STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>STEPHANIE C. STUCKY,<br><br>Complainant,<br><br>and<br><br>WILFRED OKABE, President, Hawaii State Teachers Association; WILBERT HOLCK, UniServ, Hawaii State Teachers Association; ERIC NAGAMINE, Maui UniServ, Hawaii State Teachers Association; DAVID FORREST, Oahu UniServ, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION,<br><br>Respondents. | CASE NO. CU-05-303<br><br>ORDER NO. 2807<br><br>ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS COMPLAINT, FILED ON APRIL 14, 2011; AND NOTICE OF SECOND PREHEARING/ SETTLEMENT CONFERENCE |

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS COMPLAINT FILED ON APRIL 14, 2011; AND NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

On April 7, 2011, Complainant STEPHANIE C. STUCKY (Complainant or Stucky), *pro se*, filed a Prohibited Practice Complaint (Complaint) against Respondents WILFRED OKABE (Okabe), President, Hawaii State Teachers Association; WILBERT HOLCK (Holck), UniServ, Hawaii State Teachers Association; ERIC NAGAMINE (Nagamine), Maui UniServ, Hawaii State Teachers Association; DAVID FORREST (Forrest), Oahu UniServ, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) (collectively, Respondents) with the Hawaii Labor Relations Board (Board). Complainant alleges that the HSTA breached its duty of fair representation by acting in bad faith in the implementation of Article V of the Unit 05 collective bargaining agreement (CBA or Agreement) and internal process guidelines for the submission of grievances through to arbitration as per the CBA, specific to the process of taking a grievance through to arbitration; and in representing Ms. Stucky in filing a motion to vacate the Arbitrator's Decision and Award dated January 12, 2011, as per Hawaii Revised Statutes (HRS) § 658-9; and committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5).

On April 14, 2011, Respondents filed a Motion to Dismiss Complaint, asserting the Complaint should be dismissed for (1) lack of subject matter jurisdiction, and (2) failure to state a claim for relief.

On April 25, 2011, Ms. Stucky filed Complainant's Affirmation in Opposition to Respondent's Motion to Dismiss Complaint, asserting the Complaint alleges Respondents have engaged in or are engaging in a prohibited practice or practices within the meaning of HRS §§ 89-13(b)(3), (4), and (5), and 89-14.

On May 26, 2011, the Board[1] held a hearing on Respondents' Motion to Dismiss Complaint, in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), with Complainant appearing via telephone.

After careful consideration of the arguments, record, and filings in this case, the Board[2] makes the following findings of fact, conclusions of law, and decision and order granting in part, and denying in part, Respondents' Motion to Dismiss Complaint.

## FINDINGS OF FACT

1. At all relevant times, Complainant Stucky was a teacher and a public employee within the meaning of HRS § 89-2[3] and a member of BU 05[4] and the HSTA.

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[1]Chair James B. Nicholson (Nicholson) and former Board Member Norman K. Kato II heard the arguments on Respondent's Motion to Dismiss Complaint on May 26, 2011. Board Member Sarah R. Hirakami recused herself from the proceedings.

[2]Presently, the Board consists of Chair Nicholson and Board Members Sesnita A. D. Moepono and Rock B. Ley. Board Member Sesnita A. D. Moepono was appointed to the Board on an interim appointment on June 15, 2011 and began her term on July 1, 2011, replacing Board Member Hirakami. Board Member Rock B. Ley was appointed on July 1, 2011 replacing Board Member Kato. The recently appointed Board members have read the entire files of this proceeding and have reviewed the transcript of the oral arguments presented.

[3]HRS § 89-2 provides as follows:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

[4]Pursuant to HRS § 89-6(a), governing appropriate bargaining units, BU 05 consists of "[t]eachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]"

2. At all relevant times, Respondent HSTA was an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,[5] of employees included in BU 05.

