

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

BOARD OF EDUCATION, Department of
Education, State of Hawaii; and SUSAN H.
KITSU, Department of Education, State of
Hawaii,

Respondents.

CASE NO. CE-05-669

ORDER NO. 3015

ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS AND/OR FOR
SUMMARY JUDGMENT AS TO
HAWAII STATE TEACHER
ASSOCIATION'S PROHIBITED
PRACTICE COMPLAINT FILED JUNE
4, 2008; DENYING HSTA'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT; AND DENYING AS
MOOT HSTA'S MOTION TO
EXPEDITE ISSUES BEFORE THE
BOARD AND HSTA'S SECOND
MOTION TO EXPEDITE RESOLUTION
OF ISSUES BEFORE THE BOARD

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND/OR FOR
SUMMARY JUDGMENT AS TO HAWAII STATE TEACHER ASSOCIATION'S
PROHIBITED PRACTICE COMPLAINT FILED JUNE 4, 2008; DENYING
HSTA'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING AS
MOOT HSTA'S MOTION TO EXPEDITE ISSUES BEFORE THE BOARD AND HSTA'S
SECOND MOTION TO EXPEDITE RESOLUTION OF ISSUES BEFORE THE BOARD

I. PROHIBITED PRACTICE COMPLAINT

On June 4, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (Complainant or HSTA) filed its Prohibited Practice Complaint (Complaint) in this matter against Respondents BOARD OF EDUCATION (BOE), Department of Education (DOE), State of Hawaii; and SUSAN H. KITSU (Kitsu), of the DOE, State of Hawaii (collectively Respondents).

The HSTA is an employee organization within the meaning of Hawaii Revised Statutes (HRS) § 89-2ⁱ, and is the exclusive bargaining representative of teachers and other educational personnel of the DOE in bargaining unit (BU) 5, as provided by HRS § 89-6ⁱⁱ.

The BOE is an employer or public employer as provided by HRS § 89-2; Ms. Kitsu was at all relevant times the Director of the Office of Civil Rights Compliance of the DOE and a designated representative of the BOE within the meaning of HRS § 89-2ⁱⁱⁱ.

The HSTA and the BOE have been parties to successive collective bargaining agreements since on or about February 29, 1972. The Complaint arose from the collective bargaining agreement (Agreement) for BU 5 employees covering the period from July 1, 2007, through June 30, 2009.

The Complaint alleges the following:

The [A]greement contains various provisions intended to safeguard the due process and other procedural and substantive rights of employees against whom complaints are filed for possible civil rights violations, including but not limited to Article IV Section A^{iv}, Article IX Section A^v, Article X Sections A & D^{vi}, Article XXI Section A^{vii}, and Article XXIII [sic]^{viii}.

Article XXI of the [A]greement provides for the maintenance of prior rights, benefits, and privileges of employees in [BU] 5 which incorporates, *inter alia*, rights as set forth in Hawaii Administrative Rules (HAR) Title 8, Subtitle 2, Part 1, Chapter 41 on civil rights policies and complaint procedures (hereafter chapter 41).

Chapter 41^{ix} provides [BU] 5 employee prior rights, including but not limited to (a) the right to have all complaints filed within twenty days of alleged violations under Section 8-41-11(a)^x, (b) the right to a copy of a complaint where the employee is named as a respondent within three days of receipt under Section 8-41-11(a), and (c) the right to information in the possession of the department bearing on the validity of the complaint under Section 8-41-8^{xi}.

Article XXIII of the collective bargaining agreement provides that “no other agreement, representations, or understanding will be binding on the parties, unless made in writing by the mutual consent of both parties.”

At no time has HSTA agreed via mutual consent to change the prior rights of employees as set forth in chapter 41.

Commencing on or about March 28, 2008 and thereafter respondents have unilaterally changed existing terms and conditions of employment on a mid-term basis without compliance with the duty to bargain in good faith with HSTA (and without mutual consent) relating to complaints and investigations of possible civil rights violations against unit 5 employees.

On or before April 18, 2008 [R]espondents received a complaint of a possible violation of civil rights occurring at Highlands Intermediate School against a [BU] 5 employee, but declined to provide to HSTA upon request (dated April 25, 2008 and May 19, 2008) a copy of the complaint, the names and identities of complainants, a description of the nature of the alleged infractions or violations, and copies of other related complaints or incidents. On and after May 2, 2008 [R]espondents have refused to provide to HSTA or the bargaining unit employee the aforementioned information.

On or before May 7, 2008 [R]espondents received a complaint of a possible violation of civil rights occurring at Kapaa Middle School against a [BU] 5 employee, but declined to provide to HSTA upon request (made on May 5, 2008 and on May 19, 2008), (a) a copy of the complaint, (b) the names and addresses, and the status of the complainants, (c) a description of the nature of the alleged infraction and a copy of relevant policies, rules and standards of conduct, (d) a description of the basic facts, (e) information on related criminal, civil or administrative complaints (f) a copy of prior complaints or reports of incidents, (g) the names, positions, and addresses of the investigators, (h) leave status of the employee, and (i) notice of scheduled interviews and meetings. On and after May 7, 2008 and May 26, 2008 [R]espondents repeatedly refused to provide the aforementioned information to HSTA or the affected employee.

On or about March 28, 2008 and thereafter [R]espondents have engaged in a concerted effort to unilaterally repeal the prior rights of employees as set forth in chapter 41 in violation of the [Agreement].

