA and a violation of HRS Chapter 89 (specifically, HRS Sections 89-3, 89-8(a), 89-8(b), 89-9 and 89-10.8(a)), because it was a conscious, knowing and deliberate interference with the Union's right to have its disputes with DOE resolved through the bargained for class grievance process.¹⁰²

Because Dietz wilfully, consciously, knowingly and deliberately intended to improperly amend or change CBA Section 15.G and to interfere with the Union's right to file and prosecute its class grievance, Dietz's rejection of the Union Grievance Letter and refusal to proceed with the class grievance was a prohibited practice as defined in HRS Sections 89-13(a)(1) (interference in the exercise of any right guaranteed by HRS Chapter 89), 89-13(a)(5) (failure to bargain in good faith), 89-13(a)(7) (refusal or failure to comply with Chapter 89) and 89-13(a)(8) (violation of the CBA).

19. In addressing a similar situation, the Hawaii Public Employment Relations Board (HPERB), the Board's predecessor, was faced with the issue of whether the untimely filing of a Step III grievance precluded the union from pursuing an arbitration (Step

¹⁰² See, *Aio v. Hamada*, 66 Haw. 401, 409 (1966), where the Hawaii Supreme Court stated:

"Turning to appellant's assertion that HPERB incorrectly interpreted 'wilfully' as it is employed in Section 89-13(b), we observe at the outset that the related legislative history is devoid of any reference thereto. HPERB thus logically sought aid from a dictionary, and relying on the discussion of the pertinent term in *Black's Law Dictionary*, ruled 'that to make out a prohibited practice under Subsection 89-13(b), HRS, conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven. We have no reason to reject the construction.

IV).¹⁰³ The employer argued that its denial of SHOPO's arbitration demand (Step IV) was justified because "the request for the Step III hearing was untimely and that this excuses him from any obligation to proceed further under the contractual grievance resolution procedures."¹⁰⁴ In rendering its decision, HPERB first determined the issue at hand was "whether it was for the Employer or an arbitrator to rule on the timeliness issue of the filing and the arbitrability of the dispute."¹⁰⁵ Because the collective bargaining agreement provided that "the Arbitrator shall *first* determine whether he has jurisdiction to act (italics added)," HPERB ruled that (in a situation where the request to proceed to the next grievance step was clearly untimely):

"Under this contractual provision, and pertinent decisional law, the Employer in this case may not unilaterally determine the arbitrability of the subject grievances which is what, in fact, he attempted to do by unilaterally determining that the matter could not go to arbitration. The decision on arbitrability is for the arbitrator to make. When the issue of arbitrability of the grievances is submitted to the arbitrator, then the Employer may raise his assertions that noncompliance with the time limits render the grievances nonarbitrable."¹⁰⁶

HPERB then concluded that "[t]he Employer's *failure to utilize the total grievance procedure as outlined in the contract* is a prohibited practice under Section 89-13(a)(8)." (Italics added.)¹⁰⁷

¹⁰³ *In the Matter of State of Hawaii Organization of Police Officers (SHOPO) and Frank F. Fasi*, I HPERB No. 79, p. 715 at p. 718 (1977) (SHOPO/Fasi Case).

¹⁰⁴ *Id.*

¹⁰⁵ SHOPO/Fasi Case, *supra*, I HPERB No. 79 at p. 719.

¹⁰⁶ SHOPO/Fasi Case, *supra*, I HPERB No. 79 at p. 720.

¹⁰⁷ *Id.*

20. Here, the situation is even more egregious. Dietz did not allow the Union to proceed with its class grievance because he could not determine the date when the alleged violation(s) occurred and determined that the Union had a contractual obligation to provide the date. He was, in fact, imposing obligations upon the Union which were not part of CBA Section 15.G. Dietz not only failed "to utilize the total grievance procedure as outlined in the" CBA, he prevented the grievance process from even starting. Clearly, this is a prohibited practice, and Dietz wilfully engaged in such practices. Dietz should have processed the Union's class grievance and then after engaging in fact finding, determine whether the class grievance was timely or not. If he found that it was untimely, he could have denied the class grievance, at which point, the Union could have proceeded to the next step, i.e., arbitration. In the arbitration, the arbitrator would have ultimately determined the issue of arbitrability, i.e., timeliness in this case.

21. In spite of Dietz improperly acting as a "gate keeper," the Union and DOE proceeded with the Arbitration Proceeding. By letter dated September 17, 2015, the Union withdrew the class grievance "without withdrawing the present prohibited practices complaint."¹⁰⁸ Apparently, DOE advised the Union that it was rescinding "its January 2014 consultation and [maintaining] the 1988 SARSA process with the exception of including the changes outlined in the 2008 Superintendent Patricia Hamamoto memo."¹⁰⁹ In effect, the Arbitration Proceeding was withdrawn.

¹⁰⁸ Declaration of Peter L. Trask attached to the Union's Motion to Schedule Hearing on the Merits (Trask Declaration) at Paragraph 7 and Exhibit 1 attached thereto.

¹⁰⁹ September 17, 2015 letter from the Union to DOE, a copy of which is attached to the Trask Declaration as Exhibit 1.

22. The withdrawal of the Arbitration Proceeding does not render this case moot because:

(a) During the Hearing, DOE's attorney advised the Board that it would not be arguing that the Arbitration Hearing's withdrawal rendered this action moot.¹¹⁰ Thus, DOE cannot raise mootness as a "defense" because it was waived at the Hearing.

