

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

STEPHANIE C. STUCKY,

Complainant,

and

DWIGHT TAKENO, HSTA, Interim
Executive Director; RAY CAMACHO, HSTA
Deputy Executive Director; ERIC
NAGAMINE, HSTA UniServ Director;
DAVID FORREST, HSTA UniServ Director;
and HAWAII STATE TEACHERS
ASSOCIATION,

Respondents.

CASE NO. CU-05-283

ORDER NO. 2834

ORDER GRANTING IN PART AND
DENYING IN PART RESPONDENTS'
MOTION TO DISMISS COMPLAINT
AND IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT, FILED ON
NOVEMBER 4, 2009; AND NOTICE
OF SECOND PREHEARING/
SETTLEMENT CONFERENCE

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS'
MOTION TO DISMISS COMPLAINT AND IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT, FILED ON NOVEMBER 4, 2009;
AND NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

On October 27, 2009, Complainant STEPHANIE C. STUCKY (Complainant or Stucky), *pro se*, filed a prohibited practice complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged that, *inter alia*, Respondents failed to follow the strict guidelines in the bargaining unit (Unit) 05 collective bargaining agreement (CBA) and the union's internal process guidelines for the submission of grievances through to arbitration and thereby breached the duty of fair representation in wilful violation of Hawaii Revised Statutes (HRS) § 89-13(b)(3), (4), and (5) in the handling of her termination grievance.

On November 4, 2009, Respondents DWIGHT TAKENO, HSTA, Interim Executive Director; RAY CAMACHO, HSTA Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA UniServ Director, and HAWAII STATE TEACHERS ASSOCIATION (collectively referred to as Respondents or HSTA), by and through their counsel, filed with the Board a Motion to Dismiss Complaint and in the Alternative for Summary Judgment contending that the Complaint should be dismissed for lack of jurisdiction, failure to state a claim for relief, and failure to exhaust internal union remedies. Alternatively, Respondents argued that summary judgment should be rendered in their favor.

On November 12, 2009, Complainant filed with the Board a Memorandum in Opposition to Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment. Complainant argued, *inter alia*, that the Board has jurisdiction over these matters because the allegations involve statutory rather than contractual violations; there are allegations that the instant grievance is not being properly processed; and there is a divergence of positions between Complainant and HSTA.

On June 2, 2010, HSTA filed a Supplemental Memorandum in Support of Motion to Dismiss Complaint and in the Alternative for Summary Judgment Filed on November 4, 2009 with the Board. HSTA contended, *inter alia*, that any claims which arose prior to July 29, 2009 (the 90th day prior to the filing of the October 27, 2009 Complaint) are time-barred and thus any delay at Step 2 of the grievance procedure is not within the Board's jurisdiction; the complaint against individual HSTA employees as respondents fails to state a claim for relief pursuant to Matthew M. Taamu, Order No. 2677, Order Granting in Part and Denying in Part UPW's Motion to Dismiss Complaint and/or for Summary Judgment, and Denying Motion to Dismiss for Lack of Prosecution; and Notice of Second Prehearing/Settlement Conference, Case No. CU-01-282 (January 12, 2010); the claim against HSTA is a hybrid claim and the instant Complaint is inadequate because it fails to allege a breach of duty of fair representation by HSTA or a specific violation of the Unit 05 collective bargaining agreement; and Complainant failed to exhaust internal union remedies as set forth in Article XV of the HSTA By-laws.

On June 10, 2010, Stucky filed Complainant's Response to HSTA's Supplemental Memorandum in Support of Motion (sic) Dismiss Complaint and in the Alternative for Summary Judgment Filed on November 4, 2009. Stucky contended, *inter alia*, that HRS § 89-14 gives the Board authority to hear prohibited practice complaints based on violations of HRS Chapter 89, including HRS § 89-13(b)(3), (4) and (5); that Complainant alleges statutory claims as well as violations of the Unit 05 collective bargaining agreement; and Respondents' citations of failure to exhaust internal Association remedies is inapplicable to the instant Complaint.