3. At all relevant times, Respondent Okabe was or is the President of the HSTA.

4. At all relevant times, Respondent Holck was or is the Deputy Executive Director of the HSTA.

5. At all relevant times, Respondent Nagamine was or is the Maui UniServ Director of the HSTA.

6. At all relevant times, Respondent Forrest was or is the Oahu UniServ Director of the HSTA.

7. The HSTA and the Department of Education, State of Hawaii (DOE) have been parties to at least 15 successive collective bargaining agreements. In the present case, the relevant grievance procedure is contained in the CBA with effective dates of July 1, 2007, through June 30, 2009.[6]

8. Article V of the 2007 – 2009 CBA provides for a grievance procedure. Relevant portions of Article V, Section G.2., governing arbitration, include the following:

> Should the parties not agree to mediation, or if the mediated grievance was not resolved, the grievance timelines shall be reinstated.
>
> a. Representatives of the parties shall immediately attempt to select an arbitrator. If the parties have not appointed an arbitrator within two (2) weeks from the receipt of the

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[5]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.

[6]The current CBA has the effective dates of July 1, 2009, through June 30, 2011.

request for arbitration, the parties will request that the Hawaii Labor Relations Board provide five (5) names from the register of arbitrators.

The arbitrator shall be chosen by the parties by alternately striking one (1) name at a time from the list. The first party to scratch a name shall be determined by lot. The arbitrator whose name remains on the list shall serve for that case.

By mutual agreement, the parties may select a permanent umpire to serve on all cases.

b. In making a decision on a case, the arbitrator shall not have the authority to consider any facts not in evidence, nor shall the arbitrator add to, subtract from, delete, or in any way amend or modify any term or condition of the [CBA]. The arbitrator's decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.

The arbitration hearing shall commence within forty-five (45) days from the [HSTA's] official notification to the Employer that the case is going to arbitration. The parties may mutually agree to written waiver of the timelines. The arbitrator(s) to be selected must agree to the schedule.

* * *

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

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

* * *

g. The parties shall not have the right to present different allegations, facts, evidence and arguments in arbitration than those presented to the State Superintendent or designee at the Step 2 meeting or hearing.

Article V, Section M, provides:

> Disciplinary action taken against a teacher shall be for proper cause and shall be subject to the Grievance Procedure. An expedited grievance procedure shall be used for suspensions or terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.
>
> If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

9. Article VIII of the CBA, governing teacher performance, provides in Section N:

> A teacher who has been given an unsatisfactory rating may process a grievance except as provided for in Article VIII, Section M [sic][7], paragraphs 2 and 3. A teacher whose

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[7]The reference to "Section M" appears to be a typographical error, as Section M of Article VIII consists of only a single paragraph. However, Section O of Article VIII provides:

> No teacher shall be adversely evaluated without proper cause, but only adverse evaluations used as the basis for any disciplinary action against the teacher shall be subject to the Grievance Procedure.
>
> Any adverse evaluation used as the basis for any disciplinary action against a probationary teacher shall be subject to the Grievance Procedure up to but not including arbitration.
>
> The non-renewal of a probationary or non-tenured teacher contract shall be at the discretion of the Employer and shall not be subject to the Grievance Procedure except for procedural defects. A probationary or non-tenured reacher whose contract is not renewed shall be given an opportunity for a hearing with the principal and [a HSTA] representative present if desired by the teacher, prior to the principal's recommendation of non-renewal.

unsatisfactory rating has been maintained through the grievance procedure as described in Article V shall be terminated.

10. In 2006, Principal Kilborn evaluated Ms. Stucky and rated her as overall unsatisfactory and recommended Ms. Stucky's termination. On June 1, 2006, the HSTA filed a grievance relating to Ms. Stucky's alleged right to discuss her Professional Evaluation Program for Teachers (PEP-T) Overall Rating with her Rater at the time she was informed of that Rating on May 26, 2006, and the rater's alleged refusal to provide Ms. Stucky with documentation supporting the Rating at that time.

11. By letter dated May 1, 2009, the DOE notified Ms. Stucky of a decision to terminate her employment, effective May 11, 2009, due to an overall "Unsatisfactory" rating as indicated on her PEP-T rating form dated May 25, 2006.

12. From the time that Principal Kilborn recommended employment termination in 2006 and until Ms. Stucky's termination on May 11, 2009, Ms. Stucky was placed on leave with pay status and continued to receive her salary, including raises, and continued to earn credits for sick leave, seniority, and service credit for retirement benefits. On May 12, 2009, the HSTA filed a Grievance Form at Step 2 on behalf of Ms. Stucky, alleging Ms. Stucky was being terminated without just and proper cause.