The HSTA alleges that Respondents by their conduct have willfully violated the rights of public employees in violation of HRS §§ 89-3^{xiii} and 89-9^{xiii}, and committed prohibited practices in violation of § 89-13(a)(1), (5), (7), and (8)^{xiv}.

On June 12, 2008, Respondents filed their Answer to Prohibited Practice Complaint Filed June 4, 2008 (Answer to Complaint), asserting, *inter alia*, that the HSTA's consent is not required before Chapter 41 may be amended; Complainant failed to exhaust contractual remedies available under the BU 5 Agreement; Respondents have "management rights" pursuant to HRS § 89-9(d);

the Complaint is untimely; Respondents did consult with the HSTA over the subject matter of the Complaint; and that Respondents acted in good faith.

II. HSTA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 15, 2008, the HSTA filed its Motion for Partial Summary Judgment, asserting there were no genuine issues of material fact in dispute as to violations of HRS § 89-13(a)(5) and (8), and the HSTA is entitled to judgment as a matter of law. The HSTA asserted that Rule 8-41-11(a) of Chapter 41 specifically requires the employer to provide a copy of a complaint to a teacher who is accused of a civil rights violation as follows:

The complainant shall file a written complaint with the district superintendent of the school district in which the alleged violation took place.

The written complaint shall be filed within twenty days of the alleged violation and shall be made on a form provided by the department. There shall be no time limit for a complainant to file a written complaint alleging systemic discrimination. A copy of the written complaint shall be sent by mail, return receipt requested, to each respondent by the department within three days of receipt of the written complaint. (Emphasis in the HSTA's motion).

The HSTA alleged that commencing on or about March 28, 2008, and thereafter, Respondents have unilaterally changed existing terms and conditions of employment on a mid-term basis without compliance with the duty to bargain in good faith and without mutual consent relating to complaints and investigations of possible civil rights violations against BU 5 employees; that on March 25, 2008, a proposal was made to repeal chapter 41 of the HAR; that Respondents have repeatedly refused to provide a copy of the complaints of possible civil rights violations filed against teachers; that on or before April 18, 2008, Respondents received a complaint of a possible violation of civil rights occurring at Highlands Intermediate School against a BU 5 employee, but declined to provide to HSTA upon request, dated April 25, 2008, and May 19, 2008, a copy of the complaint, the names and identities of complainants, a description of the nature of the alleged infractions or violation, and copies of other related complaint or incidents; and that on and after May 22, 2008, Respondents refused to provide such information to HSTA or the affected employee. The HSTA further alleged that on or before May 7, 2008, Respondents received a complaint of possible violation of civil rights occurring at Kapaa Middle School against a BU 5 employee, but declined to provide to HSTA upon request made on May 5, 2008, and May 19, 2008, a copy of the complaint, the names and addresses, and the status of the complainants, a description of the nature of the alleged infraction and a copy of relevant policies, rules and standards of conduct, a description of the basic facts, information on related criminal, civil or administrative complaint, a copy of prior complaints or reports of

incidents, the names, positions, and addresses of the investigators, leave status of the employee, and notice of scheduled interviews and meetings.

The HSTA provided Ms. Kitsu with the following explanation of the reason for each of the requested information items:

1. A copy of the original and all amended complaints which prompted or pertain to the investigation.

Reason: Without the complaint(s) the employee and HSTA lacks adequate notice of the scope of the allegations, names of all accusers, dates of incidents or occurrences, witnesses, and basic facts (including what happened, who was involved, when the relevant occurrences happened, where the incidents occurred, and why the investigation is needed).

Note: If the complaints were not in writing then please provide all notes and records of DOE officials who received the oral complaints.

2. The names, address, and status (i.e., whether faculty member, student, or excluded personnel) of the complainant(s).

Reason: Without the names, addresses, and status of complainants HSTA is unable to effectively represent all affected bargaining unit employees. If the complainant is in bargaining unit 5 HSTA may need to assign another UniServ director to the investigation possibly to represent the complainant. If a student is involved it affects the scope of our investigation and HSTA's right to information.

3. A specific description of the nature of alleged infraction and a copy of all relevant policies, rules, regulations, and standards of conduct which may apply to the person under investigation.

Reason: Without this information HSTA is unable to determine the scope of the investigation, and what the material issues are.

4. Please provide a description of the basic facts as represented by the complainant to representatives of the Department of Education, including the dates, times, places, occurrence, witnesses, and other persons involved or affected.

Reason: Without these basic facts HSTA cannot effectively comply with its duty of fair representation to all affected bargaining unit employees.

5. Please indicate whether there are any related criminal, civil (including requests for restraining order), administrative, or other related proceedings which have been initiated by complainant or the Department of Education.

Reason: Without this information HSTA is unable to provide effective representation and adequate safeguards.

6. Please provide a copy of prior complaints or reports of prior incidents involving complainant or the employee under investigation which the Department of Education is aware of.

Reason: Without this information HSTA lacks the necessary background information.

7. Please provide the names, positions, addresses, and phone numbers of all investigators assigned by Department of Education to this case.

Reason: Without this information HSTA is unable to be in communication with DOE representatives and to assist in the investigative process.

8. Please indicate whether the person under investigation has been placed on department directed leave with pay and a copy documents recommending and approving such leave.

Reason: Without this information HSTA cannot perform its role as exclusive bargaining agent over wages, hours, and working conditions.

9. Please provide advance notice of all scheduled interviews and investigative meeting to be conducted by the Department of Education as part of the investigation.

Reason: Without appropriate notice HSTA is unable to fulfill its role as the exclusive bargaining representative.

