



STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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Case No. 16-CU-05-346, 16-CE-05-888

In the Matter of

JULIE CANDELARIA-LAWRENCE

Complainant,

and

HAWAII STATE TEACHERS
ASSOCIATION,

Respondent.

CASE NO. 16-CU-05-346

ORDER NO. 3218

ORDER GRANTING IN PART AND
DENYING IN PART DEPARTMENT OF
EDUCATION RESPONDENTS' MOTION
TO DISMISS PROHIBITED PRACTICE
COMPLAINT FILED NOVEMBER 14, 2016;
GRANTING IN PART AND DENYING IN
PART RESPONDENT HAWAII STATE
TEACHERS ASSOCIATION'S MOTION TO
DISMISS COMPLAINANT'S PROHIBITED
PRACTICE COMPLAINT [FILED ON
11/14/16]; AND GRANTING IN PART AND
DENYING IN PART RESPONDENTS',
DEPARTMENT OF EDUCATION, MARK
HACKLEBERG, HANNAH LOYOLA, AND
GENA BONACORRSI, SECOND MOTION TO
DISMISS PROHIBITED PRACTICE
COMPLAINT FILED NOVEMBER 14, 2016

In the Matter of

JULIE M. CANDELARIA-LAWRENCE,

Complainant,

and

DEPARTMENT OF EDUCATION;
MARK HACKLEBERG, Principal;
Kealakehe Intermediate School,
Department of Education, State of Hawaii;
HANNAH LOYOLA, Vice Principal;
Kealakehe Intermediate School,
Department of Education, State of Hawaii;
and GENA BONACCORSI, Department
Head, Kealakehe Intermediate School,
Department of Education, State of Hawaii,

Respondents.

CASE NO. 16 CE-05-888

ORDER GRANTING IN PART AND DENYING IN PART
DEPARTMENT OF EDUCATION RESPONDENTS' MOTION
TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED
NOVEMBER 14, 2016; GRANTING IN PART AND DENYING IN PART
RESPONDENT HAWAII STATE TEACHERS ASSOCIATION'S MOTION
TO DISMISS COMPLAINANT'S PROHIBITED PRACTICE COMPLAINT [FILED
ON 11/14/16]; AND GRANTING IN PART AND DENYING IN PART
RESPONDENTS', DEPARTMENT OF EDUCATION, MARK HACKLEBERG,
HANNAH LOYOLA, AND GENA BONACORRSI, SECOND MOTION TO
DISMISS PROHIBITED PRACTICE COMPLAINT FILED NOVEMBER 14, 2016

I. PROHIBITED PRACTICE COMPLAINTS AND PROCEDURAL
BACKGROUND

A. CASE NO. CU-05-346

On November 14, 2016, Complainant JULIE M. CANDELARIA-LAWRENCE (Complainant) filed a Prohibited Practice Complaint in Case No. 16-CU-05-346 (CU Complaint) against the Hawaii State Teachers Association (Respondent HSTA or HSTA) with the Hawaii Labor Relations Board (Board). Paragraph 6 of the CU Complaint setting forth relevant facts stated:

During the period encompassing the 2014-2015 school year and the 2015-2016 school year, I, Julie Candelaria-Lawrence experienced numerous instances of contract violation by the employer, Department of Education, particularly related to Article VI - Teaching Conditions and Hours - Initially, I attempted to resolve the issue by working with school administration directly but as the violations continued, I had to turn to HSTA for assistance. My initial calls were ignored, and, when an HSTA representative was finally sent, no follow-up was made on the complaint. (It was discovered that the HSTA rep had been fired) Ultimately, I lost my job because I received a rating of "Marginal" under the EES guidelines, for two years in a row.

It is my contention that had HSTA honored their promise to protect our contract rights, I would not have lost my job. This is a prohibited practice under HRS 89-13, 10b which states prohibits the union from violating the terms of the agreement.

Attached to the Form HLRB-4 were attachments and a STATEMENT OF FACTS (CU Statement of Facts), which stated as follows:

I am filing a Prohibited Practices Complaint against HSTA because the school I worked at continually violated the Collective Bargaining Agreement from September 2014 until August 2016 at which time I was fired from Kealahou Intermediate. Throughout that two year period, I asked for help from my union, HSTA, on numerous occasions. They did not provide any representation for the first 2 months, then, the representative they did finally send was fired before he filed my grievance, and, the union didn't even bother to tell me that. I was finally given some representation in January 2015, and again in May 2016 but by then the damage had been done. The continued contract violations and the lack of union representation resulted in me losing my job. I received notification on 8/16/16 that my contract would not be renewed.

I was a Special Education Teacher at Kealahou Intermediate, teaching the Fully Self- Contained classroom for the 2014-2015 school years.

I had a class of 8 high-needs students, 5 of whom had a variety of special needs such as Down's syndrome, blindness, ADHD, low iq, amongst other learning challenges. In addition to these 5, I also had 3 severe needs students with Autism, all three requiring 1:1 aides throughout their school day because of the severity of their condition. I had one student who could not talk or otherwise communicate and was still in diapers at age 11. The two groups were very different and, generally would be in different types of classrooms, but administration not only tasked me with teaching BOTH classes at the same time, they also assigned me a General Education Advisory with over 20 students. I am supposed to provide guidance and homework support to these students as well. Now, remember that I still have the 3 severe-needs students who are required, via their IEP, to be in the fully-self contained classroom for their entire school day and are now in the classroom with the Gen Ed advisory, sometimes spitting, yelling, and otherwise acting out uncontrollable behaviors which just come with their special needs. It was a very inappropriate environment for that particular class time. And the fact that their IEP's require 1:1 support in the fully self contained classroom, that meant they were in the classroom even during the time that was allocated for my prep time and team time.

On top of all this, soon into the semester, the 1:1 aide for one of my Autistic students was removed. When I asked if I need to do an IEP revision and notify parents, they said it wasn't needed because I have a staff of 4 in my class and, I could be "the 1:1 support". because they have no other staff. Huh? I am the

teacher; I have 8 students to care for. And, an IEP revision is legally required! IEP's required 3 staff members just for 1:1 service and I had only 2 staff members designated for this.

I loved my students and worked hard to deliver their Individualized Education Programs to the fullest ability, make they feel included; to allow them participate in their education to the best of their abilities.

However, because of how Administration chose to schedule classroom time, preparation time, team time, and faculty time for the school as a whole, I was "behind" in my work from the minute school started. The bell rang at 8:15; students were in class until 3:15.

Prep and Team time are within the bell schedule. This schedule didn't even factor time for writing Individualized Education Plans (IEP) nor for holding IEP meetings.

It was "expected" (and I was told) that all these other duties would just have to be done on my own time.

In fact, the principal arbitrarily decided and mandated that all IEP meetings would be held either at 7:30am or at 3:30pm, hours that are outside of our 7 hour work day which was from 8:15am to 3:15pm.

Because prep periods are missed this is a violation of Article VI, Section X, 3.

Related to IEP meetings scheduled before and after the work day, Article VI, Section HH., 1., allows 10 release days to be used for IEP work as provided in Standard Practices Regulation #4510.3.

This highlights only a few of the violations I experienced early in the year. So, I made several attempts to contact the Union to get some representation.

On September 2014, I contacted (via telephone) the union office and left a voice message that I needed representation. I had to call several times before someone contacted me. On October 16, 2014, I finally heard from Leroy Simms, who was the Uniserve Director for West Hawaii. We met on November 12, 2014 for over two hours, and he took copious notes on the contract violations. He counted 9 areas where he felt I had grievance rights.

