

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

PATRICIA HAMAMOTO, Superintendent,
Department of Education, State of Hawaii;
and CONNECTIONS, A New Century Public
Charter School,

Respondents.

CASE NO. CE-01-539

ORDER NO. 3005

ORDER DENYING RESPONDENTS'
SECOND MOTION TO DISMISS, OR
IN THE ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT, FILED
ON JULY 29, 2009; DENYING
COMPLAINANT'S MOTION TO
AMEND COMPLAINT; AND
DENYING COMPLAINANT'S
MOTION TO CONDUCT PROMPT
HEARING AND EXPEDITIOUS
RESOLUTION OF ISSUES ON
REMAND; NOTICE OF STATUS
CONFERENCE

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PROMPT HEARING AND EXPEDITIOUS RESOLUTION OF ISSUES ON REMAND

I. BACKGROUND OF THE CASE

A. The Complaint

Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant or UPW) filed its Prohibited Practice Complaint (Complaint) on August 18, 2003, against then-Superintendent of Education PATRICIA HAMAMOTO (Hamamoto) of the Department of Education, State of Hawaii (DOE), and John Thatcher, III (Thatcher), the Chief Executive Officer of CONNECTIONS, A New Century Public Charter School (Connections or the School). The Complaint alleged, *inter alia*, that on or about September 5, 2000, James Ah Sing (Ah Sing) was hired as a part time custodian at the Mt. View location of Connections; that commencing on or about February 8, 2001 and thereafter, Ah Sing was employed as a full time custodian when Connections relocated its operations from Mt. View to its new Hilo location; that, as a school custodian in Position No. 56376, Ah Sing subsequently became a civil servant, passed his probationary period, was covered by the Unit 1 collective bargaining agreement (CBA), and became a member of the UPW; and that on or about June 27, 2003, Respondents unilaterally changed the wages, hours or work, and the other terms and conditions of

employment under the Unit 1 CBA by terminating Ah Sing effective June 30, 2003, without just or proper cause, eliminating or converting Position No. 56376 from a full time civil service position covered by the Unit 1 CBA to a non-civil service non-bargaining unit position, and Respondents committed other acts and deeds to be established during hearing on the Complaint.

The Complaint alleged that such wrongful acts contravened the union recognition (Section 1), discipline (Section 11), prior rights (Section 14), bill of rights (Section 58), Department of Education (Section 61), entirety and modification (Section 64) and the July 21, 2000, Memorandum of Agreement (MOA) between the UPW and the DOE requiring all New Century Public Charter Schools (NCPCS) to comply with the Unit 1 CBA and to negotiate any changes to said agreement through the Office of Collective Bargaining with UPW. The Complaint alleged that Respondents' willful violations of the terms and provisions of said agreements constitute prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(8)ⁱ.

The Complaint further alleged that Respondents' conduct contravenes the duty to bargain in good faith over mid-term changes in wages, hours, and other conditions of employment under HRS §§ 89-3ⁱⁱ and 89-9(a)ⁱⁱⁱ, and the duty to recognize the UPW as the exclusive bargaining agent of Unit 1 employees in HRS § 89-8(a)^{iv}, and that such willful refusal and failure to comply with the provisions of HRS chapter 89 constitute prohibited practices under HRS § 89-13(a)(1), (5), and (7)^v.

The Complaint requested the following relief: declaratory relief in favor of Complainant; compensatory and other make whole relief to adversely affected employees; a cease and desist order prohibiting Respondents from engaging in prohibited practices; and other affirmative relief to ensure full compliance with chapter 89 and the applicable provision of the collective bargaining agreements.

The Respondents filed their Answer to Complaint on September 2, 2003, generally denying the allegations in the Complaint, and asserting that Ah Sing was employed on a full-time basis as a maintenance custodian position number 111418 beginning on or about February 8, 2001, and subsequently employed as a School Custodian II in position 56376, a temporary one year appointment not to exceed June 30, 2003. Respondents asserted that the Board lacks jurisdiction; the Complaint was untimely; Complainant failed to exhaust contractual remedies; Complainant is stopped by virtue of its own actions in dealing with Respondents; that Respondents at all times acted in good faith in this matter; and that assuming, *arguendo*, that a prohibited practice was committed, Respondents denied that said prohibited practice was committed "willfully."

B. Motion to Amend Complaint

On September 23, 2003, the UPW filed a Motion to Amend Complaint, seeking to add "Section 12 (layoff)" of the Unit 1 CBA to the allegation in the Complaint concerning violations of the CBA and MOA.

At the Prehearing Conference held on September 23, 2003, counsel for Respondents indicated he had no objection to the Motion to Amend Complaint. Counsel for the UPW indicated he would stipulate to treating the Respondents' Answer to Complaint as denying the Complaint as amended by the Motion to Amend Complaint. Accordingly, the Complaint is treated by the Board as including the "Section 12 (layoff)" allegation, which is treated as denied by Respondents.

