STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MICHAEL HIKALEA, Complainant, and DEPARTMENT OF ENVIRONMENTAL SERVICES, City and County of Honolulu, DAVID SHIRAISHI, Department of Environmental Services, City and County of Honolulu; KIRK CALDWELL, Mayor, City and County of Honolulu; HOWARD KAHUE, United Public Workers, AFSCME, Local 646, AFL-CIO; BRANDON MCCONNELL, United Public Workers, AFSCME, Local 646, AFL-CIO; LAURIE SANTIAGO, United Public Workers, AFSCME, Local 646, AFL-CIO; and DAYTON NAKANELUA, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NOS.: CE-01-808 CU-01-317 ORDER NO. 2950 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT; AND NOTICE OF PREHEARING CONFERENCE

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT; AND NOTICE OF PREHEARING CONFERENCE

On August 13, 2012, Complainant MICHAEL HIKALEA (Hikalea or Complainant), by and through his counsel,[1] filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that Respondent Kirk Caldwell,[2] Mayor, City and County of Honolulu (Employer or City), and Respondent Dayton Nakanelua,

State Director, United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union) and their agents, committed prohibited practices against him by ignoring his seniority, improperly denying him overtime opportunities and failing to process his grievances. Complainant also alleged, *inter alia*, that since October 15, 2011, the Employer created and maintained a hostile work environment with UPW's designated agent and steward, Respondent Howard Kahue (Kahue), to discourage membership in the Union or undermine his confidence in the Union and acted in derogation of Complainant's Uku Pau contract rights, thereby violating Hawaii Revised Statutes (HRS) § 89-13(a)(3); that the Employer violated HRS § 89-13(a)(8) by violating the terms of the Uku Pau Contract and various provisions of the Unit 01 Collective Bargaining Agreement (CBA); that the Employer violated HRS § 89-13(a)(5) by bargaining in bad faith with a corrupt Union official to alter Complainant's Uku Pau contract rights under Section 51.04 and agreeing to the Clarification of Operating Procedures (COP); that the Employer deliberately failed to process Complainant's written grievance, dated May 17, 2012, in violation of HRS § 89-13(a)(1); and that each day after May 17, 2012, is a separate count or violation. As against UPW, Complainant alleged, *inter alia*, that since October 15, 2011, Union steward Kahue and other Union agents interfered with Complainant's statutory rights by discriminating against him and deliberately failing to process Complainant's verbal and written grievances in violation of HRS §§ 377-9(d) and 89-13(b)(1) and (2); that the Union improperly withdrew the grievance by letter dated May 23, 2012; and that the Union failed to bargain in good faith by "rigging" the overtime work schedule by the COP in violation of HRS § 89-13(b)(2).

On August 22, 2012, the UPW, by and through its counsel, filed a Motion to Dismiss and/or for Summary Judgment with the Board. The UPW contended that the Complaint should be dismissed for (1) lack of jurisdiction with respect to any claims which occurred more than 90 days prior to August 13, 2012; (2) failure to state a hybrid claim for relief for breach of a collective bargaining agreement by the employer and a breach of the duty of fair representation by the union; and (3) lack of standing. Alternatively, the UPW contends there are no material issues of fact in dispute and the Union is entitled to judgment as a matter of law.

On August 24, 2012, the City Respondents, by and through their counsel, filed a Substantive Joinder in Union Respondents' Motion to Dismiss and/or for Summary Judgment Filed on August 22, 2012, with the Board.

On August 29, 2012, Complainant filed his Memorandum in Opposition to Motion to Dismiss and/or for Summary Judgment, Filed August 22, 2012, with the Board.

On September 10, 2012, the Board conducted a hearing on the instant motion and provided the parties with the opportunity to present evidence and argument to the Board. Based on a review of the record, the Board hereby grants in part and denies in part the UPW's Motion to Dismiss Complaint and/or for Summary Judgment, filed on August 22, 2012, and the City Respondents' Substantive Joinder in the Union's motion, dated August 24, 2012.

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.

For purposes of this Order and for consideration of the UPW's Motion to Dismiss and/or for Summary Judgment, and the City Respondents' Substantive Joinder therein, the Board accepts the allegations in the Complaint as true, and the Board views the allegations in the light most favorable to Complainant as the party against whom the motions are made.