(b) Since Dietz testified that he still believes he was right in rejecting the Union Grievance Letter (i.e., individual grievance pleading requirements should be applied to class grievances), the Board must clearly and unambiguously state that Dietz (and the other Respondents) cannot continue to reject class grievances based Dietz's unilateral modification of the CBA. In other words, because Dietz may continue to reject class grievances for failing to meet the individual grievance pleading requirements, it must be made clear that he cannot do so.

(c) Although DOE's decision to proceed with the Arbitration Proceeding and its subsequent withdrawal left the Union with no perceptible relief, this Decision and Order may be used by the Board and the Union in evaluating DOE's conduct in future prohibited practice cases.¹¹¹

(d) Finally, the Board believes that this Decision and Order will (a) assist the Union and DOE in preventing further disputes regarding the class grievance process and (b) allow the parties to address the merits of any dispute rather than arguing over the process itself. In other words, Dietz and DOE should not continue to reject and return class grievances for

¹¹⁰ TR-53, Lines 19-23.

¹¹¹ *State v. Nakanelua*, 134 Hawai'i 489, 502-503 (2015) (Nakanelua Case).

failure to meet the pleading requirements applicable to individual grievances or based on timeliness, which is a matter that should be decided by the arbitrator.

Therefore, based on the foregoing, this case is not moot. Nakanelua Case, *supra*, 134 Hawai'i at 502-503.

23. The Board also finds that the "exhaustion of contractual (or administrative) remedies" requirement is not applicable to the specific facts of this case.¹¹² The exhaustion requirement "is not absolute." *Williams v. Aona*, 121 Hawaii 1, 11 (2009). "[E]xceptions to this doctrine exist, such as when pursuing the contractual remedy would be futile." *Poe v. Haw. Labor Rels. Bd.*, 97 Hawai'i 528, 534-535 (2002) (Poe I). Further, "[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist." *Hokama v. University of Hawaii*, *supra*, 92 Hawaii at 273. Finally, the exhaustion requirement is not applicable where "policy interests underlying the exhaustion doctrine may be outweighed by other interests." *Williams v. Aona*, *supra*, 121 Hawaii at 11.

(a) Requiring the Union to go through the grievance process would be futile. Even if the exhaustion requirement applies to class grievances (a question that the Board does not reach), a party need not exhaust its contractual remedies if it would be futile.¹¹³ Here, Dietz, in effect, was unilaterally amending the CBA to require the Union to meet the pleading requirements in the context of a class grievance. To require the Union, at that point,

¹¹² HRS Section 89-10.8 provides that collective bargaining agreements shall include "a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute *concerning the interpretation or application of a written agreement*. (Italics added.)" Thus, the Board has held that a party cannot seek remedies "for *contractual* violations before the [HLRB] without first exhausting contractual remedies. (Italics added.)"¹¹² *Poe v. Haw. Labor Rels. Bd.*, 97 Hawai'i 528, 534-535 (2002). "The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution." *Hokama v. Univ. of Hawaii*, 92 Hawai'i 268, 272 (1999) (citations omitted).

¹¹³ *Id.*

to file a separate grievance and eventually to go to arbitration to establish that Dietz had no right to do so, would have been time consuming, costly and ineffective and inefficient. Further, pursuant to CBA Section 15.I, "the arbitrator shall have *no jurisdiction* to alter, amend, or modify the terms of the Agreement." (Italics added.) Therefore, it is clear that an arbitrator could not amend or supplement the CBA to impose the individual grievance pleading requirements on class grievances. Thus, an arbitrator could not decide this issue. In effect, going through the arbitration process would have been futile.

Further, if the Board required the Union to file a separate grievance/arbitration, upon completion of this process, DOE could argue that, once a final determination is made regarding the pleading requirements for a class grievance, the subsequent refile of the original class grievance was untimely. In other words, forcing the Union to file a separate grievance to challenge Dietz's actions could ultimately adversely affect the original "substantive" grievance. Thus, forcing the Union to file a separate grievance would be futile where Dietz's actions interfered with, and frustrated the purpose of, a class grievance by unilaterally modifying the CBA (i.e., applying the individual grievance pleading requirements to class grievances) or usurping the jurisdiction of the arbitrator (i.e., making determinations of timeliness), both in an effort to prevent the grievance process from starting. Requiring the Union to challenge DOE's refusal to proceed with a grievance process by filing a separate grievance and thereby potentially placing into question the timeliness of the original grievance would be futile.¹¹⁴

(b) Requiring the Union to file a separate grievance does not provide

¹¹⁴ While DOE argues that the Union was allowed to proceed to arbitration in this case on the underlying claims and that the process "worked," the Board finds this argument to be disingenuous. The process did not work. If the Union had been allowed to grieve, it is conceivable that there could have been a resolution without resorting to arbitration. In fact, this is what happened in this case. The parties, even before the arbitration started (there was no arbitrator selected), were able to resolve the disputed issues. Thus, the process would have worked if Dietz had allowed the grievance to proceed rather than rejecting it.

an effective remedy. At the point Dietz rejected the Union Grievance Letter, the Union needed an effective and timely remedy. Forcing the Union to go through a separate grievance and arbitration process, in light of the clear violation of the CBA by DOE, would neither be effective nor timely. In effect, the Union would not be able to meet the time limitations if it were to refile the "substantive" grievance after receiving a final decision in the "procedure" grievance, and the Union would, ultimately, have no effective remedy. Given the time restrictions in the handling of a prohibited practice complaint (pursuant to HRS Section 377-9(b), a hearing must be held no later than 40 days after the filing of a complaint) and that ability of the Board to impose a broad range of remedies pursuant to HRS Section 377-9(d), the Union's claims could be adjudicated in relatively short time by the Board and a remedy fashioned to protect the Union's right to file and prosecute a class grievance. Thus, the Union's only effective and timely remedy (under the circumstances of this case) would be to file and prosecute a prohibited practice claim before the Board. Therefore, the exhaustion requirement is not applicable to this case.

