EFiled: Jun 22 2015 01:35PM HAST
Transaction ID 57442686
Case No. CU-10-331

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEROY MAMUAD, Complainant, and DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-10-331 ORDER NO. 3070 ORDER SETTING HEARING ON PROHIBITED PRACTICE COMPLAINT; NOTICE OF SECOND PREHEARING/ SETTLEMENT CONFERENCE

ORDER SETTING HEARING ON PROHIBITED PRACTICE COMPLAINT

On November 24, 2014, Complainant Leroy Mamuad (Complainant or Mr. Mamuad) filed a prohibited practice complaint (Complaint) as a self-represented litigant (SRL or *pro se*), against Dayton Nakanelua (Mr. Nakanelua or Respondent), State Director for the United Public Workers, AFSCME, LOCAL 646, AFL-CIO (UPW or Union), with the Hawaii Labor Relations Board (Board or HLRB). Paragraph 5 Allegations of the Complaint states verbatim:

> Complainant charges a violation of Hawaii Revised Statutes (HRS) Section 89-13(b)(1), (4), and (5) and a breach of duty of fair representation by failing to represent me when I repeatedly asked for representation relating to the termination of employment. My business agent Melanie Sato (UPW) said she would begin the process of recommending arbitration. In the middle of July, Melanie Sato called me and informed me that the paperwork for my arbitration was given to Maui UPW Director Lahela Aiwohi. Aslo [sic] she believed that same week Lahela traveled to Oahu and hand delivered he [sic] paperwork to the Oahu UPW office. A month later Melanie called me and informed me that my paperwork for arbitration is still on Maui on Lahela's desk. Also Melanie said Lahela is NOT recommending arbitraion [sic] because the UPW has just represented someone on Molokai with similar accusations and lost the arbitration. The difference between both cases is that the person on Molokai got Convicted

[sic] in court and I got my charges expunged. If the UPW can represent someone who got convicted in a court of law, they should represent me who got the charges expunged and won an appeal from the unemployment department[.][i]

The Complaint had attachments of a February 25, 2014 letter from Ted Sakai (Sakai), Director of the Department of Public Safety, State of Hawaii (PSD or Employer), to Mr. Mamuad (Sakai Letter); and an October 17, 2014 letter from Mr. Nakanelua to Mr. Mamuad (Nakanelua Letter).

Based on a review of the full record filed herein, the Board makes the following findings of fact, conclusions of law, and order.

I. FACTUAL AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. Background to the Prohibited Practice Complaint

By a January 30, 2014 letter from Sakai, Complainant was notified of his discharge, effective February 21, 2014, from his employment with PSD, Corrections Division as an Adult Corrections Officer III for violations of PSD's Standards of Conduct.

On February 25, 2014, Complainant was notified by the Sakai Letter that his February 21, 2014 discharge was sustained. The Sakai Letter states in pertinent part:

Dear Mr. Mamuad:

On Tuesday, February 25, 2014, your Pre-Discharge Hearing was held and the evidence presented by you and your representative was insufficient to overturn the sanction imposed by the dismissal letter dated January 30, 2014. Therefore, the discharge is sustained and your discharge date was Friday, February 21, 2014.

If you feel that this action is without just and proper cause, you have the right to process a grievance in accordance with the provisions of your Collective Bargaining Agreement.

On or about March 5, 2014, UPW Business Agent Melanie Saito (Saito)[ii] filed a Step 1 grievance regarding Mr. Mamuad's discharge in Case No. MS-14-05 (Mamuad grievance), alleging violations of the relevant UPW Unit 10 Agreement (CBA) §§ 1, 11, 14, and 58. She also sent a letter to Sakai requesting all grievance information pertaining to the Mamuad

grievance. On March 18, 2014, PSD Personnel Technician Pua Nunies responded to the request by providing the documents.

On May 15, 2014, Sakai sent a letter to Saito informing the UPW that PSD denied the Step 1 grievance filed on behalf of Mr. Mamuad.

By letters to the Director of the Department of Human Resource Development, State of Hawaii (DHRD), on June 2, July 9, August 6, September 11, October 10, November 13, and December 11, 2014, Saito requested multiple one-month extensions to submit the notice of intent to arbitrate the Mamuad grievance. The final request was for an extension of the deadline to January 14, 2015.

However, on October 17, 2014, Respondent sent the Nakanelua Letter, notifying Mr. Mamuad of the Union's decision not to pursue the grievance and stating in relevant part:

> As the affected employee, the Union is informing you that it processed the above-cited grievance through the grievance procedure of the collective bargaining agreement (CBA).
>
> Based on a review of the entire matter, including but not limited to the applicable provisions of the CBA and the evidence presented, the Union has decided not to pursue the above-cited grievance because there is insufficient proof that there is a violation of the CBA.

B. Complaint and Pre-Hearing/Settlement Conference

Consequently, on November 24, 2014, Mr. Mamuad filed the above-referenced Complaint against Mr. Nakanelua with the Board.

On November 25, 2014, the Board issued a Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint (Notice) to Mr. Nakanelua with a copy of the Complaint attached. This Notice stated in pertinent part:

> YOU ARE DIRECTED to file a written answer to the complaint within ten (10) days after service of the complaint. One copy of the answer shall be served on each party, and the original and one (1) copy of your answer with certificate of service on all parties shall be filed with the Board no later than 4:30 p.m. on the tenth day after service of the complaint. If you fail to timely file and serve an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

USPS Tracking information retained by the Board shows that the Notice was shipped to Respondent at the UPW office on November 25, 2014 and delivered on November 26, 2014.

