

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. 2854

ORDER GRANTING RESPONDENTS'  
SECOND MOTION TO DISMISS  
COMPLAINT

ORDER GRANTING RESPONDENTS'  
SECOND MOTION TO DISMISS COMPLAINT

On October 27, 2009, Complainant STEPHANIE C. STUCKY (Complainant or Stucky), *pro se*, filed a prohibited practice complaint (Complaint) against the above-named Respondents DWIGHT TAKENO, HSTA, Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA UniServ Director and HAWAII STATE TEACHERS ASSOCIATION (collectively Respondents, HSTA, or Association) with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that Respondents failed to follow the strict guidelines in the bargaining unit (Unit) 05 collective bargaining agreement (CBA or Agreement) 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 March 15, 2012, the Board issued Order No. 2834, Granting in Part and Denying in Part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009. The Board concluded that it lacked jurisdiction over alleged prohibited practices occurring before July 29, 2009, and accordingly the Board dismissed Complainant's allegations regarding Step 2 of the grievance process. The Board also concluded that Complainant failed to state a claim for relief for a HRS § 89-13(b)(3) violation.

Complainant's remaining allegation after Order No. 2834 in this matter was her allegation of prohibited practices regarding her request for arbitration. The remaining issue was whether HSTA failed to follow its internal complaint procedure and adhere to the contractual timelines after Step 2 of the grievance process.

On May 21, 2012, Respondents filed Respondents' Second Motion to Dismiss Complaint, moving to dismiss the Complaint for mootness, and, alternatively, for lack of standing.

On May 24, 2012, Complainant filed Complainant's Memorandum in Opposition to Respondents' Second Motion to Dismiss Complaint filed May 21, 2012.

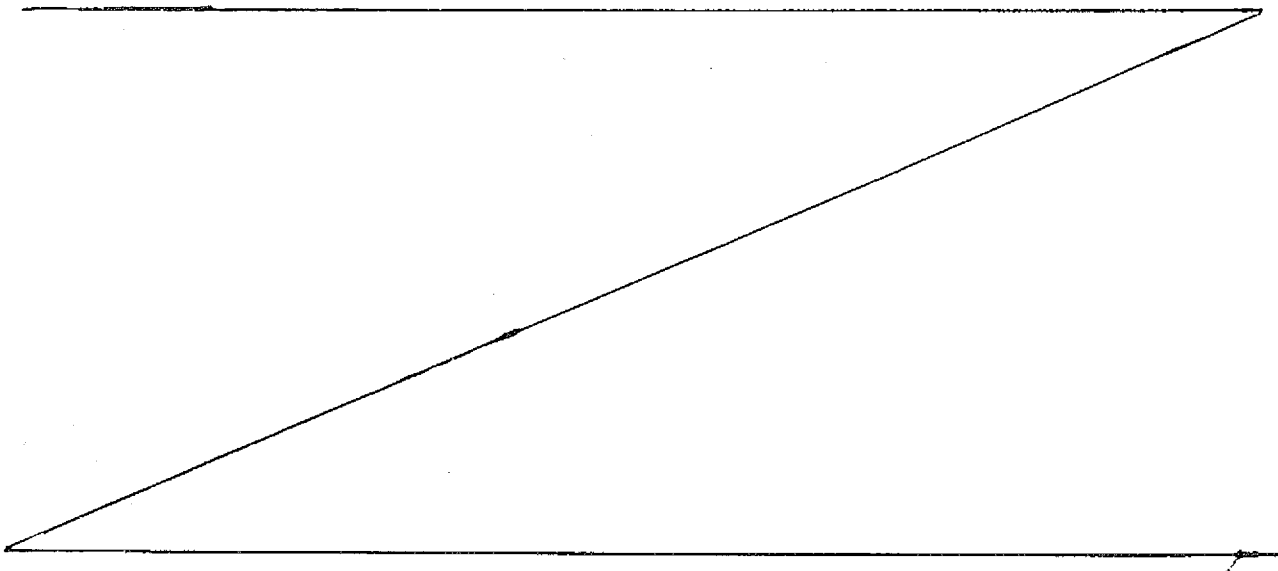
On May 24, 2012, the Board issued a Notice of Hearing on Respondents' Second Motion to Dismiss Complaint filed May 21, 2012, notifying the parties that the Board had scheduled a hearing for June 5, 2012 at 9:00 a.m.

On June 5, 2012, the Board held a hearing on Respondents' Second Motion to Dismiss Complaint filed on May 21, 2012, in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), with Complainant appearing by telephone.

After careful consideration of the arguments, record, and filings in this case, the Board grants Respondents' Second Motion to Dismiss Complaint.