C. Respondents' Motion to Dismiss,
or in the Alternative, Motion for Summary Judgment

On September 30, 2003, Respondents filed their Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, for failure to state claims upon which relief can be granted; failure to establish a violation of the Unit 1 CBA; and failure to exhaust contractual remedies. Specifically, Respondents asserted that: (1) the Complaint fails to establish a violation of HRS § 89-13(a)(1) because it lacks any factual allegations relating to interference, restraint or coercion of an employee in the exercise of a right guaranteed under chapter 89; (2) the Complaint fails to establish a violation of HRS § 89-13(a)(5) because there is no duty for a public employer to bargain over its decision not to renew a temporary appointment; (3) the Complaint fails to establish a violation of HRS § 89-13(a)(7) because HRS § 89-3 does not impose a duty for an employer to bargain, HRS § 89-9(a) does not impose an obligation for a public employer to bargain or negotiate over the expiration of an individual temporary appointment, and HRS § 89-8(a) does not recognize an exclusive representative upon the expiration of an individual temporary appointment; (4) the Complaint fails to allege any actions by Respondents which would give rise to willful violation of the terms of the Unit 1 CBA, that the section of the CBA referenced in the Complaint neither apply to nor modify the June 30, 2003 expiration date of Ah Sing's temporary appointment, and that the CBA provides for a mandatory grievance procedure; and (5) the Complaint is barred by the provisions of Section 15A of the CBA, providing for a grievance procedure, and that Complainant failed to exhaust contractual remedies.

On October 13, 2003, the UPW filed its Memorandum in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment. The UPW asserted that the UPW presented numerous claims for relief under HRS chapter 89 against Respondents, such as interfering with protected rights when Thatcher retaliated against Ah Sing by terminating his contract because of the prohibited practice complaint filed by the union; breaching of the obligation to negotiate over changes in wages, hours, and other terms and conditions of employment; undermining the merit principles and the principle of equal pay for equal work; and willfully violating provisions of the Unit 1 CBA. The UPW also asserted that summary judgment is inappropriate since there were genuine disputes over material issues of fact. Finally, the UPW asserted that the Board cannot decline jurisdiction in a controversy regarding superseding public policies. On October 17, 2003, the UPW filed a Supplemental Submission.

D. December 3, 2003, Proceedings

On December 3, 2003, the Board held a hearing on Respondents' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. The Board indicated that it would take notice

of the proceedings in Board Case No. CE-01-537a. The issues relevant to the Board's consideration of the motion included whether Ah Sing may have believed he was a civil servant; that the employer told Ah Sing that he passed probation; whether Ah Sing was led to believe that he was covered under the Unit 1 CBA; and Respondents' varying positions on the nature of Ah Sing's employment. The Board announced its inclination to deny Respondents' Motion to Dismiss due to material issues of fact in dispute, including whether Ah Sing had a limited term appointment, whether estoppel applies, and whether there was retaliation. The Board orally ruled that the Complaint was deemed amended to include the retaliation claim and that no written amendment was required.

E. Complainant's Motion for Summary Judgment

On March 16, 2004, Complainant filed UPW'S MOTION FOR SUMMARY JUDGMENT, based upon the Stipulation and Order (Stipulation and Order) filed in Board Case Nos. CE-01-537a, CE-02-537b, CE-03-537c, CE-04-537d, and CE-06-537e, In the Matter of United Public Workers, at al v. Kathleen Watanabe, et al. (Case No. CE-01-537a) as Order No. 2237. The Stipulation and Order was entered into by, or on behalf of, the UPW; the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA); Hamamoto; and the Board of Education^{vi} on March 15, 2004, and provided, in relevant part:

7. On or about June 9, 2003 the Department of Human Resources Development (DHRD) informed Employer of its position (and policy) that employees of public charter schools in the DOE "do not have civil service status" and are no longer part of the merit system.
8. On or about June 12, 2003 DHRD requested Employer to "convert all public charter school positions to reflect the fact that these positions do not have civil service status" by June 30, 2003, and thereafter informed Employer that DHRD would not provide "certified lists of eligible applicants" and "civil service appointments may not be made to fill public charter school positions."
9. On and after July 8, 2003 the aforementioned DHRD position, policy, and actions were communicated to public charter school administrators and employees.
10. As a direct consequence various public charter school employees (in order to preserve and maintain their civil service status, rights and benefits), initiated transfers and other changes in their terms and conditions of work.
11. As a further consequence on or about July 1, 2003 and thereafter, DOE failed to process for hiring approximately fifteen (15) or more public charter school employees in classified positions through the statewide merit system for compliance with civil service requirements, and as a result these employees are currently exempt from civil service coverage.