For all relevant times, Complainant was a refuse collector employed by the City and County of Honolulu and an employee within the meaning of HRS § 89-2, and included in bargaining unit 01.

For all relevant times, the UPW was an employee organization and the exclusive representative, within the meaning of HRS § 89-2, for employees in bargaining unit 01.

For all relevant times, Peter Carlisle was the mayor of the City and County of Honolulu and the public employer, within the meaning of HRS § 89-2, of employees of the City and County of Honolulu.

The UPW and the City and County of Honolulu are parties to the Unit 01 CBA, setting forth a grievance procedure to resolve violations or misapplications of the CBA.

Complainant alleged he was improperly denied overtime opportunities since October 11, 2011, and continuing due to City and Union Respondents' actions of granting overtime opportunities to 6:00 a.m. shift pool workers rather than senior employees in the 4:00 a.m. shift. Complainant alleged Respondents violated the CBA and the Uku Pau agreement, thereby committing prohibited practices in violation of HRS § 89-13(a)(1), (3), (5) and (8) and 89-13(b)(1), (2), (4) and (5), and any other statute found applicable. Complainant alleged that overtime was assigned pursuant to a

collusive agreement entered into in October 2011. Complainant also alleged that the UPW filed a grievance on his behalf on or about April 20, 2013 (Exh. 2a to the Complaint), and improperly withdrew the grievance on May 23, 2012.

With regard to the timeliness of the Complaint, the UPW argued that the Complaint was filed on August 13, 2012, and thus the 90th day prior to the filing of the Complaint is May 15, 2012. The UPW contended that any claims occurring prior to May 15, 2012, are barred by the Board's 90-day statute of limitations. The UPW alleged that it filed a grievance on Complainant's behalf on April 20, 2012, and after reviewing the grievance, the UPW's State Director withdrew the grievance on May 23, 2012. At the motion hearing held on September 10, 2012, the UPW argued that Complainant admitted in a May 17, 2012, letter to Mr. Wong at the Department of Environmental Services, Exhibit 1 attached to the instant Complaint, that he was aware of the UPW's position on May 9, 2012. The letter states in part as follows:

> 3. Status of my step 1. grievance to Mr. Timothy Steinberger [form sent out on April 20, 2012 from the UPW]. The United Public Workers position as of 5/9/2012 is that they will not process any grievances regarding the lost overtime of 4:am workers regardless of its at 4:am or 6:am. In fact according to the Oahu Island Director "we have no rights to overtime".

The UPW argued that since Complainant knew that UPW would not process his overtime grievances on May 9, 2012, his allegations regarding the withdrawal of his grievance in his Complaint was time-barred.

Dayton Nakanelua, UPW's State Director, stated in a Declaration, dated August 22, 2012, as follows:

> d. The grievance in case LS-12-02 was carefully and fully investigated by the union, and on or about May 23, 2012 I determined that the grievance and the claims for overtime presented by Michael Hikalea should not be arbitrated because there was inadequate proof of a violation of Section 5 of the policies and procedures on task work for refuse collection on or about April 3, 7, 10, 16, and 17, 2012 as alleged. I considered the prior arbitration awards rendered by Ted Tsukiyama and Stanley Ling and determined that there was inadequate proof in a number of significant respects. First, there was no proof that an overtime situation arose at

the 4:00 a.m. shift in route #38 which was selected by Michael Hikalea. Second, there was no proof that an overtime situation arose at 6:00 a.m. after the employer had exhausted the master pool (or foreman's pool) for all bargaining unit work on a straight time basis. Third, there was no proof that the employer assigned overtime out of the preferential order where the vacancy occurred, i.e., in a particular route, or contrary to a "fair rotational basis" as required by Section 5. Accordingly, for all of the foregoing reasons I notified Michael Hikalea and the employer that the union was withdrawing the grievance in LS-12-02 on May 23, 2012. Exhibit 15 are copies of the letters I sent out on May 23, 2012 to Michael Hikalea and Timothy Steinberger.

8. The decision not to proceed to arbitration on grievance case number LS-12-02 was based solely and exclusively upon my judgment that the claims presented by Michael Hikalea lacked merit under the collective bargaining agreement and the relevant provisions of the policies and procedures on task work for refuse collection. This action is consistent with the broad latitude granted to the union as the exclusive bargaining representative under Section 89-8(a). Hawaii Revised Statutes, and the applicable case law established by the Hawaii Labor Relations Board. Exhibit 16 is a copy of Order No. 2790 rendered by the Hawaii Labor Relations Board in Case CE-10-768 and CU-10-297 which refers to the applicable standard.