That was the last I heard from him or anyone from the Union. I emailed him on December 16, concerned about my case and never heard anything back.

Finally, in January 2015 I heard back from Suzanne Bitler of HSTA, but my timeline for grievance had already been compromised and she offered at least an “informal meeting” with the principal. An Agreement was reached with the principal, but it was seldom adhered to and I continued to be overwhelmed by the job expectations versus the job hours allowed to accomplish this.

I received a Marginal Rating in May 2015 and again contacted the Union for assistance. Inasmuch as I am a new teacher, I did not have tenure, I did not have arbitration rights, I could only go to an informal hearing where the rating was upheld. (I am simultaneously filing a complaint against DOE for this issue),

When school began in the 2016-2017 school year, many of the same violations continued, and in fact worsened. I tried working with Administration, but the school was having problems with staffing – our principal left, came back, then left again. I was just lost in the shuffle, not getting my prep times, being told to work on my own time, being demeaned, and not being given the support the principal had promised (by contract!) to provide me.

In February 2016 and in March 2016, I emailed and called the Union asking for help. Just like 2014-2015, I received no response.

In May 2016, just like May 2015, I received a Marginal Rating which did not follow EES standards of evaluation, and I asked for Union Representation by emailing and calling the HSTA office on May 6, 2016.

This time, I did get a representative to come with me to the final EES meeting, but the principal was adamant that he would not change his “opinion” of me, that he didn’t want me at his school, and that even if I filed a grievance, based on what he has heard of me, it wouldn’t likely change his mind.

On August 12, 2016, the Complex Area superintendent upheld the principals’ Marginal Evaluation.

On August 16, 2016, I received notice that my contract would not be renewed, and, that I would not be allowed to teach in the State of Hawaii any longer.

It is my contention that had HSTA given me appropriate representation in September 2014, none of this would have happened and I would still have a position as a Special Education Teacher.

I attest that the foregoing is true to the best of my recollection.

On November 21, 2016, the Board notified the Respondent HSTA by mail of receipt of the CU Complaint.

On November 29, 2016, the Board held the Prehearing Conference on the CU Complaint at 9:00 am in the Board Hearing Room, as noticed by the Board on November 21, 2016 to the Complainant and the Respondent HSTA, through its Deputy Executive Director Andrea Eshelman. The Complainant participated in the Prehearing conference via telephone conference call. The Respondent HSTA was not present at the Prehearing Conference; therefore, the Prehearing Conference in Case No. 16-CU-05-346 was adjourned. The Respondent HSTA had not responded to the Complaint filed on November 14, 2016. A search by the Board of the USPS Certified Mail tracking number indicated the Respondent HSTA receiving the Board Notice of November 21, 2016 on Monday, November 28, 2016.

On December 2, 2016, Respondent HSTA filed a Notice of Appearance Vladimir Devens and Keani Alapa for Respondent Hawaii State Teachers Association and Respondent Hawaii State Teachers Association's Answer to Complainant's Prohibited Practice Complaint [Filed on 11/14/16].

On December 9, 2016, HSTA filed Respondent Hawaii State Teachers Association's Motion to Dismiss Complainant's Prohibited Practice Complaint [Filed on 11/14/16].

CASE NO. CE-05-888

On November 14, 2016, Complainant filed a Prohibited Practice Complaint in Case No. 16-CE-05-888 (CE Complaint), with the Board utilizing the File & ServeXpress electronic filing system (FSX). However, the Prohibited Practice Complaint (Complaint) in Case No. 16-CE-05-888 consisted of Statement of Facts, and supporting documents but did not include the Board's prohibited practice complaint form, Form HLRB-4.

On November 17, 2016, Complainant, utilizing theFSX, filed a First Amended Prohibited Practice Complaint (First Amended Complaint or CE Complaint) in Case No. 16-CE-05-888 against the DEPARTMENT OF EDUCATION; MARK HACKLEBERG, Principal; Kealakehe Intermediate School, Department of Education, State of Hawaii; HANNAH LOYOLA, Vice Principal; Kealakehe Intermediate School, Department of Education, State of Hawaii; and GENA BONACCORSI, Department Head, Kealakehe Intermediate School, Department of Education, State of Hawaii (collectively DOE Respondents) utilizing the Board's Form HLRB-4.

The CE Complaint in paragraph 5. ALLEGATIONS stated:

Respondents have continually, habitually, knowledgeably engaged in Prohibited Practices under HRS 89-13 by violating the following:

- 1) interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- 6) refuse to participate in good faith in the mediation and arbitration procedures set forth in section 90-11;
- 8) violate the terms of a collective bargaining agreement

In paragraph 6, regarding relevant facts, the CE Complaint stated:

Employer methodically and without regard for the well-being of students or teachers violated the Collective Bargaining Agreement on a daily basis from September 2014 through August 2016.

Please refer to the attached for a statement regarding the violations.

Attached to the Form HLRB-4 were exhibits and the STATEMENT OF FACTS (CE Statement of Facts) stating as follows:

I am filing a Prohibited Practices Complaint against the Department of Education, Kealakehe Intermediate School, and the administration: Mark Hackelberg, Principal; Hannah Loyola, Vice Principal, and Department Head, Gena Bonaccorsi because they continually violated the Collective Bargaining Agreement from September 2014 until August 2016 at which time I was fired from Kealakehe Intermediate.

Throughout that two year period, I asked for help from my union, HSTA, I began asking for union help as early as August 2014, the Union did not respond until October 2014. The representative they did finally send was fired before he filed my grievance, and, the union didn't even bother to tell me that. In December 2014, I heard from HSTA, was told my timeline for grievance had already been compromised; offered an "informal meeting" with the principal. An Agreement was reached but never implemented and I continued to be overwhelmed by the job expectations versus the job hours allowed to accomplish this.

I received a Marginal Rating in May 2015.

At the time, I was a Special Education Teacher at Kealakehe Intermediate, teaching the Fully Self-Contained classroom for the 2014-2015 school years. I had a class of 8 high-needs students, 5 of whom had a variety of special needs such as Down's syndrome, blindness, ADHD, low iq, amongst other learning challenges. In addition to these 5, I also had 3 severe needs students with Autism, all three requiring 1:1 aides throughout their school day because of the severity of their condition. I had one student who could not talk or otherwise communicate and was still in diapers at age 11. The two groups were very different and, generally would be in different types of classrooms, but administration not only tasked me with teaching BOTH classes at the same time, they also assigned me a General Education Advisory with over 20 students. I am supposed to provide guidance and homework support to these students as well. Now, remember that I still have the 3 severe-needs students who are required, via their IEP, to be in the fully-self contained classroom for their entire school day and are now in the classroom with the Gen Ed advisory, sometimes spitting, yelling, and otherwise acting out uncontrollable behaviors which just come with their special needs. It was a very inappropriate environment for that particular class time. And the fact that their IEP's require 1:1 support in the fully self contained classroom, that meant they were in the classroom even during the time that was allocated for my prep time and team time.

On top of all this, soon into the semester, the 1:1 aide for one of my Autistic students was removed. When I asked if I need to do an IEP revision and notify parents, they said it wasn't needed because I have a staff of 4 in my class and, I could be "the 1:1 support". because they have no other staff. Huh? I am the teacher; I have 8 students to care for. And, an IEP revision is legally required! IEP's required 3 staff members just for 1:1 service and I had only 2 staff members designated for this.

I loved my students and worked hard to deliver their Individualized Education Programs to the fullest ability, .make them feel included; to allow them participate in their education to the best of their abilities.