(c) As a matter of policy, where there is a substantial interference with the grievance process, the exhaustion requirement will not apply. The Board believes that one of the primary purposes of HRS Chapter 89 is to "provide a rational method of dealing with disputes and work stoppages."¹¹⁵ Thus, any interference with the grievance process outlined in the CBA must be prevented, and the integrity of the grievance process must be maintained. In the past, the Board determined that it "has jurisdiction over prohibited practice charges, *including those alleged breaches of contract, regardless of the presence of a*

¹¹⁵ HRS Section 89-1(a).

grievance arbitration provision in a collective bargaining agreement."¹¹⁶ Thus, the Board may or may not, in appropriate circumstances, retain jurisdiction or "require parties to utilize negotiated grievance arbitration procedures when and to the extent appropriate."¹¹⁷ In this situation, where Dietz's actions frustrated and stymied the grievance process by preventing the Union from pursuing its class grievance, the Board finds that all parties have a substantial interest in protecting the grievance process, and by finding that the exhaustion requirement does not apply in this case, the Board serves this interest by protecting the integrity of the grievance process.¹¹⁸ Thus, the exhaustion requirement is not applicable.

(d) DOE cannot unilaterally amend the CBA. Finally, this is not a case involving the interpretation of the CBA. Based on his testimony, Dietz was amending the provisions of the CBA by requiring the Union to comply with the individual grievance pleading requirements in filing a class grievance. Dietz admitted that nothing in CBA Section 15.G referred to or incorporated the pleading requirements of CBA Section 15.E. Therefore, this case does not merely involve the interpretation of the CBA but an attempt by Dietz to

¹¹⁶ *In the Matter of Hawaii State Teachers Association and Department of Education*, 1 HPERB No. 22 (253) at p. 264 (1972). In so concluding, the Board reviewed the applicable statutes and the legislative history to HRS Chapter 89. *Affirmed in part, reversed in part, Hawaii State Teachers Association v. Hawaii Public Employment Board*, First Circuit Court of the State of Hawaii, Civil No. 38086 (3/30/1973). *See, also, In the Matter of State of Hawaii Organization of Police Officers (SHOPO) and Linda Crockett Lingle, Mayor, et al.*, 5 HPERB No. 377 (597) at p. 599 (1996) (SHOPO/Lingle Case), where HPERB stated that:

"While the Board is cognizant of its long-settled policy regarding the deferral to the contractual grievance process, the Board nevertheless retains concurrent jurisdiction in matters raising from specific contractual violations pursuant to Section 89-13(a)(8), HRS. The Board further reserves the right to decide whether it shall exercise that jurisdiction on a case-by-case basis *especially in a case such as this where there are attendant statutory violations and allegations that the contractual grievances are not being properly processed.* (Italics added.)"

That is the case here. The basis of this prohibited practice case is the Union's allegation that Dietz, by rejecting and returning the Union Grievance Letter, did not properly process its class grievance. Thus, the Board had the discretion to exercise jurisdiction in this case.

¹¹⁷ *Id.*

¹¹⁸ *See, SHOPO/Lingle Case, and SHOPO/Fasi Case.*

unilaterally modify the CBA (which he knew he could not do). In this situation (to preserve the integrity of the class grievance process), the Board finds that the exhaustion requirement is not applicable, and it will exercise its original exclusive jurisdiction over any attempt by either the employer or union to unilaterally change, amend or modify the collective bargaining agreement.¹¹⁹

24. Further, with regard to the exhaustion requirement, DOE requested that the Board provide both it and the Union with guidance regarding the class grievance procedure, and took the position that it does *not*:

"assert that this means an employer is free to refuse to proceed to later steps in the grievance process, including arbitration. Rather, the step process continues, but the employer's primary defense to the 'grievance' remains the same, namely that it may not be considered because it fails to comply with the agreed upon grievance procedure. Further, [DOE does] not assert that an employer is free to refuse to consider a grievance which contains a timely date of violation that it disagrees with. However, if [the Union] files grievance which contains an overly stale date of violation, or no date of violation at all, the 'may not be considered' restriction applies. **Apparently** [emphasis in original], *all of these fascinating issues of contract interpretation need to be considered by this Board and ruled upon so that both parties fully understand their own grievance procedure.* [Italics added.]"¹²⁰

¹¹⁹ DOE argued that the Union could have easily complied with Dietz's request or obtain information pursuant to HRS Section 89-16.5. This argument, however, ignores the fact that Dietz did not have the right to require compliance with the pleading requirements of CBA Section 15.E (individual grievances) when filing a class grievance pursuant to CBA Section 15.G class grievance. The issue is not whether the Union could have gotten information through another means, but whether Dietz could block the filing of a class grievance. Thus, HRS Section 89-16.5 is not applicable to this case, and the mere fact that it was a method for obtaining information does not excuse Dietz's (and DOE's) conduct in this matter.