The HSTA argued, *inter alia*, in its memorandum of law that an employer commits an unfair labor practice (similar to prohibited practice) when it fails to provide a bargaining

representative information it needs to perform its duties, citing to N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956); Sinclair Refining Co. v. N.L.R.B., 306 F.2d 569, 570 (5th Cir. 1962); and N.L.R.B. v. Acme Indus. Co., 385 U.S. 432, 436 (1967); and that the Hawaii Labor Relations Board (Board) recognizes that an employer's failure to provide information promptly interferes and obstructs the collective bargaining process, citing to In the Matter of HGEA and Board of Regents, Decision No. 340, 5 HLRB 198, 209 (1993); and HGEA v. Benjamin Cavetano, 6 HLRB at 12. The HSTA also cited N.L.R.B. v. Whittin Machine Works, 217 F.2d 593, 594 (4th Cir. 1954) for the proposition that information must be provided whether there is a pending grievance or controversy, as long as the information is needed by the union to perform its duties and functions; and Amersig Graphics, Inc., 334 NLRB 880, 885 (2001), for the "essential elements" of an unfair labor practice for breach of duty to bargain in good faith: (1) the union made a request for information, (2) the information is relevant and necessary to the union's role, and (3) the employer fails to provide the information which is available "promptly" upon request.

The HSTA further argued that Respondents breached their duty to bargain in good faith by making unilateral changes to existing terms and conditions of employment, when Ms. Kitsu and the BOE unilaterally implemented changes to the concept of "proper cause" as provided in Article V of the Agreement.

The HSTA also asserted that Respondents willfully violated the terms and conditions of the BU 5 Agreement in violation of HRS § 89-13(a)(8), because Article IV Section A of the Agreement states in relevant part:

In addition to any obligation under chapter 89, HRS, to furnish information in its possession, the Employer will furnish such information in its possession, in response to reasonable requests by the Association which will assist the Association in effectively representing the teach [sic] in the collective bargaining process and processing grievances. (Emphasis in HSTA's memorandum).

III. RESPONDENTS' MOTION TO DISMISS AND/OR FOR
SUMMARY JUDGMENT AS TO HAWAII STATE TEACHER
ASSOCIATION'S PROHIBITED PRACTICE COMPLAINT FILED JUNE 4, 2008

On July 15, 2008^{xv}, Respondents filed their Motion to Dismiss and/or for Summary Judgment as to Hawaii State Teacher [sic] Association's Prohibited Practice Complaint Filed June 4, 2008 (Motion to Dismiss and/or for Summary Judgment). Respondents attached as Exhibit "A" copy of a class grievance filed by the HSTA on September 19, 2007, which alleged the following:

Date alleged violation first became known or date(s) of subsequent alleged violation(s): August 30, 2007

1. Nature of grievance (Briefly state pertinent facts):
The DOE Civil Rights Compliance Office has established unilateral procedures for investigating complaints against teachers that deprives teachers of their right to a copy of complaints used against them, and their right to full implementation of the negotiated contract.

2. Specific term or provision of the Agreement allegedly violated:
Article II - Section A Article XX - Sections A and C
Article IX - Section A Article XXI - Section A
Article X - Section D Appendix III

3. Complete this section if grievance is filed at Step 2. Specific portion of the prior decision being appealed.
This grievance is being first filed at Step 2 because the violation occurred at the DOE State Office.

REMEDY SOUGHT:

Teachers will be immediately notified of complaints made against them, including the specifics, as required in the negotiated agreement. Teachers will receive copies of all complaints and negative documents against them. Documents not received and signed by teachers will not be used against them in any way. The Employer will cease creating unilateral procedures that differ from or conflict with negotiated agreement. Teachers will be allowed to respond to allegations made against them before the DOE begins investigations made against said teachers and such ability to respond to said complaints or allegations will be after full disclosure of all allegations and complaints made against them.

Respondents asserted that the Complaint should be dismissed pursuant to the ninety day statute of limitations found in HRS § 377-9(1)^{xvi}, as the beginning of the limitations period begins to run when an aggrieved party knew or should have known that his [or her] statutory rights were violated (citing to Metromedia, Inc. KMBC TV v. N.L.R.B., 585 F.2d 1182, 1189 (8th Cir. 1978), and Department of Public Safety v. UPW, HLRB Order No. 2380 (June 2006).

Respondents further asserted that Article XXI of the BU 5 Agreement is not an “incorporation clause” and even if it was, does not incorporate HAR chapter 41, differentiating between a “preservation” clause and an “incorporation” clause, and differentiating between the “Standard Practices” referenced in Article XXI and “chapter 41.”

IV. RESPONDENTS' OPPOSITION TO HSTA'S MOTION FOR SUMMARY JUDGMENT

On July 22, 2008, Respondents filed their Opposition to Hawaii State Teacher's [sic] Association's Motion for Summary Judgment Filed June 23, 2008 (Opposition to HSTA's Motion for Summary Judgment). Respondents argued that the untimely Complaint involves the investigation of civil rights complaints made by students against teachers, and not the manner in which teachers are actually disciplined or the initiation of the grievance process. Respondents also repeated arguments presented in their Motion to Dismiss and/or for Summary Judgment, including timeliness, and the assertion that Article XXI of the BU 5 Agreement is not an incorporation clause, and even if it is, it does not incorporate HAR Chapter 41.

Respondents also argued that the HSTA is asserting the same claims as in CE-05-667^{xvii} thus violating HAR § 12-42-43[sic]^{xviii}, which prohibits more than one prohibited practice complaint on a given subject.