However, Mr. Nakanelua did not file a written answer to the complaint within the required ten days after service of the complaint, nor did he file any motions in lieu of an answer.

On December 18, 2014, Mr. Nakanelua filed both an untimely Respondent's Answer to Prohibited Practice Complaint and Respondent's Pre-Hearing Statement.

Accordingly, on December 23, 2014, the Board issued Order No. 3037 (Order No. 3037). In that Order, the Board concluded that:

> Where no timely answer to a prohibited practice complaint is filed, Hawaii Administrative Rules (HAR) §12-42-45(a) and (g) mandates that the material facts alleged in the complaint shall be deemed admitted and a hearing shall be waived.
> ***
> However, although the material facts in the complaint are deemed to be true, that does not, in itself, require the Board to hold that Respondent willfully committed a prohibited practice pursuant to HRS § 89-13(b)(1), (4), or (5).

The Board also noted that:

> ... pursuant to HAR §12-42-45(g), the failure to file an answer only constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing; however, the rule does not require the Board to make any particular legal conclusion regarding whether a prohibited practice was or was not committed, nor does the rule prohibit the Board from holding a hearing on a complaint in its discretion.

The Board then ordered that the December 24, 2014 hearing be deferred and taken off the Board's calendar and directed the parties to file proposed conclusions of law and legal arguments in support of their position.

On December 26, 2014, Respondent filed a Motion to Set Aside Entry of Default for Failure to File Timely Answer and for Relief from a Judgment and Order (Motion to Set Aside Entry of Default) with supporting Memorandum and documents requesting the Board to: 1) set aside entry of default for "good cause" against the UPW for failure to file a timely answer, and for relief from judgment and order under Hawaii Rules of Civil Procedure (HRCP) Rule 60(b) due to mistake, inadvertence, and excusable neglect; and 2) extend the UPW's time to respond to

the Complaint, set aside the order for parties to submit legal briefs, and permit the UPW to have a hearing on the merits of its defenses.

On December 29, 2014, Respondent filed an Errata to the Memorandum in Support of Motion to Set Aside of Default [sic] for Failure to File Timely Answer and for Relief from a Judgment and Order Filed on December 26, 2014.

On January 5, 2015, Mr. Nakanelua filed a Motion to Set Deadline for Complainant's Response to December 26, 2014 Motion and Other Appropriate Relief. In that Motion, Respondent requested that the Board set a specific deadline for Complainant to respond to the Motion to Set Aside Entry of Default and to afford other appropriate relief including scheduling of a hearing on this Motion and postponement of the January 26, 2015 deadline for the parties proposed conclusions of law and legal arguments established in Order No. 3037.

On January 14, 2015, in Order No. 3042, the HLRB: 1) denied the Motion to Set Aside Entry of Default based on its determination that Respondent's reasons for failing to file a timely answer did not rise to the level of "extraordinary circumstances;" 2) denied the Motion to Set Deadline as moot; and 3) reiterated that the deadline to file proposed conclusions of law and legal argument was January 26, 2015 pursuant to Board Order No. 3037.

On January 20, 2015, Mr. Nakanelua filed Respondent Dayton Nakanelua's Proposed Conclusions of Law and Legal Arguments (Nakanelua's Proposed Conclusions).

On January 26, 2015, Shawn A. Luiz filed both a Notice of Appearance entering his appearance as counsel of record for Mr. Mamuad and Complainant Leroy Mamuad's Proposed Conclusions of Law and Legal Arguments in Support of His Position (Mamuad's Proposed Conclusions).

C. Proposed Conclusions of Law and Legal Arguments

In his Proposed Conclusions, Nakanelua asserts that: 1) the Board lacks jurisdiction based on the untimely filing of the Complaint; 2) Complainant failed to exhaust his contractual remedies; 3) the Complaint is deficient because of a failure to state a "hybrid" claim for relief, to name a proper Respondent, and to allege a "willful" violation of a statute or contractual provisions; and 4) Complainant has failed to meet his burden of proof to establish a breach of the duty of fair representation requiring dismissal of the Complaint.

Mr. Mamuad responds that he: 1) is entitled to prove any set of facts entitling him to relief; 2) named the correct party because Mr. Nakanelua is named in his official capacity as the UPW State Director; 3) pled sufficient facts and filed his Complaint within the applicable statute of limitations; and 4) properly exhausted his administrative remedies as far as the Union allowed

him to pursue the grievance, and the Union's refusal to pursue the grievance further was a "willful" breach of the duty of fair representation in violation of HRS §§89-13 and 89-14.

II. DISCUSSION, CONCLUSIONS, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Timely Filing of The Complaint.

Mr. Nakanelua's first proposed conclusion of law is that the Board lacks jurisdiction because the November 24, 2014 Complaint was untimely filed under HRS §377-9(l) and HAR §12-42-42. Mr. Nakanelua bases this conclusion on his assertions that, "Mamuad's claim is that the union breached its duty of fair representation by failing to represent him 'in the middle of July 2014'" and that "the complaint also states that Mamuad was informed a month later that Lahela Aiwohi was not recommending arbitration." Respondent; therefore, maintains that since the violations occurred in mid-July and mid-August 2014, the Complaint filed in late November is barred by the applicable statute of limitations because: 1) the requirement that all prohibited practice complaints be filed within 90 days of their occurrence is a jurisdictional requirement established by the Legislature; 2) compliance with time and other similar statutory provisions established for jurisdictional reasons are mandatory; 3) untimely complaints and claims are barred to fulfill important public policies; and 4) the Board under HRS Chapter 89 has strictly construed the 90-day statute of limitations set forth under HRS §377-9(l) and dismissed complaints that were even one day late.

