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Case No. 17-CE-10-900, 17-CU-10-356**

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

CRAIG PINKNEY,

Complainant,

and

DEPARTMENT OF PUBLIC SAFETY,  
HAWAII COMMUNITY CORRECTIONAL  
CENTER, STATE OF HAWAII,

Respondent.

CASE NO.: 17-CE-10-900

ORDER NO. 3308

ORDER DENYING COMPLAINANT'S MOTION TO EXTEND THE HEARING ON THE MERITS; ACCEPTING COMPLAINANT'S FILING OF A 1<sup>ST</sup> AMENDED PROHIBITED PRACTICE COMPLAINT DATED OCTOBER 13, 2017 AS A FIRST MOTION TO AMEND PROHIBITED PRACTICE COMPLAINT FILED IN CASE NO. 17-CE-10-900 AND GRANTING COMPLAINANT'S FIRST MOTION TO AMEND PROHIBITED PRACTICE COMPLAINT FILED IN CASE NO. 17-CE-10-900; DENYING RESPONDENT DEPARTMENT OF PUBLIC SAFETY'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017 IN CASE NO. 17-CE-10-900; AND DENYING COMPLAINANT'S SECOND MOTION TO AMEND PROHIBITED PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017 IN CASE NO. 17-CU-10-356

In the Matter of

CRAIG PINKNEY,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO,

Respondent.

CASE NO.: 17-CU-10-356

ORDER DENYING COMPLAINANT’S MOTION TO EXTEND  
THE HEARING ON THE MERITS; ACCEPTING COMPLAINANT’S  
FILING OF A 1<sup>ST</sup> AMENDED PROHIBITED PRACTICE COMPLAINT  
DATED OCTOBER 13, 2017 AS A FIRST MOTION TO AMEND  
PROHIBITED PRACTICE COMPLAINT FILED IN CASE NO. 17-CE-10-900  
AND GRANTING COMPLAINANT’S FIRST MOTION TO AMEND  
PROHIBITED PRACTICE COMPLAINT FILED IN CASE NO. 17-CE-10-900;  
DENYING RESPONDENT DEPARTMENT OF PUBLIC  
SAFETY’S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT  
FILED ON OCTOBER 2, 2017 IN CASE NO. 17-CE-10-900; AND DENYING  
COMPLAINANT’S SECOND MOTION TO AMEND PROHIBITED  
PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017 IN CASE NO. 17-CU-10-356

I. BACKGROUND AND FINDINGS OF FACT

On October 2, 2017, Complainant CRAIG PINKNEY (Complainant or Pinkney), a self-represented litigant (SRL), filed a prohibited practice complaint against Respondent DEPARTMENT OF PUBLIC SAFETY, HAWAII COMMUNITY CORRECTIONAL CENTER, State of Hawaii (PSD, Employer, or Respondent) in Case No. 17-CE-10-900 (CE Complaint and CE Case, respectively) alleging, among other things, that: Hawaii Community Correctional Center (HCCC) under Warden Peter Cabrerros (Cabrerros) failed to supply all video and documents to his union in support of grievance cases #MH-17-01 and #MH-17-01A; that in 2015, there were three incidents in which an inmate was highly intoxicated with numerous drugs; that Complainant was involved in the third occurrence, in which the inmate suffered minor abrasions after struggling with five adult correctional officers (ACOs) and was placed in a cell until medical arrangements could be made to address his condition because the jail had no medical staff present at the time of the incident; the inmate proceeded to intentionally injure himself, which was witnessed and documented by other ACOs; the PSD refused to arbitrate this situation but allowed the other ACOs involved in two similar incidents within the same year to mitigate their discharge to a 30-day suspension; and PSD refused to follow past practices, continues to violate his due process rights, and to support discriminatory behavior of its administrative employees.