On June 14, 2010, the Board conducted a hearing on the Respondents' Motion to Dismiss and in the Alternative Motion for Summary Judgment.¹

¹The hearing on Respondents' Motion to Dismiss and in the Alternative for Summary Judgment was previously scheduled on December 7, 2009 and continued by the Board because of the lack of a quorum due to the recusal of Board Member Sarah R. Hirakami, and the passing of Board Member Emory J. Springer. On June 14, 2010, the Board, with James B. Nicholson (Nicholson) Chair, presiding and Norman K. Kato II (Kato), Member, heard the arguments on Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment.

After careful consideration of the arguments, and the record and filings in this case, the Board² 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 § 89-2³ and a member of BU 05⁴ and Respondent HSTA.

²Presently, the Board consists of Chair Nicholson and Board Members Sesnita A. D. Moepono (Moepono) and Rock B. Ley (Ley). Board Member 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 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.

In addition, on November 10, 2011, the Board issued a Notice of Disclosure by Board Member Sesnita A.D. Moepono and Deadline to File Objections advising the parties that Member Moepono's spouse is a member of Unit 05 and her sister is an HSTA retiree member and if any party objected to her participation in this matter, the party could file a statement of objections with the Board by November 25, 2011. As no objections were filed with the Board, Member Moepono will participate in these proceedings.

³HRS § 89-2, as amended, provides in part 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)].

⁴Pursuant to HRS § 89-6(a), governing appropriate bargaining units, bargaining unit (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 DWIGHT TAKENO (Takeno) was the Interim Executive Director of HSTA.
4. At all relevant times, Respondent RAY CAMACHO (Camacho) was the Deputy Executive Director of HSTA.
5. At all relevant times, Respondent ERIC NAGAMINE (Nagamine) was the Maui UniServ Director of HSTA.
6. At all relevant times, Respondent DAVID FORREST (Forrest) was a UniServ Director of HSTA.
7. 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.
8. Article V of the 2007 – 2009 CBA provides for a grievance procedure and provides in pertinent part:
 - E. STEP 1. a) If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved, then the teacher or the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific term or provision of the Agreement allegedly violated and the remedy sought.

⁵HRS § 89-2 provides in part as follows:

“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, and other terms and conditions of employment of public employees.

- b) The grievance must be presented to the CAS [Complex Area Superintendent] or Assistant Superintendent in the case of State Office teachers, in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved.
- c) The CAS or Assistant Superintendent in the case of State Office teachers may hold a meeting for a purpose of obtaining evidence pertaining to the grievance and for the purpose of attempting to settle the matter. The decision will be in writing and delivered to the grieving party within five (5) days of the receipt of the grievance.

F. STEP 2. a) If the answer to the grievance in Step 1 is not delivered within five (5) days or does not satisfactorily resolve the matter, then the grieving party in Step 1 may appeal such answer or any part thereof, by filing the grievance with the Superintendent or designee within five (5) days after the receipt or non-receipt of the answer in Step 1. The Superintendent or designee shall hold a meeting within five (5) days. However, a formal hearing shall be held in lieu of a second level meeting if requested by either party.

- b) The grievance must be set forth in writing on a form set forth in Appendix 1 and specifically state which portion of the answer to the grievance in Step 1 is being appealed and the remedy sought.
- c) The Superintendent or designee's answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the hearing or meeting.

* * *

G. MEDIATION/ARBITRATION

If a claim by the Association or teacher that there has been a violation, misinterpretation or misapplication of this Agreement is not satisfactorily resolved at Step 2, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2.

However, a grievance may be submitted to mediation after the Association has submitted its request for arbitration.

* * *

2. ARBITRATION

Should the parties not agree to mediation, or if the mediated grievance was not resolved, the grievance timeline 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 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 Collective Bargaining Agreement. The arbitrator's

decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.