HRS §377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90-day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14.[iii] In addition, HAR §12-42-42(a) states:

> A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee...within ninety days of the alleged violation.

The Board agrees with Respondent's articulation of the basic principles regarding the 90-day requirement for filing of a prohibited practice complaint under Chapter 89. The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, et. al., CE-01-802 and CU-01-315, Order No. 2010, at *15 (May 1, 2013)

(Nakamoto Order). The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, 3 HPERB 186, 199 (1983) (*citing* Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, *reh. den.*.; [sic] 33 Haw. 409 (1935)); Nakamoto Order, at *15; Valeho-Novikoff v. Okabe, CU-05-302, Order No. 3024, at *10 (October 6, 2014) (Valeho-Novikoff Order).

Respondent is also correct that in the United Public Workers, AFSCME, Local 646, AFL-CIO v. Okimoto, 6 HLRB 319, 330 (2003) (Okimoto), the Board relied on the rule that limitations period begins to run when "an aggrieved party knew or should have known that his [or her] statutory rights were violated." The Board notes, however, that in Okimoto, the UPW argued that the limitations period could not have run because of lack of notice from the employer regarding the changes in hours. The Complainant in this case is likewise claiming that he lacked notice that the Union was not pursuing his case to arbitration until the October 17, 2014 Nakanelua Letter, which made the filing of the Complaint on November 24, 2014 within the 90-day limitation period.

Prior to ruling on this issue, the Board finds that the Nakanelua Letter, attached to the Complaint, is to be considered as part of the Complaint. As noted by the Board in a slightly different context of a motion to dismiss in Tupola v. University of Hawaii Professional Assembly. CU-07-330 and CE-07-847, Order No. 3054, at *37 (February 25, 2015) (Tupola Order) (*citing* U. S. v. Ritchie, 342 F.3d 903, 907-908 (9th Cir. 2003); Morris v. McHugh, 997 F.Supp.2d 1144, 1154 (D. Haw. 2014), *reconsideration denied by* U.S. Dist. LEXIS 47921 (D. Haw. 2014)) under HRCP Rule 12(b)(6), the Board is permitted to consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. *See also*: Parks Sch. of Business v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) ("When a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment" (*citing* Cooper v. Bell, 628 F.2d 1208, 1210 n. 2 (9th Cir. 1980)); Corpuz v. Yaneza, 2005 U.S. Dist. LEXIS 16132, at *3 (D. Haw. 2005).

The Nakanelua Letter states in relevant part:

RE: WITHDRAWAL OF GRIEVANCE-GRIEVANCE CASE #MS-14-05

Dear Mr. Mamuad:

As the affected employee, the Union is informing you that it processed the above-cited grievance through the grievance procedure of the collective bargaining agreement (CBA).

> Based on a review of the entire matter, including but not limited to the applicable provisions of the CBA and the evidence presented, the Union has decided not to pursue the above-cited grievance because there is insufficient proof that there is a violation of the CBA.

Based on a review of the Complaint allegations, the Nakanelua Letter, and the full record in this case, the Board holds that the November 24, 2014 Complaint was timely because the limitations period began to run when Complainant received the October 17, 2014 Nakanelua Letter. Based on the Complaint allegations, there is no question that the Union's conduct during mid-July and mid-August 2014 involved only notice of the processing of the grievance and a recommendation by Aiwohi not to pursue arbitration. The Complaint alleges that, "In the middle of July, Melanie Sato called me and informed me that the paperwork for my arbitration was given to Maui UPW Director Lahela Aiwohi. Aslo [sic] she believed that same week Lahela traveled to Oahu and hand delivered he [sic] paperwork to the Oahu UPW Office[]; "[a] month later Melanie called me and informed me that my paperwork for arbitration is still on Maui on Lahela's desk. Also Melanie said Lahela is NOT recommending arbitration [sic] because the UPW had just represented someone on Molokai with similar accusations and lost the arbitration" (emphasis added). Accordingly, it was reasonable for the Complainant to believe that further action by the UPW Oahu Office would be taken and a final determination rendered after the arbitration paperwork was delivered and the Aiwohi "recommendation" was reviewed.

This finding is further supported by the October 17, 2014 Nakanelua Letter. In contrast to Saito's oral communications, the October 17, 2014 Nakanelua Letter provides specific written notice to Mr. Mamuad that the Union: 1) "processed the above-cited grievance through the grievance procedure of the collective bargaining agreement (CBA);" 2) conducted and completed "a review of the entire matter;" and 3) decided not to pursue the grievance "based a review of the entire matter;" and for the reason that "there is insufficient proof that there is a violation of the CBA." Since "a review of the entire matter" ostensibly should have included the "paperwork for arbitration" which according to Saito, "[was] still on Maui on Lahela's desk" in mid-August, the limitations period could not have commenced running at that point in time. As the review and the processing of the grievance were not completed, and the decision was not reached and communicated to Mr. Mamuad until two months after his call from Saito, the breach of the duty of fair representation could not have occurred until on or after October 17, 2014, the date of Nakanelua Letter. Consequently, the Complaint filed on November 24, 2014 was timely filed within the 90-day limitation period. In so ruling, the Board distinguishes between Aiwohi's staff recommendation and a final Union decision that a grievance is not going to be pursued to arbitration "based on a review of the entire matter" because of "insufficient proof that there is a violation of the CBA". *See also*: Taamu v. United Public Workers, AFSCME. Local 646, AFL-CIO, et. al., Case No. CU-01-282, Order No. 2677, at *11 (January 12, 2010) (Taamu Order) ("In the present case, the Complaint asserts that Complainant received the letter from the UPW notifying him of the grievance disposition on July 27, 2009. Because the Complaint was

filed on October 20, 2009, the Board concludes that the complaint is timely. Although a complaint alleges certain actions by representatives that occurred prior to July 27, 2009, the Board concludes that these actions occurred during the course of the grievance process, and Complainant properly exhausted his contractual remedies prior to bringing a prohibited practice complaint that involves issues of alleged contract violations").