13. By letter dated May 15, 2009, the DOE acknowledged receipt of the Step 2 grievance.

14. On July 6, 2009, a Step 2 meeting was held. In attendance at the meeting was Ms. Stucky, Nagamine, Forrest, and the Superintendent's Designated Representative Yvonne W.M. Lau (Lau).

15. By letter dated July 13, 2009, Lau notified the HSTA that the Step 2 grievance was denied. Lau concluded, in summary, that the DOE properly discharged Ms. Stucky for overall unsatisfactory job performance (under PEP-T) and with just cause.

16. By letter dated July 15, 2009, the HSTA demanded arbitration regarding the Step 2 grievance.

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Additionally, in the current CBA, the reference is to "Section O." Accordingly, it appears the reference should be to "Section O" rather than "Section M."

17. By letter dated September 25, 2009, the HSTA notified the DOE that the Board of Directors of the HSTA approved the case for arbitration.

18. By letter dated November 2, 2009, Forrest, pursuant to Article V.G.2.a of the Unit 05 CBA, requested from the Board a list of five names from which an arbitrator may be selected.

19. Arbitrator Frank Yap, Jr. (Arbitrator Yap), was selected to be the arbitrator to hear the June 1, 2006 PEP-T and May 12, 2009 termination grievances. The arbitration hearing was held over a period of nine days, on May 12 and 13, June 9, 19, 20, 22, 23, and 26, and October 14, 2010. The DOE called Catherine Kilborn (the Principal at the time of the termination) and Patricia Hamamoto (the Superintendent at the time of the termination, and the final reviewing authority) as witnesses. The HSTA called Ms. Stucky as a witness.

20. Arbitrator Yap issued an Arbitrator's Decision and Award, dated January 12, 2011.

21. Arbitrator Yap found that the "parties were afforded a full opportunity to submit evidence, to examine and cross-examine the witnesses, to present rebuttal evidence, and by written post-hearing memoranda, to present argument on the issues. Counsel and the UniServ Directors fully and fairly represented their respective clients, and their respective positions were appropriately presented at the arbitration hearing and in their simultaneous post-arbitration memoranda[.]"

22. Arbitrator Yap considered the HSTA's allegations that the principal did not objectively rate Ms. Stucky; that the principal engaged in an intentional pattern of failing to comply with provisions of the CBA when Ms. Stucky brought certain matters to her attention, then relied upon those matters to justify the ratings she made; and that the basis for the principal's actions was in retaliation for the prior grievances Ms. Stucky filed which involved both administrative and judicial litigation. Arbitrator Yap ultimately concluded and affirmed the DOE's decision to terminate Ms. Stucky based upon her overall unsatisfactory rating under the PEP-T, and denied the grievance filed on May 12, 2009, and remedies sought; and, denied the grievance filed on June 9, 2006.

23. On January 18, 2011, Ms. Stucky received a telephone call from Nagamine informing her of the Arbitrator's Decision and Award. When Ms. Stucky requested a copy of the decision, she was told that Nagamine could not release a copy until he received permission from Holck. Ms. Stucky requested information on what her options were, and Nagamine answered that he was

under the impression the arbitration decision was final and binding and he knew of no other options.

24. Ms. Stucky was given the opportunity to review the Arbitrator's Decision and Award during a scheduled meeting on January 18, 2011, from 3:00 to 5:00 p.m.

25. On January 22, 2011, Ms. Stucky received the Arbitrator's Decision and Award.

26. Via e-mail to Nagamine, Forrest, and Holck on February 1, 2011, Ms. Stucky requested that "HSTA file a notice of appeal within the deadlines according to Arbitration Rules."

27. Via e-mail to Holck, Nagamine, and Forrest on February 6, 2011, Ms. Stucky questioned why the arbitrator used the performance criteria of the current CBA for guidance.

28. Ms. Stucky also contacted the HSTA with questions or concerns about the Arbitrator's Decision and Award via e-mails on February 5, 7, 9, 12, and 17, 2011.

29. On February 12, 2011, Ms. Stucky submitted an Application for Legal Services Program form of the HSTA, requesting "legal assistance from HSTA/NEA or legal fees in vacating judgment to the circuit court for a trial de novo" regarding the Arbitrator's Decision and Award.