Respondents further argued that the information demanded by the HSTA regarding the two complaints in question was not necessary for the HSTA to perform its statutory or contractual function in negotiating a contract, nor was it necessary to process grievances, and that the HSTA has no right to participate in the internal investigations and thus no "representation" of its members was taking place. Respondents further argued that the concepts of "due process" and "just and proper cause" as asserted by the HSTA apply to the application of discipline and adverse employment actions, which do not take place until after the internal investigations in question.

Finally, Respondents asserted that, in compliance with Article X, Section D, of the BU 5 Agreement, the DOE *did* provide the HSTA with the identities of the complainants and a description of the events complained of by the alleged victims in the incidents alleged in the Complaint, although not the victims' addresses nor the identities of the investigators (referencing the HSTA's own Exhibits 7 and 8 attached to its Motion for Partial Summary Judgment, which were provided to the HSTA in non-redacted form).

V. HSTA'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On July 22, 2008, the HSTA filed its Memorandum in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment Filed on July 15, 2008. The HSTA argued that Respondents have not met their burden of proof to dismiss or for summary judgment on any claim, and that Respondents have not shown that the filing of the class grievance itself imposes knowledge to the union as to the violations underlying the Complaint.

The HSTA further argued that Article XXI does incorporate the DOE's rules and regulations pursuant to the School Code, referencing its Exhibit "10" for Arbitrator Ted Tsukiyama's holding in a grievance that a violation of the School Code constitutes a violation of the prior rights and benefits of teachers in 1987; and further, that the School Code expressly incorporates by reference not just federal laws and statutes, but also Department rules and regulations (Exhibit "11-4"):

Administrative Parameters.

The Department's personnel programs shall operate within the parameters set by applicable federal laws, State of Hawaii statutes, Board of Education policies, employee collective bargaining agreements, Department rules and regulations and executive orders and directives. These programs shall be further guided by the standards set by the merit principle and by concepts of equal employment opportunity and affirmative action to ensure that no discrimination based on race, color, religion, sex, age, marital status and/or national origin shall exist at any level in the system. (Emphasis in the HSTA's memorandum).

The HSTA also argued that Section B of Article XXI of the BU 5 Agreement requires the DOE to consult with the HSTA before it amends, revises, or deletes any portion of the Standards of Practice.

VI. RESPONDENTS' REPLY TO HSTA'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On July 25, 2008, Respondents filed their Reply to HSTA's Memorandum in Opposition to Respondent's [sic] Motion to Dismiss and/or for Summary Judgment as to Hawaii State Teacher [sic] Association's Prohibited Practice Complaint Filed June 4, 2008. Respondents argued that the Civil Rights Compliance Office conducts investigations and issues investigative reports; it does not participate in subsequent personnel decision making and employment actions. Further, that it is the union's duty to provide fair representation to a teacher arising in relation to charges and adverse employment actions initiated by the employer, not in relation to mere allegations made by students or anyone else.

Respondents re-asserted their timeliness argument; asserted that the Complaint's allegations regarding "the department's actions" to "repeal chapter 41" are inchoate and do not implicate a named party, and that on March 25, 2008, the BOE voted down a motion to approve a recommendation of a subcommittee regarding the repeal of Chapter 41; and re-asserted that Article XXI of the Agreement is not an incorporation clause, and even if it was, it does not incorporate Chapter 41, distinguishing the Tsukiyama arbitration decision as holding that a

suspension was without “just cause” because a specific appellate provision of Regulation 5110 was not complied with, not that “a violation of the School Code constitutes a violation of the prior rights and benefits of teachers” as the HSTA asserted.

Additionally Respondents asserted that Chapter 41 is not a BOE policy (as referenced in the School Code), nor is it a DOE rule or regulation (as reference in the School Code); rather, it is an administrative rule promulgated by the BOE (and not referenced in the School Code), and that HAR § 8-41-3(d)^{xix} makes it clear that provision of the School Code apply to civil rights allegations lodged by DOE staff against other staff, not allegations lodged by students. Thus even if, *arguendo*, the School Code is incorporated into the Agreement, that does not mean Chapter 41 is incorporated into the Agreement.

Respondents also asserted that Article XXI, Section A does not reference the “School Code,” it references “Standard Practices” – specifically, Standard Practices “in effect at the time the contract was executed” and the Declaration of Ms. Kitsu shows no Standard Practice containing anything analogous to the above-referenced provision of the School Code was in effect at the time the Agreement was executed, nor was one developed since; and that the only Standard Practice that is relevant is attached to the Declaration of Ms Kitsu as Exhibit “E,” which is also the Standard Practice at issue in Case No. CE-05-667 (DOE SP 0211).

Finally, Respondents argued that the HSTA’s memorandum in opposition asserted the “Employer simply ignores the condition precedent to Section B of Article XXI that requires the DOE to consult with HSTA before it amends, revises or deletes any portion of the Standard Practices,” but that the Complaint involves an alleged failure to negotiate, not a failure to consult.

VII. HSTA’S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO RESPONDENTS’ REPLY BRIEF FILED ON JULY 25, 2008

On July 28, 2008, the HSTA filed its Supplemental Memorandum in Response to Respondents’ Reply Brief Filed on July 25, 2008, asserting that the right of union representation extends under Weingarten^{xx} to pre-disciplinary investigations, and HSTA’s duty of fair representation is triggered at that point.

