

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

CHAD V. MEDEIROS,

Complainant,

and

RANDY PERREIRA, Executive Director,
Hawaii Government Employees Association,
AFSCME, Local 152, AFL-CIO, and HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondents.

CASE NO. CU-03-323

ORDER NO. 3011

ORDER GRANTING
RESPONDENTS RANDY
PERREIRA AND HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL
152, AFL-CIO'S MOTION TO
DISMISS PROHIBITED
PRACTICE COMPLAINT FILED
ON JULY 23, 2013 AND/OR FOR
SUMMARY JUDGMENT

ORDER GRANTING RESPONDENTS RANDY PERREIRA AND HAWAII
GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO'S MOTION TO DISMISS PROHIBITED PRACTICE
COMPLAINT FILED ON JULY 23, 2013 AND/OR FOR SUMMARY JUDGMENT

For the reasons discussed below and based on the record in this case, the Hawaii Labor Relations Board (Board) hereby grants "Respondents Randy Perreira and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Motion to Dismiss Prohibited Practice Complaint filed on July 23, 2013 and/or For Summary Judgment" (Motion to Dismiss), filed on September 9, 2013.

I. FACTUAL AND PROCEDURAL BACKGROUND

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.

Complainant Chad Medeiros (Complainant or Mr. Medeiros) filed a prohibited practice complaint (first prohibited practice) against Respondent Hawaii Government Employees

Association (HGEA or Respondent) and HGEA Kauai Business Agent Dale Shimomura (Shimomura) in Case Nos. CE-03-812 and CU-03-319.

After the filing of the first prohibited practice case, an HGEA Honolulu Business Agent, Jarnett Lono (Lono), was temporarily assigned to represent the Complainant.

On July 10, 2013, Mr. Medeiros wrote an email to Respondent Randy Perreira (Mr. Perreira) stating in relevant part:

So I ask why am I being reassigned to the same incompetent person or persons in the Kauai HGEA division office that screwed up and lost my case in the first place. I believe that my case is still under investigation by the Hawaii state dept. of labor and until then I refuse to be represented by Dale Shimomura or Gerald Ako. Or anyone else from the HGEA Kauai Division.

On that same date, Mr. Medeiros wrote another email to Perreira stating in pertinent part:

Still no response from you about or letters to why Mr. Dale Shimomura and Mr. Gerald Ako.

Did not respond to the Nov. 12, 2012 letter of intent to arbitrate on behalf of Mr. Medeiros.

Later, on that date, Mr. Perreira responded by an email stating in relevant part:

Mr. Medeiros:

It is my understanding that you have a pending complaint at the Hawaii Labor Relations Board that directly addresses the information that you are seeking. Given that this matter is pending before the Board, I am not in a position to respond to your inquiry; this should be addressed through the Board proceedings.

However, on July 16, 2013, Lono sent an email to Complainant, stating in pertinent part:

Aloha, Chad,

The purpose of this email is to inform you that your case(s) was reassigned back to the Kauai Division. At the direction of my supervisor, Ms. Puuohau, I transferred the two (2) original grievances that Dale Shimomura filed on your behalf, plus the three (3) additional grievances that I filed including the oral Reprimand, Written Reprimand Retaliation Grievance. I am no longer in

possession of any of your files and Kauai Division will be responsible to follow up with you on any updates and to also provide you with representation.

I apologize for any inconvenience that this may have caused you and thank you for the opportunity to represent you. I am confident that our Kauai Division will provide you with level of service you deserve. Please feel free to contact Mr. Gerald Ako at 241-5362 or email at gako@hgea.org.

On July 17, 2013, Complainant wrote another email to Mr. Perreira stating in relevant part,

Aloha, Mr. Perreira,

I am filling [sic] yet another HLRB-4 PROHIBITED PRACTICE COMPLAINT, Section 89-13. Against the union who still chooses to represent myself Chad Medeiros incorrectly. It was you Mr. Perreira who said yourself in an e-mail dated 7-10-13

Mr. Medeiros:

It is my understanding that you have a pending complaint at the Hawaii Labor Relations Board that directly addresses the information you are seeking. Given that this matter is pending before the board, I am not in a position to respond to your inquiry; this should be addressed through the Board's proceedings.

Randy Perreira

On July 22, 2013, Mr. Medeiros sent another email to Mr. Perreira stating, "I still don't know who my union representative is at this time? I do need a union representative to talk to as soon as possible."

By a July 22, 2013 letter, Mr. Perreira responded, stating in pertinent part:

Dear Mr. Medeiros:

This is in response to your electronic mail message received today regarding your union representative.