30. On February 14, 2011, Holck sent an e-mail to Ms. Stucky acknowledging receipt of the request for legal services, and stating he asked legal counsel to review the arbitration decision. Holck also asked Nagamine and Forrest for their opinions applying the statutory standards for vacating an award. Holck stated that if legal counsel found there were grounds to vacate the award, counsel would file a motion with the court and represent the HSTA in the matter.

31. By letter dated March 7, 2011, Holck notified Ms. Stucky that Nagamine, Forrest, and counsel for the HSTA concurred that the HSTA does not have a legal basis to file a motion to vacate the arbitration award, and thus Ms. Stucky's request for legal services was denied. Holck also provided Ms. Stucky with the statutory requirements for vacating an arbitrator's decision.

32. On March 11, 2011, Ms. Stucky sent an e-mail to Nagamine, Forrest, and Holck, stating, inter alia, that she was deeply disappointed in their indication that there is no basis to file a motion to vacate, despite Ms. Stucky's rebuttals and concerns through several e-mails and her requests to "get together" to review the decision; that she felt "abandoned" by the HSTA; that she requested several times for information as to what legal options and advice were available to her, all without response; and that she feels she was ignored and that HSTA feels no further responsibility to represent her since the decision. Ms. Stucky requested information regarding her "rights of any legal services Appeals procedures available" to her at that time.

33. By letter dated March 13, 2011, Ms. Stucky sent an "Application for Legal Services Program for HSTA/DUSHANE Legal Appeal Services Program designed specifically for members who feel that they have been denied or curtailed legal support by local NEA affiliate HSTA." Ms. Stucky also requested the opportunity to present her reason and case before a three-member panel.

34. Ms. Stucky continued to periodically express her concerns and questions to the HSTA via e-mails, both prior to and after her March 13, 2011, letter.

35. By letter dated March 15, 2011, the HSTA acknowledged receipt of the March 13, 2011, application.

36. By letter dated March 30, 2011, the HSTA notified Ms. Stucky that the HSTA was convening a 3-member panel to hear her request on March 31, 2011, and that Ms. Stucky may appear via video conference from the HSTA's Maui office.

37. On March 31, 2011, a 3-member panel heard the HSTA/DUSHANE Legal Services Appeal of Ms. Stucky, with Ms. Stucky appearing via video conference.

38. Via e-mail on April 2, 2011, the HSTA provided Ms. Stucky with a copy of the 3-member panel's March 31, 2011, decision denying Ms. Stucky's appeal, the panel having determined that "there is no basis upon which to grant your appeal for legal services. No reasons were presented refuting the statutory requirements . . . for vacating an arbitration award[.]" The decision also notified Ms. Stucky of her right to appeal the panel's decision with the NEA Office of Legal Services Programs.

39. On April 7, 2011, Ms. Stucky filed the instant Complaint. The Complaint alleges that the HSTA breached its duty of fair representation by acting in bad

faith, in the implementation of Article V of the Unit 05 CBA and internal process guidelines for the submission of grievances through to arbitration as per the CBA, specific to the process of taking a grievance through to arbitration; and in representing Ms. Stucky in filing a motion to vacate the Arbitrator's Decision and Award, as per HRS § 658-9, and committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5).

40. On April 14, 2011, Respondents filed a Motion to Dismiss Complaint[8], asserting the Complaint should be dismissed for (1) lack of subject matter jurisdiction, and (2) failure to state a claim for relief. Respondents contend that the Board lacks jurisdiction to vacate an arbitration award and that the instant complaint should be dismissed because the Complaint fails to state a claim for either a breach of the duty of fair representation by the union or a violation of the CBA by the Employer. Respondents further contend, *inter alia*, that one of Ms. Stucky's claims is that the HSTA failed to provide her legal representation under an agreement with the National Education Association which is an internal matter and to which the Union's duty of fair representation does not extend; the HSTA has no duty of fair representation which extends beyond the arbitration of a grievance under HRS § 89-10.8 or Article XV of the collective bargaining agreement; the arbitration award is final and binding by contract and HRS § 89-10.8; and acceptance of an adverse award does not constitute a violation of the duty of fair representation.

