STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

IN THE MATTER OF UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Complainant, and BOARD OF REGENTS, University of Hawaii, State of Hawaii; and NEIL ABERCROMBIE, Governor, State of Hawaii, Respondents.	CASE NO. CE-07-804 ORDER NO. 2939 ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT and GRANTING RESPONDENT GOVERNOR NEIL ABERCROMBIE'S JOINDER TO RESPONDENT BOARD OF REGENTS OF THE UNIVERSITY OF HAWAII'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO COMPLAINANT'S JULY 13, 2012'S MOION FOR SUMMARY JUDGMENT, FILED AUGUST 16, 2012

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND RESPONDENT GOVERNOR NEIL ABERCROMBIE'S JOINDER TO RESPONDENT BOARD OF REGENTS OF THE UNIVERSITY OF HAWAII'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO COMPLAINANT'S JULY 13, 2012'S MOTION FOR SUMMARY JUDGMENT FILED AUGUST 16, 2012

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 25, 2012, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY ("Complainant" or "UHPA") filed the instant Prohibited Practice Complaint ("Complaint") with the Hawaii Labor Relations Board ("Board" or "HLRB") against Respondents BOARD OF REGENTS OF THE UNIVERSITY OF HAWAII ("BOR" or "UH") and NEIL ABERCROMBIE, GOVERNOR OF THE STATE OF HAWAII ("Governor" or "Abercrombie"). In the Complaint, UHPA alleged that "employee beneficiary" members of bargaining units, other than bargaining unit 7 ("Unit 7"), are and have been receiving public employer premium contribution rates to their respective Hawaii Employer-Union Health Benefits Trust Fund ("EUTF") benefits in accordance with supplemental agreements between the "exclusive representatives" for those bargaining units and their respective County of Hawaii, Maui, or Kauai "public employers" greater than the 50-50 employer EUTF monthly contribution rate for "employer beneficiary" members of Unit 7. UHPA further alleged that by failing and refusing to pay more than the 50-50 employer EUTF monthly contribution rate to these Unit 7 members, Respondents are and have been violating Article XXII ("Article XXII"

or "MFN clause") of the 2009-2015 Agreement between the UHPA and BOR ("CBA") providing for the rate of EUTF contributions in violation of Section 89-13(a)(8) ("Section 89-13(a)(8)"), Hawaii Revised Statutes ("HRS").

On May 29, 2012, the Board issued a Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference; and Notice of Hearing On The Prohibited Practice Complaint. On June 7, 2012, both the BOR and the Governor filed Answers to the Complaint.

On July 13, 2012, Complainant filed a Motion for Summary Judgment based on the ground that there was no genuine issue of material fact that the Respondents violated and continue to violate Article XXII of the CBA by their ongoing failure to pay the proper contractual rate and amount of employer premiums contributions to the EUTF-administered benefit plans on behalf of "employee-beneficiaries" who are Unit 7 active employees and that UHPA is entitled to a judgment as a matter of law.

On July 18, 2012, the Board conducted a Prehearing/Settlement Conference.

On August 16, 2012, Respondent BOR filed its Motion for Summary Judgment based on the following grounds: 1) the MFN clause does not obligate the University of Hawaii ("UH") to pay the same rate found in just any agreement but is limited to EUTF contribution rates contained in other collective bargaining agreements negotiated after July 1, 2009; 2) even if the MFN clause is ambiguous, the CBA refers all contract language disputes to the grievance/arbitration procedure subject to the timely filing and processing of a grievance; and 3) UHPA, without first negotiating and securing legislative approval and appropriation, as required by statute, improperly requests the HLRB to impose an increase for a cost item. On that same date, Respondent Abercrombie filed a Joinder to Respondent BOR's Motion for Summary Judgment and Opposition to Complainant's July 13, 2012 Motion for Summary Judgment Filed August 16, 2012.

On August 27, 2012, Complainant filed a Reply in Opposition to Respondent Board of Regents, University of Hawai'i's Motion for Summary Judgment Dated August 16, 2012 and In Support of Complainant's Motion for Summary Judgment, Dated July 13, 2012.

