STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, Complainant, and UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO; and DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NO. CU-10-322 ORDER NO. 2944 ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND DENYING COMPLAINANT'S MOTION TO STAY DISTRIBUTION OF A NEW LIST OF ARBITRATORS; NOTICE OF PREHEARING CONFERENCE; AND NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINT

ORDER DENYING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND DENYING COMPLAINANT'S MOTION TO STAY DISTRIBUTION OF A NEW LIST OF ARBITRATORS

For the reasons discussed below, the Hawaii Labor Relations Board (Board) hereby denies Respondents' Motion to Dismiss Complaint, filed by Respondents UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Union) and DAYTON NAKANELUA (Nakanelua), on July 30, 2013. The Board also denies Complainant's Motion to Stay Distribution of a New List of Arbitrators, filed by Complainant DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or Complainant).

Accordingly, the Board hereby orders that Respondents shall file an answer to the Prohibited Practice Complaint (Complaint) filed on July 22, 2013, by close of business on **September 17, 2013.** Failure to timely file and serve an answer may constitute an admission of the material facts alleged in the Complaint and a waiver of hearing.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 2013, PSD filed the instant Complaint, alleging, *inter alia*, that Respondents willfully sought to violate the provisions of Section 15.17 of the Unit 10 collective bargaining agreement (Agreement) setting forth the manner in which the parties are to choose an arbitrator

to adjudicate grievances; and specifically, that Respondents had personal knowledge that Michael Ben (Ben) had formerly been employed with the County of Hawaii and the State of Hawaii in various capacities involving labor relations well prior to the time they became aware of the names listed in the Board's list of five potential arbitrators; that Respondents objected to Mr. Ben's potential appointment on that basis; that Respondents nevertheless intentionally declined to either disclose their objections or to use their two allotted strikes to remove Mr. Ben from contention; and that Respondents fully intended to only raise their objections to Mr. Ben after he had been selected and thereby obtain a de facto third strike in the selection process and access to the new arbitrator list. The Complaint alleges that Respondents committed prohibited practices pursuant to Hawaii Revised Statutes (HRS) § 89-13(b)(4) and (5), which provides, in relevant part, that it shall be a prohibited practice for an employee organization or its designated agent to willfully refuse or fail to comply with any provision of chapter 89, or violate the terms of a collective bargaining agreement. The Complaint asserts that Respondents' behavior constitutes a willful manipulation and violation of the agreed-upon process set forth in the Agreement by which the parties shall choose an arbitrator, and also violates HRS § 89-10.8(a)(1).[1] The Complaint seeks the following remedies: an order declaring that Respondents have committed prohibited practices as stated in the Complaint; an order requiring Respondents to comply with the mandated arbitrator selection process set forth in the Unit 10 Agreement and to cease and desist from engaging in the behavior described in the Complaint for future arbitrator selections; an order requiring UPW to post notices in all of its offices and those of its State Director and legal counsel stating that Respondents have committed prohibited practices; an order stating that Respondents' second strike from the Board's list previously provided for this case be deemed to be Michael Ben and that Thomas E. Crowley shall thus be deemed to be the arbitrator duly selected by the parties; interlocutory relief in favor of the Complainant; and other remedies.

On July 30, 2013, Respondents filed their Motion to Dismiss Complaint, asserting lack of subject matter jurisdiction, failure to state a claim for relief, and mootness.[2] Respondents argue that the circuit court, not the Board, has subject matter jurisdiction pursuant to HRS §§ 658A-5, 658A-11, 658A-12, and 658A-26, and quote the following statutes:

> § 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.
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> * * *

§ 658A-11. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

§ 658A-12. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section 658A-23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under section 658A-23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 658A-23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 658A-23(a)(2).

* * *

§ 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.

Respondents also argue that the Complaint fails to state a claim for relief because the Union complied with Section 15.17 of the Agreement by requesting a list of potential arbitrators from the Board and exercising its two strikes. Respondents also argue that the Complaint had been rendered moot when Mr. Ben decided to withdraw as the arbitrator on July 15, 2013.