12. On or about January 13, 2004 public charter school employees were informed by Employer that the June 30, 2003 deadline for compliance with the DHRD position and policy had been extended to June 30, 2004, and that public charter school employees with civil service appointments would continue "with civil service status through June 30, 2004."
13. On or about March 5, 2004 Employer was informed by DHRD that the June 30, 2004 deadline could be extended to September 30, 2004.
14. Employer hereby stipulates and agrees to cease and desist from implementing the aforementioned DHRD position or policy regarding loss of civil service status for public charter school positions and employees, and to make whole all adversely [sic] employees (including but not limited to the restoration or return of said employees to their former public charter school positions without loss of rights, privileges, and benefits).
15. Within 30 days from the date of this Stipulation and Order Employer shall process all currently exempt public charter school employees in classified positions through the statewide merit system and restore them to civil service status. All classified positions in public charter schools shall be restored to the merit system within thirty days.
16. Within 30 days from the date of this Stipulation and Order Employer shall provide to UPW and HGEA a report of its compliance with the make whole provisions herein, and shall provide all public charter school employees a copy of this Stipulation and Order.
17. No changes in the terms and provisions of this Stipulation and Order shall be made, except by negotiations and mutual consent of the parties prompted by legislative clarifications hereafter to the public charter school laws or as a result of a final decision and order of the Hawaii Labor Relations Board (subject to judicial review) in this or other related proceedings.
- 17.[sic]In accordance with the terms and conditions herein Patricia Hamamoto and the Board of Education shall be dismissed as respondents in the above referenced case.

On March 23, 2004, Respondents filed their Memorandum in Opposition to Complainant's Motion for Summary Judgment, asserting that Ah Sing did not fall within the category of adversely affected employees under the Stipulation and Order; that a prohibited practice requires a willful violation; and that the evidence illustrates that Ah Sing's temporary appointment expired under its own terms and was not renewed.

On March 25, 2004, Complainant filed its Reply Brief in Support of Motion for Summary Judgment, asserting that the Declaration by Linda Shinsato (Shinsato) submitted by Respondents should be disregarded because Shinsato was not involved in negotiating the Stipulation and Order and therefore lacked personal knowledge thereof; that Respondents were precluded from repudiating the terms and provisions of the Stipulation and Order; and that the Stipulation and Order plainly applies to all public charter school positions and employees, including Ah Sing.

On March 29, 2004, the Board held a hearing on Complainant's Motion for Summary Judgment. The Board announced its inclination to grant the UPW's Motion for Summary Judgment, based in part on the separation notice of July 8, 2003, which identified the position not being renewed as the reason for separation, establishing the personnel action as being within the class of actions affected by the DHRD instructions and accordingly incorporated into the remedial provisions of the Stipulation and Order. The Board opined that by eliminating Ah Sing's position, the DOE changed the terms and conditions of employment and violated the CBA.

On April 15, 2004, the UPW filed its Supplemental Submission in Support of its Motion for Summary Judgment Filed on 3/16/04. On April 23, 2004, Respondents submitted their Supplemental Submission in Opposition to Complainant's Motion for Summary Judgment Filed on March 16, 2004.

F. The UPW's Motion to Amend Complaint

On June 21, 2004, the UPW filed its Motion to Amend Complaint, seeking to add claims that Respondents failed to comply with the Stipulation and Order entered in Case No. CE-01-537a as well as the Board's oral ruling of March 29, 2004; that on or about June 30, 2003, Ah Sing was effectively laid off without compliance with a 90 day notice as required by the layoff provision of the CBA; that on October 1, 2003, Thatcher terminated a dump rubbish contract with Ah Sing worth approximately \$75.00 per week in retaliation for filing the Complaint; that Respondents' failure to comply with the terms and provisions of the Stipulation and Order constitutes unlawful discrimination against Ah Sing in his terms and conditions of employment; and a request for attorney's fees and costs.

On June 29, 2004, Respondents filed their Opposition to Amend Complaint, asserting that the Board's inclination, as announced at the March 29, 2004 hearing, cannot form the basis for a prohibited practice claim; that permitting amendment of the Complaint is inappropriate given the Board's inclination to grant the UPW's Motion for Summary Judgment; that the UPW's allegations concerning violation of the Stipulation and Order had already been advanced in Case No. CE-01-537a; and that the UPW provided neither bases nor authority for seeking attorney's fees and costs.

On July 7, 2004, the UPW filed its Reply Brief in Support of Motion to Amend Complaint Filed on June 21, 2004, asserting that the amendment was necessary to supplement the Complaint and conform to evidence; there is no prejudice to Respondents; this proceeding is the only "case" involving all necessary and indispensable parties to the controversy; and the

merits of a claim for attorney's fees and costs is irrelevant to whether a complaint can be amended or not.