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

* * *

- I. The parties by mutual written agreement may waive Steps 1 and 2 of the Grievance Procedure and proceed with arbitration. In addition, the parties may voluntarily and mutually agree to mediation at any time prior to Step 2 provided it is at no cost to either party. The grievance time frame shall be suspended for twenty-five (25) days to accommodate the mediation process.
9. On May 12, 2009, HSTA filed a Grievance Form at Step 2 on behalf of Stucky, alleging Stucky was being terminated without just and proper cause.
10. On May 27, 2009, Complainant requested that HSTA proceed to an expedited arbitration per Article V-I of the CBA.
11. On July 6, 2009, a Step 2 meeting was held. In attendance at the meeting were Stucky, Nagamine, Forrest, and the Superintendent's Designated Representative, Yvonne W.M. Lau (Lau).
12. On July 13, 2009, Lau issued a response to Stucky's Step 2 grievance, finding Stucky was properly discharged from employment.
13. By letter dated July 15, 2009, HSTA submitted a Demand for Arbitration of Stucky's grievance to the Department of Education.
14. Wilfred Okabe (Okabe), HSTA President, stated in a Declaration, dated November 3, 2009, that in accordance with internal HSTA procedure, the board of directors (BOD) of the Association must approve the arbitration of

grievances. The BOD acts on the basis of a recommendation from the executive director.

15. On or about August 5, 2009, Complainant received a copy of an email from Nagamine to Camacho regarding, "Arbitration Recommendation for the BOD to Consider."
16. A recommendation to arbitrate was submitted by the executive director, and was approved at a board meeting held on September 19, 2009.
17. On September 21, 2009, Camacho informed Complainant that the BOD had approved the arbitration of her grievance.
18. By letter dated September 25, 2009, Camacho informed Susan La Vine, Labor Relations, Department of Education, that HSTA's BOD approved Complainant's grievance M-09-17 for arbitration at its meeting held on September 19, 2009.
19. On October 17, 2009, Complainant emailed Nagamine requesting that HSTA proceed with arbitration on the termination grievance.
20. On October 27, 2009, Complainant filed the instant Complaint with the Board alleging, *inter alia*, that HSTA breached the duty of fair representation by acting in bad faith in the implementation of Article V of the CBA, specifically regarding the process of taking a grievance through Step 2, and to Arbitration. Complainant contended that HSTA had committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5). Complainant requested that the Board "find Respondents have committed a prohibited practice under Chapter 89, order Respondents to cease and desist from any further conduct of such nature, compel Respondents to fulfill their obligations under Article V of the CBA by expediting grievance M-09-17 and completing arbitration as soon as possible, thus assuring arbitration decision by the last day of December 2009, and with the understanding that parties may cancel arbitration proceedings upon mutual agreement between the parties, and award Complainant any other further remedies that this Board may find just and proper."
21. The ninetieth day prior to the filing of the complaint is July 29, 2009. Allegations of prohibited practices occurring before July 29, 2009 are time-barred.
22. Article XV, Section 3 of HSTA By-laws pertaining to Exhaustion of Internal Procedures and Remedies state as follows:

Section 3. Exhaustion of Internal Procedures and Remedies.

