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Case No. CU-05-302

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SHANYE N. VALEHO-NOVIKOFF, Complainant, and WILFRED OKABE, President, Hawaii State Teachers Association; WILBERT HOLCK, UniServ, Hawaii State Teachers Association; CHRISTOPHER CHANG, Maui UniServ, Hawaii State Teachers Association and HAWAII STATE TEACHERS ASSOCIATION, Respondents.	CASE NO. CU-05-302 ORDER NO. 3024 ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS COMPLAINT; NOTICE OF STATUS CONFERENCE

ORDER GRANTING IN PART AND DENYING
IN PART RESPONDENTS' MOTION TO DISMISS COMPLAINT

I. FINDINGS OF FACT 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.

A. Prohibited Practice Case

On March 9, 2011, Complainant SHANYE N. VALEHO-NOVIKOFF (Complainant or Ms. Valeho-Novikoff), *pro se*, filed a prohibited practice complaint (Complaint) against Respondents WILFRED OKABE (Okabe), President, Hawaii State Teachers Association (HSTA or Union); WILBERT HOLCK (Holck), UniServ, HSTA; CHRISTOPHER CHANG (Chang), Maui UniServ, HSTA; and HSTA (collectively Respondents). The Complaint allegations are set forth verbatim as follows:

$89-13 [sic] Prohibited practices; evidence of bad faith.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
(3) Refuse to participate in good faith in the mediation; fact-finding and arbitration procedures set forth in section 89-11;
(4) Refuse or fail to comply with any provision of this chapter; or
(5) Violate the terms of the collective bargaining agreement.

The cause of action is that the employee organization (HSTA) has failed to perform their legal obligation and have breached their duty as set forth in the collective bargaining agreement in which the complainant is a third party beneficiary who has been prejudiced and not afforded her due process rights as stated in the collective bargaining agreement.

1. The complainant Shanye N. Valeho-Novikoff, a living, breathing human being, known as the complainant, was discharged without proper cause on December 31, 2009 by Patricia Hamamoto.

2. The complainant met with the HSTA Uniserve, Christopher Chang, at the Maui office on January 5, 2010 at 3:30PM and made it clear that the time lines in the collective bargaining agreement shall be strictly adhere to.

3. Per Article V – Grievance Procedure, section G-Step 2 it states, "a) Any grievance involving suspensions, terminations, or class grievances shall be filed with Superintendent's or designee in writing within twenty (2) days after the occurrence of the alleged violation....." The complainant met with HSTA Uniserv, Christopher Chang, at the Honolulu office on January 15, 2010 at 2:30PM and signed and filed a grievance that still needed issuance of a case number.

4. On January 19, 2010, the complainant was informed by HSTA Maui secretary, Beverly Saiki that the complainant's grievance was issued number M10-2 and was duly faxed and mailed out to the Superintendent on January 19, 2010.

5. On January 28, 2010, HSTA Uniserv Christopher Chang contradicted himself saying he got a letter from the Superintendent's office wanting to schedule a meeting for Step 2 meeting on January 22, 2010 and then saying he received the letter of January 28, 2010 when he came to work. The complainant asked Mr. Chang the date of the receipt of the grievance by the employher. Mr. Chang said it was stamped received by the employer on January 20, 2010.

6. The complainant filed an HLRB complaint during February 2010 regarding this matter and due to the discussions during the Pre-Hearing meeting between the HSTA representation Herbert Takahashi and the Attorney General Office

representative Maura Okamoto, it was agreed that the case would be moved to Arbitration. A list of five names were provided by Mr. James Nicholson to both the HSTA and AG's office to start striking names for a possible arbitrator for grievance #M10-02.

7. By mid-March 2010, Maura Okamoto suggested to arbitrator Thomas Crowley III that her office was still understaffed and she needed more time to prepare. An extension was granted by Mr. Crowley and dates were moved to mid-May 2010.

8. By mid-May 2010, Maura Okamoto resigned her post and the arbitration for grievance #M10-02 was left for rescheduling. Mr. Crowley moved the date to mid-October 2010.

9. On May 21, 2010, Chris Chang supposedly recommended my case to Arbitration, but, Chang informed me on June 3, 2010, via an email, that although he recommended to proceed to arbitration, Chang had concerns. Chris Chang had told a mistruth on May 22, 2010 at 2:40 PM when he said that the HSTA Board approved my case to arbitration. Chang also told me a mistruth when he said he would arrange to come into Hana to meet with witnesses. He made no effort to come to Hana despite arrangements for meetings were made on three occasions.

10. From or around July 2, 2010 through September 6, 2010, I did not hear anything from Chris Chang regarding the arbitration of grievance #10-02. I contacted Chris Chang on September 6, 2010 and asked for the status of arbitration for grievance #M10-02.