G. Order Granting the UPW's Motion for Summary Judgment

On June 8, 2007, the Board issued its Proposed Order Granting Complainant's Motion for Summary Judgment. On June 29, 2007, the Board issued Order No. 2457, Final Order Adopting Proposed Order and Granting Complainant's Motion for Summary Judgment. The Board found, *inter alia*:

2. PATRICIA HAMAMOTO was, for all relevant times, the Superintendent of the Department of Education ("DOE"), State of Hawaii, and represented the Board of Education in dealing with DOE employees, and is therefore a public employer within the meaning of HRS § 89-2. CONNECTIONS is a public charter school ("PCS") representing the interests of the employer with respect to its employees and is therefore a public employer within the meaning of HRS § 89-2.
3. The UPW and public employers were parties to a collective bargaining agreement covering the employees in bargaining unit 01. UPW's Memorandum in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment, Exhibits ["UPW's Exs."] 6 and 7.
4. In April 2000, the Board of Education, State of Hawaii authorized and approved CONNECTIONS as the first new century public charter school. UPW's Ex. 34. The school was originally located at Mountain View on the Big Island where it shared facilities with Mt. View Elementary. *Id.*
5. On July 21, 2000, the State, the DOE and UPW entered into a Memorandum of Agreement to require all public charter schools to "comply with the Unit 01 Collective Bargaining Agreement that expired on January 31, 2000 until it is replaced by a new Collective Bargaining Agreement." Ex. 8.
6. On or about September 5, 2000, CONNECTIONS hired Ah Sing as a part-time custodian working 19 hours per week. Ah Sing Declaration ("Decl.") ¶ 2. Ah Sing was informed that his position was temporary or casual. *Id.* Ah Sing also worked at Longs. *Id.* When CONNECTIONS moved to the Kress Store building in downtown Hilo, his hours increased from 19 hours to 40 hours per week starting on or about February 8, 2001 and he was unable to continue working at Longs. Ah Sing Decl. ¶ 3.
7. On or about August 2, 2001, Ah Sing was informed that his job was being changed to a civil service position, Position No. 56376. Ah Sing Decl. ¶ 4. Ah Sing accordingly filed a Separation Notice from his job at

CONNECTIONS PCS, Position No. 111418. UPW's Ex. 2. Ah Sing served a six-month probationary period and was evaluated by Tom Helm ("Helm") on or about February 8, 2002. Ah Sing Decl. ¶ 4. Helm told him that he did well and passed his probationary appraisal. Id. Ah Sing was never told that this appointment was temporary. Id.

8. By letter dated May 6, 2003, Lawrence T. Jackson, President CPCS Local School Board, wrote to Ah Sing as follows:

On Monday, May 5, 2003, the Connections PCS Local School Board took action to decline to renew your 89 day contract as of June 30, 2003. Please discuss this matter with Mr. John Thatcher, Connections PCS Chief Educational Officer, if you have any questions.
UPW's Ex. 19.

9. On or about June 27, 2003, Ah Sing was notified that his civil service School Custodian II position was "not being renewed." Ah Sing Decl. ¶ 5, UPW's Ex. 3. Ah Sing was terminated effective June 30, 2003. UPW's Ex. 3. By letter dated July 17, 2003, John Thatcher ("Thatcher"), CEO, CONNECTIONS informed Ah Sing that:

Our Local School board has decided that we can no longer afford to provide custodial services at the Kress Building given the limited funds we will be receiving for the coming school year. Your position (#56376) as a School Custodian II will be eliminated. Thank you for your understanding.

UPW's Ex. 4. Ah Sing was not given a 90-day notice of a layoff due to lack of funds by the DOE or provided an opportunity for placement within the DOE. Ah Sing Decl. ¶ 6. Based upon several subsequent visits to CONNECTIONS, the custodial work was being performed by three non-bargaining unit employees who were not covered by the Unit 01 agreement. Ah Sing Decl. § 7.

10. After separating from CONNECTIONS, Ah Sing was contacted by school personnel to perform on contract during August and September 2003. Ah Sing Decl. ¶ 9. Thereafter, on October 1, 2003, Thatcher told him that he was advised by his attorney to cut all ties with Ah Sing because of the filing of the prohibited practice complaint. Id.
11. On or about June 8, 2003, Roland Kadota ("Kadota"), UPW Hawaii Division Director, learned of a dispute over whether the merit principles would continue to apply to Unit 01 employees of the DOE in

a PCS based upon a news article in a local newspaper. Kadota Decl. ¶ 9, UPW's Ex. 12. The June 8, 2003 article in the Hawaii Tribune Herald reported, inter alia, that the Department of Human Resources Development ("DHRD") ruled that six employees in a conversion charter school would not [sic] longer be classified as civil service employees under a Waimea Middle School Plan. Id.