41. On April 25, 2011, Ms. Stucky filed Complainant's Affirmation in Opposition to Respondent's Motion to Dismiss Complaint, asserting the Complaint alleges Respondents have engaged in or are engaging in a prohibited practice or practices within the meaning of HRS §§ 89-13(b)(3), (4), and (5), and 89-14. Complainant highlighted portions of Article V 2a, b, d, and g of the Collective Bargaining Agreement, dealing with grievance procedure timelines and contended, *inter alia*, that "[s]ince the arbitrator's award dated January 12, 2011, HSTA abandoned Complainant and refused to review the arbitration

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[8]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 (1974); United Public Workers, 5 HLRB 177 (1993).

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).

award for purposes of determining whether there was any basis to vacate the award in circuit court, and also in understanding the award, and communicating the reasons why the award would not be contested."

42. On May 26, 2011, the Board held a hearing on Respondents' Motion to Dismiss Complaint, in accordance with HRS § 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3), with Complainant appearing via telephone.

43. Based upon a review of the record and consideration of the arguments presented, the Board finds that the arbitration at issue is a grievance arbitration; that there were no arguments presented regarding noncompliance with the timelines of the grievance procedure; and that the HSTA did not file a motion to vacate Ms. Stucky's arbitration award pursuant to HRS § 658A-23.

## CONCLUSIONS OF LAW

1. 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)).

2. 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)).

3. The Complaint alleges prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5). HRS § 89-13(b) provides in relevant part:

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

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

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

4. With respect to alleged violation of HRS § 89-13(b)(3) for refusal to participate in good faith in the mediation and arbitration procedures set forth in HRS § 89-11, the Board concludes that HRS § 89-11 governs the resolution of disputes and impasses over the terms of an initial or renewed collective bargaining agreement, and as such is inapplicable to the present case which involves a grievance arbitration. The Board therefore concludes that Complainant fails to state a claim for relief for a HRS § 89-13(b)(3) violation.

5. With respect to the alleged violations of the terms of the collective bargaining agreement, the Board finds Complainant appears to allege that HSTA failed to adhere to the timelines in Article V of the CBA and internal process guidelines for the submission of grievances and that the HSTA did not address Complainant's alleged HRS § 89-13(b)(5) violations. The Board thus denies HSTA's motion to dismiss Complainant's allegations of an HRS § 89-13(b)(5) violation.

6. With respect to the alleged breach of duty of fair presentation in violation of HRS § 89-13(b)(4), the Board agrees with Respondents that the court, and not the Board, has exclusive jurisdiction to enter judgment on an award under HRS Chapter 658A, the Revised Uniform Arbitration Act (RUAA) and that subject matter jurisdiction on a motion to vacate an arbitral award rests exclusively in the circuit court.

7. HRS chapter 658A provides in relevant part (emphases added):

§ 658A-3. When chapter applies. (a) Except as provided in subsection (c), this chapter governs an agreement to arbitrate made on or after July 1, 2002.

(b) This chapter governs an agreement to arbitrate made before July 1, 2002, if all the parties to the agreement or to the arbitration proceeding so agree in a record. If the parties to the agreement or to the arbitration do not so agree in a record, an agreement to arbitrate that is made before July 1, 2002, shall be

governed by the law specified in the agreement to arbitrate or, if none is specified, by the state law in effect on the date when the arbitration began or on June 30, 2002, whichever first occurred.

(c) After June 30, 2004, this chapter governs an agreement to arbitrate whenever made.

* * *

§ 658A-5. Application for judicial review. (a) Except as otherwise provided in section 658A-28, an application for judicial relief under this chapter shall be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this chapter shall be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion shall be given in the manner provided by law or rule of court for serving motions in pending cases.

* * *

§ 658A-23. Vacating award. (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 658A-15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising

the objection under section 658A-15(c) not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 658A-9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as that provided in section 658A-19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

* * *

§ 658A-26. Jurisdiction. (a) A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this chapter.

8. In construing the RUAA, "We cannot presume that the legislature intended to enact an unnecessary amendment." In re Taxes, Hawaiian Land Co., 53 Haw. 45, 60-61, 487 P.2d 1070, 1080 (1971); see also, Levy v. Kimball, 51 Haw. 540, 545, 465 P.2d 580, 581 (1970) ([W]e must start with the presumption that our legislature intended to enact an effective law, and it is not to be presumed that legislation is in vain effort or a nullity."). As stated in Norman J. Singer and J.D. Shambie Singer, 1 Statutes and Statutory Construction (2009 ed.)