11. If I had not contacted HSTA Uniserv Chang on September 6, 2010, I do believe that I would not hear from him. By October 4, 2010, it was revealed that Chang did not contact any witnesses and he did not subpoena any of the witnesses. Even though Chang had some of the witnesses phone numbers from our February 3, 2009 hearing in front of P. Hamamoto (superintendent) and Chang was given witness contact numbers on June 7, 2010, Chang did not contact them at all.

12. By October 8, 2010, only 4 days before the hearing commenced, Chang began to contact witnesses at the last minute. Chang's questioning of the witnesses were along the lines of discrediting the witness' testimony. The affidavits could have been used to refresh the witness' recollection of their sworn statements, not to exclude them from the witness list. The affidavit would serve to rehabilitate the witness with his statement at the time.

13. On Dec. 08, 2010, I was made first made aware that HSTA was intending to rescind my case #10-12[1] to arbitration. I received an emailed copy from

HSTA Maui Uniserv, Christopher Chang informing me that the HSTA Board was presented with information only provided by Chang in Chang's attempts to drop this case to the wayside.

14. During October 2010 through January 2011, I have repeatedly asked Mr. Chang for copies of documents from my file and he refused at first. He then made me tag the documents that I wanted, which I did. After this, he gave me only 2 documents. I filed a complaint with Wil Okabe and Wilbert Holck. The documentation reveals no work has been done regarding my case.

15. On Jan. 21, 2011, I requested to exercise my right to Wilbert Holck to appeal the decision by the HSTA Board of Directors to rescind or not to go to arbitration for the HSTA Board did not have the benefit of very relevant information that was erroneously withheld regarding my case.

16. On February 19, 2011, I presented my appeal to the HSTA Board of Directors. Mr. Wil Okabe said I would hear of a decision within a week. The Board was informed of a compounded history of retaliatory and discriminatory actions of the employer against me. The Board was informed of key witnesses who would testify on my behalf which includes a very conspiratorial and collusive conversation between DOE administrators in the presence of a witness. I have heard nothing from HSTA since.

16. I have been denied my due process rights and have been prejudiced in that I was not afforded her Step 2 meeting according to the language in the contract. I, the complainant, have not received fair representation in that HSTA and its representatives have first approved my case to Arbitration and then arbitrarily refused to process this meritorious grievance to Arbitration based on Uniserv Chang's whims and prejudices which was also based on Wilbert Holck's advisement.

(Endnote added) In addition, Complaint Section 6 requesting a clear and concise statement of any other relevant facts, further states verbatim:

Briefly, in 2001, while in an educational exchange trip to Tahiti, I blew the whistle and reported the Hana School principal's daughter involved in drinking alcohol and smoking marijuana in Tahiti. Upon return, and to cover it up, the principal was not following thru with Chapter 19 procedures and I questioned it. This case, as some of you may recall, for I stood here in front of you then, went up to the BOE, State legislature/representatives, newspapers, and the Governor. Hamamoto was sickened by this and ended up having to remove the Hana principal and placing her on Moloka'i. I was going to pay for this, and I am, and I did. I have been a victim of continual violation of discrimination, retaliation, and adverse actions by certain DOE administrators. I have been terminated and I humbly need HSTA to properly represent me in this case.

> At each step of the investigative procedure, Uniserv Chang just watched. I did all the presenting, compiling of evidence, creating the record, gathering and contacting witnesses, etc., Chang just showed up. He told me he represents me if and when I got fired. IS THIS FAIR REPRESENTATION? NO! Well, I got fired and I still received no help. My case is getting dumped to the wayside. For example...On the initial complaint letter from the Hana principal, I asked Chris Chang to file a grievance against the employer for I was not allowed to face my complainants. Chang told me to just wait and see what route the principal would take. I waited and the statute of limitations ran out to file the grievance, thus losing my opportunity to nip this case in the bud. This is not fair representation or representation in good faith. This is Uniserv Chang's arbitrary and perfunctory handling of grievance #M10-02. This is just one example of the many [sic]

In her prayer for relief, the Complainant requested that the HLRB: 1) assume jurisdiction regarding the Complaint; 2) award the Complainant the right to move grievance M10-02 to arbitration under the collective bargaining agreement due to the "arbitrary and perfunctory handling of grievance #M10-02 by Christopher Chang;" 3) direct HSTA to provide proper representation; 4) award a monetary compensation of her daily wages for all the days that that grievance M10-02 is stalled beginning from January 20, 2010 because Complainant as a third party beneficiary was hurt and prejudiced by being denied her due process rights under the collective bargaining agreement; 5) order that all documentation regarding the investigative process and DOE Administrative Regulation #5110 held by the Employer and the Union be entered into the arbitration record; 6) order that all audio tapes recorded by the Union and the February 3, 2009 teleconference tape be entered into the arbitration record; and 7) award other relief that the Board deems appropriate.