On September 5, 2012, the foregoing Motions for Summary Judgment were heard. The parties agreed that there was no dispute of material fact. After the parties presented arguments, the Board took the Motions under advisement.

After a full consideration of the record and the arguments presented on the Motions, the Board grants Respondent BOR's Motion for Summary Judgment, which was joined by Respondent Abercrombie regarding dismissal of the Section 89-13(a)(8),

HRS, prohibited practice charge for failure to exhaust contractual grievance/arbitration remedies under the CBA. Further, the Board does not reach and makes no rulings on the other issues raised in that Motion or in Complainant UHPA's Motion for Summary Judgment; and makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

To the extent that any of these Findings of Fact are better characterized as Conclusions of Law, they are to be so construed.

1. The UHPA is and was at all times relevant an "employee organization" and the "exclusive representative," as defined in HRS Section 89-2, of the employees in Unit 07, Faculty of the University of Hawaii and the community college system.

2. The BOR is and was for all times relevant, an "employer," as defined in HRS Section 89-2, for the University of Hawaii.

3. Governor Abercrombie is and was for all times relevant, the Governor of the State of Hawaii, and an "employer," as defined in HRS Section 89-2.

4. UHPA, the BOR, and Governor Abercrombie executed the Unit 7 CBA, effective from July 1, 2009, up to and including June 30, 2015.

   ARTICLE XXII of the CBA provides in relevant part:

   > From and after plan year 2009-2010 and continuing to and including June 30, 2015 the Employer's percentage rate and monthly contribution for the benefit plans shall be not less than the highest rate, monthly contribution, or share for any Employee-Beneficiary in any other bargaining unit in the same month for those collective bargaining agreements reached after July 1, 2009.

   ARTICLE XXIV, GRIEVANCE PROCEDURE ("Article XXIV") of the CBA provides in relevant part:

   A. DEFINITION

   > A grievance is a complaint by…the Union concerning the interpretation and application of the express terms of this Agreement....

* **

C. PROCEDURES

1. Requirements for Filing a Formal Grievance.

A grievance must be submitted in writing and shall contain (1) a statement of the facts concerning the grievance, (2) the specific provision of this Agreement alleged to have been violated, (3) the relief requested, and (4) whether the Faculty member attempted an informal adjustment of the grievance, and, if so, with whom.

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A grievance must be filed within twenty (20) calendar days or within forty-five (45) calendar days in the case of a class grievance, of the date following the alleged violation giving the rise thereto, or the date on which the Faculty member or the Union first knew or reasonably should have known of such alleged violation, or the date on which either party informs the other that informal attempts to resolve the grievance are concluded, whichever date is later.

There shall be no obligation by the Employer to consider any grievance not filed within the specified time limit and in accordance with the specific procedure stated in each step.

2. Formal Grievance Procedure.

The Employer and the Union may, by mutual agreement, waive any or all of the steps and proceed directly to Step 3.

a. **Step 1.** A grievance shall be filed with the Chancellor, or the respective designee (herein referred to as Chancellor). The Chancellor shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the grievance and shall

issue a decision in writing to the grievant within fifteen (15) calendar days after close of the meeting.

b. **Step 2.** If the response at Step 1 does not resolve the grievance, the grievant may appeal the Step 1 response by filing an appeal with the President of the University or the President's designee within fifteen (15) calendar days after receipt of the Step 1 response. Such appeal shall be in writing and shall specify the reason why the Step 1 decision is unsatisfactory. The President need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. The President or the President's designee shall schedule a grievance meeting with the grievant and/or the grievant's designate representative within fifteen (15) calendar days after receipt of the appeal or grievance is filed and shall render a response in writing to the grievant within twenty (20) calendar days after the close of the meeting.

c. **Step 3. Arbitration.** If the grievance has not been settled at Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the President's designee. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

If an agreement on an Arbitrator is not reached within fifteen (15) calendar days after the request for arbitration is submitted, either party may request the Hawaii Labor Relations Board to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator.

