STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BOARD OF EDUCATION, Department of Education, State of Hawaii; KATHERINE TOLENTINO, Principal, Honoka`a Elementary School, Department of Education, State of Hawaii; and SHANE SAIKI, Personnel Regional Officer, Department of Education, State of Hawaii, Respondents.	CASE NO. CE-05-658 ORDER NO. 2509 ORDER DENYING DOE'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; GRANTING IN PART AND DENYING IN PART DOE'S MOTION TO STRIKE DECLARATION OF RAYMOND CAMACHO; AND DENYING HSTA'S MOTION FOR AN ORDER ADMITTING MATERIAL FACTS AND WAIVER OF HEARING BY RESPONDENTS

ORDER DENYING DOE'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; GRANTING IN PART AND DENYING IN PART DOE'S MOTION TO STRIKE DECLARATION OF RAYMOND CAMACHO; AND DENYING HSTA'S MOTION FOR AN ORDER ADMITTING MATERIAL FACTS AND WAIVER OF HEARING BY RESPONDENTS

For the reasons discussed below, the Board denies DOE's Motion to Dismiss Prohibited Practice Complaint (Motion to Dismiss); grants in part and denies in part DOE's Motion to Strike Declaration of Raymond Camacho; and denies HSTA's Motion for an Order Admitting Material Facts and Waiver of Hearing by Respondents.

FINDINGS OF FACT

1. Respondents BOARD OF EDUCATION, Department of Education, State of Hawaii; KATHERINE TOLENTINO, Principal, Honoka`a Elementary School, Department of Education, State of Hawaii; and SHANE SAIKI, Personnel Regional Officer, Department of Education, State of Hawaii, collectively, DOE, was or is, at all times relevant to these proceedings, a

public employer within the meaning of Hawaii Revised Statutes (HRS) § 89-2.[1]

2. Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA), was or is, at all times relevant to this proceeding, an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,[2] of employees included in bargaining unit 05.

3. On February 19, 2008, HSTA filed a prohibited practice complaint (Complaint) against DOE with the Hawaii Labor Relations Board (Board). The Complaint alleged, inter alia, that DOE wilfully interfered, restrained, and coerced employees for exercise of protected conduct in violation of HRS § 89-13(a)(1); unlawfully discriminated against an HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2[3]) in that employee's terms and conditions of employment to discourage membership in HSTA in violation of HRS

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[1]HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

[2]HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[3]HRS § 89-2 provides in relevant part:

"Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

(HRS § 89-6 governs appropriate bargaining units).

§ 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).

4. DOE filed its Answer to the Complaint on February 28, 2008 and on March 13, 2008, the Board conducted a prehearing/settlement conference in the instant proceeding. During the conference the Board set April 8, 2008 as the deadline to file any motion and scheduled a hearing on the motions on April 16, 2008 at 9:00 a.m.

5. On April 7, 2008, DOE filed a Motion to Dismiss Prohibited Practice Complaint (Motion to Dismiss), asserting failure to state a claim upon which relief may be granted and failure to exhaust contractual remedies. Attached to the Motion to Dismiss is a copy of the grievance filed by the HSTA representative referred to in the Complaint, pursuant to the grievance procedure in the Unit 05 collective bargaining agreement (CBA). The grievance asserted the following CBA violations: Article X - Sec. D - Teacher Protection; Article IX - Sec. A - Personnel Information; Article II - Sec. A - Non-Discrimination; Article XX - Miscellaneous; and Article XXI - Maintenance of Benefits. The grievance alleged:

> On or about Nov. 26, 2007 the principal sent the grievant a letter stating that she had received complaints about the grievant from other teachers. The Principal required the grievant to sign a letter that was hearsay and derogatory to the grievant as grievant never had a chance to confront the complainants nor respond to the allegations. The grievant was told to sign the letter and that it would be placed in her personnel file. Principal also sent a copy to the District Office before speaking to the grievant about the issue. The grievant feels she is being harassed by the Principal since she became actively involved in the Association. The grievant is now concerned with a hostile work environment.