Also, on October 2, 2017, Pinkney, SRL, filed a prohibited practice complaint against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW, Union, or Respondent) in Case No. 17-CU-10-356 (CU Complaint and CU Case, respectively) alleging, among other things, that: the UPW has supported his former employer’s violation of his right to due process as an employee of a public agency; failed to represent Complainant in violation of Hawaii Revised Statutes (HRS) § 89-13; Complainant’s business agent refused to submit all of the evidence that Complainant gave her, reasoning that it was not legal to use recorded evidence that Complainant legally obtained under federal law, 18 U.S.C. § 2511(2)(d); in response to Complainant’s request to have the enclosed disc presented on his behalf, the business agent

stated that the Union's practice is not to bring into evidence information collected without all parties being aware of the recording; there is no legal requirement compelling the Union to omit and prevent evidence from being considered for the purpose of clearing him from work related allegations; UPW has acted in a discriminatory manner by disallowing all of Pinkney's evidence to be considered prior to making the decision not to take his grievance cases (#MH-170 and #MH-17-01A) to arbitration; the Union informed Complainant that three incidents occurred in 2015 with his case being the third matter with similar conditions; the ACOs involved in the other two incidents had their discharge mitigated to a 30-day suspension with Union assistance; and the Union's refusal indicates an unwillingness to follow past practice.

On October 5, 2017, the Union filed a MOTION FOR JOINDER OF THE DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII (EMPLOYER) AS RESPONDENT in the CU Case based on PSD's interest as a public employer in the dispute or controversy presented by the CU Complaint and that the absence of the State (PSD) as a Respondent creates a substantial risk of incurring inconsistent obligations because of the State (PSD)'s and UPW's claimed interests.

On October 11, 2017, UPW filed RESPONDENT UPW'S ANSWER TO THE COMPLAINT FILED ON OCTOBER 2, 2017 (UPW Answer).

On October 11, 2017, PSD filed RESPONDENT STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017 (PSD Answer).

On October 12, 2017, PSD filed RESPONDENT STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017 (PSD Motion to Dismiss) for failure to: state a prohibited practice under HRS § 89-13; exhaust administrative remedies; and show that the Union breached its duty of fair representation before filing the CE Complaint.

On October 12, 2017, the Board issued ORDER NO. 3295 CONSOLIDATING CASES AND DENYING UPW'S MOTION FOR JOINDER; AND NOTICE OF CONSOLIDATED HEARING, which consolidated the CU and the CE Cases for hearing and disposition and denied the Motion for Joinder as moot.

On October 13, 2017, the Complainant filed a 1<sup>ST</sup> AMENDED PROHIBITED PRACTICE COMPLAINT in the CE Case (proposed CE Amended Complaint) alleging violations of HRS § 89-13(a)(1)-(10) and (b)(1)-(5) by PSD, HCCC, and Cabrerros, and, among other things, alleged the following facts verbatim:

The Hawaii Department of Public Safety [DPS], Hawaii Community Correctional Center [HCCC] and Warden Peter Cabrerros acted in a negligent, malicious and willful manner, when they intentionally refused to follow their own policies and procedures in relation to investigating alleged use of excessive force violations and dishonesty allegations stemming from the incident that involved inmate KAILI, CHAWN and Adult Correctional Officers [ACO's} Pinkney, Demattos, Tagaloa, and Taum on June 15th, 2015 .

A willfully and deliberately intentional refusal by DPS, HCCC, and Cabrerros has led to a misrepresentation of facts during an investigation of the alleged actions that have never been proven to be factual during any administrative investigation which included alleged excessive use of force violations, dishonesty and other allegations that led to the termination of myself. I, Craig Pinkney requested that the matter be addressed by the grievance process contained within the United Public Workers [UPW] Bargaining unit 10 contract, with the employer DPS.

As a result of my request to grieve the matter it was assigned the grievance case number of MH-17-01 and a second grievance MH-17-01 for the departments failure to adhere to the timeliness requirements contend within the above-mentioned contract.

Between June 15th, 2015 and December 23rd, 2016, The employer deliberately and willfully violated Hawaii Revised Statutes, section 89-13 when they willfully committed the following violations under HRS 89-13 and continue to said violations[.]

The proposed CE Amended Complaint alleged verbatim more specific factual claims against the Employer regarding HRS § 89-13[(a)]<sup>i</sup> (1), (2), (5), (6), (7), and (8) violations, including but not limited to the following:

1. The employer willfully Interfered with an investigation and deliberately choose to, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
2. When the employer dominated, interfered, or assist in the formation, existence, or administration of any employee organization; by refusing to reach impasse and when intentional omissions were made in order to support their allegations rather than the facts.
5. When the employer refused to bargain collectively in good faith with the exclusive representative as required in section 89-9
6. When the employer refused 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;

The proposed CE Amended Complaint further alleged more specific factual allegations regarding HRS § 89-13(b)(1), (3), (4), and (5) violations against the Employer and a request for remedies, including make whole remedies, declaratory and injunctive relief, a cease and desist order against the Employer from further similar actions, punitive damages, and other appropriate relief.