Finally, the seven letters sent by Saito to the DHRD Director between June 2, 2014 and December 11, 2014 requesting multiple extensions until January 14, 2015 to submit the notice of intent to arbitrate the Mamuad grievance verify a finding that the Union had not decided whether or not to submit the matter to arbitration until well after the middle of August 2015 and that the grievance process continued during that period of time.

For these reasons, the Board holds that it has jurisdiction over the November 24, 2014 Complaint, which was timely filed under HRS §377-9(l) and HAR §12-42-42.

B. Exhaustion of Contractual Remedies

Mr. Nakanelua relies on HRS §§ 89-8 and 89-10.8 and the Court's decision in Poe v. Haw. Lab. Rels. Bd., 97 Hawaii 528, 536, 40 P.3d 930, 938 (2002) (Poe I) in support of his fifth proposed conclusion of law that Mr. Mamuad failed to exhaust his contractual remedies in this case. In response, Complainant contends that he properly exhausted his administrative remedies as far as the Union allowed him to pursue the grievance. The Board agrees with Mr. Mamuad that he properly exhausted his contractual remedies; and is not precluded from bringing a prohibited practice complaint on this ground.

In rejecting Respondent's position, the Board notes that the particular rule relied on by the Respondent was specifically characterized by the Court in Poe I as the general rule. The Court stated, "[i]n labor relations law, the general rule is that an employee is required to exhaust contractual remedies before bringing suit. Thus, 'individuals who sue their employers for breach of a collective bargaining agreement must first attempt exhaustion of remedies under that agreement.'" (Emphasis added). The Poe I Court further noted that, "exceptions to this doctrine exist, such as when pursuing the contractual remedy would be futile." *Id.* at 536-537, 40 P.3d at 938-939. In Poe I, the public employee pursued his individual grievance before requesting the union to proceed to the last step, which only the exclusive representative could undertake. The Court held that in a case where the public employee completed every step available to the employee in the grievance process and a request to the employee's exclusive representative would be futile, the employee exhausts his or her administrative remedies. 97 Hawaii at 531, 40 P.3d at 933. In so ruling, the Poe I Court relied on the Hawaii Intermediate Court of Appeals' (ICA) decision in Winslow v. State, 2 Haw. App. 50, 55, 625 P.2d 1046, 1050 (1981) (Winslow), and reasoned as follows:

However, exceptions to this doctrine exist, such as when pursuing the contractual remedy would be futile. In Winslow, which was somewhat analogous to this one, the Intermediate Court of Appeals (the ICA) declared that, where a collective bargaining agreement provides that only a union may exercise the ultimate grievance step of requesting arbitration, the employee is bound thereby, and if the union elected not to exercise that option, the employee has exhausted his or her administrative remedies. There, the ICA stated:

> Given the well-settled rule of the doctrine of exhaustion of remedies in administrative law, 2 Am. Jur. 2d Administrative Law §595; this state's public policy favoring arbitration as a means of settling differences to avoid expensive and unnecessary litigation; Rules 52(a) and 56(c), [Hawaii Rules of Civil Procedure]; and the facts of this case, we find no error in the court's ruling that the State was entitled to summary judgment. Contrary to appellant's contentions, we 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. Here the grievance procedure consisted of five steps with the fifth step final and binding arbitration. At steps one through four, either the employee or the union could carry forward the grievance; and if the employee did so, only the union has the election to take the matter to arbitration (step 5). If the union elected not to go to arbitration, the employee would then have exhausted her administrative remedies and could have brought the employer into court.

However, in that case, at step 3, the appellant was advised by the department head to proceed to the step 4 level (appeal to the employer), but with counsel's advice, chose not to do so. Because further contractual remedies existed which were not exhausted by the employee, the court in Winslow determined that she had not exhausted her available remedies prior to bringing her employer into court.

B. Here, there is no step beyond Step 3 which Poe could exhaust; under the statutes and terms of the agreement, Poe had taken the process as far as he was able. The HGEA was aware of Poe's grievance and chose not to involve itself in his individual grievance. As the HLRB found, Poe requested that the HGEA represent him and the Controllers as a class. The HGEA was afforded the opportunity to be present at the meetings between Poe and the Employer. However, the HGEA did not respond to the request or participate. Instead, the

HGEA apparently engaged in independent negotiations on the subject matter directly with the Employer.

Nothing in the statutes or the agreement requires Poe to file an intra-HGEA appeal in order to acquire the right to bring his prohibited practice claim to the HLRB. Under such circumstances, it is evident that HGEA, as Poe's representative, had eschewed any involvement in Poe's individual grievance, much less an election to proceed to Step 4 arbitration on Poe's behalf. The sole power to proceed to arbitration rested with the HGEA. As Winslow suggested, when only the exclusive bargaining representative can elect to advance to the final grievance step, the employee exhausts his or her remedies at the point in the grievance procedure where the employee can no longer progress. Because Poe could move no further in the grievance procedure, he had exhausted his administrative remedies. Requiring him to repeatedly request the HGEA to pursue his grievance would be futile. Thus, the HLRB was wrong in concluding that Poe had failed to exhaust his administrative remedies.