However, because of how Administration chose to schedule classroom time, preparation time, team time, and faculty time for the school as a whole, I was "behind" in my work from the minute school started. The bell rang at 8:15;

students were in class until 3:15. Prep and Team time are within the bell schedule. This schedule didn't even factor time for writing Individualized Education Plans (IEP) nor for holding IEP meetings.

It was "expected" (and I was told) that all these other duties would just have to be done on my own time.

In fact, the principal arbitrarily decided and mandated that all IEP meetings would be held either at 7:30am or at 3:30pm, hours that are outside of our 7 hour work day which was from 8:15am to 3:15pm.

Because prep periods are missed this is a violation of Article VI, Section X, 3.

Related to IEP meetings scheduled before and after the work day, Article VI, Section HH., 1., allows 10 release days to be used for IEP work as provided in Standard Practices Regulation #4510.3.

That was the last I heard from him or anyone from the Union. I emailed him on December 16, concerned about my case and never heard anything back.

Finally, in January 2015 I heard back from Suzanne Bitler of HSTA, but my timeline for grievance had already been compromised and she offered at least an "informal meeting" with the principal. An Agreement was reached with the principal, but it was seldom adhered to and I continued to be overwhelmed by the job expectations versus the job hours allowed to accomplish this.

I received a Marginal Rating in May 2015.

When school began in the 2016-2017 school year, many of the same violations continued, and in fact worsened. On the very first day of school, I was given a new assignment - I was now the 8th grade inclusion teacher. I would be inclusion teaching in 4 different core classes (Math, Science, Language Arts, and History). In addition, I would also be teaching my own, stand alone Resource Social Studies Class. AND I had a separate Study Skills class for a brand new case load of 11 8th grade Special Education Students.

I am great with my students, but I am a relatively new teacher. At this point, I had spent 3 years teaching in the Fully Self-Contained environment, with severe needs students who performed well below grade level. I was teaching my students what

a calendar is, what the days of the weeks are – primary level learning. I had some higher-performing students of course, but none of my students were above a 4 grade level.

I expressed concern to my Dept Head, Gena Bonacorrisi – I’ve never taught a grade-level core content class (Resource Social Studies), nor have I been exposed to ANY of the 8th grade curriculum. But now I am tasked with learning EVERY core content area, designing a curriculum for my own Social Studies class, and planning a Study Skills class for 11 students who may or may not be in the same classes, who may or may not need the same accommodations and modifications. Her “support” was to tell me to just ask the other teachers in my grade level.

In addition, because of my marginal rating in 2014-2015 school year, I am placed on Enhanced Evaluation path, am tasked by the Principal to do an SLO, and IDP, AND a PDP. I also have my IEP case load to manage which will involve at least 3 IEP meetings for each student.

Now, the previous year, my Marginal Rating had been in part because the school did not provide me any support to get these extra duties done. I feel I was punished for filing a complaint in 2014-2015, because instead of giving me help and additional training, the Principal is piling even more duties on me. We did meet and she signed a contract which outlined the additional support I would get.

None of it came to fruition.

The principal ended up leaving the school before the end of the first quarter and we got a new principal, Mark Hackelberg. He refused to provide me the support contracted for with the prior principal. In addition, whenever I would ask for help, he would literally tell me to just do it on my own time, that’s the way teaching is, get it done etc etc. He would not even accept the SLO that I submitted, saying it was really bad. BUT the SLO was the professionally prepared document that ALL Social Studies teachers’ used last year! The prior Principal had given it to me in support of our agreement to give me help.

In any event I was never given time to do any of these essential duties – co-plan with inclusion teachers, even have planning time for my own classes, we never got early release days for our IEPs, nor compensating time for IEP meetings held outside of work hours.

In addition, I continued to experience retaliation by the Vice Principal, Hannah Loyola and the Department Head, Gena Bonnaccorsi, with their attacks on my personal performance and threats to “notate in my Core Professionalism”.

For instance, in January/February 2016, I received an email to schedule IEP meetings – I received notice on a Thursday and I had to contact all parents, service providers, and arrange a GE – all by the next Tuesday. Not even one week. When I was unable to connect with two of the parents, I was reprimanded and threatened that it would be noted in my Core Professionalism. I have no control over parents, nor any authority to compel their attendance. Nevermind the fact that PROTOCOL for scheduling IEP Meetings is at minimum two months. Not only did I have to contact the parents, I had to find TIME to review files and WRITE 8 IEPS between Thursday and Tuesday.

These are just several examples of how the department again and again violated the work hours of the Collective Bargaining Agreement. The principal keeps telling me that everyone else gets in done during school hours. Not only is it impossible, it is easily verifiable just by looking at the Audit Logs. And, research based evidence tells us students (and teachers!) need at minimum 90 uninterrupted minutes to do a good job at researching [sic] and writing. That type of time doesn't exist in a bell-to-bell schedule. Everyone does them after hours, on weekends because they fear for their jobs. And what does that mean? They are giving up their family time, their personal time. They work at 10, 11, 12 at night. I've been up until 2:00am to get it done. How can I be doing the best possible job at PLANNING A CHILDS Education if I am doing it after a long stressful day? How can I be the best teacher for these students if I go to work the next day with little rest?

Individually and collectively, the Department of Education and it's employees: Mark Hackleberg (Principal), Hannah Loyola (Vice-Principal) and Gena Bonaccorsi, (Department Head) violated the terms of the Collective Bargaining Agreement particularly related to Article VI – Teaching Conditions and Hours as well as failing to provide the support and hours necessary to complete all tasks required.

Mr. Hackleberg further violated this Article by imposing his own requirement that all teachers participate in writing a complete response for the Accreditation review that was going to visit the school in 2016. He REQUIRED faculty to work

after school and during their planning and team periods to get the report written for him. In fact, at one point he had me scheduled for THREE different things during my planning period – WASC Review, IEP File Review, and Observation walk with peers. I was tasked with being a committee chair to gather information and evidence on school practices that I don't even get involved in; plus, I wasn't even at the school when the Accreditation Team visited.

At my EES evaluation appointment, Mr. Hackleberg straightout told me that the "contract is worthless" "we all know that you have to do this on your own time" "just do whatever you need to on your own time, I am not giving you support"

As a final insult, Mr. Hackleberg did not follow the outlined protocol for evaluating SLO's. He did not review it, make comments for improvement, nor give me the proper training for SLO preparation. He rejected the SLO that the former principal gave me – (which had been professional prepared and approved for THE ENTIRE SOCIAL STUDIES department the previous year.) He said he didn't like my assessments or rubric, but again, they are the same ones used last year. He went around asking teachers for their opinions of me, (without my knowledge or opportunity to discuss!) and factored those opinions into his evaluation of me to falsely skew my 2015-2016 EES Evaluation resulting in a Marginal Rating.

This was my second Marginal Rating. As a result, on August 16, 2016, I received notice that my contract will not be renewed and that I would not be allowed to teach anymore.

Please refer to the additional exhibits for supporting documentation.

On November 21, 2016, the Board notified the DOE Respondents, by mail of receipt of the First Amended Complaint. The Board received the signed USPS Form 381 Return Certificate of Postal Service from the DOE Respondents on November 25, 2015 indicating delivery by the Postal Service on November 23, 2016.

On November 21, 2016, the Board issued Order No. 3210 Accepting First Amended Prohibited Practice Complaint; Notice to Respondents of First Amended Prohibited Practice Complaint; Notice of Prehearing Conference; and Notice of Hearing on First Amended Prohibited Practice Complaint. In addition to accepting and providing notice of the First Amended Prohibited Practice Complaint, the Board scheduled a prehearing conference on November 29, 2016 and a hearing on the merits on December 21, 2016.