12. By letter dated June 9, 2003, Kathleen Watanabe (Watanabe), Director, DHRD advised HAMAMOTO that based on the PCS law, employees of a PCS do not have civil service status. UPW's Ex. 14.
13. By letter dated June 10, 2003, Watanabe noted that HAMAMOTO recommended that the Board of Education issue a charter to Waimea Middle School with the stipulation that the civil service employees remain employees of the DOE for one year. UPW's Ex. 15. Watanabe acknowledged the recommendation and stipulation, adding that the stipulation did not conflict with DHRD's position that the PCS employees were not civil service employees. Id.
14. By letter dated June 12, 2003, based on her position that PCS employees were not civil service employees, Watanabe directed the DOE to convert all PCS positions to reflect that these positions do not have civil service status by June 30, 2003. UPW's Ex. 17.
15. By letter dated June 13, 2003, HAMAMOTO requested Watanabe to extend the June 30, 2003 conversion deadline by 90 days. UPW's Ex. 17-6. By letter dated June 18, 2003, Watanabe agreed with HAMAMOTO's request for a 90-day extension for the conversion of temporary civil service employees to non-civil service status. UPW's Ex. 17-7. Watanabe, however, did not approve of a blanket 90-day extension for permanent civil service PCS employees. Id.
16. On or about June 27, 2003, Kadota requested a list of all DOE employees in public charter schools on the Big Island covered by the Unit 01 agreement, specifying their civil service status. Kadota Decl. ¶ 11. By letter dated July 3, 2003, Ronald Furukawa, DOE personnel regional officer provided Kadota a list of affected employees. Id., UPW's Ex. 18. On July 11, 2003, Kadota learned that Ah Sing would be adversely affected immediately because his employment terminated on June 30, 2003. Kadota Decl. ¶ 11
17. By memorandum dated July 8, 2003, HAMAMOTO communicated DHRD's position to all PCS administrators with concerns and instructions to inform the employees of such.

18. On or about March 15, 2004, the UPW, the HGEA, HAMAMOTO, and the Board of Education filed a Stipulation and Order in Case Nos.: CE-0 1-537a, et seq. UPW's Ex. 37. The Stipulation and Order was approved by the Board as Order No. 2237. *Id.* Among the provisions agreed to by the parties was the reestablishment of positions that the DOE failed to process for hiring on July 1, 2003 because of DHRD's position that employees of PCSs in the DOE do not have civil service status and are no longer part of the merit system. *Id.*

* * *

19. **Based on the record, the Board finds that given the Employer's varying versions of Ah Sing's employment status and his separation from his job as a custodian at CONNECTIONS at a time when the employment status of charter school employees was at best ambiguous and muddled, Ah Sing fell within the affected class referred to in the Stipulation and Order, Order No. 2237 and should have been reinstated.** (Emphasis added).

The Board concluded, in part, "On the record before the Board in this case, the Board can only conclude that Ah Sing's employment status and treatment by the Respondents were hopelessly muddled. The record reflects at least six alternative representations of his employment status and consequent reasons for termination[.]" The Board further concluded that Ah Sing was in all probability the victim of the confusion surrounding the employment rights and status of public charter school workers, the Board further concludes that it is neither necessary nor proper to put Ah Sing and the parties through the burdens of the uncertainty, time and expense that would be involved in sorting through the minutia of his particular circumstances. The Board therefore orders that Ah Sing be reinstated or placed [in] a substantially similar position with back pay and the restoration [of] all appropriate rights and benefits."

H. Respondents' Circuit Court Appeal

On July 27, 2007, Respondents filed their Notice of Appeal to Circuit Court in the First Circuit. On August 7, 2007, the UPW filed a Motion to Dismiss the appeal, asserting lack of subject matter jurisdiction and improper venue. On September 26, 2007, the First Circuit Court denied the Motion to Dismiss, and transferred venue to the Third Circuit Court.

On October 31, 2007, Respondents filed a Motion for Stay Pending Appeal with the Third Circuit Court. The Court denied the Motion for Stay Pending Appeal on January 14, 2008.

On December 3, 2008, the Court issued its Decision and Order on the Appeal of Respondent-Appellants Patricia Hamamoto, Superintendent, et al. The Court held, *inter alia*, that the Board "**erroneously granted UPW's Motion for summary judgment because there are genuine issues of material fact at least as to whether (1) James Ah Sing was a member of the UPW collective bargaining agreement at the time he was terminated and (2) there is an unresolved controversy as to whether James Ah Sing was intended to be covered by**

Stipulation and Order Dated March 15, 2004, in United Public Workers, AFSCME, Local 646, AFL-CIO HLRB cases CE-1-537(a) et a seq.” (Emphasis added). The Court held that the Board “sought to resolve and determine the claims in the prohibited practices complaint but in doing so it improperly resolved genuine issues of material fact. As a consequence, the respondents were denied a contested case hearing on the issues.”