6. On April 8, 2008, HSTA filed a Motion to Amend Complaint.

7. On April 14, 2008, HSTA filed its Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint (Memorandum in Opposition).

8. Attached to HSTA's Memorandum in Opposition is a declaration by Raymond Camacho (Camacho), deputy executive director of HSTA

(Camacho Declaration). In paragraph 3 of the Camacho Declaration, Camacho states in relevant part (emphasis added):

> On or [sic] November 8, 2007 Lisa Leach was notified by the principal of an investigation into her conduct during a faculty meeting. Exhibit 1 is a copy of the written notification dated November 8, 2007. **Ms. Leach responded to the notice of investigation on November 11, 2007. Exhibit 2 is a copy of the November 11, 2007 response**.

9. Exhibit 2 attached to the Camacho Declaration appears to be a memorandum from Leach to the Principal, dated November 7, 2007, and states in relevant part:

> The purpose of this reply is to confirm a meeting time to discuss my conduct at the full faculty meeting on Wednesday, November 7, 2007. In order to keep minimal disruption from my classroom I would prefer to meet with you outside classroom instruction time at 2:30 p.m. in Room J5.
>
> I came to the faculty meeting prepared and informed. I asked questions that were pertinent and representative of the many concerns of teachers I represent. Please state your expectations of discussion conduct up front at our next faculty meeting on Wednesday, November 14, 2007.
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> I view your memorandum as intimidating and harassing. When I receive confirmation from my Uniserve Representative I will confirm our meeting date with you.

10. At hearing held on April 16, 2008, the Board orally granted HSTA's Motion to Amend Complaint. In fairness to the Employer because of the Board's orally granting HSTA's Motion to Amend Complaint, the Board allowed the DOE to file supplemental arguments supporting its Motion to Dismiss by noon on April 21, 2008. The Board also scheduled a hearing on April 23, 2008 at 8:30 a.m.

11. On April 16, 2008, HSTA filed its First Amended Complaint. The First Amended Complaint alleged, inter alia, that DOE wilfully interfered, restrained, and coerced employees for exercise of protected conduct under HRS § 89-3, including but not limited to engaging in retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1); unlawfully discriminated against two employees in the

employees' terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).

12. The First Amended Complaint asserts, inter, alia, that HSTA representatives actively participated in concerted activities to improve the terms and conditions of employment of bargaining unit 05 employees at the school; that one representative (a teacher at the school and public employee within the meaning of HRS § 89-2) attended a faculty meeting during which she raised questions over concerns of faculty members regarding the 2008 to 2009 academic plan for the school, and participated in a consultation process affecting employee-employer relations; that the school principal informed the representative that the principal had received complaints regarding the questions raised by the representative and the principal would be investigating; that the representative exercised her right to union representation and an investigative meeting with an HSTA field representative present was scheduled for November 14, 2007; that when the HSTA field representative arrived for the meeting, the principal abruptly cancelled the meeting and prohibited the HSTA field representative from remaining on the school premises; that the principal refused to identify the source of the anonymous complaints; and that a memorandum was placed in the representative's personnel file and intended as a disciplinary action. The First Amended Complaint also alleged that the principal reassigned another HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2) to teach fourth grade during the 2008 to 2009 school year instead of third grade, and that the actions taken against these representatives are part of an on-going pattern of adverse, discriminatory, and retaliatory actions against HSTA representatives at the school. The First Amended Complaint further alleged that a former HSTA representative was previously reassigned from the fourth to the sixth grade in the prior school year by the principal, and reportedly called a trouble maker and union person when she sought transfer to another school.

13. On April 21, 2008, DOE filed its Additional Argument in Respondent's Motion to Dismiss Prohibited Practice Complaint. On April 22, 2008, HSTA filed its Supplemental Submission.

14. On April 22, 2008, DOE filed a Motion to Strike the Declaration of Raymond Camacho (Motion to Strike), asserting material misrepresentation in the declaration. Attached to the Motion to Strike is a Declaration by Katherine Tolentino, the school principal (Tolentino Declaration).

TOLENTINO stated that April 21, 2008, was the first time she had seen the document that has been identified herein as Exhibit 2 to the Declaration of Camacho, which was confirmed by a check of her files. Attached to the Tolentino Declaration as Exhibit A is a document TOLENTINO states is a copy of the memorandum from Leach to herself, dated November 11, 2007, which she provided to her attorney in this proceeding. Exhibit A has a date stamp of receipt of November 14, 2007, and states in relevant part:

> The purpose of this reply is to confirm a meeting time to discuss my conduct at the full faculty meeting on Wednesday, November 7, 2007. In order to keep minimal disruption from my classroom I would prefer to meet with you outside classroom instruction time at 2:30 p.m. in Room J5. When I receive confirmation from my Uniserve Representative I will confirm our meeting date with you.