Your union representative is Division Chief Gerald Ako. In light of the fact that you have filed a charge for fair representation with the Hawaii Labor Relations Board concerning Dale Shimomura, he will not be assigned to represent you.

Should you have any matter that requires our assistance or representation, please contact Mr. Ako at any time.

Since July 23, 2013, HGEA Kauai Division Chief Ako has been assisting and representing Complainant with his grievances and other employment matters.

On July 23, 2013, the Complainant filed the instant Prohibited Practice Complaint (Complaint) against Respondents Mr. Perreira and HGEA (Respondents collectively). The Complaint alleges in relevant part that:

I beleieve [sic] that my case is still ongoing with the Labor board and a Final Decision has Not yet Being Made.

So I Ask that until my case is settled that I do not be Reassigned back to the Kauai Division office. And back to the same person or person's [sic] that on Recording say that "They don't give a Sh—about what I say" [sic]

Attached to the Complaint was a copy of Hawaii Revised Statutes (HRS) §89-13 with §§89-13(a) (5) and (9) and 89-13(b) (2) and (4) highlighted.

On September 9, 2013, Respondents filed the Motion to Dismiss based on Hawaii Administrative Rules §12-42-(g) (3) (c) and Hawaii Rules of Civil Procedure (HRCPP) Rules 7, 12, 56, and 81. In the Memorandum in Support of Motion (Respondents' Memorandum), Respondents took the position that the Complaint should be dismissed for failing to plead sufficient facts to show that Respondents committed a prohibited practice.

On September 11, 2013, Respondents filed an Errata to that Motion to Dismiss with an original signed Declaration of Gerald Ako, dated September 9, 2013.

On September 16, 2013, Complainant filed "Complainant's Response to Respondents' Motion to Dismiss Prohibited Practice Complaint Filed on September 9, 2013 and September 11, 2013." (Complainant's Response) In that Response, Complainant stated in relevant part:

Aloha, to the Board.

This letter is in response to the Sept. 9 and Sept. 11, 2013, Motion to dismiss Prohibited practice complaint CU-03-323.

I believe that I can prove a total lack of communication between the HGEA Oahu division office and the HGEA Kaua'I [sic] division office.

And that the failure to communicate properly has cost myself Chad Medeiros.

Precious personal time and Benefits, and was the leading cause to the loss of My workman's comp benefits.

I will also show that the transfer of document's [sic] from HGEA Kaua'I [sic] to HGEA Oahu And [sic] the transfer back from HGEA Oahu division to the HGEA Kaua'I [sic] division was Untimely [sic] and inappropriate.

So I humbly ask the Board for one more time to speak and explain my concerns On [sic] the Oct. 2nd hearing.

On October 2, 2013, the Board held a hearing on the Motion to Dismiss. The Respondents argued: 1) there is no dispute that Complainant's cases were reassigned to the Kauai Division for assistance and representation by Gerald Ako since July 23, 2013; 2) Complainant has failed to present any specific facts that at trial, he will be able to show that Respondents' reassignment of the cases wilfully violated Section 89-13(b), HRS; 3) Mr. Medeiros provides no specific explanation regarding his claims that he can prove that a lack of communication between HGEA Oahu and Kauai offices cost him precious personal time and benefits; 4) Mr. Medeiros' allegations regarding his workers' compensation case and benefits are untimely and should be dismissed;¹ 5) for the reasons set forth in their Memorandum, Complainant cannot prove HRS §89-13(b)(1), (2), (3), (4), or (5); 6) that Mr. Medeiros lacks standing to bring claims under HRS §89-13(b)(2) and (3) because he is not a "public employer" or an "employee organization;" 7) based on Pavsek v. Sanvold, 127 Haw. 390, 403 (2012), in weighing the allegations of the complaint as against a motion to dismiss, conclusory allegations on the legal effect of the events alleged need not be accepted; and 8) under Exotics Hawaii-Kona v. E.I. du Pont de Nemours & Co., 116 Haw. 277, 301 (2007), a party opposing a motion for summary judgment cannot discharge his burden by alleging conclusions, nor is he entitled to a trial on the basis of a hope that he can produce some evidence at that time.

At the hearing, Complainant responded to the Respondents' arguments, maintaining that: 1) he had specific facts based on emails to prove that HGEA failed to do its job on his case; 2) Lono was a good representative for him; 3) while admitting that a grievance was filed, Ako failed to answer his questions; and 4) because of the lack of representation for the past few weeks, he lost all of his cases and had to bargain with the County to keep his job.

II. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

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.