B. Motion to Dismiss

On March 17, 2011, Respondents filed a "Motion to Dismiss Complaint" (Motion). The Motion asserts that the Complaint should be dismissed because: 1) of a lack of jurisdiction over occurrences that happened prior to December 9, 2011, 90 days before the filing of the Complaint on March 9, 2011; 2) Complainant lacks standing to bring a claim for refusal to participate in good faith in mediation and arbitration under HRS 89-11; 3) of a failure to state a hybrid claim for relief under Chapter 89 and the collective bargaining agreement; and 4) of a failure to exhaust internal union remedies set forth in Article XV, §3 of HSTA policies and remedies.

On March 28, 2011, Complainant filed a "Memorandum in Opposition to Respondent's [sic] Motion to Dismiss Complaint" (Memorandum in Opposition). In that Memorandum in Opposition, Complainant contends, among other things, that: 1) HRS Chapter 89 gives HLRB the authority to hear prohibited practice complaints under HRS §§89-13(b)(3), (4), and (5) and 89-10.8; 2) if there is evidence of a continuing violation, the time period should be tolled because Complainant was pursuing redress through the grievance and

appeal procedures of the Union; 3) the failure to exhaust administrative remedies theory is not applicable to the Complainant, who was prejudiced, not afforded her due process rights, and delayed and denied her rights by the Union; 4) HSTA has violated its duty of fair representation based on Chang's failure to properly process the grievance from July through September 2010; and 5) the Board should retain jurisdiction. Regarding its allegation that HSTA violated its duty of fair representation, Complainant cites the following reasons, among other things: (1) Chang did not properly process the grievance; (2) Respondents have acted arbitrarily, discriminatorily, and in bad faith by withholding relevant information from Complainant regarding her case, such as not informing her until March 14, 2011 that the HSTA Board would be making its decision at the April 1, 2011 meeting and regarding the status of her grievance M10-02 appeal for arbitration; (3) Complainant has not received UniServ representation that other bargaining unit members have received from Chang and her grievance was rescinded; (4) the December 17, 2009 DOE Superintendent's letter should not be considered "new evidence" because Chang was privy to this information since 2008 when the Hana Principal made his recommendation; (5) on January 15, 2010, Chang was aware of, but failed to inform the HSTA Board, of a March 18, 2008 collusive, conspiratorial conversation/voicemail, in which the Hana Principal, Vice-Principal, and Maui Personnel Regional Officer indicated that they pursued an investigation without any policy violation by the Complainant and slipped in a last minute violation of the Profile of an Effective Teacher-Misconduct; (6) the grievance should have been pursued for unlawful termination (contract violation), not the fraudulent "misconduct" that Chang is pursuing; (7) Chang did not provide meaningful representation during the investigative hearings under School Code 5110 and violated the "fiduciary duty of representation" by doing nothing and making arbitrary and capricious decisions and actions that injured her; and (8) the Board retains concurrent jurisdiction in matters arising from specific contract violations pursuant to HRS §89-13(a) (8) and reserves the right to exercise that jurisdiction on a case-by-case basis but is required to retain jurisdiction in cases where there is a conflict of interest between the employee and the union based on a National Labor Relations Board (NLRB) case Anaconda Wire & Cable Co., 201 HLRB [sic] No. 125, 82 LRRM 1419 (1973) (Anaconda).[2] Complainant further asserts that the Board should retain jurisdiction because: (1) the allegations involve statutory, rather than contractual violations; (2) Complainant has been injured due to unemployment and suffered a measurable compensable loss as a direct result of the Union's breach of duty based on allegations that grievance No. 10-02 has been handled and processed arbitrarily and perfunctorily; and (3) there is a divergence of positions between the Complainant and HSTA evidenced by the filing of this prohibited practice case.

On April 19, 2011, the Board held a hearing on the Motion. At the hearing, the parties reiterated and provided further support for the arguments presented in their respective Memoranda. At the hearing, Complainant read her "Verified Affidavit of Truth," which she later submitted to the Board on April 21, 2011.

C. Background Events Leading Up to The Complaint

The foregoing Complaint and Motion arose out of the following events.

By a December 17, 2009 letter, from Hawaii State Department of Education (Employer or DOE) Superintendent Patricia Hamamoto, Ms. Valeho-Novikoff was informed of her termination from her librarian position at Hana High and Elementary, effective December 21, 2009, based on "sufficient evidence to show that you engaged in behavior that failed to meet the expectations of the 'Profile of an Effective Teacher' when you misused Hana High & Elementary School funds to make purchases for your personal use." The letter stated that the termination was based in part upon an investigation report finding that Ms. Valeho-Novikoff misused school funds for purchases of office and classroom supplies from Costco, books from Barnes and Noble, classroom supplies from Borders Books and Music, and use of two rental car vouchers from Hana High and Elementary School for personal use.