The HSTA also argued that the duty to provide information is triggered on a case-by-case basis as the need arises under chapter 89, and that the class grievance O-08-08 involved an investigation at Kailua Intermediate School, whereas the present Complaint involves different investigations, for which the need for information did not arise until April 18, 2008, and May 7, 2008, respectively. The HSTA further asserts that the class grievance did not mention alleged violation or change to Chapter 41.

The HSTA further argued that Chapter 4I is a DOE rule which Respondents cannot unilaterally disregard or change, and that rule provides, “[a] copy of the written complaint shall be sent by mail, return receipt requested, to each respondents by the department within three days of receipt of the written complaint” (HAR § 8-41-11(a)).

VIII. HSTA’S MOTION TO DEFER FURTHER PROCEEDINGS IN CASE

On September 19, 2008, the HSTA filed a Motion to Defer Further Proceedings in Case, to allow the parties an opportunity to negotiate a possible settlement of their difference, attaching a letter from the HSTA to the DOE.

On October 1, 2008, Respondents filed their Reply to HSTA’s Motion to Defer Further Proceedings in Case, arguing that the DOE is not a party to this case, and that the BOE was not prepared to take a position in the Motion to Defer Further Proceedings until the next meeting of the BOE scheduled for October 9, 2008.

IX. HSTA’S MOTIONS TO EXPEDITE ISSUES BEFORE THE BOARD

On July 15, 2011, the HSTA filed a Motion to Expedite Resolution of Issues Before the Board. On August 1, 2011, the Board held a status conference in this matter, at which the HSTA orally withdrew its Motion to Defer Further Proceedings in Case.

On June 25, 2014, the HSTA filed its Second Motion to Expedite Resolution of Issues Before the Board. On July 2, 2014, Respondents filed their Response to HSTA’s Second Motion to Expedite Resolution of Issues Before the Board Filed June 25, 2014.

X. STANDARDS OF REVIEW

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 Hawaii 275, 280, 81 P.3d 1190, 1195 (2003); Yamane v. Pohlson, 111 Hawaii 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

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).

Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (“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 (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.

A non-movant may not rest upon the allegations in the complaint, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact. Tri-S Corp. v. Western World Ins. Co., 110 Hawaii 473, 494, 135 P.3d 82, 103 (2006).

Furthermore, 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

XI. DISCUSSION, FINDINGS AND CONCLUSIONS

The Board finds that there are no material facts in dispute and that disposition of the Complaint via motion to dismiss or via summary judgment is appropriate. The Complaint involves the Respondents’ alleged failure to provide information relating to two civil rights complaints at Highlands Intermediate School and Kapaa Middle School, specifically: “(a) a copy of the complaint, (b) the names and addresses, and the status of the complainants, (c) a description of the nature of the alleged infraction and a copy of relevant policies, rules and standards of conduct, (d) a description of the basic facts, (e) information on related criminal, civil or administrative complaints (f) a copy of prior complaints or reports of incidents, (g) the names, positions, and addresses of the investigators, (h) leave status of the employee, and (i) notice of scheduled interviews and meetings.” The HSTA alleges that the Respondents committed

prohibited practices in violation of § 89-13(a)(1), (5), (7), and (8). HRS § 89-13(a) provides in relevant part:

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;

* * *

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

* * *

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

- (8) Violate the terms of a collective bargaining agreement[.]

A. Failure to Exhaust Contractual Remedies

With respect to the claims that the HSTA is entitled to the requested information pursuant to Article IV Section A, Article IX Section A, Article X Sections A & D, Article XXI Section A, and Article XXIII of the BU 5 Agreement, the Board holds that the HSTA failed to exhaust contractual remedies. The BU 5 Agreement provides for a grievance process, which may result in an arbitration, which may be invoked in the event of alleged violation, misinterpretation or misapplication of a term of the Agreement, or in the event disciplinary action is taken against any teacher. Article V of the Agreement provides in relevant part (HSTA's Exhibit "4-99" through "4-101"):

- A. DEFINITION. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

GRIEVING PARTY. Only teachers or their certified bargaining representative, [sic] shall have the right to institute and process grievances under this Article.

* * *

2. ARBITRATION

Should the parties not agree to mediation, or if the mediated grievance was not resolved, the grievance timeline shall be reinstated.

* * *

- L. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.
- M. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure. An expedited grievance procedure shall be used for suspensions or terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

Furthermore, as indicated by Respondents' Exhibit "A," the HSTA previously filed a class action grievance, #O-08-08, alleging the "DOE Civil Rights Compliance Office has established unilateral procedures for investigating complaints against teachers that deprives teachers of their right to a copy of complaint used against them, and their right to full implementation of the negotiated contract."

Finally, HRS § 89-10.8(a) requires a collective bargaining agreement to contain a "grievance procedure **culminating in a final and binding decision**, to be invoked in the event of **any dispute concerning the interpretation or application of a written agreement**"; grievance procedure "**shall be valid and enforceable**" (emphases added).

In Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 100-01, 94 P.3d 652, 655-56 (2004), the Hawaii Supreme Court held:

Poe contends that the circuit court erred in affirming the decision of the HLRB because the Board incorrectly determined that Poe had failed to exhaust his remedies under the collective bargaining agreement. HLRB and Employer argue, *inter alia*, that Poe's suit was barred because he failed to prove that HGEA breached its duty of fair representation in not advancing Poe's claims through Step 3 arbitration.

This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. (Emphasis added).

(Internal quotation marks and citations omitted). There has been no showing of an exception to the doctrine of exhaustion of contractual remedies, such as when exhaustion would be futile (Poe, 105 Hawaii at 102, 94 P.3d at 657). Accordingly, the Board holds that HSTA failed to exhaust contractual remedies.