On October 14, 2017, Complainant filed a 2<sup>nd</sup> Amended Prohibited Practice Complaint (proposed CU Amended Complaint) alleging verbatim, among other things, that:

On June 15th 2015, myself and numerous other adult correctional officers encounter an inmate [Inmate]<sup>ii</sup> who was high on three illegal substances. The department of public safety has never provided training to any of its employees relating to how to address any individual that is high on drugs and what actions to take if our training proves to be ineffective in addressing a situation in which an inmate repeatedly refuses to comply with lawful orders and is non responsive to all of the training elements that are utilized to control said person and the [UPW] union is well aware of the training that is received by all adult correctional officers. I was discharged from my employment with the department of public safety as a result of a flawed investigation on December 23, 2016, but received notice on January 4, 2017 that the investigation was complete and that I did not supply enough evidence to overturn the departments previous decision to discharge myself and others. The union did acknowledge all of the violations of the bargaining unit 10 contract, but refuses to take the matter to arbitration, which is in violation of my due process, past paractices and is utilized to condone and support the (b department of public safety's illegal actions taking against myself as it relates to the discharge of a public employee.

As a result of my request to grieve the matter it was assigned the grievance case number of MH-17-01 and a second grievance MH-17-01A for the departments of public safety's failure to adhere to the timeliness requirements contained within the above-mentioned contract.

Between June 15th, 2015 and December 23rd, 2016, the [UPW] union deliberately and willfully violated Hawaii Revised Statutes, section 89-13 when they willfully committed the following violations under HRS 89-13 and continue to said violations:

The proposed CU Amended Complaint further alleged more specific violations of HRS §§ 89-13[(a)]<sup>iii</sup>(1), (2), (5), (6), (7), and (8) and HRS § 89-13(b)(1), (2), (4), and (5) against the UPW and relied on different factual allegations from the original CU Complaint. The HRS § 89-13(b) allegations verbatim, included but are not limited to the following:

1. The employee organization Interfered, restrained, or coerced any employee in the exercise of any right guaranteed under this chapter;

When the [UPW] union failed to gather all information pertaining to the event in question, they were unable to perform a fair and unbiased investigation that would have established a just cause for dismissal.

2. The [UPW] union refused to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;  
Evidence of this is provided within the letter from the union to employee that advises that the grievance is being withdrawn from arbitration.
4. The [UPW] union refused or failed to comply with any provision of this chapter; or
5. Violated the terms of a collective bargaining agreement.

The proposed CU Amended Complaint further alleged facts in support of the CBA violation claims, including but not limited to that the Union refused to consider mitigating factors associated with the investigation, follow past practices, and establish just cause for dismissal; that the Union failed to consider other witness statements and expert testimony presented at the pre-discharge hearing, and that Pinkney was never disciplined prior to termination and not allowed progressive discipline; and that the Union failed to prove any alleged violation of rule, law, policy, procedure, or common practice by Pinkney, acknowledge the inmate's statement that he injured himself, which were consistent with other ACO's observations, and to dispute the employer's violation of Pinkney's due process.

The proposed CU Amended Complaint further alleged verbatim that the Union and the Employer violated the UPW unit 10 contract:

Section 1, including but not limited to, by failing to negotiate with the union when formulating and implementing personnel policies, practices and any matter affecting working conditions, changes which were made without mutual consent.

Section 11, including but limited to, the employer failed to provide just and proper cause in imposing disciplinary action of discharge against Craig Pinkney and not considering all evidence presented at the December 20, 2016 Pre-Discharge Hearing.

Section 14, including but not limited to, by failing to recognize that nothing in this Agreement shall be construed as abridging, amending, or waiving any rights, benefits or perquisites presently covered by constitutions, statutes or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this agreement.

Section 61, including but not limited to the Employer/Union MISAPPLIED this section.

[All information was collected legally and is available for evidence, the UPW unions suggestion that such evidence is illegally obtained is totally baseless, all audio recordings are in compliance with all recording laws applicable to this matter].

Finally, the proposed CU Amended Complaint requested remedies, including but not limited to make whole remedies, including rescission of the discharge and removal of the reference from his official personnel file, declaratory and injunctive relief, a cease and desist order, punitive damages, a request to select other attorneys to defend this matter in arbitration, payment of all expenses incurred (legal, transportation, shelter, and food), and other appropriate relief.