[Emphasis added.]

Based on the foregoing, the Board finds that the UPW State Director has the sole authority to determine whether a grievance goes forward to arbitration and Nakanelua's declaration clearly states that he made the decision not to proceed on Hikalea's grievance on May 23, 2012, and sent copies of the letter to Complainant and Timothy Steinberger on that date. Accordingly, the Board finds after viewing the facts in the light most favorable to Complainant, that Complainant knew or should have known that the UPW would not take his grievance when Nakanelua made the decision to withdraw the grievance and when Complainant received Nakanelua's May 23, 2012, letter. Thus, the Board finds that the Complaint was filed within 90 days after Complainant learned that the UPW withdrew his grievance, and is timely. While matters or events occurring

outside of the applicable statute of limitations may be time-barred as the basis of a prohibited practice claim under HRS § 377-9(d), those matters may be nevertheless be considered by the Board to provide a historical context for the facts in this case.

The UPW also contends that Complainant failed to allege a hybrid action before the Board. The Board finds Complainant alleged as against the City, *inter alia*, violations of the CBA and the Uku Pau contract. In addition, Complainant alleged that the Union agents improperly withdrew his grievance on the denial of overtime opportunities; failed to represent him fairly by refusing to process his grievances; and entered into a collusive agreement with the Employer which interfered with his rights. The instant Complaint is also fraught with, *inter alia*, allegations of discrimination by both City and Union Respondents against Complainant. In reviewing the allegations against the UPW in the Complaint, the Board notes that Complainant cites specific violations of HRS §§ 377-9(d) and 89-13(b)(1) and "HRS § 89-13(b)(2) and any other statute found applicable." Viewing the allegations of the Complaint in the light most favorable to the Complainant, the Complaint clearly alleges violations of the Union's duty of fair representation as provided in HRS §§ 89-8[3] and 89-13(b)(4) as well as interference with the grievance procedure as Complainant alleges, *inter alia*, that the UPW, his Union steward and other Union agents interfered with his rights to file grievances, improperly withdrew his grievance, and negotiated a Clarification of Procedures applicable to only the Ke`ehi (Honolulu) Baseyard which discriminated against Complainant. Accordingly, the Board deems Complainant's allegations as charges of a breach of the Union's duty of fair representation in HRS § 89-3 and violations of HRS § 89-13(b)(4). Thus, the Board finds that Complainant sufficiently pled a hybrid action in his Complaint before the Board and accordingly, the Board denies the UPW's motion to dismiss on those grounds.

In addition, the UPW contended that Complainant lacks standing before the Board, arguing that Complainant has not suffered any actual injury from Respondents' actions for which relief is likely. Complainant argued that he has been denied overtime opportunities and overtime payments and will suffer reduced pension benefits due to Respondents' actions. The Board finds that Complainant has sufficiently alleged that he has suffered injury by the loss of overtime which he will be permitted to prove at trial.

CONCLUSIONS OF LAW

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

The Board has jurisdiction over the Complaint pursuant to HRS §§ 89-5 and 89-14 as set forth herein.

Under Rule 12(b)(6) of the Hawaii Rules of Civil Procedure, a complaint, or any portion thereof, may be dismissed when it is apparent from the pleading that the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Bertelman v. TAAS Assocs., 69 Haw. 95, 99, 735 P.2d 930, 936 (1987).

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. In re Estate of Rogers, 103 Hawai`i 275, 280, 81 P.3d 1190, 1195 (2003); 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)). The court must therefore view a complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. [O]ur consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true. Rogers, at 281, 81 P.3d at 1196.

However, in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact). Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (construing federal rule that is analogous to Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6)) (citation and footnote omitted).

The court has stated that an HRCP Rule 12(b)(6) "dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (internal quotation marks and citation omitted).

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.

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. 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.