B. The Complaint is Untimely

Pursuant to HRS § 377-9(l), “[n]o complaints of any specific unfair labor practice shall be considered [by the Board] unless filed within ninety days of its occurrence.” Furthermore, HAR § 12-42-42 provides, “[a] complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.”

Statutes of limitations are to be strictly construed and a prohibited practice complaint will be dismissed even if it is one day beyond the limitations period (Petramala v. HGEA, 5 HLRB 172, 175 (1993); Iwai v. HGEA, 5 HLRB 132, 134 (1993)). See also, Gao v. Hawaii Labor Relations Board, 129 Hawaii 106, 294 P.3d 1092 (2013) (summary disposition order upholding the Board’s dismissal of unfair labor practice claims filed beyond ninety days of its occurrence).

The beginning of the limitations period does not depend upon actual knowledge of a wrongful act, but when “an aggrieved party knew or should have known that [its] statutory rights were violated” (Metromedia, Inc. v. N.L.R.B., 585 F.2d 1182, 1189 (8th Cir. 1978)). Here, the class action grievance filed by the HSTA indicates the HSTA knew or should have know about the alleged violations at least as early September 19, 2007, when the grievance was filed. Although the instant Complaint may involve different specific schools, teachers, or complainants, the class action grievance alleged that

the DOE “established unilateral procedures for investigating complaints against teachers that deprives teachers of their right to a copy of complaints used against them, and their right to full implementation of the negotiated contract” (emphasis added) which implicates more than just an individual person or school, and the nature of a “class action” itself demonstrates the HSTA knew or “should have known” of alleged violations, beyond just a specific example, by September 19, 2007.

However, assuming for the sake of argument that the Complaint is not untimely, the Board further makes the following findings and conclusions:

C. A Union’s Right to Information Beyond the Provisions of the Agreement

Although the Board disposes of the HSTA’s claims based upon provisions of the BU 5 Agreement (see discussion above), a union may also bring, as the HTSA did here, a prohibited practice complaint for failure to provide information based upon general collective bargaining principles and obligations, pursuant to HRS § 89-13(a)(1) or (5). In such case, the union’s need for the information is balanced against the employer’s need to keep certain information confidential. For example, in Board Decision No. 130, In the Matter of Manuel Vincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980), the Board held that the employer’s tally sheets were relevant and necessary to grievances which alleged irregularities in the promotion procedure, and did not reach the “sensitivity” level of psychological tests that were at issue in Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 99 S. Ct. 1123 (1979); however, the Board held that the promotion board member’s personal notes, as a reflection of management’s thinking and deliberation, were entitled to a shield of confidentiality. In General Dynamics Corp., 268 N.L.R.B. 1432 (1984), the National Labor Relations Board used a balancing test in evaluating whether, or to what extent, information that was entitled to attorney work product privilege should be disclosed to the union for purposes of the union’s pending grievance. The union’s need for the information was balanced against the confidentiality interests of the employer.

Here, the HSTA provided the following justifications for its information requests:

1. A copy of the original and all amended complaints which prompted or pertain to the investigation.

Reason: Without the complaint(s) the employee and HSTA lacks adequate notice of the scope of the allegations, names of all accusers, dates of incidents or occurrences, witnesses, and basic facts (including what happened, who was involved, when the relevant occurrences happened, where the incidents occurred, and why the investigation is needed).

Note: If the complaints were not in writing then please provide all notes and records of DOE officials who received the oral complaints.

2. The names, address, and status (i.e., whether faculty member, student, or excluded personnel) of the complainant(s).

Reason: Without the names, addresses, and status of complainants HSTA is unable to effectively represent all affected bargaining unit employees. If the complainant is in bargaining unit 5 HSTA may need to assign another UniServ director to the investigation possibly to represent the complainant. If a student is involved it affects the scope of our investigation and HSTA's right to information.

3. A specific description of the nature of alleged infraction and a copy of all relevant policies, rules, regulations, and standards of conduct which may apply to the person under investigation.

Reason: Without this information HSTA is unable to determine the scope of the investigation, and what the material issues are.

4. Please provide a description of the basic facts as represented by the complainant to representatives of the Department of Education, including the dates, times, places, occurrence, witnesses, and other persons involved or affected.

Reason: Without these basic facts HSTA cannot effectively comply with its duty of fair representation to all affected bargaining unit employees.

5. Please indicate whether there are any related criminal, civil (including requests for restraining order), administrative, or other related proceedings which have been initiated by complainant or the Department of Education.

Reason: Without this information HSTA is unable to provide effective representation and adequate safeguards.

6. Please provide a copy of prior complaints or reports of prior incidents involving complainant or the employee under investigation which the Department of Education is aware of.

Reason: Without this information HSTA lacks the necessary background information.

7. Please provide the names, positions, addresses, and phone numbers of all investigators assigned by Department of Education to this case.

Reason: Without this information HSTA is unable to be in communication with DOE representatives and to assist in the investigative process.

8. Please indicate whether the person under investigation has been placed on department directed leave with pay and a copy documents recommending and approving such leave.

Reason: Without this information HSTA cannot perform its role as exclusive bargaining agent over wages, hours, and working conditions.

9. Please provide advance notice of all scheduled interviews and investigative meeting to be conducted by the Department of Education as part of the investigation.

Reason: Without appropriate notice HSTA is unable to fulfill its role as the exclusive bargaining representative.