In addition, as Pu'uohau testified, the Union was concerned that, by revealing the identities of individual educational officer, they would be subject to retaliation. Whether or not this was the purpose of providing for a class grievance process, the Board will not force the Union to comply with requirements that it did not agree upon in the CBA.

¹²⁰ Respondents' Memorandum in Opposition to HGEA's Motion for Summary Judgment filed on June 26, 2015 (DOE Opposition Memorandum), fn. 4 at p. 11.

The Board will take DOE at its word, and will treat this statement as a judicial admission that the Board should consider this case and proceed to render a decision irrespective of the exhaustion requirement, and the Board determines that DOE is estopped from arguing otherwise.¹²¹

25. Finally, the Board notes that HRS Chapter 89 provides that "it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." HRS Section 89-1(b), quoted in *State v. Nakanelua*, supra, 134 Hawaii at 504 (2015) (Nakanelua Case). As outlined by the Hawai'i Supreme Court:¹²²

"One purpose of chapter 89 is 'to provide a rational method for dealing with disputes and work stoppages[.] [Cites omitted] 'To administer the provisions of chapters 89 and 377,' and effectuate their policies, the legislature created the HLRB. [Cites omitted.]

.....
.....

Under HRS Section 89-14, the legislature also granted the HLRB 'exclusive original jurisdiction' over '[a]ny controversy concerning prohibited practices[.]' Pursuant to HRS Section 89-13, 'It shall be a prohibited practice for a public employer [or bargaining unit representative] willfully to: [r]efuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11; [r]efuse or fail to comply with any provision of this chapter; [or] [v]iolate the terms of a collective bargaining agreement[.] (Cite omitted; ellipses in original.)"

As can be seen from the discussion above, the Board cannot overemphasize the necessity of both parties to a collective bargaining agreement to act in good faith and to interpret and implement the provisions of each collective bargaining agreement so that it

¹²¹ *Rodrigues v. Cnty. of Kaua'i*, 135 Hawaii 456, 467 (2015) (under the doctrine of quasi-estoppel "a party is estopped from taking 'a position inconsistent with a previous position if the result is to harm another").

¹²² *Id.*

assures the "effective and orderly operations of government." Good faith and promoting the "effective and orderly operations of government" are the principles guiding the Board's decisions. To that end, the Board, in rendering this Decision and Order, reiterates what guides HPERB and this Board, and more importantly, will guide public employers and public unions. Even as Dietz admits, it is important for the parties to start off on the right foot, and it is important for the parties not start off on the wrong foot.¹²³ The Board agrees with Dietz's sentiments, but disagrees with his conclusion that he acted properly -- he simply cannot change or amend the CBA without first asking the Union to agree to negotiate and enter into an appropriate amendment or supplement to the CBA pursuant to HRS Chapter 89.

Thus, it is important to note that in this particular case this matter would not have resulted in a dispute if the parties had followed the following broad guidelines:

- (a) The parties must act, at all times in good faith;
- (b) In the context of grievances, the parties must "utilize the total grievance procedure as outlined in the contract;"
- (c) Utilization of the "total grievance procedure as outlined in the contract" requires that there be no barriers to a grievance not clearly set forth in the collective bargaining agreement; and
- (d) In appropriate situations, the Board will exercise its discretion to address especially egregious acts interfering with the grievance process.

B. Conclusions of Law. Based on the foregoing findings, the Board adopts the following conclusions of law:

¹²³ TR-78, Line 9, to TR-79, Line 2.

(1) Article 15 of the CBA provides for the filing of two types of grievances, i.e., individual grievances and class grievances. Individual grievances may be filed by the individual educational officer or by the Union on behalf of the individual educational officer. Class grievances may be filed only by the Union.

(2) Individual grievances are subject to the specific pleading requirements set forth in CBA Section 15.E. An individual grievance must be "set forth in writing on a form provided by the Board, the nature of the complaint, the specific provision(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought." Class grievances, on the other hand, are not subject to specific pleading requirements. CBA Section 15.G. In filing a class grievance, the Union is not required to allege, among other things, the specifics or date of any alleged violation forming the basis of the class grievance. To do so, would amount to an improper and unilateral attempt to amend or supplement the CBA.

(3) By responding to the Union Grievance Letter as he did, Dietz, acting on behalf of DOE, wilfully committed a prohibited practice within the meaning of HRS Section 89-13(a) as outlined above. Dietz based his action on his asserting that the Union Grievance Letter was insufficient because it did not have a date of the alleged violation(s) and was not specific. However, as the Board found, there is nothing in the CBA which requires the Union, in filing a class grievance, to state a date, or the details, of any alleged violation. Even if there was such a requirement, it is clear that Hawaii courts rejected "the approach that pleading is a game of skill in which one mishap by counsel may be decisive to the outcome and in turn the accepted principle that the purpose of pleading is to *facilitate a proper decision on the merits.*" *Hall v. Kim*, 53 Haw. 215, 221 (1971) (internal quotation marks and citation omitted; italics added). *See, also, In the Matter of Caldeira and Eduardo E. Malapit, at al.*, 3 HPERB No.