Id. at 536-538, 40 P.3d at 938-940. (Citations omitted) (Emphasis added) In Poe v. Haw. Lab. Rels. Bd., 105 Hawaii 97, 94 P.3d 652 (2004) (Poe II), the Court extended that rule to recognize that even an employee, such as Mr. Mamuad, who has been represented by a union through the grievance procedure but is prevented from exhausting his contractual remedies by the union's breach of the duty of fair representation is not left without recourse. In so ruling, the Court acknowledged the Poe I principle that exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. The Court then clarified that the exhaustion doctrine applies to a situation in which the employee is prevented from exhausting his contractual remedies by the union's breach of the duty of fair representation. In so ruling, the Court relied on the U.S. Supreme Court's decision in Vaca v. Sipes, 386 U.S. 171, 185-186 (1967) (Vaca) that stated:

[A] situation when the employee may seek judicial enforcement of his contractual rights arises, if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstance would, in our opinion, be a great injustice.

> For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Id. at 101-02, 94 P.3d at 656-657. (Citations omitted) (Emphasis added)

In this case, based on the record, there is no dispute that: Mr. Mamuad's grievance was processed up to the arbitration step; the UPW has the sole power under the collective bargaining agreement to exercise the ultimate grievance step of requesting arbitration;[iv] Mr. Mamuad requested the UPW to proceed to arbitration; the Union declined to do so; and the Complaint alleges that Mr. Mamuad has been prevented from exhausting his contractual remedies by the Union's breach of its duty of fair representation based on its wrongful refusal to proceed to arbitration. Accordingly, under Poe I and II, there is no question that Mr. Mamuad exhausted his contractual remedies.

While the Board notes the decisions cited by Mr. Nakanelua in support of his position that "the Board has consistently required a complainant who alleges a hybrid claim to exhaust for [sic] breach of the duty of fair representation and a violation of the collective bargaining agreement," none of these cases control the present case because of significant factual distinctions. In both the Nakamoto Order and Esera Fonoti-Ulufale v. United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CU-01-251, Order No. 2388 (August 16, 2006), unlike the present case, no grievances had been filed prior to the filing of the prohibited practice claims in those cases. Consequently, the employees in those cases made no attempt to exhaust the contractual grievance procedure in the collective bargaining agreement. In the Glen Y. Tanaka v. United Public Workers, AFSCME. Local 646, AFL-CIO, Case Nos. CU-01-262 and CE-01-01-653, Order No. 2494 (February 27, 2008) case, a grievance had been filed but was still pending at the time of filing of the prohibited practice complaint. In the Paula M. Moniz v. United Public Workers, AFSCME, Local 646, AFL-CIO, Case Nos. CU-01-250 and CE-01-626, Order No. 2400 (October 6, 2005), a Step 1 grievance had been filed by the union regarding working conditions and allegations of co-worker harassment and workplace violence but the complainant had refused to participate in the grievance meeting; and on another issue of transfer of workplace, no complaint had been made to the union nor was any grievance filed. In short, all of these cases are factually distinguishable from the present case and do not fall within the situations addressed by Poe I and II.

C. Sufficiency of the Complaint

Respondent further asserts that the Complaint in this case is deficient because: 1) Mr. Nakanelua is named as the sole respondent; 2) Mr. Mamuad failed to allege a claim of a willful [sic][v] violation of a statute or contractual provisions; and 3) Complainant failed to exhaust his contractual remedies. Accordingly, Mr. Nakanelua maintains that there was no prohibited practice committed as a matter of law.

In this case, because Order No. 3037 deemed the material facts admitted, the Board finds these determinations of whether the Complaint in this case is deficient analogous to a determination of whether a Complaint should be dismissed for failure to state a claim under HRCP Rule 12(b)(6), in which the allegations must be deemed to be true.

In applying the standard for a motion to dismiss for failure to state a claim, the Board has long adhered to the principle that *pro se* pleadings must be held to less stringent standards than formal pleadings drafted by lawyers and read more liberally than pleadings drafted by counsel. Erickson v. Pardus, 551 U.S. 89. 94 (2007); Estelle v. Gamble, 429 U.S. 97, 106 (1976). To survive a motion to dismiss, the claim "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (*citing* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Further, the Board has also noted while a *pro se* complainant has been held not excused from knowing the most basic pleading requirement, HRCP Rule 8(f), states that, "All pleadings shall be construed as to do substantial justice." Tupola Order, at *36 (*citing* Am. Ass'n. of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-1108 (9th Cir. 2000)).

The Board has further relied on the HRCP Rule 8(a) requirement that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and Hawaii decisions holding that the rule is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests. Valeho-Novikoff Order, at *19 (*citing* Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 543 (1971); Au v. Au, 63 Haw. 210, 221, 626 P.2d 173, 181 (1981); Kellberg v. Yuen, 2014 Haw. App. LEXIS 146, at *28 (March 28, 2014); Kam Ctr. Specialty Corp. v. LWC IV Corp., 2007 Haw. LEXIS 283, at *59 (September 27, 2007)). Finally, as stated above, under HRCP Rule 12(b)(6), the Board is permitted to consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. Tupola Order, at *37.