Based upon the HSTA's Exhibits "7" and "8," the Board finds that Respondents provided the HSTA with basic information, including a description of the alleged actions being complained of, to enable the HSTA to perform its duties. The information requests by the HSTA occurred during the DOE's investigation of the complaints, and prior to the imposition of any discipline. The investigations involved civil rights complaints by students against teachers. The reasons provided by the HSTA for needing information that was not provided, such as the students' home addresses or the names and addresses of the investigators, do not outweigh the employer's need to keep such information confidential during the investigation stage. Accordingly, the Board concludes that summary judgment is appropriate in favor of Respondents.

D. Claims with Respect to HAR Chapter 41

The Complaint alleges "Chapter 41 provides [BU] 5 employee prior rights, including but not limited to (a) the right to have all complaints filed within twenty days of alleged violations under Section 8-41-11(a), (b) the right to a copy of a complaint where

the employee is named as a respondent within three days of receipt under Section 8-41-11(a), and (c) the right to information in the possession of the department bearing on the validity of the complaint under Section 8-41-8.” The Complaint further alleges, “[a]t no time has HSTA agreed via mutual consent to change the prior rights of employees as set forth in chapter 41”; and “[c]ommencing on or about March 28, 2008 and thereafter respondents have unilaterally changed existing terms and conditions of employment on a mid-term basis without compliance with the duty to bargain in good faith with HSTA (and without mutual consent) relating to complaints and investigations of possible civil rights violations against unit 5 employees.”

Case No. CE-05-667, HSTA v. Board of Education, filed on May 27, 2008, involves a prohibited practice complaint by the HSTA against the BOE alleging, *inter alia*, that the BOE, the Superintendent of Education, and Ms. Kitsu **unilaterally formulated, adopted, and/or implemented mid-term changes, without negotiations or mutual consent, to the BU 5 Agreement relating to anti-harassment, anti-bullying, and anti-discrimination policy; new standard of practice documents and new disciplinary policies and procedures; repeal of Title 8, Subtitle 2, Chapter 41 of the HAR; and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment** (emphases added).

The Board agrees with Respondents that the Board’s rules, which prohibit more than one complaint on a given subject, bar the instant claim that Respondents failed to negotiate changes to, or repeal of, HAR Chapter 41. HAR § 12-42-42(f) provides, “[o]nly one complaint shall issue against a party with respect to a single controversy.”

Furthermore, assuming for the sake of argument that Chapter 41 is incorporated into the BU 5 Agreement pursuant to Article XXI Section A, the parties do not dispute that Section B of Article XXI permits the employer to amend, revise or delete any portion of the Standard Practices (see Respondents’ Opposition to Hawaii State Teacher’s [sic] Association’s Motion for Summary Judgment Filed June 23, 2008, page 6, first paragraph; HSTA’s Memorandum in Opposition to Respondents’ Motion to Dismiss and/or for Summary Judgment Filed on July 15, 2008, page 12, last paragraph). As the HSTA points out, Section B requires the employer to consult with the HSTA before it amend, revises or deletes any portion of the Standard Practices. The instant complaint, however, alleges a failure to negotiate or mutually consent, not a failure to consult.


Accordingly, the Board holds that summary judgment in favor of Respondents is appropriate.

ORDER

For the reasons discussed above, the Board hereby grants Respondents' Motion to Dismiss and/or for Summary Judgment as to Hawaii State Teacher[sic] Association's Prohibited Practice Complaint Filed June 4, 2008, and denies the HSTA's Motion for Partial Summary Judgment. The Board further denies as moot^{xxi} the HSTA's Motion to Expedite Issues before the Board and Second Motion to Expedite Resolution of Issues Before the Board.

DATED: Honolulu, Hawaii, August 29, 2014

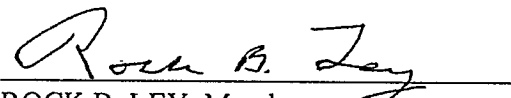
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

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

ⁱ HRS § 89-2, governing definitions, provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

* * *

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit

without discrimination and without regard to employee organization membership.

ii HRS § 89-6(a), governing appropriate bargaining units, provides in relevant part:

All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]

iii HRS § 89-2 provides 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.

iv Article IV Section A of the 2007-2009 BU5 Agreement, governing association rights, employer information, provides:

In addition to any obligation under Chapter 89, HRS, to furnish information in its possession, the Employer will furnish such other information in its possession, in response to reasonable requests by the Association which will assist the Association in effectively representing the teacher in the collective bargaining process and in the processing of grievances. Any information personal in nature and confidential to any particular teacher and which the Employer is not obligated to furnish under Chapter 89, HRS, may not be disclosed by the Employer unless written prior approval of the individual concerned has been given. The Employer need not perform compilation of facts or information for the purpose of responding to such Association requests.

However, in the event that the Employer does agree to compile facts or information in response to an Association request, the Association shall pay all extra costs incurred as a result of such compilation including, but not limited to, labor, printing, duplicating and distribution costs.

The Superintendent or designee shall prepare a list of informational items which may be given, upon request, to an Association UniServ Director by a Complex Area Superintendent (CAS) and/or principal. The list of informational items may be updated periodically.

v Article IX Section A of the 2007-2009 BU5 Agreement, governing personnel information, provides:

No material derogatory to a teacher’s conduct, service, character or personality shall be placed in his personnel file unless the teacher has had the opportunity to review such material and the opportunity to affix his signature to the copy to be filed, with the express understanding that such signature in no way indicates agreement with the contents thereof. Teachers shall also have the right to submit a written answer to such material, and their answer shall be reviewed by the Superintendent or designee and attached to the file copy. Derogatory materials which teachers have not been given an opportunity to review shall not be used in any proceedings against them.