On August 1, 2013, Complainant filed its Opposition to Respondents' Motion to Dismiss, arguing that the Agreement's method of selecting an arbitrator did not "fail" but rather, Respondents willfully violated that method, which constitutes a prohibited practice over which

the Board has exclusive, original jurisdiction pursuant to HRS § 89-14. Complainant further argues that Respondents did not comply with Section 15.17 of the Agreement, and instead "cynically manipulated the process in order to gain an unfair advantage not intended by the parties when the selection process was negotiated is supposed good faith." Complainant also argues that the Complaint was not rendered moot by way of Mr. Ben's withdrawal, and that had Mr. Ben not withdrawn, the Complaint would not have been ripe as Complainant would not yet have suffered actionable harm; that the Complaint alleges a pattern of bad behavior that needs to be addressed; and that there remains a live controversy as the Complaint requests that the Board utilize its equitable powers regarding the selection of the arbitrator. Finally, Complainant argues that HRS chapter 89 takes precedence over all conflicting statutes concerning this subject matter, pursuant to HRS § 89-19. On August 2, 2013, Complainant filed its Supplement Submission to Its Opposition to Respondents' Motion to Dismiss, and attached exhibits that Complainant asserts establish a pattern of improper behavior.

II. LEGAL STANDARD

In considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the Complaint, which are deemed to be true. See County of Kauai v. Baptiste, 115 Hawaii 15, 24, 165 P.3d 916, 925 (2007) (citing In re Estate of Rogers, 103 Hawaii 275, 280-81, 82 P.3d 1190, 1195-96 (2003), *reconsideration denied*, 115 Hawaii 231, 116 P.3d 991). 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. Id.

Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 9987 (2006) (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)).

III. DISCUSSION

A. Subject Matter Jurisdiction

Pursuant to HRS § 89-14, the Board has exclusive original jurisdiction over prohibited practices. Here, the Complaint sufficiently raises a controversy concerning prohibited practices to establish the Board's subject matter jurisdiction. The Complaint alleges that Respondents committed prohibited practices pursuant to HRS § 89-13(b)(4) and (5) by allegedly willfully manipulating and violating the agreed-upon process set forth in the Agreement by which the parties shall choose an arbitrator, and in violation of HRS § 10.8. Further, the Complaint seeks

remedies available pursuant to chapter 89 that are not available pursuant to chapter 658A, such as an order declaring that Respondents have committed prohibited practices; an order requiring Respondents to comply with the mandated arbitrator selection process set forth in the Unit 10 Agreement and to cease and desist from engaging in the behavior described in the Complaint for future arbitrator selections; and an order requiring UPW to post notices in all of its offices and those of its State Director and legal counsel stating that Respondents have committed prohibited practices. See Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Lingle, 124 Hawaii 197, 239 P.3d 1 (2010) (the Board, not the circuit court, has exclusive original jurisdiction over controversies concerning statutory prohibited practices).

B. Failure to State a Claim

If the allegations in the Complaint are assumed to be true (for purposes of a motion to dismiss), then Mr. Ben was the arbitrator designated pursuant to the process agreed upon by the parties and contained in Section 15.17 of the Agreement. Section 15.17 provides in relevant part:

> 15.17 b.1. The Union and the Employer by lot shall determine who shall have first choice in deleting a name from the list of Arbitrators.
>
> 15.17 b.2. Subsequent deletions shall be made by striking names from the list on an alternating basis and the remaining name shall be designated the Arbitrator.

However, Mr. Ben withdrew as the Arbitrator based upon objections made by the Union pursuant the HRS § 689A-12. The Complaint alleges that PSD will prove Respondents intended to raise objections to Mr. Ben's impartiality prior to exercising its strikes against other potential arbitrators, thus manipulating and violating the agreed-upon process and the intent of the parties when negotiating the process, to obtain a de facto third strike in the process and access to a new list of potential arbitrators.

Accordingly, based upon the allegations of the Complaint, which must be deemed to be true for purposes of a motion to dismiss, the Complaint sufficiently alleges a prohibited practice and claim for relief, notwithstanding the fact that the Union did request a list of potential arbitrators from the Board, and did exercise two strikes, in accordance with the Agreement.

C. Mootness

Assuming the allegations in the Complaint to be true, the Board finds that this dispute is not moot and, moreover, is capable of repetition but evading review. As Complainant argues,

had Mr. Ben not withdrawn as Arbitrator, the Complaint may not have been ripe because Complainant would not have suffered a tangible injury. 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 for justiciability – adverse interest and effective remedy – have been compromised. Doe v. Doe, 116 Hawaii 323, 326, 172 P.3d 1067 (2007). Here, there remains adverse interest between the parties despite Mr. Ben's withdrawal as Arbitrator, and as Complainant points out, *because* Mr. Ben withdrew as the Arbitrator. Furthermore, some remedies requested by Complainant, such as a cease and desist order prohibiting engagement of similar behavior in future arbitrator selections, remain a potential effective remedy. Accordingly, the Board holds that the dispute is not moot.