On October 15, 2017, Complainant filed CRAIG PINKNEY'S OBJECTION TO UNITED PUBLIC WORKERS [sic] MOTION TO DISMISS;<sup>iv</sup> and on October 15, 2017, Pinkney filed CRAIG PINKNEY'S OBJECTION TO THE DEPARTMENT OF PUBLIC SAFETY'S AND UPW'S MOTION TO DISMISS. These Objections are very similar and appear to address the defenses raised in the UPW and PSD Answers to the CU Complaint and the CE Complaints.

On October 15, 2017, Complainant filed CRAIG PINKNEY'S MOTION TO REQUEST IN PERSON HEARING IN HILO, HAWAII requesting that the Board hold a hearing and that all parties involved in the CE Case and the CU Case appear in Hilo, Hawaii. In support, Pinkney represented that he is undergoing medical procedures discouraging air travel, would be subjected to substantial risk of medical harm, financial difficulty, and possible loss of employment if forced to participate in person at hearings in Honolulu, Hawaii.

On October 26, 2017, the Board issued ORDER NO. 3298 ACCEPTING COMPLAINANT'S FILING OF A 2<sup>ND</sup> AMENDED PROHIBITED PRACTICE COMPLAINT DATED OCTOBER 14, 2017 AS A SECOND MOTION TO AMEND THE PROHIBITED PRACTICE COMPLAINT; NOTICE OF HEARING ON (1) RESPONDENT STATE OF HAWAI'I, DEPARTMENT OF PUBLIC SAFETY'S MOTION TO DISMISS PROHIBITED

PRACTICE COMPLAINT FILED ON OCTOBER 2, 2017, (2) COMPLAINANT'S SECOND MOTION TO AMEND THE PROHIBITED PRACTICE COMPLAINT AND LOCATION CHANGE OF HEARING ON THE MERITS (Order No. 3298). Order No. 3298 confirmed the Board's prior oral ruling issued during the October 23, 2017 Prehearing Conference accepting the CU Amended Complaint as a 2<sup>nd</sup> Motion to Amend the CU Complaint; set a deadline for Respondents' response for October 30, 2017; and ordered a hearing on the PSD Motion to Dismiss and the 2<sup>nd</sup> Motion to Amend CU Complaint at the commencement of the Hearing on the Merits (HOM) on November 8, 2017 and that the HOM would be recessed pending the Board's deliberation and rulings regarding the motions; and providing that all other matters, including previously set deadlines would be suspended and subject to future notice, subsequent to the Board's decisions on the motions; and provided notice of the HOM and the hearing on the motions on November 8, 2017 in Hilo, Hawaii.

On October 30, 2017, UPW filed RESPONDENT UPW'S MEMORANDUM IN OPPOSITION TO MOTION TO AMEND PROHIBITED PRACTICE COMPLAINT (UPW Opposition to CU Amended Complaint). In its Opposition, UPW requests denial of the 2<sup>nd</sup> Motion to Amend the CU Complaint, contending that occurrences alleged in the CU Amended Complaint prior to July 4, 2017 are untimely and beyond the Board's jurisdiction; an amendment including allegations that the Union violated HRS § 89-13(a)(1)-(10) should be denied for futility due to the failure to state a claim for relief; and the CU Amended Complaint fails to state a claim under HRS 89-13(b)(1)-(5).

PSD filed no opposition to either the proposed CE Amended Complaint or the proposed CU Amended Complaint.

On October 30, 2017, UPW further filed a MOTION TO ALLOW UNION RESPONDENT'S COUNSEL TO APPEAR VIA TELECONFERENCE ON NOVEMBER 8, 2017 because counsel has another engagement on Oahu.

On November 2, 2017, the Board issued ORDER NO. 3301 GRANTING MOTION TO ALLOW UNION RESPONDENT'S COUNSEL TO APPEAR VIA TELECONFERENCE ON NOVEMBER 8, 2017; ORDER ALLOWING RESPONDENT DEPARTMENT OF PUBLIC SAFETY, HAWAII COMMUNITY CORRECTIONAL CENTER, STATE OF HAWAII TO APPEAR VIA TELECONFERENCE ON NOVEMBER 8, 2017. This Order further noted that Complainant refused the Board's Executive Officer's request to the parties to stipulate to waive the forty-day requirement set forth in HRS § 377-9(b) and Hawaii Administrative Rules (HAR) § 12-42-46(b) to allow the parties to appear via teleconference for the November 8, 2017 hearing. Therefore, the Board would proceed with the HOM as noticed in Order No. 3298.