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No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement. The Agreement shall not consider any new alleged violations or charges than those presented initially.

1) The parties may by mutual agreement request the Arbitrator to conduct an informal hearing. Informal hearings shall be conducted without reporters or transcriptions. There shall be no briefs filed by either party. The Arbitrator shall issue a decision within twenty-one (21) calendar days from the adjournment of the hearing. The decision of the Arbitrator shall be limited to a written statement of the Arbitrator's conclusion setting forth briefly the factual basis for the decision, and shall be within the scope set forth below in 3).

2) If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits. The Arbitrator shall render an award in writing, no later than thirty (30) calendar days after the conclusion of the hearings or, if oral hearings are waived, then thirty (30) calendar days from the date statements and proofs were submitted to the Arbitrator.

3) The decision of the Arbitrator shall be final and binding upon the Union, its members, the Faculty Member(s) involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below.

    a) The arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this

Agreement. The Arbitrator's award must be consistent with the terms of this Agreement.

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5. From January 1, 2012 until the present date, Respondent employers have been contributing funds to the Unit 7 EUTF-administered plans in accordance with a 50-50 split of the premium rate between the employer and the employee.

6. The following supplemental agreements were executed:

   a. On October 7, 2011, the County of Maui and the HGEA executed a supplemental agreement on behalf of employees in bargaining units 02, 03, 04, and 13, stating in relevant part:

      NOW, THEREFORE, IN LIEU OF THE MOA dated June 28, 2011 effective July 1, 2011 to and including June 30, 2013, the PARTIES mutually agree to the following:

         A. The Employer contributions to the Hawai'i Employer-Union Health Benefits Trust Fund in effect on June 30, 2011 shall remain in effect for the contract period July 1, 2011 to and including June 30, 2013.

         B. Should the Trust Fund Board change rates for health benefit plans, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees;...

   b. On December 2, 2011, the County of Hawaii and the UPW, on behalf of employees in bargaining unit 1, executed a supplemental agreement providing in relevant part:

      NOW, THEREFORE, in lieu of the MOA dated November 28, 2011 effective for the contract period July 1, 2011 through June 30, 2013, the PARTIES mutually agree to the following:

A. The Employer contributions to the Hawai'i Employer-Union Health Benefits Trust Fund in effect on June 30, 2011 shall remain in effect for the contract period July 2, 2011 to and including December 31, 2011.

B. Effective January 1, 2012, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the premium rates established by the Trust Fund Board for the respective health benefit plan, plus sixty percent (60%) of all administrative fees.

C. Should the Trust Fund Board change rates for health benefit plans, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the premium rates established by the Trust Fund Board for the respective health benefit plan, plus sixty percent (60%) of all administrative fees;...

7. On December 12, 2011, the County of Maui and the UPW, on behalf of employees in bargaining unit 01, executed a supplemental agreement stating in relevant part:

IN ADDITION, effective July 1, 2011 to and including June 30, 2013, the PARTIES mutually agree to the following:

A. The Employer contributions to the Hawai'i Employer-Union Health Benefits Trust Fund in effect on June 30, 2011 shall remain in effect for the contract period July 1, 2011 to and including June 30, 2013.

B. Should the Trust Fund Board change the rates for the health benefit plans, the Employer shall pay a specific dollar amount equivalent to sixty percent (60) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees;...

8. "To date, UH has not received any written grievance from UHPA alleging a violation of Article XXII of the 2009 CBA." *(Declaration of John F. Morton, p.*

3, executed August 6, 2012, Honolulu, Hawaii, attached to Respondent's Motion for Summary Judgment.)

9 . On May 25, 2012, UHPA filed the instant Complaint.

DISCUSSION

UHPA alleges in the Complaint that Respondents have violated Section 89-13(a)(8), HRS, by their failure and refusal to pay Unit 7 employees more than the 50% employer EUTF monthly contribution rate despite other public employees represented by other public unions being paid higher rates based on supplemental agreements entered into by those public unions and the Counties of Hawaii, Kauai, and Maui, in contravention of CBA Article XXII.