A. Legal Standards for A Motion to Dismiss

When considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the complaint, which are deemed to be true. However, the Board is not

restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000) (Casumpang); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

“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 support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.” Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), *citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.” Young v. Allstate Insurance Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008).

Further, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Pavsek v. Sandvold, 127 Hawaii 390, 403, 279 P.3d 55, 68 (App. 2012) (Pavsek), *citing* 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’ provides 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).

Pavsek, 127 Hawaii at 403, 279 P.3d at 68 (Citations omitted)

B. Legal Standards for Motion for Summary Judgment

In Exotics Hawaii-Kona, Inc. v. E.I. du Pont de Nemours & Co., 116 Hawaii 277, 301, 172 P.3d 1021, 1045 (2007) (Exotics Hawaii), the Hawaii Supreme Court (Court) stated,

A summary judgment motion challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he or she is entitled to prevail because his or her opponent has no valid claim for relief or defense to the action. Accordingly, the moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. The moving party may discharge his or her burden by demonstrating that[,] if the

case went to trial[,] there would be no competent evidence to support a judgment for his or her opponent.

When a motion for summary judgment is made and supported,

an adverse party may not rest upon the mere allegations or denials of his or her pleading, but his or her response, by affidavits or as otherwise provided in HRCF Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If he or she does not so respond, summary judgment, if appropriate, shall not be entered against him or her.

HRCF Rule 56(e) (1988) (emphasis added). In other words, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he or she entitled to a trial on the basis of a hope that he can produce some evidence at that time. On motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party.

Id. at 301, 172 P.3d at 1045. (Citations and emphasis omitted)

In cases, such as this one, in which the non-moving party bears the burden of proof at trial, the Court has adopted the burden shifting paradigm:

The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.

First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.

Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.

French, 105 Hawai'i at 470, 99 P.3d at 1054 (citation and emphasis omitted).

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial.

Ralston v. Yim, 129 Hawaii 46, 56-57, 292 P.3d 1276, 1286-1287 (2013) (*Ralston*) (Emphases added); *French v. Hawaii Pizza Hut, Inc.*, 105 Hawaii 462, 470, 99 P.3d 1046, 1054 (2004).

Finally, regardless of which evidentiary standard is required of the moving party, "Once the moving party has satisfied its initial burden of showing the absence of a genuine issue of material fact and its entitlement to a judgment as a matter of law, the opposing party 'may not rest upon the mere allegations or denials of [the opposing party's] pleading' but must come forward, through affidavit or other evidence with 'specific facts showing that there is a genuine issue for trial.' Rule 56(e). If the opposing party fails to respond in this fashion, the moving party is entitled to summary judgment as a matter of law." *Suzuki v. State*, 119 Hawaii 288, 296-297, 196 P.3d 290, 298-299 (App. 2008), citing *Hall v. State*, 7 Haw.App. 274, 284, 756 P.2d 1048, 1055 (1988); *Foronda v. Hawaii International Boxing Club*, 96 Hawaii 51, 58, 25 P.3d 826, 833 (2001); *Tri-S Corp. v. W. World Insurance Co.*, 110 Hawaii 473, 494, n. 9, 135 P.3d 82, 103, n. 9 (2006).

C. The Complaint Must Be Dismissed Because There Is No Prohibited Practice Alleged In This Case.

From the face of the Complaint with the highlighted attached copy of HRS §89-13, it appears that Complainant is essentially asserting that the Respondents' refusal to grant his request that his grievance cases not be transferred from an HGEA Honolulu Business Agent back to the HGEA Kauai Division office while his first prohibited practice case was pending constitutes a prohibited practice under HRS §§89-13(a)(5) and (9) and 89-13(b) (2) and (4).

HRS §89-13(a)(5) and (9) state:

§89-13 **Prohibited practices, evidence of bad faith.** (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

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

(9) Replace any nonessential employee for participating in a labor dispute;

(Emphasis added) The Board finds that these HRS §89-13(a)(5) and (9) provisions are inapplicable to the alleged conduct by HGEA because HRS §89-13(a) is limited to “wilfull” conduct by “a public employer² or its designated representatives.” The Board determines that Respondents do not fall within the definition of “public employer” nor are they shown to be a “designated representative” of a “public employer.” Accordingly, their conduct cannot constitute a violation of HRS §89-13(a); and these allegations must be dismissed.