On November 6, 2017, however, Pinkney filed CRAIG PINKNEY'S MOTION TO EXTEND THE NOVEMBER 8, 2017 HEARING ON THE MERITS (Motion to Extend HOM),

requesting that the November 8, 2017 hearing be rescheduled to allow his recently obtained counsel time to review the document and prepare for the HOM. Complainant further waived the 40-day requirement because his attorney was unavailable for the hearing.

On November 8, 2017, the Board held a hearing in Hilo, Hawaii, on the Motion to Extend the HOM, the Second Motion to Amend the CU Complaint, and the PSD Motion to Dismiss. At the hearing, the Board orally denied the Motion to Extend the HOM and the Second Motion to Amend the CU Complaint. Finally, the Board heard the PSD Motion to Dismiss and orally took the matter under advisement.

## II. STANDARDS OF REVIEW

### A. Motion to Amend

The grant or denial of a motion to amend under Hawaii Rules of Civil Procedure (HRCP)<sup>v</sup> Rule 15(a) is within the discretion of the Board and will be reviewed under the abuse of discretion standard. Bishop Trust Co. v. Kamokila Dev. Corp., 57 Haw. 330, 337, 555 P.2d 1193, 1198 (1976); Gonsalves v. Nissan Motor Corp. in Hawaii, 100 Hawai'i 149, 158, 58 P.3d 1196, 1205 (2002).

“Rule 15 (a)<sup>vi</sup> declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [the plaintiff] ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be ‘freely given.’” Forman v. Davis, 371 U.S. 178, 182 (1962). (Citations omitted)

### B. Motion to Dismiss

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the HRCP Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP 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 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000);

Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP 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 Hawai‘i 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 Hawai‘i at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawai‘i 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 Hawai‘i 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 Hawai‘i at 406, 198 P.3d at 669.

### III. CONCLUSIONS OF LAW

#### A. Motion to Extend the HOM

At the November 8, 2017 hearing on the Motion to Extend the HOM, the Board orally denied the Motion to Extend and disregard the 40-day requirement for several reasons, which are incorporated into this written order. First, as noted in Board Order No. 3301, prior to making this Motion to Extend, Pinkney had already refused the Board’s Executive Officer’s request to stipulate to waive the 40-day requirement to allow the parties to appear by teleconference. Second, while Complainant represented that the extension was necessary for his newly obtained counsel to have time to review the documents and prepare for the HOM, no counsel entered an appearance by the close of business on the day prior to the hearing. Third, under HAR § 12-42-8(g)(3)(C)(iii), Respondents are required to be given five days from the filing of the Motion to Extend to file a response (by November 14, 2017), which as of the commencement of the HOM had not elapsed. For these reasons, the Board ordered that the HOM was required to begin on November 8, 2017 as scheduled, and the Motion to Extend was moot.

#### B. First Motion to Amend the CE Complaint (proposed 1<sup>st</sup> Amended Complaint)

The proposed CE Amended Complaint was filed on October 13, 2017. At the November 8, 2017 HOM, the Board clarified based on Complainant's representations that the 1st Amended Prohibited Practice Complaint (CE Amended Complaint) was a proposed amendment to the CE Complaint. The Board, therefore, accepts Complainant's filing of the 1<sup>st</sup> Amended Complaint as a First Motion to Amend the CE Complaint (First Motion to Amend)

Under HAR § 12-42-8(g)(3), an opposition to the filing of a motion to amend the complaint is due within five days after service of the motion papers, unless the Board directs otherwise. Even assuming the November 8, 2017 HOM was the date that PSD was notified of the proposed CE Amended Complaint, any opposition was due on November 15, 2017 to meet the five-day filing requirement of HAR § 12-42-8(g)(3). PSD has filed no opposition.

Accordingly, based on PSD's lack of opposition to the proposed CE Amended Complaint on any of the grounds set forth in HRCF Rule 15(a) (undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility) warranting the denial of a motion to amend, the Board grants the First Motion to Amend and orders Complainant to file a copy of the CE Amended Complaint (1<sup>st</sup> Amended Complaint that was filed on October 13, 2017) by the deadline ordered below.