In its Motion for Summary Judgment that was joined by the Governor, the BOR argues, among other things, that this prohibited practice claim should be dismissed because UHPA failed to exhaust its contractual remedies under the CBA.

The Hawaii Supreme Court articulated the well-established standards and burden of proof for summary judgment in Thomas v. Kidani, 126 Hawai'i 125, 129-130, 267 P.3d 1230, 1234-1235 (2011):

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.

"A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Fujimoto v. Au, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001) (citations omitted). . We review the evidence in the light most favorable to the party opposing the motion for summary judgment. Id. at 137, 19 P.3d at 720 (citations omitted); see also, Hokama v. University of Hawaii, 92 Hawai'i 268, 271, 990 P.2d 1150, 1153 (1999) ("Hokama").

The party moving for summary judgment bears the burden of proof to show the absence of genuine issues of material fact and entitlement to judgment as a matter of law. Stanford Carr Dev. Corp. v. Unity House Inc., 111 Hawai'i 286, 295-96, 141 P.3d 459, 468-69 (2006). Where the moving party is the defendant and does not bear the burden of proof at trial, he or she may prevail on a motion for summary judgment by demonstrating that the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co., 116

Hawai'i 277, 302, 172 P.3d 1021, 1046 (2007) (citing Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1998)) (emphasis omitted).

In addition, it is a well-established principle that whether exhaustion is required in a particular case is left to the sound discretion of the trial court. Exhaustion is not required where it would be futile or the administrative remedies are inadequate. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 426 n.8 (1968); Buzzard v. International Ass'n. of Machinists & Aerospace Workers, 480 F.2d 35, 41 (9th Cir. 1973); Fristoe v. Reynolds Metal Co., 615 F.2d 1209, 1214 (9th Cir. 1980).[1]

Based on the relevant statutory provisions and applicable cases interpreting those provisions, the Board concludes that the rule is well-established that a party must exhaust any grievance/arbitration procedures provided under a collective bargaining agreement before bringing a prohibited practice charge under Section 89-13(a)(8), HRS, for the following reasons.

HRS Section 89-13(a)(8) states:

> **Section 89-13 Prohibited practices; evidence of bad faith.** (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> ***
>
> (8) Violate the terms of a collective bargaining agreement;

(emphasis added). HRS Section 89-14 gives the Board jurisdiction over prohibited practice controversies, which pursuant to HRS Section 89-13(a)(8) and (b)(5)[2] include CBA violations. On the other hand, HRS Section 89-10.8 specifically requires that "[a] public employer…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. The grievance procedure shall be valid and enforceable…." (emphasis added).

In accordance with this requirement, the CBA contains the following relevant provisions. Article XXIV GRIEVANCE PROCEDURE, paragraph A. DEFINITION defines "grievance" as "a complaint by…the Union concerning the interpretation and application of the express terms of this Agreement." Paragraph B. PROCEDURES, subparagraph 2. c. **Step 3. Arbitration** specifically provides that "No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement." Finally, subparagraph states, "The decision of the Arbitrator shall be final and binding upon the Union, its members, and the Employer."

The Hawaii appellate courts have addressed the quandary of this dual jurisdiction of the Board and arbitrator in two decisions rendered in actions brought by aggrieved employees against the public union and employer. In both cases, the courts unequivocally held that the complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint alleging a violation of Section 89-13(a)(8). In Santos v. DOT, 64 Haw. 648, 655, 646 P.2d 962 (1982) ("Santos"), the Hawaii Supreme Court affirmed the circuit court's grant of summary judgment in favor of the employer and reversal of a decision by this Board's predecessor, the Hawaii Public Employment Relations Board (HPERB). The circuit court reversed based on the ground that HPERB should have deferred to the grievance procedure under the relevant collective bargaining agreement. In affirming, the Hawaii Supreme Court cited the general rule that before an individual can maintain an action against his or her employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the union, noting that, "[t]he rule is in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." The court then found that the Intermediate Court of Appeals had specifically adopted and applied this rule in Winslow v. State of Hawaii, 2 Haw. App. 50, 55, 625 P.2d 1046, 1050 (1981) ("Winslow"), stating:

> [W]e hold that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement.