Regarding the HRS §89-13(b) allegations, Respondents take the position that the Complaint should be dismissed for: 1) failure to state a claim upon which relief can be granted; 2) failure to plead facts showing that Respondents violated their duty of fair representation by wilfully violating this Section; and 3) a lack of standing to bring a claim under HRS §89-13(b)(2). More specifically, Respondents contend that Complainant is unable to establish that Respondents’ act of reassigning his case back to Kauai Division Chief Ako or Ako’s representation during the pendency of the first prohibited practice case was arbitrary, discriminatory, or in bad faith. Specifically regarding the alleged violation of §89-13(b)(2)³, Respondents maintain based on Thomas Lepere and John Waihee, Case No. CE-10-132, Decision No. 348, 5 HLRB 263 (2/8/94) (Lepere), that Complainant is neither an “employee organization” nor a “public employer,” as defined in HRS §89-2; and therefore, lacks standing to bring a §89-13(b)(2) charge. Regarding the HRS §89-13(b)(4) claim, Respondents further assert that dismissal is warranted because Complainant has not alleged and cannot prove any set of facts indicating that Respondents refused or failed to comply with any provision in Chapter 89, HRS, by reassigning his cases back to the Kauai division. Finally, Respondents contend that Mr. Medeiros’ allegations are conclusions which need not be accepted in opposing a motion to dismiss or would discharge his burden in opposing a motion for summary judgment.

In opposing the Motion to Dismiss, Complainant has submitted the foregoing emails and generally asserts that he has emails and additional facts to show that Respondents failed to do its job correctly. He further argues that the lack of communication between the Kauai and Oahu Division offices and the lack of representation caused him to lose all of his cases and forced him to bargain with the County regarding his job.

§89-13(b)(2), HRS, states:

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

(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

The Board agrees with the Respondents that the reasoning set forth in the

Lepere case is applicable regarding the §89-13(b)(2) and (4) allegations of the Complaint. In Lepere, the complainant employee brought a prohibited practice case against the United Public Workers (UPW) based on, among other things, HRS §89-13(b)(2) and (4). In that case, the complainant alleged that UPW engaged in prohibited practices when it refused to provide him with grievance forms, failed to process his grievance against the employer, and refused to participate in mediation, fact-finding, and arbitration procedures under §89-11, HRS. The Board dismissed the §89-13(b)(2) claim, reasoning:

Subsection 89-9(b) (2), HRS, prohibits an employee organization from refusing to bargain with the public employer as required in Section 89-9, HRS. In this case, there is no evidence that the Union refused to bargain with the public employer. Furthermore, the refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. As such, the Board finds that LEPERE cannot raise a refusal to bargain charge against the UPW and hereby dismisses his allegation of a Subsection 89-13(b) (2), HRS, violation.

Lepere, 5 HLRB at 272. For similar reasons, the Board agrees with the Respondents that Mr. Medeiros lacks standing to raise a refusal to bargain charge in this case against Respondents, and his allegation of a §89-13(b)(2) violation must be dismissed.

Further, regarding the §89-13(b)(4) claim, the Board found in Lepere that there was nothing in the record in that case to indicate that the Union treated Lepere in an arbitrary or discriminatory manner so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171 (1967). “A union breaches its duty of good faith when its conduct towards a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith.” Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 104, 94 P.3d 652, 659 (2004) (Citations omitted). The Board agrees with Respondents that the Complainant has failed to assert a breach of the duty of fair representation claim or presented sufficient facts to or make or even raise a good claim in support of his HRS §89-13(b)(4) allegation for several reasons.

First, Mr. Medeiros has not alleged in his Complaint that Respondents’ conduct regarding his requests and their representation was “arbitrary, discriminatory, or in bad faith.”

Second, Complainant’s arguments presented in his Response and at the hearing on the Motion and the evidence presented in this case do not raise an allegation or establish a set of facts sufficient to support a claim that Respondents’ conduct regarding his requests and their representation was “arbitrary, discriminatory, or in bad faith,” violating HRS §89-13(b)(4). As stated above, in his Response, Mr. Medeiros referenced a lack of communication between HGEA’s Kauai and Oahu Division offices, which resulted in loss of personal time and benefits, including workers’ compensation and that the transfer of documents was “untimely

and inappropriate.” During the hearing on the Motion, Mr. Medeiros reiterated that because of his lack of representation, he lost all of his cases and had to bargain with the County to keep his job. He further represented that if given the opportunity that he would present evidence of specific times and places to show that HGEA failed to do its job correctly.

Third, the email exchanges fail to provide facts sufficient to make a good claim that the Respondent’s conduct was “arbitrary, discriminatory, or in bad faith.” Rather, this exchange establishes the following. Complainant requested that Respondents not reassign his cases back to the HGEA Kauai Division Office and expressed his dissatisfaction with and refusal to accept representation by that Office while his first prohibited practice case was pending. Nevertheless, the Respondents reassigned his cases back, not to Shimomura, the Business Agent charged in the first prohibited practice case, but to Gerald Ako, the head of the Kauai Division office. Further, Mr. Perreira refused to respond to Mr. Medeiros’ inquiry because of his “understanding that you have a pending complaint at the Hawaii Labor Relations Board that directly addresses the information that you are seeking,” and “Given that this matter is pending before the Board, I am not in a position to respond to your inquiry; this should be addressed through the Board proceedings.”