196, 523, 550 (1984), where the Board stated that "any doubt as to the sufficiency of Complainant's written grievance should be resolved in favor of entertainment of the controversy on the merits."

(4) The Board reiterates the position it adopted in the SHOPO/Fasi Case¹²⁴: "[t]he Employer's failure to utilize the total grievance procedure as outlined in the contract is a prohibited practice under Section 89-13(a)(8), HRS." The purpose of the grievance process is to determine disputes over the interpretation or application of the CBA. The Hawaii Legislature mandated that disputes be resolved through the grievance process "culminating in a final and binding decision."¹²⁵ In this case, DOE and the Union agreed that the "final and binding decision" be rendered by an arbitrator. By refusing to proceed with the class arbitration, Dietz prevented the parties from either resolving their differences at the initial class grievance stage, and if resolution is not achieved, by an arbitrator.

(5) In spite of the DOE Rejection Letter, the parties proceeded to arbitration on the SARSA Issue. The Arbitration Proceeding was eventually withdrawn by the Union. These occurrences, as noted above, do not result in this case becoming moot. The Board may take into consideration past prohibited practices decisions when determining current prohibited practice complaints.¹²⁶ In addition, this case falls within the public interest exception to the mootness doctrine. Here, (a) this case involves a public matter, i.e., a dispute over the terms of the CBA between a public employer (DOE) and a public union (the Union); (b) deciding the issues extant in this case would assist the Board in adjudicating future cases involving similar

¹²⁴ I HPERB No. 79 at p. 720.

¹²⁵ HRS Section 89-10-8(a).

¹²⁶ Nakanelua Case, *supra*, 134 Hawaii at p.502-503.

issues and provide guidance to not only DOE and the Union, but also to parties to comparable collective bargaining agreement; and (c) finally, without a ruling, it is foreseeable that similar disputes would arise in the future.¹²⁷ Under these circumstances, this matter is not moot.

(6) The Board has jurisdiction of this case, and the exhaustion requirement is not applicable especially where (a) DOE interfered with, and frustrated, the grievance process and (b) the pursuit of such remedies would be futile.¹²⁸ As noted above, given Dietz's position regarding class grievances, and the egregious nature of his actions, the Board found that to force the Union to file a separate and distinct class grievance challenging Dietz's rejection of the Union Grievance Letter would have been futile. Further, the Union filed a class grievance and not an individual grievance. If an employer interferes with the ability of a union to file a class grievance, then the Board will decide a prohibited practice complaint based on such interference. This is similar to the situation the Board faced in (a) SHOPO/Fasi Case where the prohibited practice claim was decided without requiring SHOPO to exhaust its contractual remedies and (b) the SHOPO/Lingle Case where the Board decided the prohibited practice claim in spite of a pending grievance(s) where a grievance is not being properly processed (which is the case here).

(7) Based on the foregoing, DOE committed a prohibited practice, and the Union is entitled to relief.

IV. DECISION AND ORDER.

The Board confirms that the DOE Motion and the Union Motion were denied at the Hearing.

¹²⁷ Nakanelua Case, *supra*, 134 Hawaii at 503-504.

¹²⁸ *Poe v. Haw. Labor Rel. Bd.*, 97 Hawaii 528, 536 (2002).

Based on the foregoing findings of fact and conclusions of law, the Board holds and orders that:

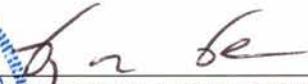
- A. The Board has jurisdiction over the subject matter of this case.
- B. Dietz and DOE wilfully committed a prohibited practice.
- C. CBA Section 15.G (class grievances) does not incorporate the specific pleading requirements for individual grievances outlined in CBA Section 15.E.
- D. In future disputes, the parties are to use the total grievance procedure as outlined in the CBA.
- E. In connection with future class grievances:
 - (1) No party to the CBA may make a unilateral determination of arbitrability of any class grievance. The decision on arbitrability is for the arbitrator to make.
 - (2) The parties are urged to act in good faith in initiating and prosecuting any class grievance to conclusion. This aspirational principle includes meaningful discussions regarding the subject of any class grievance, and if reasonably necessary, the exchange of relevant information so that all parties may attempt to understand and then resolve any class grievances.
 - (3) Unless exceptional circumstances arise, the Board may (in its discretion) exercise original exclusive jurisdiction over any interference with the class grievance process.
- F. This Decision and Order shall be posted by DOE for publication in all locations where Bargaining Union 06 employees may review and gather for sixty (60) days with proof of compliance being made to the Board and the Union.

HGEA v. DAVID IGE, Governor, State of Hawaii, et al.
CASE NO. CE-06-859
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
DECISION NO. 483

DATED: Honolulu, Hawaii, June 28, 2016.

HAWAII LABOR RELATIONS BOARD

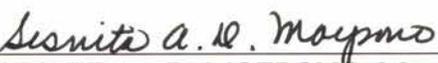



KERRY M. KOMATSUBARA, Chair


ROCK B. LEY, Member

Ms. Moepono's dissent to follow.

I do not concur with this process and I reserve my right to submit my dissent as a separate document on a later date.