Id. at 655-656; 646 P.2d at 967. The rule has become a guiding principle in subsequent cases involving public employees aggrieved by actions of their employers and unions. In those decisions, the court has stated that, "It is well-settled that an employee must exhaust any grievance or arbitration procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement," see, Hokama, 92 Hawai'i at 272, 990 P.2d at 1154; Poe v. Hawaii Labor Relations Board, 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Poe I"); Poe II, 105 Hawai'i at 101, 94 P.3d at 656. In so noting, the court articulated the strong policy considerations supporting this rule, "The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process allowing the parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. " Hokama, 92 Hawai'i at 272, 990 P.3d at 1154; Poe I, 97 Hawai'i at 537, 40 P.3d at 939; Poe II, 105 Hawai'i at 101, 94 P.3d at 656. Regarding the procedural effect of the doctrine, Hawaii appellate courts have ruled that, "In such cases, in the interest of judicial economy, 'the doctrine of exhaustion temporarily divests a court of jurisdiction.'" Leone v. County of Maui, 128 Hawai'i 183, 192, 284 P.3d 956, 965 (App. 2012); see also, Kellberg v. Yuen,

2013 Haw. App. LEXIS 382 at *8 (2013) (mem.) "Kellberg"), *citing* Williams v. Aona, 121 Hawai'i 1, 9, 210 P.3d 501, 509 (2009) (unpublished).

Following Santos and the decisions discussed above, the Board has adhered to a consistent policy of dismissing prohibited practice charges alleging violations of Section 89-13(a)(8) based on a failure to exhaust available grievance/arbitration remedies under the collective bargaining agreement. See, e.g., Lum v. Anderson, 3 HPERB 611, 624 (1985), *aff'd,* Lum v. Fasi, Civ. No. 85-1175 (9/6/85), *appeal dismissed* (3/21/86), *motion for reconsideration denied* S. Ct. No. 11064 (4/7/86); LePere v. Waihee, 5 HLRB 277, 288-289 (1994); Mussack v. HSTA, 6 HLRB 274, 277-279 (2002); Hawaii Nurses Ass'n. v. Ariyoshi, 2 HPERB 218, 227-228 (1979) ("HNA"); State of Hawaii Organization of Police Officers v. Kusaka, 6 HLRB 25, 27 (1998) ("SHOPO II").

UHPA maintains that reliance on cases involving claims brought by aggrieved employees bypassing the grievance/arbitration procedure and suing their employers and/or unions is misplaced because the situation is not analogous to the present case. The Board disagrees. In previous decisions, this Board and its predecessor have applied the exhaustion doctrine in cases involving a union bypassing a part or all of the grievance/arbitration procedure in favor of pursuing a prohibited practice claim alleging collective bargaining agreement violations. See, e.g., HNA, 2 HPERB at 227-228 (The union did not file a grievance before filing the prohibited practice complaint in that case.); SHOPO I, 6 HLRB at 27 (The union filed a class grievance, which proceeded to step 2, and a second grievance that was pending when the prohibited practice complaint was filed.). In both the HNA and SHOPO II cases, the Board relied on Santos in dismissing the contractual violation dispute to the arbitration process contained in the collective bargaining agreement and dismissing the Section 89-13(a)(8) claims in those cases. In applying Santos to the dispute in HNA , HPERB reasoned:

> The Employer's unilateral action was based on a claim of contractual authority in one contract clause (Article X) while the union's prohibited practice charge was based on another contract clause (Article I). Resolution of this dispute requires clarification of the ambiguous language of "insofar as it is practicable in Article X and the interrelationship of Articles I and X. The dispute clearly involves contractual interpretation. As such, it should be resolved through the grievance arbitration procedure agreed to by the parties. Decision 22.

2 HPERB at 227 (emphasis added).

The Board acknowledges that Hawaii appellate courts and the federal courts[3] have also recognized several exceptions to the doctrine of exhaustion of administrative remedies, such as where resort to the administrative procedures would be wholly futile. Poe I, 97 Hawai'i at 536, 40 P.3d at 938 .