15. Exhibit 2 to the Camacho Declaration contains statements that are not included in Exhibit A to the Tolentino Declaration, namely, the second paragraph and first sentence of the third paragraph of Exhibit 2.

16. At hearing on April 23, 2008, the Board granted the parties until April 30, 2008, to submit further supplemental briefing on the Motion to Dismiss. On April 30, 2008, HSTA filed its Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint. On May 1, 2008, DOE filed its Supplemental Briefing in Support of its Motion to Dismiss Prohibited Practice Complaint.

17. On April 30, 2008, HSTA filed its Memorandum in Opposition to Respondents' Motion to Strike Declaration of Raymond Camacho, and attached to it was a Supplemental Declaration of Raymond Camacho (Supplemental Camacho Declaration). In paragraph 3 of the Supplemental Camacho Declaration, Camacho states:

> Based on my personal knowledge from a review of the files and records, and my personal familiarity and experience with HSTA procedures when investigating a potential violation by the DOE, I prepared my declaration. The exhibit 2 reference in my previous declaration was based on my review of the document in the HSTA file. I do not know if in fact that memorandum (Exhibit 2) was sent by Lisa Leach to her principal or some other version as asserted by the principal.

18. The Board held further hearing on the motion to dismiss on May 1, 2008.

19. On May 12, 2008, HSTA filed its Motion for an Order Admitting Material Facts and Waiver of Hearing by Respondents, asserting the Board should enter an order for admission of the facts alleged in the First Amended Complaint because DOE failed to timely file and answer to the First Amended Complaint.

20. On May 16, 2008, DOE filed its Memorandum in Opposition to HSTA's Motion for an Order Admitting Material Facts and Waiver of Hearing by Respondents, asserting that there was a pending motion to dismiss in this case, in lieu of answer to the First Amended Complaint, and that an answer is not due until after the Board rules on the motion to dismiss.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant First Amended Complaint pursuant to HRS §§ 89-5 and 89-14.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the Complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

3. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

4. During the course of considering a motion to dismiss, if matters outside the pleadings are presented to and not excluded by the Board, the Board may treat the motion as one for summary judgment and disposed of accordingly, giving all parties reasonable opportunity to present all material made pertinent to such motion. See Hawaii Rules of Civil Procedure (HRCP) Rule 12(b); Sierra Club v. Dept. of Transportation, 115 Hawai`i 299, 312-13, 167 P.3d 292, 305-306 (2007).

5. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624.

6. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

7. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

8. A party may move to strike an affidavit or declaration that contains evidence that would not be admissible at trial, as well as affidavits or declarations that are defective in form. A court will generally disregard only the inadmissible portions of the challenged affidavit or declaration, and consider the rest of it. The motion to strike should specify the objectionable portions of the affidavit or declaration and the grounds for each objection. See 10B Charles Alan Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure: Civil 2d* § 2738 (1998).

9. An affidavit or declaration must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant or declarant is competent to testify as to the matters therein. See HRCP Rule 56(e).

10. HAR §12-42-45 provides in relevant part:

> (a) A respondent shall file a written answer to the complaint within ten days after service of the complaint. One copy of the answer shall be served on each party, and the original and five copies, with certificate of service on all parties, shall be filed with the board.
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> * * *
>
> (g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

11. HRCP Rule 12(b) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: 1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

12. With respect to DOE's Motion to Dismiss for failure to state a claim upon which relief may be granted and failure to exhaust contractual remedies, at the hearing held on May 1, 2008, DOE made the argument that the Board has jurisdiction over the claims presented in the First Amended Complaint, but that the Board should exercise its discretion to defer to the grievance process, and argues in its memoranda that HSTA itself initiated the grievance process prior to filing the Complaint, and that DOE objects to having to litigate the same issue in different forums. HSTA argued that certain issues such as the anti-union animus and pattern of discrimination based upon union activity are not suitable subjects to defer to the grievance process, and that the Board has a statutory duty to hear the prohibited practice claims.

13. For purposes of this proceeding, the Board accepts DOE's position that the Board has jurisdiction over the prohibited practice claims, leaving the issue to be determined as whether the Board should exercise its discretion to hear

the prohibited practice claims, including claims of discrimination based upon union activity, or defer the discrimination claims to the grievance process.