The Board finds that Mr. Medeiros’ allegations and facts established by the evidence submitted amount to requests and expressions of dissatisfaction with the Respondents’ response and to their handling of his prior grievances. Respondents honored Complainant’s request to the extent that they did not reassign his cases back to Shimomura, a respondent in the first prohibited practice case. Nevertheless, they did not fully comply with his request because his pending cases were reassigned back to the Kauai Division office. While the Complainant asserts that the reassignment and the Oahu and Kauai Division offices’ failures caused him to lose time and benefits, including his workers’ compensation benefits, he provided absolutely no connection between such alleged conduct and the alleged §89-13(b)(4) violations. The Board finds that even if the allegations made by the Complainant are true, he is required “to provide the ‘grounds’ of his entitlement to relief” providing “more than labels and conclusions.” Pavsek, 127 Hawaii at 403, 279 P.3d at 68. Specifically, the Board notes the absence of any allegation or facts adequate to support a claim of other employees being treated differently; or of arbitrariness and/or of bad faith in the Respondents’ conduct in their reassignment, representation, or failures. Further, there is no claim or evidence establishing facts or raising a claim that the Respondents’ conduct in this case was “wilfull.” “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).” Pavsek, *id.*, 279 P.3d at 68. Based on the lack of allegations or facts to support a violation of HRS §89-13(b)(4), this claim obviously is without any merit “consisting in an absence of law of the support made or of facts sufficient to make a good claim.” Fuddy, 125 Hawaii at 108, 253 P.3d at 669.

The Board notes that Respondents alternatively moved for summary judgment in this case. The Board concludes that a review of the evidence in the record and the arguments

presented demonstrate that these issues are more appropriately addressed by the motion to dismiss for failure to state a claim upon which relief can be granted. Accordingly, based on the dismissal of the Complaint, the Board does not reach the Respondent's alternative motion for summary judgment.⁴

ORDER

For all of the reasons set forth above, the Board hereby grants Respondents' motion to dismiss the Complaint.

DATED: Honolulu, Hawaii, August 13, 2014.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

Chad Medeiros
Debra Kagawa, Esq.

¹ Other than references made by both parties in their arguments regarding Complainant's workers' compensation case and benefits, there does not appear to be any specific evidence in the record regarding these issues, which are not subject to the Board's jurisdiction. Accordingly, the Board is unable to resolve any of these contentions, including timeliness or prohibited practices that rely on Complainant's workers' compensation case or benefits.

² HRS §89-2 Definitions states in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case

of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

³ Respondents have further argued that based on Complainant's failure to allege and inability to prove any set of facts in support of the HRS §89-13(b) (1), (3), and (5) claims should be dismissed. Since these provisions were not highlighted on the copy of HRS §89-13 attached to the Complaint, the Board finds that Complainant has not alleged claims under these provisions. However, even if Complainant did, the Board concurs with Respondents that Complainant has not alleged any facts in the Complaint nor has submitted any evidence to resolve a factual dispute regarding the existence of jurisdiction under Chapter 89 or to plead and prove a Chapter 89 claim.

⁴ However, even if the Board did, it would appear that summary judgment would likely be warranted based on the Complainant's failure as the non-moving party to "set forth facts showing that there is a genuine issue for trial." As argued by Respondents based on Exotics Hawaii, 116 Hawaii at 301, 172 P.3d at 1045, Complainant is not entitled to a trial because "a party opposing a motion for summary judgment cannot discharge his...burden by alleging conclusions nor is he..." "entitled to a trial on the basis of a hope that he can produce some evidence at that time." As noted by the Board above, in support of his position Complainant has alleged conclusions and promised to provide emails and further evidence if given a trial. Based on this reasoning in Exotics Hawaii, this would be insufficient for the Complainant to discharge his burden of showing that there is a genuine issue of material fact on the relevant issues. Specifically, that: 1) Respondents' conduct was "wilfull" and "arbitrary, discriminatory, or in bad faith" in violation of §89-13(b)(4), HRS; 2) Respondents met the definition of "public employer or its designated representative" for the purposes of violations of HRS §89-13(a)(5) and (9); and 3) Respondents' conduct constituted a refusal to bargain with the public employer under HRS §89-13(b)(2).