C. Motion to Dismiss the CE Complaint

As stated above, PSD filed its Motion to Dismiss the CE Complaint on October 12, 2017. On October 13, 2017, Pinkney filed his proposed CE Amended Complaint. In this Order, the Board has treated the filing as a First Motion to Amend the CE Complaint, which has been granted.

An amended complaint supersedes the original complaint and renders the original complaint of no legal effect. Jou v. Siu, 2013 Haw. App. LEXIS 171, at \*9 (Haw. App.) (*citing Beneficial Hawai'i, Inc. v. Casey*, 98 Hawai'i 159, 167, 45 P.3d 359, 367 (2002)). Accordingly, as the CE Amended Complaint supersedes the CE Complaint, which ceases to exist; and as the PSD Motion to Dismiss targeted the CE Complaint no longer in effect, the Board concludes that the Motion to Dismiss is moot.

The Board, therefore, denies the Motion to Dismiss. Ramirez v. County of San Bernadino, 806 F.3d 1002, 1008 (9<sup>th</sup> Cir. 2015); *see also*, Lizza v. Deutsche Bank Nat'l Trust Co., 2014 U.S. Dist. LEXIS 91509, at \*3 (D. Haw. 2014).

D. Second Motion to Amend the CU Complaint (2<sup>nd</sup> Amended Complaint)

Based on Complainant's representations at the November 8, 2017 hearing, the Board clarified that the proposed 1<sup>st</sup> Amended Complaint was filed against the Employer, and the

proposed 2<sup>nd</sup> Amended Complaint was filed against the Union. The Board noted the Union's concern that if the proposed 2<sup>nd</sup> Amended Complaint is accepted, then the original CU Complaint with claims against both the Union and the Employer would not go forward; and the Employer would be eliminated. Pinkney maintained his intention was to allege claims against both the Union and the Employer; and that the purpose of the proposed 2<sup>nd</sup> Amended Complaint was to allege the breach of the duty of fair representation against the Union for a failure to request and preserve all evidence for use in the hearing or investigation, including the business agent's unwillingness to use evidence that she said was illegally obtained without knowledge of how Complainant obtained it; seek enforcement of the grievance process; and request a remedy.

In opposing the Motion to Amend the CU Complaint, the UPW relied on the federal court standards for determining whether to grant or deny motions to amend complaints, which provide that leave to amend should, as the rules require, be "freely given" absent undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice, or futility. In support, the UPW argues that the Board lacks jurisdiction over many aspects of the claims presented by Pinkney in the [proposed] CU Amended Complaint for untimeliness because there are occurrences and incidents, which happened more than 90-days from October 2, 2017, the date of the filing of the CU Complaint, and allegations that the Union violated HRS § 89-13 "between June 15<sup>th</sup>, 2015 and December 23<sup>rd</sup> 2016". The UPW further contends that the [proposed] HRS § 89-13(a) allegations against the Union fail to state a claim for relief rendering amendment of the complaint "futile" because this statutory provision applies only to the conduct of a "public employer". Finally, the Union argues that the [proposed] CU Amended Complaint fails to state a claim under HRS § 89-13(b)(1)-(5) because there is no factual or legal basis alleged for any claim for relief. At the Motions hearing, the UPW reiterated and further supported these grounds by asserting that Pinkney lacks standing to allege HRS § 89-13(a)(1)-(10) violations against the UPW. PSD took no position on this Motion to Amend. Pinkney responded that he is bound by the CBA making UPW the exclusive bargaining agent, and that the significant event was his receipt of the notice of intent to arbitrate on September 25, 2017 and that filing during the period between December 23, 2016 and September 25, 2017 would have been premature. The Union contended that this response was a misunderstanding of the law because Pinkney could have filed a claim of interference with employee rights against both Respondents but did not do so in the period June 15, 2015 through July 4, 2017, which is the beginning of the 90-day limitations period and that while the claim for the decision not to arbitrate was timely in the CU Complaint, the allegations in the [proposed] CU Amended Complaint regarding other occurrences have nothing to do with that decision. After hearing the Second Motion to Amend the CU Complaint (2<sup>nd</sup> Amended Complaint), the Board orally denied the Second Motion to Amend, which is incorporated into this written order.