Additionally, even if withdrawal of the Arbitrator had rendered the dispute moot, the dispute is capable of repetition yet evading review. Complainant points to other examples of similar behavior involving alleged manipulation of the selection process. In the present case, the Union notified Mr. Ben of his selection as Arbitrator by letter dated June 15, 2013.[3] Based upon the subsequent correspondence among and between the parties and Mr. Ben, Mr. Ben withdrew as the Arbitrator by letter dated July 15, 2013. Thus, only one month passed during this period, and this dispute that is capable of repetition, would also evade review if the Board were to dismiss due to mootness. The Board therefore holds that, assuming for the sake of argument the dispute is moot, an exception applies to the mootness doctrine. The prevention of prohibited practices involving public-sector collective bargaining is a matter of public interest such that invocation of the mootness exception doctrine is appropriate. Compare, Okada Trucking Co. v. Board of Water Supply, 99 Hawaii 191, 196-97, 53 P.3d 799, 804-05 (2002).

For the reasons discussed above, the Board hereby denies Respondents' Motion to Dismiss.

IV. MOTION TO STAY DISTRIBUTION OF A NEW LIST OF ARBITRATORS

On August 8, 2013, the Board sent to the parties a new list of potential arbitrators for the subject grievance. On August 8, 2013, Complainant filed a Motion to Stay Distribution of a New List of Arbitrators (Motion to Stay), arguing that the relief requested in the Complaint is a more equitable remedy than providing the parties with a new list. On August 12, 2013, Respondents filed their Opposition to Complainant's Supplemental [sic] Motion to Stay Distribution of New List of Arbitrators, arguing the issue is moot and, furthermore, the Board has issued new lists in the past when arbitrators withdrew. The Board finds and holds that this issue is moot. Accordingly, the Motion to Stay is hereby denied.

V. NOTICE OF PREHEARING CONFERENCE AND NOTICE OF HEARING

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-47, will conduct a Prehearing Conference in this matter on **October 15, 2013**, at **9:00 a.m.**, in the Board's hearing room at Room 434, 830 Punchbowl Street, Honolulu, Hawaii, 96813. The purpose of the Prehearing Conference is to arrive at a settlement or clarification of the issues, and, to the extent possible, an agreement on facts, matters, or procedures as may facilitate and expedite the hearing; to establish deadlines for the issuance of subpoenas and the exchange of witness and exhibit lists; and other procedural matters. The parties shall file a Prehearing Statement which addresses the foregoing matter with the Board at least two days prior to the Prehearing Conference.

All parties have a right to appear in person and to be represented by counsel or other representative. Any party residing on a neighbor island may appear telephonically at the Prehearing Conference; any neighbor island party who wants to appear telephonically shall call the Board at the above telephone numbers to make the necessary arrangements prior to the date of the Prehearing Conference.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata of the Board at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINT

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS §§ 377-9, 89-5(i)(4) and (5), and 89-14, and HAR §§ 12-42-46 and 12-42-49, will conduct a hearing on the merits of the instant Complaint on **November 8, 2013,** at **9:00 a.m.** in the Board's hearing room at Room 434, 830 Punchbowl Street, Honolulu, Hawaii, 96813.

All parties have a right to appear in person and to be represented by counsel or other representative.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata of the Board at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, September 4, 2013.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Richard H. Thomason, Deputy Attorney General

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[1] HRS § 89-10.8(a)(1) provides:

> (a) A public employer shall enter into 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 and shall be consistent with the following:
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> (1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance.

[2] Where the Board's administrative rules are silent as to the filing of motions to dismiss in lieu of answer, the Board has permitted such motions and considered them similarly to motions pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

[3] This letter is attached as Exhibit "G" to the Complaint. The letter is dated "June 15, 2012"; however, based upon the letter's subject line that includes the identification of the Grievance at issue, as well as the other exhibits attached to the Complaint that reference the same Grievance, it appears the June 15, 2012, date is a typographical error, and that the correct date of the letter is June 15, 2013.