§ 22:30, "[t]herefore, any material change in the language of the original act is presumed to indicate a change in legal rights." As noted above, the RUAA in HRS §§ 658A-5(a), 658A-23(a) and 658A-26, clearly specify that "the court" has the authority to provide judicial relief by a proper motion to vacate an arbitration decision and award. There is no reference in the statute to an administrative agency or other forum for relief.

9. In addition, the RUAA added a new provision entitled "jurisdiction" to expressly state in HRS § 658A-26(b), [a]n agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this chapter. It is a cardinal rule of statutory interpretation that "where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond the language for a different meaning." State v. Haugen, 104 Hawai`i 71, 75, 85 P.3d 178, 182 (2004). Moreover, "no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Allstate Ins. Co. v. Schmidt, 104 Hawai`i 261, 266, 88 P.3d 196, 201 (2004); see also Orthopedic Associates of Hawaii, Inc. v. Hawaiian Ins. & Guaranty Co., Ltd., 109 Hawai`i 185, 196, 124 P.3d 930, 941 (2005). The use of the term "exclusive jurisdiction" was intended to grant to the circuit court the power to adjudicate all actions over arbitration awards to the exclusion of all other tribunals. See definition of "exclusive jurisdiction" in Black's Law Dictionary 869 (8th ed. 1999) ("exclusive jurisdiction. A court's power to adjudicate an action or a class action to the exclusion of all other courts [federal courts have exclusive jurisdiction over actions brought under the security and exchange act].").

10. In the present case, Article V.G.2 of the CBA is an agreement to arbitrate entered into between the HSTA and the public employer. The provision is mandated by HRS § 89-10.8, which provides in relevant part (emphasis added), "[a] public employer shall enter into a written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement." See Hoopai v. Civil Service Comm'n, 106 Hawai`i 205, 218, 103 P.3d 365, 378 (2004). The Board therefore concludes that the circuit court has exclusive jurisdiction under HRS Chapter 658A to enter a judgment on the arbitration award.

11. 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).

12. The Board agrees with Respondents that Ms. Stucky brings a hybrid claim to the Board in this matter. Recently, in Lee v. United Public Workers, AFSCME, Local 646, AFL-CIO, ___ P.3d. ___, 2011 WL 2570732 (Hawai`i App. 2011), the Intermediate Court of Appeals recently affirmed the dismissal of a complaint filed in the circuit court by a public sector employee alleging a breach of duty of fair representation by the union and a breach of the collective bargaining agreement for wrongful discharge finding that the employee should have filed a prohibited practice complaint with the Board. The court discussed hybrid actions and stated:

> A wrongfully discharged employee may bring an action against his [or her] 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.* (quoting Vaca, 386 U.S. at 186).
>
> Such an action, known as a "hybrid 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." *Id.* These two claims are "inextricably interdependent," in that for an employee alleging wrongful termination to prevail against either the employer or the union, the employee must not only show that his or her termination violated the collective bargaining agreement, but must also show that the union breached its duty of fair representation by not pursuing the employee's grievance. *Id.*
>
> In order to establish the union's breach of its duty of fair representation, an employee alleging wrongful termination, such as Lee, must do more than show that he or she had been wrongfully terminated. Vaca, 386 U.S. at 193. A union breaches its duty of fair representation "only when [the] union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca, 386 U.S. at 190; see Poe II, 105 Hawai'i at 104, 94 P.3d at 659. A union breaches its duty of good faith when its conduct towards a

member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith." (citing Vaca, 386 U.S. at 190, among other cases). Thus, for Lee to prevail in her hybrid action against either the State or UPW, Lee must show both that (1) the State breached the CBA by wrongfully terminating her and (2) UPW breached its duty of fair representation by its arbitrary, discriminatory, or bad faith conduct in refusing to pursue her grievance. See Poe II, 105 Hawai`i at 101-04, 94 P.3d at 656–59. [Footnote omitted.]