The Board is compelled to agree with the UPW regarding the Second Motion to Amend the CU Complaint. The Board finds that the proposed CU Amended Complaint contains

allegations over which the Board would have no jurisdiction for untimely filing, including the alleged violations between June 15, 2015 and December 23, 2016. Further, the proposed allegations of violations of HRS § 89-13(a)(1)-(10) by the Union fail to state a claim because only the Employer can violate these provisions, resulting in an absence of law to support these claims or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. Fuddy, 4 Haw. App. at 215, 664 P.2d at 749. Finally, while the Union is subject to violations of HRS § 89-13(b)(1)-(5), some of those proposed alleged violations fail to state a claim, such as the HRS § 89-13(b)(3) violation, which the Board has held is inapplicable to prohibited practice cases brought by individual public employees and to grievance arbitrations. *See, e.g., LePere v. Waihee*, Board Case No. CE-0-132, 5 HLRB 263, 272 (2/8/94); *Stucky v. Takeno*, Board Case No. CU-05-283, Order No. 2834, at \*12 (3/15/2012). In short, the Board concludes that the Second Motion to Amend the CU Complaint must be denied for futility.

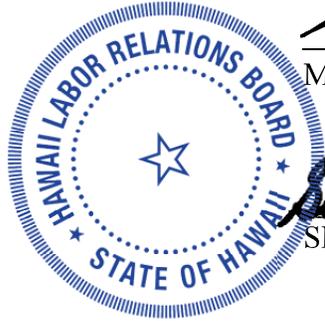
### ORDER

For the reasons set forth above, the Board:

1. Denies the Complainant's motion to extend the November 8, 2017 HOM;
2. Accepts Complainant's filing of the proposed 1<sup>st</sup> Amended Prohibited Practice Complaint (proposed CE Amended Complaint) as the First Motion to Amend the CE Complaint in Case No. CE-10-900 and orders the Complainant to file and serve upon all parties a copy of the CE Amended Complaint (1<sup>st</sup> Amended Complaint that was filed on October 13, 2017) by December 13, 2017;
3. Orders PSD to file its Answer to the CE Amended Complaint within ten (10) days after receipt of service;
4. Denies the PSD Motion to Dismiss for mootness; and
5. Denies the Complainant's Second Motion to Amend the CU Complaint in Case No. CU-10-356.

DATED: Honolulu, Hawaii, November 6, 2017.

HAWAII LABOR RELATIONS BOARD





MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



N. MUSTO, Member

Copies to:

Ted Hong, Esq.

Henry S. Kim, Deputy Attorney General

Herbert R. Takahashi, Esq.

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<sup>i</sup> The CE Amended Complaint erroneously cited to HRS § 89-13(1), (2), (5), (6), (7), and (8), which should be HRS § 89-13(a)(1), (2), (5), (6), (7), and (8).

<sup>ii</sup> The pleading contains the individual's name, which has been removed here.

<sup>iii</sup> See note i, *supra*.

<sup>iv</sup> The Board notes that there is no record that the UPW filed a Motion to Dismiss.

<sup>v</sup> When its own rules are silent on procedural matters, the Board has applied the HRCP. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1(CE), Order No. 1978, at \*5 (January 11, 2001).

<sup>vi</sup> Forman was interpreting the Federal Rules of Civil Procedure Rule 15(a) in articulating these principles. The Board has looked to analogous Federal Rule of Civil Procedure to guide its interpretation and application of the Hawaii Rules of Civil Procedure. See, e.g., Nakamoto v. Dep't of Defense, Board Case No. CE-01-801, Order No. 2010, at \*14 (5/1/13).

Case Nos. 17-CE-10-900, Pinkney and Dept. of Public Safety; and 17-CU-10-356, Pinkney and United Public Workers – Order Denying Complainant's Motion to Extend the Hearing on the Merits; Accepting Complainant's Filing of a 1<sup>st</sup> Amended Prohibited Practice Complaint Dated October 13, 2017 as a First Motion to Amend Prohibited Practice Complaint Filed in Case No. 17-CE-10-900 and Granting Complainant's First Motion to Amend Prohibited Practice Complaint Filed in Case No. 17-CE-10-900; Denying Respondent Department of Public Safety's Motion to Dismiss Prohibited Practice Complaint Filed on October 2, 2017 in Case No. 17-CE-10-900; and Denying Complainant's Second Motion to Amend Prohibited Practice Complaint Filed on October 2, 2017 in Case No. 17-CU-10-356.

Order No. 3308