The Hawaii Supreme Court has defined futility as "the inability of an administrative process to provide the appropriate relief." Hokama, 92 Hawai'i at 273, 990 P.2d at 1155; Poe I, 97 Hawai'i at 536-537, 40 P.3d at 938-939, *citing* In re Doe Children, 96 Hawai'i 272, 287 n.20, 30 P.3d 878, 893 n.20 (2001) (defining futility as "the inability of an administrative process to provide the appropriate relief" (citing Hokama v. University of Hawai'i, 92 Hawai'i 268, 273, 990 P.2d 1150, 1155 (1999)); Poe II, 105 Hawai'i at 102, 990 P.2d at 657.

Both Poe I and Poe II were appeals from Board decisions and involved the application of the futility exception to a situation in which an aggrieved employee individually pursued their grievance through the CBA but was unable to take it to arbitration because of a failure by the union to assist. In Poe I, the court ruled that the futility exception applies to these types of cases. In Poe II, based on analogous federal cases and the policy considerations articulated in them, the court clarified that the exception applies only upon a showing that the union breached its duty of fair representation by the failure to pursue the grievance to arbitration. Poe I, 97 Hawai'i at 537-538, 40 P.3d at 939-940; Poe II, 105 Hawai'i at 101-104, 94 P.3d at 656-659. The situation at issue in Poe I and Poe II is one of the classic situations in which the U. S. Supreme Court has recognized that the futility exception applies to federal labor law.[4]

In this case, however, in support of its position that the futility exception applies, UHPA contends that the dispute in this case cannot be remedied through the grievance process because the Legislature, rather than the U.H., is authorized to appropriate money for contributions to the EUTF-administered health benefit plans disbursed by the State Department of Budget and Finance. For this same reason, the BOR takes the position that this Board cannot grant the remedy requested by UHPA. In Hokama,[5] the appellant made a similar argument that the futility exception applied because the grievance procedure could not grant his requested relief. In affirming the summary judgment in favor of the U.H. based on the appellant's failure to exhaust his administrative remedies, the court rejected this argument, reasoning:

> An aggrieved party need not exhaust administrative remedies where no effective remedies exist. *See Winslow, 2 Haw. App. at 56, 625 P.2d at 1051*; *Lane v. Yamamoto, 2 Haw. App. 176, 178-79, 628 P.2d 634, 636 (1981)*; *Waugh v. University of Hawaii, 63 Haw. 117, 129, 621 P.2d 957, 967 (1980)*.
>
> It is entirely unclear from the language of the agreement whether the damages sought by Dr. Hokama are available under the grievance procedure. Arbitrators, however, normally have broad discretion to fashion appropriate remedies. *See University of Hawaii Professional Assembly ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 223, 659 P.2d 720, 727 (1983)* (recognizing the "need for flexibility" in formulating remedies in arbitration (citation omitted)); *Mathewson v. Aloha Airlines, 82 Haw. 57,*

> *79 n.22, 919 P.2d 969, 991 n.22 (1996)* (noting that arbitrators "may grant whatever remedy to right the wrongs in their jurisdiction" (citation omitted)). In this case, Dr. Hokama has not yet pursued his damage claims in the administrative forum. Until he actually does so, any assessment of the actual availability of the relief requested remains speculative and premature. *Id.* at 273-274, 990 P.2d. at 1155-156. (footnotes omitted) (emphases added)

The court then held that because the only viable claim in the complaint "breach of contract" arose from the collective bargaining agreement, the claim must be pursued in the administrative forum.