13. Respondents contend that the instant complaint should be dismissed because the HSTA has no duty of fair representation which extends beyond the arbitration of a grievance under HRS § 89-10.8 or Article XV of the collective bargaining agreement because the decision of the arbitrator is final and binding. Respondents rely on the following federal cases where the courts have held that the acceptance of an adverse award does not constitute a violation of the duty of fair representation. See Bonds v. Coca-Cola Co., 806 F.2d 1324, 1326 (7th Cir. 1986) ("union is never obliged to contest an award in court in order to discharge its duty of fair representation"); Freeman v. Teamsters Local 135, 746 F.2d 1316, 1319-22 (7th Cir. 1984) (no violation if employee has right to sue to set aside award) (Freeman); Sear v. Cadillac Auto Co. 654 F.2d 4, 7 (1st Cir. 1981) ("When a collective bargaining contract calls for final and binding grievance arbitration, as here, an arbitration decision is ordinarily final, for the employees have obtained what their union has bargained for."); Acuff v. United Papermakers and Paperworkers, AFL-CIO, 404 F.2d 169 (5th Cir. 1968) cert denied, 394 U.S. 987 (1969) ("The employees cannot equate lack of complete success with bad faith any more than they could if their own lawyers had been involved."); Rasco v. Potter, 265 Fed. App. 279, 284 (5th Cir. 2008) ("Additionally, we agree with the district court that the Union's refusal to sue to vacate the award did not violate the duty of fair representation."); see also Osborne, Labor Union Law and Regulation 347 (2003) ("Acceptance of an adverse award is neither malpractice nor a violation of the duty of fair representation").

14. The Board finds that the foregoing federal cases are not applicable to the facts in this case because in the federal courts an employee may seek judicial review to challenge an arbitration award.[9] By contrast, HRS Chapter 658A-

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[9]In the Freeman case, supra, the court stated at pp. 1321-322:

In this case, there is nothing in the record to indicate that the collective bargaining agreement gives the union the exclusive right to seek judicial review to vacate an arbitrator's award. Accordingly,

23 provides that only a party to an arbitration may apply to vacate an arbitration award on limited grounds. Thus, although the relevant contract provision Article V.G.2.b. and HRS § 89-10.8(a) refer to final and binding arbitration, HRS § 658A-23 provides a mechanism to vacate the award on specified grounds and only a party to the proceeding can move to vacate the award. The Board therefore concludes that the Union's duty of fair representation extends to the decision to seek judicial review and the Board finds that Ms. Stucky states a claim for relief for a breach of duty of fair representation; whether the HSTA breached that duty is a matter for further argument or proof. The Board therefore denies Respondents' motion to dismiss Ms. Stucky's claim of an HRS § 89-13(b)(4) violation.

ORDER

For the reasons discussed above, the Board hereby grants in part and denies in part Respondents' Motion to Dismiss Complaint, filed on April 14, 2011. Accordingly, Respondents shall file an answer to the Complaint no later that 4:30 p.m. of the tenth day after service of this order. If Respondents fail to timely file and serve answer, such failure may constitute an admission of the material facts alleged in the Complaint and a waiver of a hearing.

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Freeman had the right to file suit to set aside the committee's decision as long as he exhausted the contract's grievance procedures and alleged that Local 135 breached its duty of fair representation during the arbitration process. F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204, 1210 (7th Cir.1980), certiorari denied, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324. If Freeman wanted to appeal the award, he was at liberty to do so; having exhausted the remedies provided by the contract, he had individual access to remedies outside of the collective bargaining agreement. Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 567, 96 S.Ct. 1048, 1057, 47 L.Ed.2d 231. Once the arbitrator denied plaintiff's grievance, the rationale for the duty of fair representation evaporated; Freeman no longer needed the protections provided by the duty of fair representation because he had access to extra-contractual remedies. That being the case, the union owed plaintiff no duty in deciding whether to seek judicial review of the committee's ruling because, with respect to that decision, it was not acting as his exclusive representative. The union was under no duty to provide Freeman with more legal assistance than bargained for in the contract or required by law. [Emphasis added]

STEPHANIE C. STUCKY v. WILFRED OKABE, et al.
CASE NO. CU-05-303
ORDER NO. 2807
ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS COMPLAINT, FILED ON APRIL 14, 2011; AND NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

## NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing/settlement conference by conference call in this matter on **August 4, 2011 at 10:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii, to establish deadlines and schedule the hearing on the merits. Complainant shall telephone the Board at 984-2400 6-8615 and Respondents' counsel shall appear in the Board's hearing room, at the designated time.

DATED: Honolulu, Hawaii, July 22, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A. D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Stephanie C. Stucky
Herbert R. Takahashi, Esq.