SESNITA A.D. MOEPONO, Member

Copy sent to:

Peter Liholiho Trask, Esq.
Richard H. Thomason, Deputy Attorney General



EFiled: Jun 29 2016 04:22PM HAST
Transaction ID 59213197
Case No. CE 06-859

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT
EMPLOYEES ASSOCIATION,
AFSCME, Local 152, AFL-CIO,

Complainant,

and

DAVID Y. IGE, Governor, State of
Hawaii; DONALD G. HORNER,
Board of Education; HAWAII STATE
BOARD OF EDUCATION;
KATHRYN S. MATAYOSHI,
Superintendent, Department of
Education; NEIL DIETZ, Acting
Administrator, Labor Relations
Section, Department of Education; and
DEPARTMENT OF EDUCATION,

Respondents.

CASE NO. CE-06-859

DECISION NO. 483

DISSENTING AND
CONCURRING OPINION OF
BOARD MEMBER SESNITA
A.D. MOEPONO

DISSENTING AND CONCURRING OPINION
OF BOARD MEMBER SESNITA A.D. MOEPONO

I concur with the Board Majority that the appropriate standard to be applied in determining whether Dietz's conduct in rejecting and returning the March 16, 2015 submission was a "wilfull" violation of HRS chapter 89 is whether this conduct demonstrates a "conscious, knowing, and deliberate intent." However, I dissent from their conclusions that "wilfullness" can be presumed and that based on the record in this case that Dietz's rejection of the March 16, 2015 submission was a "wilfull" violation of HRS Chapter 89; and from their failure to address and resolve the allegation regarding whether Dietz's failure to provide the information requested was a "wilfull" violation of HRS § 89-13(a)(7) and (8) for the following reasons.

I. Application of the “Wilfulness” Standard

The Board Majority has determined that “Dietz acted wilfully, i.e., ‘with the ‘conscious, knowing, and deliberate intent to violate the provisions’ [sic] of HRS chapter 89’ when he rejected the Union Grievance Letter.” In so finding, the Board Majority concludes that “This is a case where ‘wilfulness can be presumed where a violation occurs as a natural consequence of a party’s action.’” I concur with the Board Majority that the applicable standard for a determination regarding whether Dietz’s conduct was “wilfull,” is whether his actions demonstrated a “conscious, knowing, and deliberate intent to violate” the provisions of HRS chapter 89. However, based on the Hawaii Supreme Court’s (Court) decision in Hawai’i Gov’t Emp. Ass’n v. Caspupang, 116 Hawaii 73, 170 P.3d 324 (2007) (HGEA) and subsequent Board decisions, I do not concur with the Board Majority’s reasoning that under this standard that the “wilfulness” can be presumed. In HGEA, the Court confirmed that the appropriate criteria for “‘wilfully’ means a showing that there was a ‘conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89.’” In affirming the Board’s order of dismissal in that case, the Court clarified that in assessing a violation of HRS § 89-13, the Board is required “to determine whether Respondents acted with the ‘conscious, knowing, and deliberate intent to violate the provisions’ of HRS chapter 89[.]” Subsequently, the Board relied on HGEA in “look[ing] to the Hawaii Supreme Court’s evolving guidance in interpreting provisions of HRS chapter 89,” and concluded that the assessment of an alleged prohibited practice under HRS § 89-13 requires the Board to render a specific determination regarding whether the respondent acted with “conscious, knowing, and deliberate intent” to violate the provisions of HRS Chapter 89. *Id.* at 99, 170 P.3d at 350. Hawaii State Teachers Ass’n v. Board of Education, Board Case No. CE-05-672, Order No. 2541, at *11 (August 6, 2008) (HSTA); United Public Workers, AFSCME Local 646, AFL-CIO v. Char, Board Case No. CE-10-744, Order No. 2697, at *12-13 (April 12, 2010). Applying these principles articulated in HGEA and HSTA, I conclude that a finding of “wilfulness” in this requires a specific finding that Dietz acted with a “conscious, knowing, and deliberate intent” to violate the provisions of HRS Chapter 89 in rejecting and returning the March 16, 2015 submission. Based on the evidence in this case, I am unable to so.

To establish the “wilfulness” requirement, the Union argues that Dietz’s action shows a “calculated and intentional refusal to address the BU 06 Class Grievance based on ‘a plethora of individuals at his disposal” and “a wealth of prior private sector labor experience, and some public sector experience, and familiar with the BU 06 Agreement and the BU 06 Grievance Procedure.” The Board Majority concurs with the HGEA that Dietz was “a person experienced in labor relations,” “who knew or should have known that he could not unilaterally amend the CBA;” and that this violation of the CBA and HRS Chapter 89 “was a conscious, knowing, and deliberate interference with the Union’s right to have its disputes with DOE resolved through the bargained for class grievance.” In addition, the Board Majority definitively finds that the relevant CBA does not incorporate or provide for the formal pleading requirements for a class grievance that are required for an individual grievance; and that based on Dietz’s labor relations background and participation in DOE class grievances that Dietz should have recognized this difference. Based on the record in this case, I disagree with the Board Majority’s findings on this issue. More importantly, I am unable to find that the evidence in this case demonstrates that

Dietz's actions constitute a "conscious, knowing, and deliberate intent" to violate the HRS Chapter 89 provisions for the following reasons.