#### FINDINGS OF FACT

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



1. At all relevant times, Complainant Stucky was a teacher and a public employee within the meaning of HRS § 89-2<sup>1</sup> and a member of BU 05<sup>2</sup> and Respondent HSTA.
2. At all relevant times, Respondent HSTA was an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2<sup>3</sup>, 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 or Employer) have been parties to at least 15 successive collective bargaining

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<sup>1</sup>HRS § 89-2, as amended, provides in pertinent part:

“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)].

<sup>2</sup>Pursuant 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[.]”

<sup>3</sup>HRS § 89-2 provides in part as follows:

“Employee organization” means any organization of any kind in which public employees participate and which exist 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.

agreements. In the present case, the relevant agreement covers the period July 1, 2007 to June 30, 2009.

8. On or about May 1, 2009, DOE, Complainant's employer, notified Complainant of its decision to terminate her employment due to an "unsatisfactory rating."
9. On May 12, 2009, HSTA filed a grievance contesting the discharge action against Stucky at Step 2 of the grievance procedure under the CBA.<sup>4</sup>
10. On July 6, 2009, a Step 2 meeting was held, and on July 13, 2009 a Step 2 decision denying the grievance and finding Stucky was properly discharged from employment was filed by DOE.
11. On July 15, 2009, HSTA notified DOE of its intent to proceed to arbitration.
12. Article V(G) of the 2007-2009 CBA authorizes HSTA to request mediation or arbitration as follows:

#### 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 to Arbitration.

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## 2. ARBITRATION

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<sup>4</sup>Article V (M) of the CBA states in pertinent part:

Disciplinary actions taken against any teacher shall be for proper cause and shall be subject to the grievance procedure. An expedited grievance procedure shall be used for suspensions or termination of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

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.

13. In a Declaration filed in this matter dated November 3, 2009, HSTA President Wilfred Okabe stated that in accordance with internal HSTA procedure, the board of directors (BOD) of the Association must approve the arbitration of grievances, and the BOD acts on the basis of a recommendation from the executive director.
14. A recommendation to arbitrate was submitted to the Association's BOD by the executive director and approved at a BOD meeting on September 19, 2009.
15. By letter dated September 25, 2009, Respondent Camacho informed Susan La Vine, Labor Relations, DOE, that HSTA's BOD approved Complainant's grievance M-09-17 for arbitration.
16. On October 27, 2009, Stucky 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 by not following the strict guidelines in the CBA and internal process guidelines for the submission of grievances through to arbitration, HSTA had committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5).

17. In a declaration dated June 1, 2010, Nagamine stated that the parties selected Frank Yap Jr. (Yap) as the arbitrator for Stucky's grievance over her termination, and hearings were held beginning May 12, 2010.
18. Simultaneous post-arbitration briefs were due on December 24, 2010, and on January 12, 2011, Arbitrator Yap issued his decision and award (Decision) affirming Employer's decision to terminate Stucky's employment based upon her overall unsatisfactory rating. Yap denied Stucky's grievance and remedies sought, thus awarding no remedy on behalf of Stucky. Yap found that counsel for Employer and the UniServ Directors representing HSTA and Stucky "fully and fairly represented their clients" and appropriately presented their respective positions at the arbitration hearing and in simultaneous post-arbitration memoranda. In the Decision, Yap noted that the parties "stipulated this matter is arbitrable, that the preliminary steps in the grievance process had either been met or mutually waived, and that this matter is properly before the Arbitrator for disposition."
19. On or about January 18, 2011, Stucky was notified of the Decision, and on or about January 22, 2011, a copy of the Decision was provided to Stucky.
20. On November 4, 2009, HSTA filed a motion to dismiss or alternatively for summary judgment of Stucky's October 27, 2009 Complaint.
21. On March 15, 2012, the Board issued Order No. 2834, Granting in Part and Denying in Part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009. In the Order, the Board concluded that it lacked jurisdiction over alleged prohibited practices occurring prior to July 29, 2009 and, accordingly, dismissed Complainant's allegations regarding Step 2 of the grievance. Complainant's allegation of prohibited practices regarding her request for arbitration remained, as the Board found that there are issues of material fact regarding HSTA's internal complaint procedure and adherence to contractual timelines.
22. On May 21, 2012, on the remaining issue of whether HSTA followed its procedures to secure an expedited arbitration after the DOE's Step 2 denial of the grievance, HSTA filed Respondents' Second Motion to Dismiss Complaint, moving to dismiss Stucky's Complaint for mootness and alternatively, for lack of standing.
23. Regarding mootness, the Board finds that it no longer has jurisdiction because the matter has been arbitrated and Complainant's termination sustained. The matter is now moot.