On November 28, 2016, DOE Respondents filed Respondents' Motion to Dismiss Prohibited Practice Complaint filed November 14, 2016. (First Motion to Dismiss).

On November 29, 2016, Complainant filed Complainants' Answer to Respondents' Motion to Dismiss Prohibited Practice Complaint Filed November 14, 2016 (Opposition to First Motion to Dismiss).

On November 29, 2016, the Board held the Prehearing Conference on the First Amended Complaint at 9:15 a.m. in the Board Hearing Room, as noticed by the Board on November 21, 2016 to the Complainant and the DOE Respondents, as noticed in Board Order No. 3210 on November 21, 2016. The Complainant participated in the Prehearing via telephone conference call. The DOE Respondents was represented by counsel in the person of W. Max Levins, Deputy Attorney General. At the Prehearing Conference, the Board took judicial note of the Board's right on its own initiative, pursuant to § 12-42-8(g)(13), Hawaii Administrative Rules (HAR), to *"...consolidate for hearing or other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings."*

On December 2, 2016, the DOE Respondents filed Respondents' Answer to Prohibited Practice Complaint Filed November 4, 2016.

On December 4, 2016, Respondent HSTA filed Respondent Hawaii State Teachers Association's Statement of No Position to Respondents' Motion to Dismiss Prohibited Practice Complaint Filed November 14, 2016 [Filed on 11/28/16].

B. CONSOLIDATION AND HEARING DATES

On November 30, 2016, in Case Nos. 16-CU-05-346 and 16-CE-05-888, the Board issued Order No. 3213 Consolidating Cases for Hearing and Disposition; Notice of Hearing on Respondents' Motion to Dismiss the Prohibited Practice Complaint; and Notice of Hearing on the Merits and Setting Deadlines. Regarding the consolidation, Board found upon review of the above-referenced cases that the complaints involve substantially the same parties and embody identical issues, facts, and matters of law and that consolidation of the proceedings would be conducive to the proper dispatch of business and the ends of justice and will not unduly delay the proceedings, pursuant to § 12-42-8(g)(13), HAR. The Order further provided notice of a hearing date on DOE Respondents' First Motion to Dismiss on December 5, 2016 at 10:00 a.m. in the Board's hearing room, a hearing on the merits on December 21, 2016 at 9:00 a.m. in the Board's hearing room and other deadlines and requirements regarding the hearing on the merits.

C. DOE'S FIRST MOTION TO DISMISS

The DOE Respondents' First Motion to Dismiss was based on the failure of Complainant to timely file the CE Complaint. In the Memorandum in Support of Motion and based on the supporting attachmentsⁱ, the DOE Respondents assert that the Complainant's cause of action arose on August 12, 2016, the date that DOE sent a letter notifying Complainant that the non-renewal of her contract was sustained (non-renewal letter); and that pursuant to Hawaii Revised Statutes (HRS) § 377-9(l), the Complainant should have filed a prohibited practice complaint within 90-days of that event. Therefore, the prohibited practice complaint should have been filed on November 10, 2016, and the CE Complaint filed on November 14, 2016 after that date, is untimely, and should be dismissed.

In her Opposition to DOE's First Motion to Dismiss, Complainant responds and her exhibits (Exhibits 1 and 2) attached to her Opposition support that while the letter was dated August 12, 2016, the letter was mailed on August 15, 2016, and received on August 17, 2016. Consequently, Complainant argues that the cause of action arose on August 17, 2016, the 90-day period expired on November 15, 2016, and the CE Complaint filed on November 14, 2016 was timely filed.

At the hearing on the First Motion to Dismiss, the parties basically reiterated the arguments set forth in their respective pleadings.

D. HSTA'S MOTION TO DISMISS

On December 9, 2016, HSTA filed Respondent Hawaii State Teachers Association's Motion to Dismiss Prohibited Practice Complaint [Filed on 11/14/16] (HSTA Motion to Dismiss), which was based on both untimeliness and a failure to state a claim upon which relief can be granted. In support of the Motion, HSTA took the position that the CU Complaint alleges that HSTA failed to appropriately represent her on September 14, 2014. Based on the 90-day limitations period set forth in Hawaii Administrative Rules (HAR) § 12-42-42(a), the prohibited practice complaint was required to have been filed no later than December 2014. Hence, the November 14, 2016 CU Complaint, which was filed more than two years after the alleged violation occurred, was untimely and should be dismissed. Further, in support of the Motion, the HSTA presented evidence based on Exhibit B and the Declaration of Tom Perry, HSTA UniServ (Perry), that on June 2, 2015, HSTA filed grievance WH-15-15 on Complainant's behalf challenging the first "marginal" rating, which requested that Complainant be rated at a higher level; that this grievance was taken to a Step 1 hearing on July 8, 2015 with Perry presenting arguments and Complainant presenting her side of the case; in a July 31, 2015 letter, the DOE

denied the grievance, sustained the “marginal” rating, and upheld the “non-renewal recommendation” from the principal for multiple reasons, including the Complainant’s failure to attend scheduled mandatory training sessions and to “exercise her professional responsibilities, and no weight given to Complainant’s defenses; and HSTA was prohibited from pursuing arbitration of the grievance pursuant to the Agreement between the Hawaii State Teachers Association and the State of Hawaii Board of Education, effective July 1, 2013 – June 30, 2017 (CBA). Further, HSTA introduced further evidence in support based on the Declaration of Maia Daugherty (Daugherty) and Exhibits D (grievance) and E (emails) that on June 19, 2016, HSTA filed a second grievance, dated June 15, 2016 and received on June 17, 2016, on behalf of the Complainant regarding her second “marginal” rating and the non-renewal notice that was issued to her; by a June 20, 2016 letter, DOE acknowledged receipt of the grievance and requested HSTA representative Daugherty to schedule a Step 1 hearing; Daugherty scheduled the hearing for August 2, 2016; however, on July 19, 2016, Complainant instructed Daugherty to withdraw the grievance to allow Complainant, which was confirmed with Complainant; on July 27, 2016, Complainant emailed Daugherty and Complex Area Superintendent Arthur Souza and Kealakehe School Principal Mark Hackleberg directing the expeditious withdrawal of her grievance so she could pursue a health insurance and unemployment matter; HSTA complied with her request. Finally, the HSTA argued that the CU Complaint must be dismissed for failure to allege that HSTA breached its duty of fair representation by acting in an arbitrary, discriminatory, or in bad faith or “wilfully” violated HRS § 89-13(b), particularly when Complainant failed to exhaust her potential contractual remedies by instructing HSTA to terminate her grievance.

On December 14, 2016, Complainant filed Complainants’ Answer to Respondents’ Motion to Dismiss Prohibited Practice Complaint Filed November 14, 2016 (Opposition to HSTA Motion to Dismiss), which requested the Board to deny the HSTA’s Motion to Dismiss, for the following reasons:

- 1) The incident referenced on September 2014 is just one in a series of incidents that occurred over the approximately 2 year period. Evidence and testimony to be provided at the hearing of December 21, 2016, will show that Ms. Candelaria-Lawrence repeatedly asked for representation over a two year period and HSTA neglected to provide this in any substantive form. The triggering event is the non-renewal of contract in August 2016 as this was the cumulative effect of both HSTA’s inability to provide timely representation and the DOE’s continued violation of contract.
- 2) As a result of the foregoing, Complainant was working in an extremely hostile environment. At the time that I asked for the withdrawal, school administration, HSTA, and CAS had already postponed the Step 1 hearing twice, for their own

convenience. The rescheduled hearing would not take place until after the semester started. School administration had made comments about not wanting me at the school even as a sub, and even went so far as to have the SASA call me to inform me that the principal said I should just resign. It was obvious proceeding with the hearing would be pointless so I asked to withdraw so I could pursue other remedies.