It is generally recognized that summary judgment may be granted sua sponte to a non-movant when there has been a motion but no cross-motion. See, Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982) (when one party moves for summary judgment and at a hearing the record reveals no genuine dispute on a material fact, the court may sua sponte grant summary judgment to the non-moving party); Kassbaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 494 (9th Cir. 2000); 10A Charles A. Wright, Arthur R. Miller & Mary Kane, Federal Practice and Procedure § 2720, at 347 (3d ed. 1998). The record must be carefully reviewed to determine that the moving party against whom summary judgment was rendered had a full and fair opportunity to ventilate the issues involved in the motion. Cool Fuel, 685 F.2d at 311.

The Complaint alleges prohibited practices pursuant to HRS § 89-13(a)(1), (3), (5) and (8), and § 89-13(b)(1), (2), (4) and (5) which provide as follows:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
>
> * * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

(8) Violate the terms of a collective bargaining agreement;

(b) It shall be a prohibited practice for a public employee or for an employee organization of its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer if it is an exclusive representative, as required in section 89-9;

* * *

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

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

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.

HRS § 377-9(l) states that no complaint "shall be considered unless filed within ninety days of its occurrence." Hawaii Administrative Rules (HAR) § 12-42-42 provides that a complaint for prohibited practices may be filed by a public employee "within ninety days of the alleged violation."

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").

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).

Having reviewed the allegations of the complaint in the light most favorable to the Complainant, the Board finds that the claims presented are timely since the Complaint was filed within 90 days of the date Complainant knew or should have known of the alleged prohibited practices by the Union, i.e., after receiving the letter that the Union withdrew the grievance. According to Nakanelua, he makes the sole decision whether to move the grievance forward to arbitration and he made the decision on or about May 23, 2012, and so notified Complainant. Thus, the Board concludes it has jurisdiction over the UPW's withdrawal of Complainant's grievance.

As to the issue of standing, generally it has been declared by this court that "[s]tanding is concerned with whether the parties have the right to bring suit." Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai`i 64, 67, 881 P.2d 1210, 1213 (1994) (internal quotation marks and citation omitted). "'[T]he crucial inquiry with regard to standing is whether the plaintiff has *alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.*'" Mottl v. Miyahira, 95 Hawai`i 381, 389, 23 P.3d 716, 724 (2001) (quoting In re Matson Navigation Co. v. Fed. Deposit Ins. Corp., 81 Hawai`i 270, 275, 916 P.2d 680, 685 (1996)) (emphasis added). In determining whether a plaintiff has standing, the court "look[s] solely to whether [the plaintiff] is the proper plaintiff . . ., without regard to the merits of the allegations. Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989).

In addition, in analyzing whether a party has standing, "[o]ur touchstone remains the needs of justice." Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981) (internal quotation marks and citation omitted). Hence, "while every challenge to governmental action has not been sanctioned, our basic position has been that standing requirements should not be barriers to justice." Id. at 173-74, 623 P.2d at 439. Thus, "[o]ne whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal." Id. at 174 n. 8, 623 P.2d at 439 n. 8 (internal quotation marks and citations omitted) (emphasis added). Moreover, "[a]t the pleading stage, general factual allegations of injury resulting

from the defendant's conduct may suffice." Sierra Club v. Hawaii Tourism Auth., 100 Hawai`i 242, 250-51, 59 P.3d 877, 885-86 (2002) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (other citations omitted)) (brackets omitted).

Thus, "[i]n deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury." Akinaka v. Disciplinary Bd. of the Hawai`i Supreme Court, 91 Hawai`i 51, 55, 979 P.2d 1077, 1081 (1999) (citing Bush v. Watson, 81 Hawai`i 474, 479, 918 P.2d 1130, 1135 (1996)). Furthermore, "[w]ith respect to the first prong of this test, the plaintiff must show a distinct and palpable injury to himself or herself. The injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical." Id. (internal quotation marks, brackets, and citations omitted) (emphasis added). Because "the test is stated in the conjunctive, [a plaintiff] must satisfy all three prongs to establish its standing." Sierra Club, 100 Hawaii at 250, 59 P.3d at 885.

In reviewing the Complaint, the Board finds that Complainant satisfied all three prongs of the foregoing test such that Complainant has standing before the Board. In this case, Complainant alleges that he has been denied overtime opportunities and presumably lost income and that the Union breached its duty to represent him by refusing to process and withdrawing his grievances on the loss of overtime. Complainant alleges that the improper withdrawal of the grievance at issue was due to Nakanelua's actions, and the loss of overtime opportunities is due to the Respondents' acts of discrimination and violations of applicable contract provisions. Clearly, a favorable decision by the Board could provide relief for Complainant's concerns as the Board is empowered to provide a make-whole remedy by HRS § 377-9. Accordingly, the Board concludes that Complainant has standing to bring his Complaint to the Board.