1. Naming A Proper Respondent

Mr. Nakanelua maintains in his third proposed conclusion of law that the Complaint is deficient because he is named as the sole respondent because: 1) it has long been recognized that

individual union officers or agents do not owe a duty of fair representation to employees in bargaining unit 10; 2) based on Carter v. Smith Food King, 765 F.2d 916, 920-921 (9th Cir. 1985) (Carter) and Evangelista v. Inlandboatmen's Union of Pacific, 777 F.2d 1390, 1400 (9th Cir. 1985) (Evangelista), there can be no claim for relief against individuals in their individual capacities in a breach of fair representation action; and 3) the Board recognized in the Taamu Order, that a complaint for breach of duty of fair representation is limited to the union and not to individuals. Mr. Mamuad, on the other hand, relies on Will v. Michigan Department of State Police, et. al., 491 U.S. 58 (1989) (Will), for his position that naming an individual in his official capacity is not fatal to the Complaint in this case.

Based on a review of the Taamu Order and subsequent Board decisions, the Board rejects Respondent's contention and accepts Complainant's position. In Taamu, the Complainant brought a prohibited practice claim against the UPW, its State Director Mr. Nakanelua, and a business agent, Eddie Akau. These respondents filed a Motion to Dismiss and/or for Summary Judgment asserting lack of jurisdiction and failure to state a claim for relief. In ruling on the Motion, the Board found that "the allegations of breach of duty of fair representation against Nakanelua and Akau were within the scopes of their official duties as the UPW's State Director and Business agent, respectively[,]" and then concluded and reasoned as follows:

> 18. A claim of breach of duty of fair representation may only be brought against a union as an entity, and not individual employees of the union. See Carter v. Smith Food King, 765 F.2d 916 (9th Cir. 1985); Evangelista v. Inlandboatmen's Union of the Pacific, 777 F.2d 1390 (9th Cir. 1985). The Board concludes that it is the union as an entity that owes a duty of fair representation, and may be liable for breach of that duty, and not individual employees of the union.
>
> ***
>
> 20. In the present case, Nakanelua and Akau were named in what is their "official capacities" as employees of the UPW; and accordingly, the claim of breach of duty of fair representation is a suit against the UPW itself, despite the individuals named.

Taamu Order, at *11-12. (Emphasis added)

After so concluding, the Board held:

> For the reasons discussed above, the Board grants in part and denies in part Respondents' Motion to Dismiss and/or for Summary Judgment, and denies Respondents' Motion to Dismiss for Lack of Prosecution. The Motion to Dismiss and/or for Summary Judgment is granted to the extent that Complainant's claim of breach of duty of fair representation may only lie against the UPW as an entity,

and not Nakanelua or Akau personally, and liability, if any, rests solely with the UPW; the Board concludes that to the extent Nakanelua and Akau were personally named, they were named in their "official capacities" which is a suit against the UPW itself.

Taamu Order, at 13. (Emphasis added)

In a subsequent case, Stucky v. Takeno, et. al., CU-05-283, Order No. 2834 (March 12, 2012) (Stucky Order), the Board relying on Taamu, further clarified that union is liable for breach of duty of fair representation claims even for actions taken by named individual union employees:

> 20. In the present case, Nakanelua and Akau were named in what is their "official capacities" as employees of the UPW; accordingly, the claim of breach of duty of fair representation is a suit against the UPW itself, despite the individuals named.
>
> Similarly as in Taamu, the Board finds that any allegations against Takeno, Camacho, Nagamine, and Forrest for breach of duty of fair representation appear to involve actions taken in the capacities as Interim Executive Director, Deputy Executive Director, and Uniserv Directors, respectively, and therefore as "designated agents" of HSTA. Accordingly, the Board concludes that Takeno, Camacho, Nagamine, and Forest were properly named; however, the Board also concludes that liability, if any, for alleged breach of duty of fair representation rests with HSTA, and not with the officers and agents as individuals.

Stucky Order, at *13-14. (Emphasis added) Based on the foregoing cases, because a breach of duty of fair representation claim may only lie against the UPW as an entity, the Board finds that upon "reading the Complaint more liberally than pleadings drafted by counsel" that Mr. Nakanelua is being named in his "official capacity" as an employee of the UPW. Hence, the Board concludes based on Taamu and Stucky, that any allegations against Mr. Nakanelua for his conduct constituting breach of the duty of fair representation were taken in his capacity as the State Director and a designated agent of the UPW and not personally. Consequently, the Board holds that despite Mr. Nakanelua[vi] being named as the only respondent, the claim is against the UPW itself, and the Complaint is not deficient.

2. Statement of A Claim for Relief on "Wilfullness"

As its fourth proposed conclusion of law, Mr. Nakanelua maintains that the Complaint is deficient and no prohibited practice has been committed because Mr. Mamuad fails to allege a "willful" violation of a statute or contractual provision by him based on the Hawaii Supreme Court's (Court) decision in In re Haw. Gov't. Emp. Ass'n, Local 152 v. Casupang, 116 Hawaii 73, 99, 170 P.3d 324, 350 (2007) (HGEA).

The Complaint alleges violations of HRS §89-13(b)(1), (4), and (5). Those statutory provisions state in pertinent part:

> §89-13. Prohibited practices; evidence of bad faith.
> ***
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
> ***
> (4) Refuse or fail to comply with any provision of this chapter; or
> (5) Violate the terms of a collective bargaining agreement.