On December 15, 2008, the UPW filed a Motion for Reconsideration with the Court. On March 11, 2009, the Court issued its Order Denying Union’s Motion for Reconsideration, Filed on 12/15/08.

Also on March 11, 2009, the Court issued its Judgment and Remand, stating the Board’s “Order No. 2457 is vacated and the case remanded to the HLRB for further proceeding consistent with the decision of this court.”

I. The UPW’s Motion to Enforce Board Order

On August 6, 2007, the UPW filed with the Board its Motion to Enforce Board Order, asserted that Ah Sing had not been reinstated or paid his back pay, and that no report of compliance with the Board order had been filed.

On September 5, 2007, Respondents filed their Memorandum in Opposition to Motion to Enforce Order, asserting there was no mandate on the Board to petition the circuit court for enforcement, and the Board should decline to do so based upon Respondents’ appeal to the circuit court; because Respondents intended to file a motion to stay enforcement before the circuit court; because little time had passed since the order was issued; and because there was no urgency, since the Board took several years to issue its order granting summary judgment.

On October 9, 2007, the Board held a hearing on the UPW’s Motion to Enforce Board Order.

On October 12, 2007, the Board issued Order No. 2473, Order Granting Complainant’s Motion to Enforce Order, Filed on August 6, 2007.

On October 23, 2007, the Board filed a Petition for Enforcement of Board Orders with the Third Circuit Court. On December 14, 2007, the Court issued its Order Granting Petition for Enforcement and its Judgment.

On January 14, 2008, Respondents filed their Notice of Steps Towards Compliance with Hawaii Labor Relations Board Order. Respondents submitted the Declaration of Faye Ikei (Ikei), who asserted, in part, that the DOE cannot reinstate Ah Sing to his same or similar position because Ah Sing was never an employee of the DOE, as he was an employee of a charter school and the DOE had no authority over charter school operations, including personnel matters.

II. PROCEEDINGS FOLLOWING REMAND

A. Respondents' Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment

On July 29, 2009, Respondents filed their Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. The motion asserted, *inter alia*, that civil service employees whose appointment have a limitation date shall not have layoff rights and shall be released at the end of their appointments or earlier if there is lack of work, lack of funds, or other legitimate reasons. Respondents further asserted that Ah Sing was never a civil service employee, that his temporary appointment expired, and that because Ah Sing was never a civil service employee, he never had layoff rights under the Unit 1CBA. Respondents also asserted that Complainant never filed a grievance or otherwise exhausted remedies under the Unit 1 CBA. Respondents asserted that charter schools were made independent of the DOE, and that the Superintendent did not have the power to supervise or control the new century charter schools. Finally, Respondents assert that, while Act 63, Session Laws of Hawaii 2004, amended HRS § 302A-1184 to preserve civil service status for employees in conversion charter school, the Legislature did not repeal the exemption of charter schools from HRS chapter 76 and made no mention of employees in non-conversion or start-up charter school, thus confirming that such employees are non-civil service.

On August 12, 2009, the UPW filed its Opposition to Respondents' Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment Filed on July 29, 2009, asserting: (1) the Board has subject matter jurisdiction over a complaint involving termination of a Unit 1 employee, and that the issue of failure to exhaust contractual remedies was previously raised by Respondents and then rejected by the Board; (2) the Circuit Court issued the remand order even though it was well aware that Respondents were arguing that Ah Sing was not a member of the civil service; (3) the allegations of willful and retaliatory conduct sufficiently state claims for relief; and (4) the Circuit Court's finding that material facts were in dispute bars summary judgment.

B. The UPW's Motions to Schedule Prehearing Conference and Hearing.

On June 2, 2010, the UPW filed a Motion to Schedule Pre-Hearing Conference and Hearing. On March 20, 2013, the UPW filed a Motion to Schedule Status Conference.

On April 29, 2013, the Board held a Status Conference in this matter.

On May 19, 2014, the UPW filed a Motion to Conduct Prompt Hearing and for an Expedient Resolution of Issues on Remand.

III. STANDARD OF REVIEW

A. Motions to Dismiss

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 affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawai'i 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)).

A 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). "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).

B. Motions for Summary Judgment

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 Hawaii 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawaii 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.

C. Proceedings Following Remand

On remand, it is the duty of a tribunal "to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court." State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992). However, the tribunal is free to decide issues not covered in the mandate and issues that were not decided explicitly or by necessary addition in the appeal (Id.; Liberty Mutual Insurance Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982), and where an issue is covered by the mandate, the tribunal may still reconsider the issue based on new evidence or changed circumstances (Lincoln, 72 Haw. At 485, 825 P.2d at 68).