14. Historically, the Board and the state courts have used federal precedent to guide their interpretation of state public employment law. See, Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Federal cases are split on the issue of exhaustion of contractual remedies. See, e.g., Spielberg Mfg. Corp., 112 NLRB 1080 (1955); Dubo Mfg. Corp., 142 NLRB 431 (1963); C&C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); Collyer Insulated Wire, 192 NLRB 837 (1971); General American Transportation Corp., 228 NLRB 808 (1977); United Techonologies, 268 NLRB 557 (1984). Similarly, the Board has in the past has deferred, refused to defer, and conditionally deferred prohibited practice claims to the grievance process where the claim may constitute both a statutory and contractual violation. See, e.g., Hawaii Nurses Association and Ariyoshi, 2 HLRB 218 (1979); UPW and Watada, Case No. CE-01-594; Hawaii State Teachers Association and DOE, 1 HPERB 253 (1972).

15. In the present case, the Board exercises its discretion to retain jurisdiction over the prohibited practice claims, including claims involving discrimination that may otherwise have constituted a violation of provision(s) of the CBA. In addition to the allegations of discrimination, the First Amended Complaint also alleges retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1), and violation of the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7). Accordingly, viewing the First Amended Complaint in the light most favorable to HSTA, it is not clear to the Board that these remaining issues would constitute a violation of the CBA subject to the grievance procedure contained therein. The Board, therefore, concludes that deferral of such claims is not warranted. Because the factual issues (including testimony of key witnesses) surrounding the non-discrimination claims are likely to overlap with the factual issues surrounding the discrimination claims, and because claims of discrimination based upon union activity appear similar in nature to the other anti-union animus claims in the First Amended Complaint over which the Board has jurisdiction, the Board also exercises its discretion to not defer the discrimination claims to the grievance process.

16. With respect to Exhibit 2 attached to the Camacho Declaration, the Board concludes that Camacho has not properly authenticated the document. The document is purported to be a copy of Leach's "[response] to the notice of investigation on November 11, 2007." However, Camacho admits that his statement was based solely upon his review of the documents contained in the HSTA file, and that he personally "do[es] not know if in fact that memorandum (Exhibit 2) was sent by Lisa Leach to her principal or some other version as asserted by the principal." Accordingly, Camacho has not shown that he is competent to testify as to the authenticity of Exhibit 2, and the Board concludes that Exhibit 2 should be stricken from the record. Because it is a general principle that a motion to strike should specify the objectionable portions of the affidavit or declaration and the grounds for each objection, and that a court will generally disregard only the inadmissible portions of a challenged affidavit or declaration, and consider the rest of it, the Board concludes that the remainder of the Camacho Declaration will not be stricken.

17. With respect to HSTA's Motion for an Order Admitting Material Facts and Waiver of Hearing by Respondents, the DOE filed an answer in response to the Complaint, but has not filed an answer in response to the First Amended Complaint. The Board's rules govern the filing of a complaint (HAR § 12-42-42); the amendment of a complaint (HAR § 12-42-43); and the answer to a complaint (HAR § 12-42-45). Unlike the HRCP,[4] the Board rules do not specifically address responses to amended pleadings.

18. HAR § 12-42-42(f) provides that only one complaint shall issue against a party with respect to a single controversy, and the rules do not specifically address responses to amended pleadings; however, because HAR § 12-42-43 allows the amendment of a complaint in the discretion of the Board, it is reasonable for the Board to apply HAR § 12-42-45 with respect

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[4]HRCP Rule 15(a) provides in relevant part (emphasis added):

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

to answers to amended complaints. In turn, HAR § 12-42-45 provides in relevant part that a respondent "shall file a written answer to the complaint within ten days after service of the complaint."

19. The Board rules provide for certain exceptions to the deadline for filing an answer; for example, when a motion for particularization of the complaint is filed, or in "extraordinary circumstances" as determined by the Board. See HAR § 12-42-42. The Board may also permit a respondent to "amend the answer for good cause shown at any time before or during the hearing." Id. The rules do not specifically address the issue of a respondent filing a motion to dismiss in lieu of an answer.