Unlike Poe, who did utilize the grievance/arbitration procedure in the collective bargaining agreement to the extent possible, UHPA has made no effort to invoke the grievance/arbitration procedure set forth in Article XXIV of the CBA. Accordingly, there is no showing of futility based on the foregoing Poe decisions. Based on the foregoing reasoning in Hokama, because UHPA has not yet pursued its remedies through that procedure, any assessment of the actual availability of the relief requested remains speculative and premature. For this reason, similar to the Hokama court, the Board rejects UHPA's argument that the futility exception applies obviating the necessity for UHPA to exhaust its contractual remedies under the CBA. Rather, we find that the sole allegation in the Complaint is a violation of HRS Section 89-13(a)(8), which makes it a prohibited practice for the public employer to violate the terms of the collective bargaining agreement. As in the HNA decision, the Board further reasons that since this dispute requires clarification of CBA Article XXII, this dispute obviously requires CBA interpretation. Hence, this dispute must be pursued through the grievance/arbitration forum established by Article XXIV of the CBA. Accordingly, based on the discussion set forth above, we find that there is no genuine issue of material fact and the BOR and the Governor are entitled to a judgment as a matter of law that UHPA should have, but failed, exhaust its grievance/arbitration remedies under the CBA regarding the violation of CBA Article XXII. Consequently, the Board has no subject matter jurisdiction over this dispute. We, therefore, grant the BOR's Motion for Summary Judgment, which Governor Abercrombie has joined, regarding this exhaustion issue and dismiss the charge. Kellberg, 2013 Haw. App. LEXIS 382, at *13. The Board does not reach and makes no rulings on the other issues in the BOR's Motion for Summary Judgment or UHPA's Motion for Summary Judgment.

CONCLUSIONS OF LAW

1. The Board lacks subject matter jurisdiction over the Section 89-13(a)(8), HRS, charge contained in this this Complaint because of a failure to exhaust the

grievance/arbitration remedies contained in the CBA on the contractual violation issue, and therefore this charge is dismissed.

2. The Board grants the Respondent BOR's Motion for Summary Judgment joined by Respondent Abercrombie on the ground that UHPA failed to exhaust its administrative remedies under the CBA but does not reach the other issues contained in the BOR's Motion for Summary Judgment or UHPA's Motion for Summary Judgment and makes no rulings thereon.

ORDER

The prohibited practice charge contained in Case No. CE-07-804 is hereby dismissed.

DATED: Honolulu, Hawaii, August 22, 2013.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

Sesnita A. D. Moepono

SESNITA A. D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

Copies sent to:

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Robert S. Katz, Esq.
Maria C. Cook, Esq., Deputy AG

[1] The Hawaii Supreme Court has noted that federal precedent may be used to guide its interpretation of state public employment. Hokama, 92 Hawai'i at 272 n.5, 990 P.2d at 1154 n.5; Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) ("Poe II").

[2] Section 89-13(b), HRS, states:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
> ***
> (5) Violate the terms of a collective bargaining agreement.

[3] The federal courts have delineated several exceptions to the exhaustion requirement under various federal laws. These exceptions include: 1) where the union has the sole power under the contract to invoke the upper level grievance procedures and yet prevents an employee from exhausting contractual remedies by wrongfully refusing to process the employees' grievance in violation of its duty of fair representation; 2) when the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract; and 3) when resort to the administrative procedures would be wholly futile. Emswiler v. CSX Transportation, Inc., 691 F.3d 782, 790 (6th Cir. 2012); Mitchell v. Continental Airlines, 481 F.3d 225, 231 (5th Cir. 2007); Bailey v. Bicknell Minerals, 819 F.2d 690, 692 (7th Cir. 1987), Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 875 (3rd Cir. 1972).

[4] The U. S. Supreme Court has specified at least two situations, in which resort to the administrative procedures would be wholly futile. Glover v St. Louis-San Francisco Railroad Co., 393 U.S. 324, 329-331 (1969) One is where the employee can prove that the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance. Vaca v. Sipes, 386 U.S. 171, 94-915 (1967). The second situation is where employees alleging racial discrimination should be required their controversy to "a group which is in large part chosen by the [defendants] against whom the complaint is made." Steele v. Louisville & N.R. Co., 323 U.S. 192, 206-207 (1944).

[5] Although Hokama involved the issue of exhaustion of administrative remedies prior to pursuing a court, rather than a Board, action, Hokama is nevertheless instructive regarding the futility exception.