IV. DISCUSSION

A. UPW's Motion to Conduct Prompt Hearing and for an Expeditious Resolution of Issues on Remand, Filed May 19, 2004

The UPW's Motion to Conduct Prompt Hearing and for an Expeditious Resolution of Issues on Remand, Filed May 19, 2004, is hereby DENIED as moot. A matter is moot if it has lost its character as a present, live controversy. State v. Nakaneula, 132 Hawaii 492, 503, 323 P.3d 136, 147 (App. 2014) (*quoting* Kahooohanohano v. State, 114 Hawaii 302, 332, 162 P.3d 696, 726 (2007)). The Board's Notice of Status Conference, for the purpose of establishing a hearing date and other deadlines in this matter, is contained below.

B. The UPW's Motion to Amend Complaint, Filed June 21, 2004.

On June 21, 2004, the UPW filed its [second] Motion to Amend Complaint, seeking to add claims that Respondents failed to comply with the Stipulation and Order entered in Case No. CE-01-537a as well as the Board's oral ruling of March 29, 2004; that on or about June 30, 2003, Ah Sing was effectively laid off without compliance with a 90 day notice as required by the layoff provision of the CBA; that on October 1, 2003, Thatcher terminated a dump rubbish contract with Ah Sing worth approximately \$75.00 per week in retaliation for filing the Complaint; that Respondents' failure to comply with the terms and provisions of the Stipulation and Order constitutes unlawful discrimination against Ah Sing in his terms and conditions of employment; and a request for attorney's fees and costs. It appears that the Board did not formally rule on this motion, and accordingly does so here.

With respect to the claims that Respondents failed to comply with the Stipulation and Order entered in Case No. CE-01-537a as well as the Board's oral ruling of March 29, 2004, and the claim that Respondents' failure to comply with the terms and provisions of the Stipulation and Order constitutes unlawful discrimination against Ah Sing in his terms and conditions of employment, the Board takes notice of Case No. CE-01-537a. The Second Amended Complaint in Case No. CE-01-537a already includes, *inter alia*, allegations that the State and the DHRD, in violation of the Stipulation and Order, "(a) refuse to rescind the DHRD policy announced on and after June 12, 2003, (b) continue to insist that public charter school positions and employees be converted from civil service to exempt status, and (c) refuse to process job applicants and employees for hire, promotions, and other personnel actions and the merit system." If Ah Sing is covered by the Stipulation and Order, then there would be two complaints on the same controversy. Pursuant to Hawaii Administrative Rules (HAR) § 12-42-42(f), "Only one complaint shall issue against a party with respect to a single controversy." Furthermore, with respect to Respondent Hamamoto, the UPW filed a Motion to Enforce Board Order on August 6, 2007, which resulted in the Board filing a Petition for Enforcement of Board Orders with the Third Circuit Court, which was granted by court order issued on December 14, 2007.

With respect to Respondent Connections, which is not a party in Case No. CE-01-537a, Connections is not a signatory to the Stipulation and Order, and thus the Board concludes that justice does not require that the UPW be permitted to amend its Complaint to add a claim against Connections regarding the Stipulation and Order.

With respect to the claim that on or about June 30, 2003, Ah Sing was effectively laid off without compliance with the CBA's 90-day notice requirement, such claim was known or should have been known to the UPW at the time it filed the Complaint on August 18, 2003, and when it filed its [first] Motion to Amend Complaint on September 23, 2003. Accordingly, the Board holds that due to delay, the failure to cure deficiencies in the previous motion to amend complaint, and the UPW's desire for expeditious resolution of the case, the UPW's [second] Motion to Amend Complaint is denied with respect to this issue. (See Foman v. Davis, 371 U.S. 178, 182 (1962)).

With respect to the termination of Ah Sing's dump rubbish contract in retaliation for protected activity, the Board orally ruled during the proceedings on December 3, 2003, that the Complaint was deemed amended to include a retaliation claim and that no written amendment was required. Accordingly, the Board denies the motion to amend complaint on this issue as unnecessary and already addressed by the Board's previous ruling.

Finally, with respect to the claim for attorney's fees and costs, the Board has broad discretion in ordering affirmative remedies for unfair labor practices (see, Del Monte Fresh Produce (Hawaii), Inc. v. ILWU, 112 Hawaii 489, 508, 146 P.3d 1066, 1085 (2006) (upholding the Board's imposition of enhanced severance benefits). Additionally, HRS § 377-9(d) was amended during the First Special Session of 2009, to expressly authorize the Board to, among other things, "require the person to take affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay with interest, costs, and attorney's fees." Accordingly, the Board finds it unnecessary to permit amendment of the Complaint to add a claim for attorney's fees and costs because the Board has broad discretion to order remedies and the express authority to order costs and attorney's fees pursuant to § 377-9(d).