At the hearing on the HSTA Motion to Dismiss, HSTA reiterated and provided further specificity regarding the arguments set forth in the pleadings. HSTA further argued that a review of the CU Complaint shows an admission that a non-tenured teacher has no arbitration rights under the CBA, which provides that a non-tenured teacher shall be dismissed with two unsatisfactory ratings. Regarding the failure to state a claim, HSTA took the position that not only did the Complainant fail to allege that the conduct was arbitrary, in bad faith, or discriminatory but also to make the required showing that the conduct was irrational, fraudulent, or deceitful. HSTA further submitted that negligence is not sufficient, and there is nothing that rises to the level of such conduct. Moreover, the HSTA's cancellation of the Step 1 hearing was not alleged in the CU Complaint. Regarding the timeliness of the CU Complaint, HSTA argued that for every alleged incident, the 90-day limitation starts to run. HSTA further reiterated the facts regarding the HSTA's processing of grievances in this case that the first marginal rating grievance was filed, processed as far as the procedure allowed, but was not sustained; and the second marginal rating grievance was withdrawn. Finally, responding to Complainant's argument that the HSTA allegedly breached the CBA in violation of HRS § 89-13(b)(5), HSTA maintained that the only article allegedly violated is Article VI, which is directed toward the DOE not the Union. Finally, HSTA argued that there are no allegations that HSTA violated HRS § 89-13(b)(1), (2), (3), and (4).

Complainant responded that the email correspondence shows that there were procedural violations because her hearing rights were not done in a timely manner. Complainant maintained that the hearing would have occurred too late, which was due to both Souza and the HSTA's cancellation of hearings. Further, Complainant argued regarding the September and October 2014 incident that: she contacted the HSTA representative, who met with the principal, but never followed up with her or responded to her emails regarding the results; there was an ongoing HSTA strategy to ignore us until the time limits were passed; after HSTA's rep was no longer working, there was no contact to follow up, communicate, or provide West Hawaii with representation; and HSTA told her that she could file her own grievance. Finally, Complainant noted that the June and July (2016) hearings on her grievance were cancelled, and the August 5, 2016 hearing would have been after school starts. Complainant stated that she withdrew the grievance because "it was going nowhere," after Daugherty told her that they could proceed with the grievance but was not sure what would happen.

E. DOE'S SECOND MOTION TO DISMISS

On December 9, 2016, DOE Respondents filed Respondents, Department of Education, Mark Hackleberg, Hannah Loyola, and Gena Bonaccorsi, Second Motion to Dismiss Prohibited Practice Complaint Filed November 14, 2016 (DOE Second Motion to Dismiss), which moved the Board to dismiss the CE Complaint for a failure to state a claim. In the Memorandum in Support, DOE Respondents argued that while their position is that the entire CE Complaint is untimely, the only possible alleged violation that could be construed as timely was the non-renewal of Complainant's contract in August 2016. Regarding that allegation, DOE Respondents argued that there is no dispute that Complainant was a non-tenured teacher and that she received two marginal ratings in 2015 and 2016; Complainant fails to allege any facts showing a violation of CBA Article VII P;ⁱⁱ which plainly states that the non-renewal of a non-tenured teacher is at the Employer's discretion; and that Complainant's Statement of Facts (CE) that, "As a result, on August 16, 2016, I received notice that my contract will not be renewed and that I would not be allowed to teach anymore," is utterly deficient to show any CBA violation, much less a willful one.

On December 14, 2016, Complainant filed Complainants' Answer to Respondents' Motion to Dismiss Prohibited Practice Complaint Filed November 14, 2016 (Opposition to DOE Second Motion to Dismiss), requesting that the Board deny the DOE Second Motion to Dismiss for the following reasons:

- 1) The original complaint and supporting Statement identified at least one clause in the CBA that has been violated: "Individually and collectively, the Department of Education and it's employees: Mark Hackleberg (Principal), Hannah Loyola (Vice-Principal) and Gena Bonaccorsi, (Department Head) violated the terms of the Collective Bargaining Agreement particularly related to Article VI – Teaching Conditions and Hours as well as failing to provide the support and hours necessary to complete all tasks required."
- 2) Complainant did not receive timely notice of the Motion To Dismiss: Document was e-filed December 9, 2016 at 4:01pm. There is no Certificate of Service filed in relation to this Motion. Document was filed via FileandServeXpress but Respondent neglected to include Complainant in the e-service and instead chose to mail the Motion, via regular US Mail (no certified receipt, no tracked delivery). As a result, Complainant received the Motion to Dismiss Tuesday, December 13, 2016 and has had inadequate time to prepare a more thorough response.

At the hearing, the DOE Respondents took the position that the only possible timely violation was the delivery of the non-renewal letter, which was not grievable except for procedural defects; if the issue was not grievable, then there can be no CBA violation; and that the CE Complaint allegation that “[O]n August 16, 2016, I received notice that my contract will not be renewed and that I would not be allowed to teach anymore[,]” is deficient to allege a CBA violation. DOE Respondents clarified further by arguing that the procedural defect is the only way to challenge the non-renewal letter; however, the grievance filed was withdrawn; and accordingly, there was a failure to exhaust the non-renewal grievance. Regarding timeliness, DOE Respondents objected to any new facts being presented that were not pled in the complaint, arguing that Complainant had the opportunity to provide these facts. DOE Respondents argued that while Complainant now insists that there was a continuing violation leading up to the non-renewal, the standard is not whether there was a continuing violation or marginally relevant facts, but rather there is a strict timeline; and there is no case law supporting aggregation. Regarding the service of the Second Motion to Dismiss, DOE Respondents asserted that the certificate of service shows e-filed. HSTA confirmed timely receipt of the Motion.

Complainant reiterated her arguments set forth in the pleadings. Regarding the timeliness, Complainant characterized her CE Complaint as focusing on teaching conditions and the non-renewal was the cumulative effect, and that Hackelberg’s continuing violations of procedures and schedules contributed to the non-renewal. Regarding the late receipt of the DOE Second Motion to Dismiss, Complainant represented that she did not receive the Motion in a timely manner because she was not served on FSX but received the Motion on Monday through the regular but not certified mail. However, Complainant confirmed that she filed a response.

At the conclusion of the hearings on all three of the foregoing Motions, the presiding Board member J N. Musto took the matters under advisement.

II. STANDARDS FOR REVIEW

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCPP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCPP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence,

such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCF Rule 12(b)(6) for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), (citing Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-403, 279 P.3d 55, 67-68 (App. 2012) (citing Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

III. RELEVANT STATUTORY PROVISIONS

HRS § 10.8(a) states:

[§89-10.8] Resolution of disputes; grievances. (a) A public employer shall enter into written agreement with the exclusive representative setting forth 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. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

(1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance;

(2) No employee in a position exempted from chapter 76, who serves at the pleasure of the appointing authority, shall be allowed to grieve a suspension or

discharge unless the collective bargaining agreement specifically provides otherwise; and

(3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding decision shall be made by a performance judge as provided in this section.