^{vi} Article X of the 2007-2009 BU5 Agreement, governing teacher protection, provides in Section A and D:

- A. The Employer shall provide legal counsel for teachers who are sued for actions taken by them in the course of their employment and within the scope of their duties and responsibilities.

The teacher against whom such civil action or proceeding is brought shall deliver within five (5) calendar days after date of service or knowledge of service as determined by the Attorney General, all processes or complaints served upon him or an attested true copy thereof to the immediate supervisor who shall promptly furnish copies of pleadings and process therein to the Attorney General.

When the Employer has determined that a teacher is being sued for actions taken by the teacher in the course of employment and with-in the scope of duties and responsibilities as noted in Section A, paragraph 1 above, the Attorney General or designee will meet and explain legal procedures to the teacher.

- D. Any serious complaint or any repeated minor complaint, including anonymous complaints concerning a teacher, shall be reported immediately to the teacher by the supervisor receiving the complaint. The use of complaints and the filing of said complaints shall be covered by Article IX - Personnel Information.

Any teacher against whom a serious complaint has been filed will have the opportunity to meet with the complainant(s). At the teacher's request, the supervisor shall be present at such a meeting. The supervisor shall call the complainant(s) for a meeting at a mutually acceptable time by the teacher, the complainant(s) and the supervisor.

^{vii} Article XXI of the 2007-2009 BU5 Agreement, governing maintenance of benefits, provides:

Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of the execution of this Agreement.

^{viii} Article XXIII of the 2007-2009 BU 5 Agreement, governing entirety clause, provides:

This document contains the entire agreement between the parties and no other agreement, representation or understanding will be binding on the parties unless made in writing by mutual consent of both parties.

Editorial revisions in the ratification copy of this Master Agreement between the Board and the Association may be made, provided that no items are substantively altered.

^{ix} Chapter 41 of the Hawaii Administrative Rules of the BOE governs "Civil Rights Policy and Complaint Procedure" and is found within Title 8 (Department of Education), Subtitle 2 (Education), Part I (Public School), Chapter 41 (Civil Rights Policy and Complaint Procedure) of the HAR.

^x HAR § 8-41-11(a), governing complaint procedure, provides:

The complainant shall file a written complaint with the district superintendent of the school district in which the alleged violation took place.

The written complaint shall be filed within twenty days of the alleged violation and shall be made on a form provided by the department. There shall be no time limit for a complainant to file a written complaint alleging systemic discrimination. A copy of the written complaint shall be sent by mail, return receipt requested, to each respondent by the department within three days of receipt of the written complaint.

^{xi} HAR § 8-41-8, governing right to information, provides:

A complainant and respondent shall have access to information and records in the possession of the department which bear upon the validity of the complaint except for such information and records that must remain confidential in accordance with federal and state laws.

^{xii} HRS § 89-3, governing rights of employees, 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.

^{xiii} HRS § 89-9, governing scope of negotiations; consultation, provides in relevant part:

- (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 inpassé 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.
- (b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.
- (c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.
- (d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1, or which would interfere with the rights and obligations of a public employer to:
 - (1) Direct employees;

-
- (2) Determine qualifications, standards for work, and the nature and contents of examinations;
 - (3) Hire, promote, transfer, assign, and retain employees in positions;
 - (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
 - (5) Relieve an employee from duties because of lack of work or other legitimate reason;
 - (6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;
 - (7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and
 - (8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

^{xiv} HRS § 89-13(a), governing prohibited practices; evidence of bad faith, provides is relevant part:

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;
- * * *
- (7) Refuse or fail to comply with any provision of this chapter; [or]
- (8) Violate the terms of a collective bargaining agreement[.]

^{xv} Respondents filed an Errata to the motion on July 16, 2008, correcting a reference to an exhibit.

^{xvi} HRS § 89-9(l) provides, "No complaints of any specific unfair labor practice shall be considered unless filed

within ninety days of its occurrence.”

^{xvii} Case No. CE-05-667, HSTA v. Board of Education, filed on May 27, 2008, involves a prohibited practice complaint by the HSTA against the BOE alleging, *inter alia*, that the BOE, the Superintendent of Education, and Ms. Kitsu unilaterally formulated, adopted, and/or implemented mid-term changes, without negotiations or mutual consent, to the BU 5 Agreement relating to anti-harassment, anti-bullying, and anti-discrimination policy; new standard of practice documents and new disciplinary policies and procedures; repeal of Title 8, Subtitle 2, Chapter 4 I of the HAR; and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment.

^{xviii} HAR § 12-42-43 governs amendment of a complaint. HAR § 12-42-42 governs complaints, and provides in paragraph (f), “[o]nly one complaint shall issue against a party with respect to a single controversy.”

^{xix} HAR § 8-41-3(d), governing applicability, provides, “[e]mployees of the department who believe that their nondiscrimination employment rights have been violated may file complaints under Policy 5513 of the School Code, Certified Personnel Policies and Regulations. Employees may also opt to file a grievance in accordance with the applicable bargaining agreement (see Exhibit “5-6” attached to the HSTA’s Motion for Partial Summary Judgment).

^{xx} N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975).

^{xxi} A matter is moot if it has lost its character as a present, live controversy. State v. Nakanelua, 132 Hawaii 492, 503, 323 P.3d 136, 147 (App. 2014) (*quoting* Kahoohanohano v. State, 114 Hawaii 302, 332, 162 P.3d 696, 726 (2007))