(Emphasis added)

While not disputing Respondent's position that the HGEA Court held that "in assessing a violation of HRS §89-13, the Board was required to determine whether Respondents acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS Chapter 89," the Board disagrees that the HGEA decision compels that "wilfullness" be somehow separately and distinctly alleged in the Complaint in addition to the HRS §89-13 violation. In so ruling, the Board notes the significant distinction between the requirement that a "wilfull" violation be determined by the Board as held by HGEA and Mr. Nakanelua's assertion that a "wilfull" violation be alleged. The Complaint explicitly alleges several violations of HRS §89-13(b), which, on its face, contains the "wilfully" requirement. As the "wilfull" requirement is inherent in the statutory provision alleged to have been violated in the Complaint, the Board holds that Complaint in this case is not deficient for this reason.

3. Sufficient Allegations of A Hybrid Claim.

Respondent's second proposed conclusion of law is that the Complaint fails to state a hybrid claim for relief; and therefore, no prohibited practice has been committed as a matter of law.

The Board does not dispute that Poe II, 105 Hawaii at 102, 94 P.3d at 657, requires that to prevail in this case, the Complainant must allege and establish both: 1) a breach of the duty of fair representation by the Union; and 2) a breach of the collective bargaining agreement by the employer. However, the Board finds that the Complaint is sufficient to allege a hybrid claim.

Regarding the breach of fair representation claim against the Union, the Complaint states that, "Complainant charges a violation of Hawaii Revised Statutes (HRS) Section 89-13(b)(1), (4), and (5) and a breach of the duty of fair representation by failing to represent me when I repeatedly asked for representation relating to the termination of employment." The Complaint then further alleges specific facts regarding the processing of his arbitration paperwork, Aiwohi's recommendation not to proceed to arbitration, the UPW's unsuccessful representation of someone on Molokai with similar accusations, and the difference between the Molokai individual who had been convicted and Mr. Mamuad who had his charges expunged and won an unemployment appeal. In addition, attached to the Complaint is the Nakanelua Letter, which according to the criteria set forth above, may be considered as part of the Complaint. Hence, based on the allegations of the Complaint and the Nakanelua Letter, the Board finds that the Complaint is adequate to allege a breach of the duty of fair representation claim against Mr. Nakanelua.

The Board acknowledges that the face of the Complaint contains no allegation regarding a breach of contract claim against the Employer PSD. Nevertheless, attached to the Complaint is the Sakai Letter addressed to Mr. Mamuad that stated in pertinent part:

> On Tuesday, February, 25, 2014, your Pre-Discharge Hearing was held and the evidence presented by you and your representative was insufficient to overturn the sanction imposed by the dismissal letter dated January 30, 2014. Therefore, the discharge is sustained and your discharge was Friday, February 21, 2014.
>
> If you feel that this action is without just and proper cause, you have the right to process a grievance in accordance with the provisions of your Collective Bargaining Agreement.

Accordingly, considering the Sakai Letter as part of the Complaint based on the standards set forth above, the Board determines that the Complaint is similarly sufficient to allege a claim against the Employer for breach of the CBA for Mr. Mamuad's dismissal.

Based on the standards articulated above applicable to its determination regarding whether a Complaint is adequate to state a claim, the Board holds that the Complaint in this case is sufficient to allege a hybrid claim against both the Union for breach of the duty of fair representation and the Employer for breach of the CBA.

D. Burden of Proof Regarding Breach of The Duty of Fair Representation Claim

Respondent contends in his sixth conclusion of law that Mr. Mamuad has not met his burden of proof required by HAR §12-42-8(g)(16). The Board concludes that while the Complaint is sufficient to allege a breach of the duty of fair representation, even if the material facts in the Complaint are admitted that Complainant has not proven the hybrid claim in this case as required by Poe II and the decisions relied on for several reasons.

In Poe II, 105 Hawaii at 102, 102 P.3d at 657 (*citing* DelCostello v. Int'l. Bhd. Of Teamsters, 462 U.S. 151, 164 (1983)), the Court explained the relationship between the claims against the union and the employer and the burden of proof required of the employee in a hybrid action as follows:

> Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation.
>
> The two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both. (Citations omitted)

105 Haw. at 102, 94 P.3d at 657. (Emphasis added)

Hence, to prevail against the Respondent, the burden on the Complainant is twofold. First, he must prove that his discharge was contrary to the CBA. While the Complaint with the attachment of the Sakai Letter was sufficient to allege a violation of the CBA, the lack of any factual allegations regarding the basis for Mr. Mamuad's claim that his discharge was contrary to the CBA renders him unable to prove this allegation by the admission of material fact. Hence, the Board is unable to determine the claim against Mr. Mamuad's Employer that his discharge violated the CBA.

Second, the Complainant is required to prove that the Union's refusal to take his grievance to arbitration constituted a breach of the duty of fair representation. For a union to breach its duty of fair representation for a refusal to pursue the employee's grievance, its actions

must be shown to be arbitrary, discriminatory, or bad faith conduct. *Id.* at 104, 94 P.3d at 659; Lee v. United Pub. Workers, AFSCME, Local 646, 125 Hawaii 317, 321, 260 P.3d 1135 (App. 2011) (*citing* Vaca, 386 U.S. at 190; Poe II, 105 Hawaii at 104, 94 P.3d at 659). Even in the summary judgment context, it is well-recognized that the employee must proffer evidence supporting at least one of these three elements. Emura v. Haw. Gov't. Emp. Ass'n., AFSCME, Local 152, CU-03-328, Order No. 3028, at *12 (citing Filippo v. Nothern [sic] Indiana Public Serv. Corp., Inc., 141 F.3d 744, 748 (7th Cir. 1998)).