The UPW also contended that the Complaint should be dismissed because it fails to allege or establish a violation of the CBA or a breach of the duty of fair representation. In reviewing the allegations against the UPW in the Complaint, the Board notes that Complainant cites specific violations of HRS §§ 377-9(d) and 89-13(b)(1) and "HRS § 89-13(b)(2) and any other statute found applicable." Viewing the allegations of the Complaint in the light most favorable to the Complainant, the Complaint clearly alleges violations of the Union's duty of fair representation as provided in HRS §§ 89-8 and 89-13(b)(4) as well as interference with the grievance procedure as Complainant alleges, *inter alia*, that the UPW, his Union steward and other Union agents interfered with his rights to file grievances, improperly withdrew his grievance, and negotiated a

Clarification of Procedures applicable to only the Ke`ehi (Honolulu) Baseyard which discriminated against Complainant, etc. Accordingly, the Board deems HRS § 89-13(b)(4) as an otherwise applicable statute and Complainant's allegations as charges of a breach of the Union's duty of fair representation in HRS § 89-3 and violations of HRS § 89-13(b)(4), and the Board concludes that the Complaint alleges a hybrid action and as well as contractual violations by the Employer and denies the UPW's motion to dismiss on those grounds.

Complainant also alleged that the employer and union refused or failed to bargain in good faith in violation of HRS § 89-13(a)(5) and 89-13(b)(2). HRS § 89-13(a)(5) provides that it is a prohibited practice where the employer refuses to bargain collectively in good faith with the exclusive representative. Complainant is a public employee and not the exclusive representative. There is no duty upon the employer to bargain in good faith with an individual employee under HRS § 89-9(a). Thus, the Board concludes Complainant lacks standing to allege a violation against Employer Respondents that they failed to bargain collectively in good faith. Accordingly, the Board dismisses Complainant's allegations of an HRS § 89-13(a)(5) violation.

HRS § 89-13(b)(2) provides that it is a prohibited practice for an exclusive representative to refuse to bargain collectively in good faith with the employer. Since Complainant is an employee and not an exclusive representative, he lacks standing to allege a violation of HRS § 89-13(b)(2). Accordingly, the Board dismisses Complainant's allegations of HRS § 89-13(b)(2) violations.

UPW Respondents contended in the alternative that there are no material issues of fact in dispute and the Union and its agents are entitled to judgment as a matter of law. Based upon a review of the record, the Board finds material issues of fact presented, including the UPW's processing of Complainant's grievances as well as the Employer Respondents' handling of Complainant's grievances, which need to be resolved at hearing.

ORDER

The Board hereby grants in part and denies in part the UPW's Motion to Dismiss and/or for Summary Judgment and City Respondents' Substantive Joinder in UPW's Motion to Dismiss and/or for Summary Judgment.

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS §§ 377-9 and 89-5(i)(4) and (5), and HAR § 12-42-47, the Board will conduct a second prehearing conference in this matter on Friday, **December 6, 2013, at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues; to identify and exchange witness and exhibit lists, if any; to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented; and address any other prehearing matters. The parties shall file any amendments to their previously filed Prehearing Statements which addresses the foregoing matters with the Board two days prior to the prehearing conference. Hearing on the Complaint will be scheduled at the prehearing conference.

DATED: Honolulu, Hawaii, November 8, 2013.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, CHAIR

SESNITA A.D. MOEPONO, MEMBER

ROCK B. LEY

Copies sent to:

Michael Hikalea, *Pro se*
Herbert R. Takahashi, Esq.
John S. Mukai, Deputy Corporation Counsel

END NOTES

[1]By letter dated January 14, 2013, Complainant advised the Board that he was no longer represented by Emmett E. Lee Loy, Esq. and was seeking new counsel.

[2] Kirk Caldwell, Mayor, City and County of Honolulu, is substituted for Peter Carlisle. See, Rule 25(d), Hawaii Rules of Civil Procedure ("[w]hen a public officer is a party to an action in an official capacity and during its pendency . . . ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party").

[3]HRS § 89-8(a) provides as follows:

> §89-8 Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required. [Emphasis added.]