The Board therefore DENIES the UPW's Motion to Amend Complaint filed on June 21, 2004.

C. Respondents' Second Motion to Dismiss, or in the
Alternative, Motion for Summary Judgment, Filed on July 29, 2009

In their Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, Respondents asserted that (1) civil service employees whose appointment have a limitation date shall not have layoff rights and shall be released at the end of their appointments or earlier if there is lack of work, lack of funds, or other legitimate reasons; (2) Ah Sing was never a civil service employee, that his temporary appointment expired, and that because Ah Sing was never a civil service employee he never had layoff rights under the Unit 1CBA; (3) Complainant never filed a grievance or otherwise exhausted remedies under the Unit 1 CBA; (4) charter schools were made independent of the DOE, and the Superintendent did not have the power to supervise or control the new century charter schools; and (5) while Act 63, Session Laws of Hawaii 2004, amended HRS § 302A-1184 to preserve civil service status for employees in conversion charter school, the Legislature did not repeal the exemption of charter schools from HRS chapter 76 and made no mention of employees in non-conversion or start-up charter schools, thus confirming

that such employees are non-civil service.

With respect to Respondents' assertions (1), (2), and (5), the Circuit Court held that there are genuine issues of material fact as to whether Ah Sing was a member of the UPW CBA when he was terminated, and that there is an unresolved controversy as to whether Ah Sing was intended to be covered by the Stipulation and Order. As the Board previously found and articulated in its Order No. 2457, issued June 8, 2007, Ah Sing's employment status was "hopelessly muddled" and that the record reflected "at least six alternative representations of [Ah Sing's] employment status and consequent reasons for termination." Accordingly, the Circuit Court overturned the Board's order granting summary judgment in favor of the UPW. The Board likewise denies Respondents' Second Motion to Dismiss or, in the Alternative, for Summary Judgment, where Respondents present no new evidence or changed circumstances (see Lincoln, 72 Haw. at 485, 825 P.2d at 68).

With respect to assertion (3), regarding the failure to exhaust administrative remedies, Respondents previously raised this issue in their Motion to Dismiss, or in the Alternative for Summary Judgment, filed on September 30, 2003. The Board orally denied that motion at its proceedings on December 3, 2003. The "law of the case" doctrine has been used in discussing, *inter alia*, the question of whether a trial court judge is bound to follow a prior interlocutory decision of fact or law made in the case by another judge of the same court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 121, 839 P.2d 10, 29 (1992) (*citing* 5 AM. JUR. *Appeal and Error* § 744 (1962)). This is a rule of practice based on considerations of efficiency, courtesy, and comity. Id. Accordingly, based upon the "law of the case," the Board denies Respondents' assertion (3).

With respect to Respondents' assertion (4), that charter schools were made independent of the DOE, and that the Superintendent did not have the power to supervise or control the new century charter schools, this issue is related to the issue of whether Ah Sing was "intended to be covered by the Stipulation and Order" which the Circuit Court ruled was an "unresolved controversy[.]" Accordingly, the Board denies the motion with respect to this issue.

Finally, there remains an unresolved issue as to the retaliation claim, which the Board, during the proceedings on December 3, 2003, orally ruled was deemed included in the amended Complaint. At a minimum, hearing on the merits is required for the retaliation claim.

For the reasons discussed above, the Board hereby DENIES Respondents' Second Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, filed on July 29, 2009.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a Status Conference on **July 21, 2014, at 1:30 p.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii, 96813. The purpose of the Status Conference is to establish hearing dates and other relevant deadlines such as for the issuance of subpoenas.

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.


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 Status 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 Status Conference.

DATED: Honolulu, Hawaii, July 9, 2014.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member

Copies sent to:
Herbert R. Takahashi, Esq.
James E. Halvorson, Deputy Attorney General

ⁱ HRS 89-13(a)(8) provides that “[i]t shall be a prohibited practice for a public employer or its designated representative wilfully to: . . . [v]iolate the terms of a collective bargaining agreement[.]”

ⁱⁱ HRS § 89-3 governs the rights of employees, and provides:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

ⁱⁱⁱ HRS § 89-9 governs “Scope of negotiations; consultation” and provides in paragraph (a):

The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective

counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

^{iv} HRS § 89-8(a) governs “Recognition and representation; employee participation” and provides in paragraph (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.

^v HRS § 89-13(a) provides, in relevant part, that it shall be a prohibited practice for a public employer or its designated representative willfully to:

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

* * *

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

* * *

(7) Refuse or fail to comply with any provision of this chapter[.]

^{vi} Kathleen Watanabe, Director, Department of Human Resources Development, State of Hawaii; and Linda Lingle, Governor, State of Hawaii, who are Respondents in Case No. CE-01-537a, were not signatories to the Stipulation and Order.