HRS § 89-13 states:

§89-13 Prohibited practices; evidence of bad faith. (a) 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;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

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

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

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

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

(9) Replace any nonessential employee for participating in a labor dispute; or

(10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

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

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

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

(5) Violate the terms of a collective bargaining agreement.

IV. DISCUSSION, CONCLUSIONS, AND ORDER

A. THE CE COMPLAINT IS DISMISSED, IN PART, FOR UNTIMELINESS; AND THE CU COMPLAINT IS DISMISSED IN ITS ENTIRETY FOR UNTIMELINESS.

1. Applicable Principles

The Hawaii appellate courts do not appear to have provided specific guidance regarding the burden of proof in such situations where the Respondent raises the issue of timeliness of complaint as a basis for a motion to dismiss. Accordingly, the Board turns to federal law interpreting the analogous Federal Rule of Civil Procedure 12(b)(1).ⁱⁱⁱ The Ninth Circuit has analyzed the respective burdens of the parties as, “Although ordinarily the [respondent] bears the burden of proving an affirmative statute of limitations defense, here the statute of limitations is jurisdictional, and ‘[w]hen subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1) the [complainant] has the burden of proving jurisdiction in order to survive the motion.’” Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008) (*quoting* Tosco Corp. v. Cmtys. For a Better Env’t, 236 F.3d 495, 499 (9th Cir. 2001);

Napier v. United States, 2013 U.S. Dist. LEXIS 20349, at *6 (D. Cal.) (*citing* Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008)).

The Board's jurisdiction is governed by HRS Chapters 89 and 377. HRS § 377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (Emphasis added) This provision is made applicable to prohibited practice complaints by HRS § 89-14. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This time requirement has been held jurisdictional and provided by statute, and may not be waived by either the Board or the parties. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *5-6 (October 3, 2014) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984) (failure to comply with the statute of limitations for unfair labor practice goes to the subject matter jurisdiction of the labor relations board)). In construing and applying this time limit requirement, the Board's approach has been to adhere to the principles that statutes of limitations are to be strictly construed; and that because time limits are jurisdictional, the defect of missing the deadline even by one day is unable to be waived. Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (1983); Cantan v. Dep't. of Evtl. Waste Mgmt., Board Case No. CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., Board Case No. CE-05-440, Order No. 1825, at *4 (12/13/99)). Lastly, in applying this requirement, the Board has conformed to the rule that the limitations period begins to run when "an aggrieved party knew or should have known that his [or her] statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Applying the foregoing principles to the CE and CU Complaints, the Board concludes that based on the filing date of November 14, 2016^{iv} of the complaints in this case, the significant 90-day limitations period runs from August 17, 2016 through November 14, 2016. Accordingly, the Board concludes as follows regarding the timeliness of the CE and CU Complaints.

2. CE Complaint

DOE Respondents in their First Motion to Dismiss argue that the trigger date for the limitations period ran from August 12, 2016, the date that of Arthur Souza's (Souza) non-renewal letter informing Complainant that he was upholding Principal Hackleberg's recommendation of non-renewal of her contract. The Board finds that while the non-renewal letter is dated on August 12, 2016, Complainant's Opposition to the DOE's First Motion to Dismiss is based on the exhibits attached and that the letter was mailed on August 15, 2016 (Ex.

1) and delivered on August 17, 2016 (Ex. 2). Complainant filed her CE Complaint on November 14, 2016 within the 90-day limitations period. Accordingly, the Board denies the First Motion to Dismiss insofar as the DOE Respondents are requesting dismissal of the allegation regarding the August 12, 2016 non-renewal letter and based on the date of August 12, 2016 as the date that Complainant knew or should have known.

However, regarding the remaining allegations relating to any other events or occurrences, which occurred prior to August 17, 2016, the Board grants the First Motion to Dismiss. Complainant argues that these violations are a series of violations culminating in the non-renewal letter. Upon a review of the CE Complaint, however, the Board concludes that there was no continuing violation as the allegations regarding DOE Respondents' conduct pre-dating August 17, 2016 were discrete occurrences involving different circumstances, issues, and DOE representatives. Nakamoto v. Dep't of Defense, Board Order No. 2010, Case No. CE-01-802, at * 15 (2013). Even reviewing the allegations of the CE Complaint in the light most favorable to the Complainant, the Board is compelled to dismiss the allegations of the CE Complaint other than those pertaining to the non-renewal letter, dated August 12, 2016, sent by Souza to Complainant and received on August 17, 2016.

Accordingly, the Board grants in part and denies in part DOE Respondents First Motion to Dismiss.

3. CU Complaint

The HSTA Motion to Dismiss, in part, also requests the Board to dismiss the CU Complaint for untimeliness based on the argument that the CU Complaint alleges that the HSTA failed to adequately represent Complainant on September 14, 2014. Therefore, the CU Complaint is untimely because of its filing well-outside the 90-days limitations period.

The Board recognizes the merit to HSTA's position based on the CU Complaint allegation that, "It is my contention that had HSTA given me appropriate representation in September 2014, none of this would have happened and I would still have a position as a Special Education Teacher." Even if the CU Complaint is viewed in the light most favorably to the Complainant to include the allegations regarding conduct of HSTA representatives occurring subsequent to September 2014, such as those referenced as occurring in February to May 2016, the Board still is required to grant HSTA's Motion to Dismiss based on the untimeliness of these events, which occurred outside of the 90-day limitation period from August 17, 2016 through November 14, 2016.

For these reasons, the Board grants in part and denies in part the HSTA's Motion to Dismiss based on untimeliness and dismisses the CU Complaint in its entirety.

B. THE REMAINING ALLEGATIONS IN THE CE COMPLAINT REGARDING THE NON-RENEWAL LETTER ARE DISMISSED FOR FAILURE TO EXHAUST CONTRACTUAL REMEDIES.

At the hearing on the DOE Second Motion to Dismiss, DOE Respondents argued that the allegations regarding the non-renewal letter, dated August 12, 2016, sent by Souza and received by Complainant on August 17, 2016 should be dismissed for a failure to exhaust. Complainant did not dispute this argument.

HRS § 89-10.8(a) requires 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, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement, and that the grievance procedure "shall be valid and enforceable[.]"

As required, the CBA Article V^v provides for a grievance procedure and defines a "grievance" as "Any Claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance."

CBA Article VIII P. states:

P. No teacher shall be adversely evaluated without proper cause, but only adverse evaluations used as the basis for any disciplinary action against a tenured teacher shall be subject to the Grievance Procedure.

Any adverse evaluation used as the basis for any disciplinary action against a probationary teacher shall be subject to the Grievance Procedure up to but not including arbitration.

The non-renewal of a probationary or non-tenured teacher contract shall be at the discretion of the Employer and shall not be subject to the Grievance Procedure except for procedural defects. A probationary or non-tenured teacher whose contract is not renewed shall be given an opportunity for a hearing with the principal and an Association representative present If desired by the teacher, prior to the principal's recommendation of nonrenewal.

(Emphases added)

Further, the Hawaii appellate courts have long held that a complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint. In a very early appeal from a decision of the Board's predecessor Hawaii Public Employment Relations Board (HPERB), the Hawaii Supreme Court (Court) in Santos v. Dep't of Transportation, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982), applied this principle to affirm the circuit court's reversal of HPERB's holding that the public employer in that case violated HRS § 89-13(a)(8) by violating a provision of the collective bargaining agreement. In so ruling, the Court cited and applied the general rule that before an individual can maintain an action against his or her employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the union, noting that, "[t]he rule is in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." The Santos Court then ruled:

[W]e hold that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement.