20. Historically, the Board has relied upon the HRCP in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000).

21. The issue of a party filing a motion to dismiss in lieu of an answer to a prohibited practice complaint was specifically addressed by the Board in UPW/HGEA and Cayetano, Case Nos. CE-01-378a, CE-03-378b, CE-10-378c, and CE-13-378d, Order No. 2014 (June 6, 2001). In that case, the Board found that its rules are not inconsistent with the HRCP, and relied upon the provisions of HRCP Rule 12(b) to conclude that a respondent's motion to dismiss the complaint filed in lieu of its answer "extends the time for filing of the answer until such time after the Board rules on the motion." (Order No. 2014 at 7).

22. In the present case, at the hearing held on April 16, 2008, the Board granted DOE until April 21, 2008, to file supplemental arguments supporting its Motion to Dismiss, due to the Board orally granting HSTA's Motion to Amend Complaint. Accordingly, on April 21, 2008, DOE filed its Additional Argument in Respondent's Motion to Dismiss Prohibited Practice Complaint, incorporating its arguments against the Complaint with its arguments against the First Amended Complaint. DOE, therefore, had pending before the Board a motion to dismiss in lieu of answer in response to the First Amended Complaint, extending its time for the filing of an answer until such time after the Board rules on the motion to dismiss.

23. Additionally, the Board concludes that a default ruling against the DOE is not warranted in the present case. See In re Genesys Data Technologies, Inc. v. Genesys Pacific Technologies, Inc., 95 Hawai`i 33, 40, 18 P.3d 895, 902 (2001) ("Generally, default judgments are not favored because they do not afford parties an opportunity to litigate claims or defenses on the merits"). In Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd., 100 Hawai`i

149, 58 P.3d 1190 (2002), the Hawaii Supreme Court concluded that a former employee was not entitled to default judgment, despite the former employer's failure to answer the first amended complaint, where the former employer defended the action brought by the former employee, answered the original complaint, filed summary judgment motion, and filed other motions and pleadings. Similarly, the Ninth Circuit has considered the following factors when exercising discretion as to the entry of a default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (1986).

24. In the present case, DOE defended the action brought by HSTA; answered the original Complaint; filed a Motion to Dismiss; and filed other motions and pleadings including supplemental memoranda in support of the motion to dismiss and the motion to strike the Camacho Declaration that supported the Complaint. Furthermore, there has been no showing of prejudice by the HSTA resulting from the absence of an answer to the First Amended Complaint; the merits and sufficiency of the Complaint, and First Amended Complaint by incorporation of the memoranda in support of motion to dismiss, were challenged by DOE and required deliberation by the Board prior to this Order exercising the Board's discretion to hear the discrimination claim; there is strong likelihood of dispute concerning the material facts of the First Amended Complaint; there is excusable neglect by DOE for failure to answer the First Amended Complaint (see, the Board's conclusions in UPW/HGEA and Cayetano, Case Nos. CE-01-378a, CE-03-378b, CE-10-378c, and CE-13-378d, Order No. 2014 (June 6, 2001), discussed above; and Conclusion of Law No. 25 below); and the policy articulated by the Hawaii Supreme Court in Genesys Data Technologies favors a decision on the merits. With respect to the sum of money at stake in the action, one of the factors considered by the Ninth Circuit, it is likely the sum of money at stake in the action is small, given the nature of this prohibited practice complaint alleging anti-union animus and other related claims.

25. The Board also notes that some confusion over the filing of an answer to the First Amended Complaint may have arisen because the First Amended Complaint was served on the respondents by HSTA rather than by the Board. It is the Board's practice to serve notices of the filing of complaints on respondents and to put in those notices relevant information regarding

the filing of answers. See HAR § 12-42-42(b) ("the board shall serve a copy of the complaint upon the person charged"). In the present case, the First Amended Complaint was served on DOE by HSTA rather than the Board.

ORDER

For the reasons discussed above, the Board denies DOE's Motion to Dismiss. The Board grants in part and denies in part DOE's Motion to Strike; accordingly, the document identified as Exhibit 2 attached to the Camacho Declaration is stricken. The Board denies HSTA's Motion for an Order Admitting Material Facts and Waiver of Hearing by Respondents.

Further, RESPONDENTS ARE DIRECTED TO FILE with this Board the original and five (5) copies of their answer to the First Amended Complaint, with proof of service upon HSTA, no later than 4:30 p.m. of the tenth day after service of this Order. Failure to timely file and serve an answer may constitute an admission of the material facts alleged in the First Amended Complaint and a waiver of a hearing.

DATED: Honolulu, Hawaii, May 21, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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