A review of the Complaint shows that in addition to the other allegations discussed above regarding the failure to process the paperwork and the failure to recommend arbitration, the Complaint also alleges:

> Also Melanie said Lahela is NOT recommending arbitraion [sic] because the UPW has just represented someone on Molokai with similar accusations and lost the arbitration. The difference between both cases is that the person on Molokai got Convicted [sic] in court and I got my charges expunged. If the UPW can represent someone who got convicted in a court of law, they should represent me who got the charges expunged and won an appeal from the unemployment department

Accordingly, while the Complaint articulates facts in support of Respondent's wrongful conduct, specifically missing is any allegation that such conduct is arbitrary, discriminatory, or in bad faith. While the Complaint allegation that the Complainant is charging a breach of the duty of fair representation implies that one or more of the elements of arbitrary, discriminatory, or in bad faith are met, the failure to specifically allege which of the three elements are present in this case leaves the Board unable to determine, even with the admission of the material facts, that the Union's failure to take Mr. Mamuad's case to arbitration constitutes a breach of the duty of fair representation. In addition, in prior cases, the Board has extensively addressed the stringent evidentiary standard required to establish these three elements. Tupola Order, at *27-35; Emura v. Haw. Gov't. Emp. Ass'n., AFSCME, Local 152, CU-03-328, Order No. 3028, at *12-18. In short, there are insufficient allegations and admitted material facts to demonstrate that such alleged misconduct satisfied at least one of these elements.

Finally, in support of his assertion that, "the Unions's [sic] refusal to pu rsue [sic] the grievance further was a willful breach of the duty of fair representation in violation of 89-13 and 89-14," it appears that Mr. Mamuad is relying on the fact that "UPW willfully refused to assist him further despite his particular case being inapposite from the case the UPW relied upon in refusing to assist him any further." *See* Mamuad's Proposed Conclusions, at pp. 10-11. Both the Court and this Board have held that in order to make out a prohibited practice under HRS §89-13, a "conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89 must be proven." HGEA, 116 Hawaii at 99, 170 P.3d at 350 (*citing* Aio v. Hamada, 66 Haw.

401, 410, 664 P.2d 727, 734 (1983); United Public Workers, AFSCME, Local 646, AFL-CIO v. Kunimura, 3 HPERB 507, 514 (*citing* Aio, et. al. v. Hawaii State Teachers Association, 2 HPERB 458, 491 (1980), *aff'd* Aio v. Hamada, 66 Haw. 401, 409-10, 664 P.2d 727, 732-33 (1983). The Board concludes that because there are insufficient allegations to demonstrate that such conduct satisfied at least one of these elements that it is unable to reach a conclusion regarding the "willfulness" of the alleged misconduct underlying those claims as required by the statute even with the admission of the material facts in the Complaint. As the Board indicated in Order 3037, "although the material facts in the complaint are deemed to be true, that does not, itself require the Board to hold that Respondent willfully committed a prohibited practice pursuant to HRS § 89-13(b)(1), (4), or (5)."

After so concluding, the Board, however, rejects Mr. Nakanelua's position that the failure to meet the burden of proof by the admission of material facts alleged in the Complaint requires that the Complaint be dismissed. Rather, pursuant to Order 3037, the Board holds in its discretion that a hearing on the merits of the hybrid claim alleged in the Complaint is required.

ORDER

Order No. 3037 states, "pursuant to HAR §12-42-45(g), the failure to file an answer only constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing; however, the rule does not require the Board to make any particular legal conclusion regarding whether a prohibited practice was or was not committed, nor does the rule prohibit the Board from holding a hearing on a complaint in its discretion."

Based on Order No. 3037 and for the reasons set forth above, the Board orders a hearing on the merits of the hybrid claim that: the UPW wilfully breached its duty of fair representation to Mr. Mamuad; and that the Employer willfully breached the CBA by its February 28, 2014 discharge of Mr. Mamuad.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing/status conference in this matter on **Tuesday, July 7, 2015 at 10:00 a.m.** in the Board's hearing room, Room 434 830 Punchbowl Street, Honolulu, Hawaii. The purpose of this second prehearing/settlement conference is to arrive at a settlement or clarification of the issues regarding the merits of the hybrid claim; to identify and exchange witness and exhibit lists, if any; to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues remaining; address any other prehearing matters; establish deadlines; and schedule the hearing on the merits. The parties shall file their Prehearing Statements or any amendments to previously filed Prehearing Statements

which address the foregoing matters with the Board two days prior to the prehearing/settlement conference.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata or Mr. Milton Hirata at (808) 586-8610, (808) 586-8847 (TTY) or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten (10) days prior to the prehearing/settlement conference.

DATED: Honolulu, Hawaii June 22, 2015.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Herbert Takahashi, Esq.
Shawn Luiz, Esq.

[i] The Complaint in this case was filed electronically and had the word "department" partially cutoff. The Board is unable to determine a period came after the word "department."

[ii] The Complaint refers to UPW Business Agent Melanie Saito as "Melanie Sato."

[iii] HRS §89-14 **Prevention of prohibited practices** states, in pertinent part, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]"

[iv] The relevant CBA §15.15 states:

> **STEP 3: ARBITRATION**
> In the event the grievance is not resolved in Step 2, the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

[v] The language of HRS §89-13(b) employs and spells the word "wilfully," rather than the word "willfulness," as used by the Respondent. To adhere to the language of HRS §89-13, the Board will use and spell the word as "wilfully."

[vi] While the HLRB holds that the Union, rather than the named Respondent Mr. Nakanelua, is responsible for any breach of the duty of fair representation, the Board will continue to refer to Mr. Nakanelua as the Respondent in this case.