First, while there is no dispute that Dietz had experience in labor relations based on his current position and previous jobs with the Office of Collective Bargaining and the Seafarers International Union, the significant showing, in my opinion, is the amount of experience that Dietz had handling grievances under this particular BU 06 CBA. While his contract administration with the Seafarers International involved application of various agreements that the union had with the employers, the contracts were not public sector collective bargaining agreements subject to HRS Chapter 89 but rather private sector collective bargaining agreements. The fact that the Seafarers International Union's contractual language and grievance process and statutory provisions involved were different from BU 06 was not disputed. The record shows that Dietz's only experience specifically handling BU 06 CBA grievances was based on the one year that he had spent serving as acting DOE labor administrator. During that one year, Dietz administered and provided staff support for the disciplinary process within the DOE and reviewed and assigned Step 2 grievances to DOE staff, and that experience included other HGEA cases, in which grievances were returned for insufficiency.

Moreover, CBA Article 15. states in relevant part:

C. The grievance must be filed with the appropriate superior within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be considered.

E. Step 1. If the matter is not settled on an informal basis in a manner satisfactory to the educational involved, then the educational officer or the Union may file a formal grievance by setting forth in writing on a form provided by the Board, the nature of the complaint, the specific provision(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought within the twenty (20) working days specified in paragraph C above in accordance with the following procedure:

G. If the Union has a class grievance, it shall submit the grievance in writing as follows:

3. To the Superintendent in the case of all other class grievances.

4. Time limits shall be the same as in individual grievances, and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2.

(Emphasis added)

The March 25, 2016 letter sent by Dietz in response to the HGEA's March 16, 2015 submission states in relevant part:

The Department of Education (Department) has received your submission dated March 16, 2015 indicating Hawaii Government Employees Association's (Union) belief that the Department has violated Articles 1, 3, 4, 8, 11 and 12 of the current Bargaining Unit (BU) 06 collective bargaining agreement.

I have thoroughly reviewed your document as well as Article 15 of the BU 06 collective bargaining agreement.

In your submission you do not indicate dates for any of the "violations" mentioned in the 'BACKGROUND' segment. The Department must question the timeliness of your March 16, 2015 letter.

You state, "The Union contends that the Employer is arbitrary and capricious in their continuous efforts to unilaterally implement changes despite the 2014 arbitration decision." However, that claim is not supported by any actions you allege the Employer has taken. Nor does the Union provide any support for the other allegations of your claim that would indicate the Employer has improperly interpreted or applied a specific provision of the current collective bargaining agreement.

The Union provides no support for the Union's contention that the Department violated Articles 1, 3, 4, 8, 11 and 12. It is the Union's initial burden to provide evidence of a contractual violation in this case.

It is clear from the department's review of your submission as well as Article 15 of the current collective bargaining agreement that your letter of March 16, 2015 is not a Step 2 grievance. Accordingly, as the Superintendent's designated representative in this matter, I am required to return that submission to you.

(Emphasis added)

Additional evidence in the record further clarifies and illuminates Dietz's state of mind regarding the above-stated response and his reasoning. Dietz relied on Article 15.C¹ and G² in

questioning the timeliness of the grievance. He further confirmed that Article 15 E.³ not only required HGEA to put dates of the alleged violations on the grievances, including class grievances, but that the basic pleading requirements contained in this provision were equally applicable to any grievance, including class grievances. Finally, Dietz relied on Article 15. C for the Employer's ability to return the grievance. In short, Dietz reasoned that the lack of specificity in the March 16, 2015 letter did not meet the contractual requirements of a grievance requiring him to return and not consider the submission.

The Board Majority in Conclusion 10, states that "...the CBA has no formalistic pleading requirements for a class grievance. Unlike an individual, when filing a class grievance, the Union need not (a) use a form provided by DOE, and (b) specifically state what provisions of the CBA are being violated, and (c) provide a date(s) upon which the alleged violation(s) occurred." I am of the opinion that the Board Majority's Conclusion 10, which is based solely on the lack of definitive language in the CBA incorporating the technical pleading requirements set forth in Article 15. E. into the class grievance procedure, is an overly broad interpretation. While the Board Majority points out that lack of specific incorporation of the technical pleading requirements for individual grievances into Article 15. G. similar to the specific incorporation of the 20-day time requirement indicates that these pleading requirements do not apply to class grievances, neither the HGEA, which has the burden of proving the violations of HRS § 89-13(a), nor the Board Majority cite any specific evidence to support this interpretation nor is there language in Article 15. G. specifically providing that the pleading requirements of Article 15. E. is not applicable. There are certain requirements, which are the same for both individual and class grievances based on the Article 15. G. 4. provision that, "[T]he time limits shall be the same as in individual grievances and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2." At best, based on the record and the language of Article 15, it is unclear regarding whether the technical pleading requirements for individual grievances apply to class grievances.

Accordingly, I am compelled to find that Dietz's reasoning that the pleading requirements of Article 15. E. were also applicable to class grievances and not met in this case cannot be deemed completely unwarranted or unreasonable.