Id. at 655-656; 646 P.2d at 967 (citing Winslow v. State of Hawaii, 2 Haw. App. 50, 55, 625 P.2d 1046, 1050 (1981)). This principle has become a guiding principle in cases brought by public employees. *See, e.g., Poe v. Hawaii Lab. Rels. Bd.*, 97 Hawaii 528, 536, 40 P.3d 930, 938 (2002). In Poe v. Hawaii Lab. Rels. Bd., 105 Hawaii 97, 94 P.3d 652 (2004) (Poe), the Court, in holding that the Board did not err in determining that the complainant had failed to exhaust his remedies under the collective bargaining agreement, stated:

This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. 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. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. (Emphasis added)

Id. at 101, 94 P.3d at 656. (Citations and internal quotations omitted) The Poe Court further recognized that exceptions to the exhaustion requirement exist, such as when pursuing the

contractual remedy would be futile. *Id.* at 102, 94 P.3d at 657. However, there is no showing that such an exception exists in this case.

The Board has adhered to the principles set forth above and dismissed prohibited practice complaints for failure to exhaust contractual remedies. *See, e.g., Mussack v. Harano*, Decision No. 436, 6 HLRB 273, 277-78 (2002); *Hawaii Gov't Emp. Ass'n. v. Dep't of Human Resources Dev.*, Board Case No. CE-09-361, Order No. 1780, at *6 (1999).

Based on the record in this case, there is no dispute that: Complainant was a non-tenured teacher; based on CBA Article VIII. P that because “[t]he non-renewal of a probationary or non-tenured teacher contract shall be at the discretion of the Employer,” the only recourse for Complainant is to pursue the non-renewal through the CBA Article V for “procedural defects;” and finally, Complainant did not pursue a grievance on the non-renewal letter. Accordingly, Complainant failed to exhaust her remedies under the CBA regarding the non-renewal letter, and these allegations must be dismissed.

The Board grants in part and denies in part the DOE Respondents Second Motion to Dismiss for a failure to exhaust the CBA grievance process regarding Complainant’s non-renewal for which she received notice on August 17, 2016 by the August 12, 2016 letter from Arthur Souza.

Based on the Board’s rulings set forth above, the CE Complaint is dismissed in its entirety based on timeliness and failure to exhaust contractual remedies, and the CU Complaint is dismissed in its entirety based on untimeliness. Hence, the Board does not reach the merits of the consolidated cases.

ORDER

For all of the reason set forth above, the Board:

1. Grants in part and denies in part DOE Respondents First Motion to Dismiss by dismissing for untimeliness all of the allegations of the CE Complaint, except for those regarding the non-renewal noticed in the letter sent by Souza on August 12, 2016 and received by Complainant on August 17, 2016;
2. Grants in part and denies in part HSTA’s Motion to Dismiss by dismissing the CU Complaint based on untimeliness; and
3. Grants in part and denies in part DOE Respondents Second Motion by dismissing the allegations of the CE Complaint regarding the non-renewal noticed in the letter sent by Souza on August 12, 2016 and received by Complainant on August 17, 2016 for failure to exhaust her CBA remedies.

These consolidated cases are hereby dismissed and closed.

DATED: Honolulu, Hawaii, _____ December 16, 2016 _____.

HAWAII LABOR RELATIONS BOARD



Sesnita A.D. Moepono
SESNITA A.D. MOEPONO, Member

J.N. Musto
J.N. MUSTO, Member

c: Julie M. Candelaria-Lawrence
Vladimir Devens, Esq.
Keani Alapa, Esq.
W. Max Levins, Deputy Attorney General

¹ The DOE Respondents' attachments to the First Motion to Dismiss were submitted without authentication by declaration. The Complainant also attached documents to her Opposition without any authenticating declaration. Neither party raised any objection to the lack of declarations authenticating the opposing party's attachments. Accordingly, the Board will accept and consider the attachments of both parties in support of their respective pleadings.

ⁱⁱ CBA ARTICLE VIII – TEACHER PERFORMANCE, paragraph P states:

P. No teacher shall be adversely evaluated without proper cause, but only adverse evaluations used as the basis for any disciplinary action against a tenured teacher shall be subject to the Grievance Procedure.

Any adverse evaluation used as the basis for any disciplinary action against a probationary teacher shall be subject to the Grievance Procedure up to but not including arbitration.

The non-renewal of a probationary or non-tenured teacher contract shall be at the discretion of the Employer and shall not be subject to the Grievance Procedure except for procedural defects. A probationary or non-tenured teacher whose contract is not renewed shall be given an opportunity for a hearing with the principal and an Association representative present if desired by the teacher, prior to the principal's recommendation of nonrenewal.

ⁱⁱⁱ The Hawaii Supreme Court has adopted the approach that, “Where an appellate court has patterned a rule of procedure after an equivalent rule within the Federal Rules of Civil Procedure, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of a state court. Schefke v. Reliable Collection Agency, Ltd., 96 Hawaii 408, 431, 32 P.3d 52, 75 (2001).

^{iv} The Board notes that the record in this case shows that the CU Complaint was filed on November 14, 2016. As stated above, the initial CE Complaint was also filed on that date but was not on HLRB Form 4. However, in accordance with HAR § 12-42-8(g)(10)(C), the Board finds that the CE Complaint relates back to the November 14, 2016 date on which the initial CE Complaint was filed.

^v CBA Article V states:

ARTICLE V - GRIEVANCE PROCEDURE

A. DEFINITION

Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

B. GRIEVING PARTY

Only teachers or their certified bargaining representative shall have the right to institute and process grievances under this Article.

C. TIME LIMITS

All limits shall consist of school days, Monday through Friday, except that when a grievance is submitted on or after June 1, and before the first work day of the next school year, time limits shall consist of all week days, Monday through Friday, so that matters may be resolved before the close of the school term or as soon as possible thereafter. The number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process. There shall be no obligation by the Employer to consider any grievance not filed or appealed in a timely manner. The parties may mutually agree in writing to extend the twenty (20) day time limits to file a grievance at the informal step of the grievance procedure for a period not to exceed ten (10) days.

In the event that the Employer processes a complaint which may not be properly defined as a grievance as set forth, the Employer shall not be stopped from rejecting such complaint on that basis at a later date, except as provided in Section G-d, or refusing to process the complaint further provided that such disputes shall be provided under Section H-e.

Either party may seek a waiver to the timelines established in the grievance and arbitration procedures. The mutual agreement to waive the timelines and establish a new timeline must be in writing. If a time limit is missed and no written waiver exists, the parties will revert to the contractual timelines and move the grievance to the next level up to and including arbitration.

D. ASSOCIATION REPRESENTATION - RIGHT TO PRESENT A GRIEVANCE

Upon selection and certification by the Association, the Board shall recognize an Association grievance representative in each school on the following ratio: one (1) Association grievance representative for each school with up through one hundred (100) members of the bargaining unit; two (2) Association grievance representatives for schools with over one hundred (100) members of the bargaining unit.

An individual teacher of the bargaining unit may present a grievance at any time to the Employer and have the grievance heard without intervention of the Association, provided that the Association is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of this Agreement.

Insofar as possible, grievance investigation and handling will not interfere with classroom instruction. However, for grievance meetings beyond the school level, grievance representatives, individual grievants and other necessary parties in interest who are bargaining unit personnel shall be given release time as provided in Article XXVI during the day without loss of pay or benefits to attend such meetings if held during the work day.

Grievance meetings beyond the school day shall be held at times mutually convenient for the Employer and the grievant.