- a. Prior to initiating or filing any action in any judicial, administrative, or legislative tribunal against the Corporation, its officers, agents, representatives, or Members, a Member is required to exhaust internal procedures and remedies.
 - b. All Member complaints, charges, protests, suits, grievances, or other legal challenge against the Corporation, its officers, agents, representatives or Members shall be filed with the President within thirty (30) calendar days after its occurrence, and referred to the judicial panel for a hearing and determination within sixty (60) calendar days. An "occurrence" shall mean the date the Member actually knew or should have known of the alleged violation. The findings, conclusions, decision and order of the judicial panel shall be final and binding unless an appeal is filed with the Board of Directors within thirty (30) calendar days. In the event of an appeal the decision and action of the Board shall be final and binding on all parties.
 - c. Any member who files a complaint, charge, protest, suit, grievance, or other legal challenge against the Corporation, its officers, agents, representatives or Members without exhausting internal procedures and remedies shall be subject to disciplinary action and be required to pay all reasonable attorney's fees, costs and litigation expenses incurred to defend against the judicial, administrative or legislative proceeding.
23. Okabe stated in his Declaration, dated November 3, 2009, that the internal procedures regarding the processing of grievances were ratified by members in May 2009 and require an HSTA member to exhaust internal remedies within the Association prior to filing any complaint. Okabe stated that the internal procedures and remedies were established in accordance with Clayton v. UAW, 451 U.S. 679 (1981), and Stucky did not file a complaint with him prior to October 27, 2009 regarding the manner in which any grievance was being handled by HSTA's staff.
24. Nagamine stated in a Declaration, dated June 1, 2010, that the parties selected Frank Yap as the arbitrator for Stucky's grievance and hearings commenced arbitration hearings on May 12, 2010. Nagamine further stated

that the HSTA procedure for exhaustion of internal Association remedies is adequate to reactivate grievances and affords members prompt relief.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant 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. 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.
5. 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.
6. 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.

7. The Complaint alleges the Respondents committed prohibited practices in violation of 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.
8. HRS § 89-14, provides that any controversy concerning prohibited practices may be submitted to the Board in the same manner and with the same effect as provided in HRS § 377-9, and the Board shall have exclusive original jurisdiction over such a controversy.
9. HRS § 377-9(l) states that no complaint “shall be considered unless filed within ninety days of its occurrence.” Hawaii Administrative Rules § 12-42-42 provides that a complaint for prohibited practices may be filed by a public employee “within ninety days of the alleged violation.”
10. The ninety (90)-day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. TriCounty Tel. Ass’n., Inc. v. Wyoming Public Service Comm’n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, “As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do”); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (“The law has long been clear that agencies may not nullify statutes”).

11. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when “an aggrieved party knew or should have known that his statutory rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).
12. Having reviewed the allegations of the complaint in the light most favorable to the Complainant and Respondents’ argument that occurrences prior to July 29, 2009 are untimely and outside of the Board’s jurisdiction, the Board finds that the Complaint was filed on October 27, 2009 and the 90th day prior to the filing of the Complaint is July 29, 2009. Pursuant to the applicable 90-day statute of limitations in HRS § 377-9, the Board concludes that it lacks jurisdiction over alleged prohibited practices occurring prior to July 29, 2009. Accordingly, Complainant’s allegations regarding Step 2 of the grievance are dismissed; Complainant’s allegations of prohibited practices regarding her request for arbitration remain.
13. 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.
14. In the present case, HSTA contends that Respondents Takeno, Camacho, Nagamine and Forrest are immune from suit and owe no duty of fair representation as union officers, agents, or Uniserv representatives and the Complaint fails to state a claim for relief against them. HSTA also contends that the complaint against HSTA fails to state a claim for relief because there is no evidence of bad faith as to the selection of the arbitrator by the Association or evidence of a violation of the collective bargaining agreement or any delays in picking the arbitrator attributable to the DOE. In Matthew M. Taamu, Case No. CU-01-282, Order No. 2677, Order Granting in Part and Denying in Part UPW’s Motion to Dismiss Complaint and/or for Summary Judgment, and Denying Motion to Dismiss for Lack of Prosecution; and Notice of Second Prehearing/Settlement Conference, dated

January 12, 2010 (Taamu), the Board considered the same argument raised by HSTA regarding the liability of union agents for a breach of duty of fair representation. The Board stated at pages 11-12:

17. HRS § 89-13(b) permits prohibited practice complaints to be brought against public employees, employee organizations, and the designated agents of employee organizations. In the present case, the allegations against Nakanelua and Akau for breach of duty of fair representation appear to involve actions taken in their capacities as State Director and Business Agent, respectively, and therefore as “designated agents” of the UPW. Accordingly, the Board concludes that Nakanelua and Akau were properly named; however, the Board also concludes that liability, if any, for alleged breach of duty of fair representation rests with the UPW, and not Nakanelua or Akau as individuals.
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.
19. As an analogy, HRS § 89-13(a) permits prohibited practice complaints to be brought against public employers and designated representatives of public employers. However, when public officials are named in their official capacities, the suit is no different from a suit against the government itself. See Will v. Michigan Dept. Of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989).
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 Forrest 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.