24. Assuming *arguendo*, the issues before the Board are not moot, the Board also finds that Complainant lacks standing to pursue her Complaint after Board Order 2834, because the outcome of the arbitration of the grievance leaves her with no injury in fact. The grievance was submitted to arbitration and was heard by the arbitrator, who issued a decision and award. It is a hypothetical question whether any delay in the submission of the grievance to the arbitrator, as alleged by Stucky, resulted in the negative arbitration award, and a decision by the Board favorable to Stucky would provide no relief for Complainant's alleged injury.

### CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

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 (9<sup>th</sup> 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 affidavits and testimony, to resolve factual issues concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988); 5A C. Wright & Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
4. Mootness is an issue of subject matter jurisdiction. Queen Emma Foundation v. Tatibouet, 123 Hawai'i 500, 506, 236 P.3d 1236, 1242 (App. 2010) (quoting Hamilton v. Lethem, 119 Hawai'i 1, 4-5, 193 P.3d 839, 842-43 (2008)), and "courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so." Id.

5. In Last v. United Public Workers, AFSCME, Local 646, AFL-CIO, Order No. 1318 at 3, CU-01-117 (Apr. 11, 1996) (App. 2) (stating the doctrine applies to quasi-judicial tribunals), the Board held as follow:

[A] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where “events . . . have so affected the relations between the parties that the two conditions of justiciability relevant on appeal - adverse interest and effective remedy - have been compromised.

6. In the instant case, where the pace at which HSTA took the matter to arbitration is the remaining basis of Stucky’s complaint, and where the parties proceeded to arbitration which resulted in an award by arbitrator Yap with no remedy or relief to Complainant, the arbitration award rendered the dispute in this case academic and, therefore, deprives the Board of jurisdiction to hear Stucky’s complaint. Stucky’s case is moot, as it has “lost its character as a present, live controversy.” See Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987). The two conditions of justiciability, which are adverse interest and remedy, no longer exist. In addition, the Board finds no evidence that the factual situation between Stucky and HSTA will arise again to warrant a future review by the Board of the mootness issue, as the arbitrator has already heard and decided this case.
7. A party seeking relief for the Board must have standing to bring a complaint on which basis he or she seeks relief. Whether a party has standing is analyzed under a three part “injury in fact” test: “(1) he or she has suffered an actual or threatened injury as a result of the defendant’s wrongful conduct, (2) the injury is fairly traceable to the defendant’s actions, and 3) a favorable decision would likely provide relief for a plaintiff’s injury.” See Keahole Defense Coalition, Inc. v. Bd. of Land and Natural Resources, 110 Hawai’i 419, 434, 134 P.3d 595, 600 (2006). The party seeking the standing must satisfy all three prongs of the standing test.
8. In the matter before the Board, the grievance in question went to arbitration and was heard by the arbitrator, who rendered a decision awarding no remedy to Stucky. The arbitrator made no finding that any delay in proceeding from Step 2 of the grievance process to the arbitration prejudiced HSTA’s case (in representing Stucky’s interests). Instead, the arbitrator found that HSTA’s representatives at arbitration were able to “fully and fairly” represent their client, and their position was “appropriately represented at the arbitration hearing.” Assuming *arguendo*, the issues before the Board are not moot, the Board concludes that Stucky has failed to



show that she sustained an actual or threatened injury as a result of any delay in proceeding to arbitration.

9. Regarding the second prong of the test for standing, the Board concludes that Stucky has not shown any direct injury caused by HSTA not expediting her grievance in the manner she alleges the Unit 05 Agreement requires.
10. The Board also concludes that Stucky does not satisfy the third prong of the test for standing. A decision by the Board favorable to Stucky's position would provide no relief for her alleged injury, as the arbitration of her grievance has already been concluded.
11. Based on the foregoing and construing Complainant's allegations in the light most favorable to her, the Board concludes that it lacks jurisdiction and therefore grants Respondents' Second Motion to Dismiss Complaint.

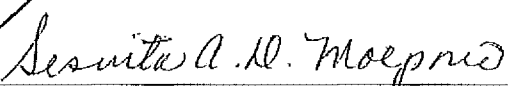
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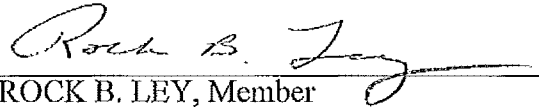
For the reasons discussed above, the Board hereby grants Respondents' Second Motion to Dismiss Complaint filed on May 21, 2012.

DATED: Honolulu, Hawaii, June 18, 2012.

HAWAII LABOR RELATIONS BOARD

  
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JAMES B. NICHOLSON, Chair

  
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SESNITA A. D. MOEPONO, Member

  
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ROCK B. LEY, Member

Copies sent to:

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