The Association will furnish in writing to the Superintendent a list of authorized Association grievance representative(s) in each school and maintain its currency.

E. INFORMAL DISCUSSION

Any teacher or the Association, in cases of an Association grievance, may institute a grievance by notifying the principal or immediate supervisor of such and shall meet with the principal or immediate supervisor on an informal basis for the purpose of discussing and attempting to settle the matter. When requested by the teacher, the Association grievance representative may intervene to assist.

F. MEDIATION

If a claim made by the Association or teacher of a violation, misinterpretation or misapplication of this Agreement has not been satisfactorily resolved at any Step of the grievance procedure, either party may present a written request for mediation to the other party. Upon receipt of the request, the receiving party shall respond in writing to the requesting party within five (5) days of receipt.

(1) The Department of Education (DOE) and the Association or teacher must mutually agree to submit a grievance to mediation. If the parties agree to submit a grievance to mediation, the time lines and procedures contained in this Agreement shall be suspended for no more than ten (10) days to accommodate the mediation process.

(2) Within five (5) days following the agreement by the DOE and the Association to mediate the grievance, the respective parties shall appoint a joint mediation team composed of one (1) DOE representative and one (1) Association representative. No mediation team shall be directly involved in representational matters within the district in which the grievance arose.

(3) The parties shall share equally the expenses of the mediation.

(4) The grievant shall have the right to be present at the mediation session(s).

(5) The mediators shall have the authority to caucus separately with either party, but shall not have the authority to compel the resolution of a grievance. The mediation process shall be limited to five (5) days from the date of selection, unless both parties mutually agree to extend this limit.

(6) Proceedings before the mediators shall be informal in nature. There shall be no formal rules of evidence, no transcript or any formal record of the conference(s) or meeting(s). The mediators shall be instructed not to make public any information relating to or arising from the mediation process.

(7) If no settlement is reached in mediation within the specified time limit, the Association or teacher shall notify the DOE of its intent to proceed with the next step of the grievance procedure and the grievance timeline shall be reinstated.

(8) In the event that a mediated grievance is appealed to the next step or arbitration, there shall be no reference to the fact that a mediation conference was or was not held.

G. STEP 1

(1) If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved, then the teacher or the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific term or provision of the Agreement allegedly violated and the remedy sought.

(2) The grievance must be presented to the CAS or Assistant Superintendent in the case of State Office teachers, in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved.

(3) The CAS or Assistant Superintendent in the case of State Office teachers shall hold a meeting within five (5) days of receipt of the grievance, for the purpose of obtaining evidence pertaining to the grievance and for the purpose of attempting to settle the matter. Attendance in the Step 1 meeting

shall be limited to all decision makers associated with the grievance (i.e. CAS/AS, PRO, principal/supervisor), the Association representative, and the grievant; unless otherwise mutually agreed upon. The decision will be in writing and delivered to the grieving party within five (5) days after the meeting.

(4) If the answer to the grievance in Step 1 meeting is not delivered within five (5) days or does not satisfactorily resolve the matter, then the Association may appeal such decision to arbitration. However, by mutual agreement between the association and the Superintendent or designee, the Association may appeal a grievance to Step 2.

H. STEP 2

(1) Any grievance involving suspensions, terminations, or class grievances shall be filed with the Superintendent or designee in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved. The Superintendent or designee shall hold a meeting within five (5) days.

(2) If by mutual agreement by the parties a grievance is appealed from Step 1 of the grievance procedure, the Superintendent or designee shall hold a meeting within five (5) days of receipt of the Step 2 grievance.

(3) The grievance must be set forth in writing on a form set forth in Appendix I and specifically state which portion of the answer to the grievance in Step 1 is being appealed and the remedy sought.

(4) The parties shall not have the right to present different allegations than those presented at the Step 1 meeting.

(5) The Superintendent or designee's answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the meeting.

I. ARBITRATION

If a claim made by the Association or teacher has not been satisfactorily resolved, the Association may present a request for arbitration of the grievance within ten (10) days after the receipt of the decision.

(1) Representatives of the parties shall immediately attempt to select an arbitrator. If the parties have not appointed an arbitrator within two (2) weeks from the receipt of the request for arbitration, the parties will request from the Hawaii Labor Relations Board a list of five (5) names from the register of arbitrators.

The arbitrator shall be chosen by the parties by alternately striking one (1)

name at a time from the list. The first party to scratch a name shall be determined by lot. The arbitrator whose name remains on the list shall serve for that case. By mutual agreement, the parties may select a permanent umpire to serve on all cases.

The arbitration hearing shall commence within forty-five (45) days from the Association's official notification to the Employer that the case is going to arbitration. The parties may mutually agree to a written waiver of the timelines. The arbitrator(s) to be selected must agree to the schedule. In making a decision on a case, the arbitrator shall not have the authority to consider any facts not in evidence, nor shall the arbitrator add to, subtract from, delete, or in any way amend or modify any term or condition of the Collective Bargaining Agreement. The arbitrator's decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.

(2) The voluntary labor arbitration rules of the American Arbitration Association as amended and in effect during the life of this Agreement shall apply to the proceedings except as otherwise provided herein or as otherwise amended by mutual agreement.

(3) The arbitration shall comply with the American Arbitration Association time limits unless the parties agree in writing to a waiver. The waiver shall not extend the timelines beyond six (6) months. If there are extraordinary circumstances, the arbitrator may request a waiver. This provision shall be provided to the arbitrator before his agreement to arbitrate.

(4) The fees and expenses of the arbitrator shall be shared equally by the Employer and the Association, including the cost of the arbitrator's transcript if one is requested by the arbitrator. Each party will pay the cost of presenting its own case.

(5) If the Employer 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 not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.

(6) 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 teacher wholly or partially for any salary lost. Such back pay award shall be offset by all other compensation received by the grievant(s) including but not limited to unemployment compensation or wages.

(7) The Arbitrator shall not consider different allegations than those presented at the Step 1 and Step 2 meeting.

J. The Employer acknowledges the right of the Association's grievance representative to represent any grievant at any level if so requested by the grievant.

K. The Employer and Association by mutual written agreement may waive Steps 1 and 2 of the Grievance Procedure and proceed with arbitration. In addition, the parties may voluntarily and mutually agree to mediation at any time prior to arbitration.

L. No reprisals of any kind will be taken by the Employer or the school administration against any teacher because of his/her participation in this Grievance Procedure.

M. All documents, communication and records dealing with the processing of a grievance will be filed separately from the personnel files of the participants.

N. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.

O. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure.

P. Expedited Grievances: Mediation or an expedited grievance procedure shall be used for class grievances, suspensions, and or terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

Q. Arbitration: If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

Case Nos. 16-CU-05-346, 16-CE-05-888 – Candelaria-Lawrence v. HSTA, et.al. - ORDER GRANTING IN PART AND DENYING IN PART DEPARTMENT OF EDUCATION RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED NOVEMBER 14, 2016; GRANTING IN PART AND DENYING IN PART RESPONDENT HAWAII STATE TEACHERS ASSOCIATION'S MOTION TO DISMISS COMPLAINANT'S PROHIBITED PRACTICE COMPLAINT [FILED ON 11/14/16]; AND GRANTING IN PART AND DENYING IN PART RESPONDENTS', DEPARTMENT OF EDUCATION, MARK HACKLEBERG, HANNAH LOYOLA, AND GENA BONACORRSI, SECOND MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED NOVEMBER 14, 2016

Order No.: 3218