15. With respect to HSTA’s argument that the complaint against HSTA fails to state a claim for relief because there is no evidence of bad faith on the selection of the arbitrator by the Association or evidence of a violation of the collective bargaining agreement and that any delays in picking the arbitrator is attributable to the delayed responses by the DOE, the Board concludes that it lacks sufficient facts to make those determinations on a Motion to Dismiss or Motion for Summary Judgment.
16. HSTA contends that the Complaint should be dismissed because Stucky failed to exhaust internal Union procedures as set forth in Article XV, Section 3 of its By-laws. The By-laws state as follows:

Section 3. Exhaustion of Internal Procedures and Remedies.

- a. Prior to initiating or filing any action in any judicial, administrative, or legislative tribunal against the Corporation, its officers, agents, representatives, or Members, a Member is required to exhaust internal procedures and remedies.
- b. All Member complaints, charges, protests, suits, grievances, or other legal challenge against the Corporation, its officers, agents, representatives or Members shall be filed with the President within thirty (30) calendar days after its occurrence, and referred to the judicial panel for a hearing and determination within sixty (60) calendar days. An “occurrence” shall mean the date the Member actually knew or should have known of the alleged violation. The findings, conclusions, decision and order of the judicial panel shall be final and binding unless an appeal is filed with

the Board of Directors within thirty (30) calendar days. In the event of an appeal the decision and action of the Board shall be final and binding on all parties.

- c. Any member who files a complaint, charge, protest, suit, grievance, or other legal challenge against the Corporation, its officers, agents, representatives or Members without exhausting internal procedures and remedies shall be subject to disciplinary action and be required to pay all reasonable attorney's fees, costs and litigation expenses incurred to defend against the judicial, administrative or legislative proceeding.

The gravamen of the Complaint is that HSTA failed to follow the contractual timelines for the processing of the grievance and the process was delayed. While Nagamine stated in his Declaration that the internal complaint procedures are adequate to reactivate grievances and provide prompt relief, in reviewing the internal complaint procedure, a member could file a complaint with the HSTA President within 30 days from an occurrence and have the judicial panel make a determination within 60 calendar days. The member would be able to appeal an adverse determination to the BOD within 30 days. The Board notes that there is no timeline for the BOD's consideration of the appeal and whether the Board's 90-day statute of limitations is tolled pending the processing of the internal complaint. In the context of a complaint such as Stucky's regarding adherence to contractual timelines, it appears that resort to the internal complaint procedure would result in further delays in reaching arbitration such that the Board in its discretion finds that exhaustion is not required. Clayton v. Auto Workers, 451 U.S. 679 (1981); Bell v. DaimlerChrysler Corp., 547 F.3d 796 (2008). Nevertheless, the Board finds there are issues of material fact regarding HSTA's internal complaint procedure and adherence to contractual timelines which prevent the Board from making a determination on HSTA's Motion to Dismiss or Motion for Summary Judgment.

ORDER

For the reasons discussed above, the Board hereby grants in part and denies in part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

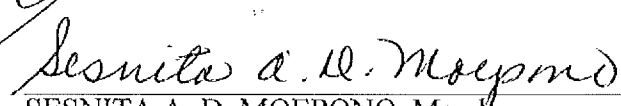
NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing/settlement conference by conference call in this matter on **April 2, 2012 at 10:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii, to establish deadlines and schedule the hearing on the merits. 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, March 15, 2012.

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.