The evidence set forth above demonstrates that Dietz interpreted CBA Article 15 to require that class grievance submissions meet the technical requirements for an individual grievance; and that this provision permitted him to return the submission for a failure to meet these requirements. There is no dispute that the HGEA did not include a date of the alleged occurrence, which would allow the DOE to determine whether the 20 working day requirement for timeliness was met nor identify any individuals in the March 16, 2015 grievance. Even Ms. Puuhou confirmed that this grievance was "unusual" because of the failure to identify the individuals involved. While there is no dispute that the procedural and substantive issues are for the arbitrator to resolve, Dietz's raising of these issues during the grievance process was not inappropriate, and as noted below, Dietz's actions did not preclude the matter from proceeding to the arbitration step, from which it was finally withdrawn. Even if Dietz's interpretation of CBA Article 15 and actions taken in raising these issues were in error, there is simply no evidence to

substantiate that he intended or was aware that his actions in rejecting the March 16, 2015 grievance for potential untimeliness and/or lack of specific facts violated HRS § 89-13(a) and could subject him and the DOE to prohibited practice violations. TWA v. Thurston, 469 U.S. 111, 128-30 (1995) (TWA) (Although in a slightly different context of determining liquidated damages, the Court held that the airline's violation of the ADEA was not "willful" because the airline did not know that its conduct violated the ADEA and its action was not taken in reckless disregard of the Act's requirements.) In short, the HGEA failed to show that Dietz's action in returning the matter to the HGEA was done with a "conscious, knowing, and deliberate intent" to violate the HRS Chapter 89.

Further, the undisputed record establishes that Dietz's actions in returning the grievance for possible untimeliness and failure to comply with the technical requirements for a grievance under the CBA was supported by his discussions and an agreement on this issue with DOE's Erin Warner, DOE investigator Jill Suzuki, and Barbara Krieg.

Finally, the fact that Dietz denies intending to forestall the grievance process in conjunction with the evidence that the matter ultimately proceeded to arbitration but was subsequently withdraw further corroborates Dietz's and the DOE position that Dietz's actions were not intended to obstruct the arbitration process or substitute his judgment for the arbitrator.

For these reasons set forth above, I dissent from the Board majority's conclusion that Dietz "wilfully" violated HRS § 89-13(a)(7) and (8) by returning the March 16, 2015 submission.

I. Information Request

I also dissent from the Board Majority's decision because the decision fails to resolve the issue of whether the failure to provide the requested information constitutes a violation of HRS § 89-13(a)(7) and (8). Regarding this issue, as well, I am unable to find the requisite "wilfulness" for this allegation to be found. In the March 25, 2015 letter, Dietz stated:

The bulk of your March 16, 2015 submission is a lengthy request for voluminous information. These requests exhibit the Union's expectation that the Department assume the initial burden of showing that the contract was violated. As such these requests are not truly requests for information but an attempt to shift the responsibility for the Union's initial burden to show the contract has been violated onto the Employer.

The uncontroverted record in this case further shows that Dietz's reason for not providing the information was because the information request was part of the March 16, 2015 letter, which the DOE determined did not meet the requirements of a grievance. In addition, Dietz relied on Warner, Krieg, and Deputy Attorney General Jim Halvorson for this response.

Dietz's reason is not without legal support and merit. "There can be no question of the

general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.” N.L.R.B. v. Acme Indus. Co., 385 U.S.432, 435-36 (1967), *citing* Labor Board v. Truitt Mfg. Co., 351 U.S. 149. “Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *Id.* at 536, *citing* NLRB v. C & C Plywood Corp., *ante*, p. 421 and Labor Board v. F.W. Woolworth Co., 352 U.S. 938. However, “[w]ith respect to matters for which the union would have no authority to bring a grievance, however, an information request cannot be enforced because the information requested is not relevant to the union’s duties.” Parson Elec. Co. v. NLRB, 976 F.2d 1167, 1169-70, *citing* N.L.R.B. v. Western Elec., Inc., 559 F.2d 1131 (9th Cir. 1977).

Similar to the lack of a showing of “wilfulness” regarding the return of the grievance, there is no evidence to substantiate that Dietz intended or was aware that his actions in failing to respond to the information request because there was no grievance could subject him and the DOE to prohibited practice violations. *Id.* The undisputed evidence is that Dietz took no action to respond to the information request because of his position that the March 16, 2015 letter did not meet the requirements of a proper grievance.

For this reason, I am unable to find that Dietz’s failure to respond to the information request was not “wilfull” in violation of HRS § 89-13(a)(7) and (8).

II. Summary

For all of the foregoing reasons, I concur with the Board Majority’s standard for “wilfulness” “ as conscious, knowing, and deliberate intent” but respectfully dissent from the Board Majority’s presumption of “wilfulness” in applying this standard and from their reasoning and conclusion that Dietz’s return and rejection of the March 16, 2015 submission constitutes a “wilfull” violation of HRS § 89-13(a)(7) and (8) and their failure to address whether Dietz’s failure to respond to the requested information constitutes a “wilfull” violation of HRS § 89-13(a)(7) and (8).

Honolulu, Hawaii, _____ June 29, 2016 _____.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member

¹ BU 06 CBA Article 15 C. states:

C. The grievance must be filed with the appropriate superior within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be considered.

² BU 06 CBA Article 15 G states in relevant part:

G. If the Union has a class grievance, it may submit the grievance in writing as follows:

4. Time limits shall be the same as in individual grievances, and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2.

³ BU 06 Article 15 E. states in relevant part:

E. Step 1. If the matter is not settled on an informal basis in a manner satisfactory to the educational officer involved, then the education officer or the Union may file a formal grievance by setting forth in writing on a form provided by the Board, the nature of the complaint, the specific provision(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought within the twenty (20) working days specified in paragraph c above in accordance with the following procedures:...