At the time of her discharge, Complainant was a librarian and a "public employee" within the meaning of HRS §89-2, and a member of bargaining unit 05 under HRS §89-6(a)(5).

The "Employer" of bargaining unit 05 is the State of Hawaii Board of Education (BOE) and any individual who represents one of these employees or acts in their interest in dealing with public employees under HRS §89-6(a)(5).

The "Agreement Between the HSTA and the BOE, effective July 1, 2009 – June 30, 2011" (CBA), contains a grievance procedure[3] providing that a Step 2 grievance is filed for terminations.

On or about January 15, 2010, HSTA filed a grievance in HSTA Case #10-02 contesting the discharge of Ms. Valeho-Novikoff based on violations of the CBA.

On February 2, 2010, the Association submitted a demand for arbitration in HSTA Case No. M-10-02.

On May 21, 2010, the HSTA Executive Director Al Nagasako (Nagasako) recommended that the grievance, designated as HSTA Case No. 10-12, be submitted to arbitration for approval by the HSTA Board of Directors (HSTA Board).

On November 23, 2010, Nagasako recommended that the HSTA Board rescind their decision to take the case to arbitration.

By a January 6, 2011 letter, Holck notified Ms. Valeho-Novikoff that on December 4, 2010, the HSTA Board rescinded their August 7, 2010 decision to take Arbitration Case No. 10-12 to arbitration, and that she could appeal this action to the HSTA Board by contacting Okabe no later than 10 working days from the notice.

On January 14, 2011, Complainant sent an email to Okabe stating verbatim:

> In adherence to **ARTICLE XV. EXHAUSTION OF INTERNAL PROCEDURES AND REMEDIES – Section 3. Exhaustion of Internal**

Procedures and Remedies of the Amended and Restated ByLaws, I am filing a formal complaint to you, the HSTA President, against Maui uni-serv representative, Christopher Chang. I requested a xerox copy of my file from C. Chang on November 8, 2010. Mr. Chang said he would have Beverly Saiki PDF it to me. I requested hard copies. On November 01, 2010 C. Chang stated, ***"The office is closed on Tuesday. I will have Beverly mail you the material."*** By November 04, 2010 I received only documents requested of the DOE by Chang. On November 08, 2010, C. Chang wrote, ***"I will have Beverly copy everything for you. Please provide her ample time to accomplish all of the copying as you already know that it is a significant about of paperwork."*** Beverly Saiki was not asked to copy any documents. Because C. Chang was making it difficult for me to get a copy of my file, I asked to come in and tag the documents that I did not have or that was different from what I had. Chang agreed to allow me to take time out of my schedule to come in on December 10, 2010 and December 13, 2010 to tag the needed documents, however, recently, he states that he will not give me those 39 documents. On December 13, 2010 I finished reviewing and tagging copies of documents from my grievance case #M10-02 and requested C. Chang to xerox the copies. C. Chang is denying me access to my file.

On January 12, 2010, I went to the HSTA Maui office to pick up the documents. Instead I got copies of 2 of the 39 requested documents. On January 13, 2010 I left a list of the 39 tagged documents for C. Chang to xerox. I would like to add that in 2008, I requested my file #M01-19 from Maui uniserv Eric Nagamine. Mr. Nagamine had that file xeroxed in its entirety for me. I am asking for 39 documents of my file #10-01 be xeroxed by C. Chang and made available to me. To resolve this matter, I would like the documents ready by next week Friday, January 21, 2010.[4]

(Bold in the original)

On January 21, 2011, Complainant sent an email to Holck stating that, "this email is a formal request to exercise my right to appeal the decision by the HSTA Board of Directors to rescind or not to go to arbitration for grievance #M10-02."

On February 19, 2011, the HSTA Board heard that appeal by teleconference.

On February 22, 2011, Holck sent an email to Ms. Valeho-Novikoff informing her that the HSTA Board was reviewing her case; and that Okabe requested her written summary of points presented to the Board on February 19, 2011. On February 28, 2011, she complied with that request.

By a March 14, 2011 letter, Okabe acknowledged receipt of her written summary of points. He further informed her that the summary would be reviewed at the April 1, 2011

meeting and that following that review and decision on that appeal, a letter would be sent to her.

1. DISCUSSION, CONCLUSIONS OF LAW, 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 Standard for Motion to Dismiss

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).[5]

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b) (1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, 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); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP Rule 12(b) (6) for failure to state a claim, "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. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, 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, 402-403, 279 P.3d 55, 67-68 (App. 2012) (citing Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

B. Application of the Standards to Respondents' Motion

As stated above, Respondents have moved to dismiss the Complaint on four grounds: 1) lack of jurisdiction over occurrences more than 90 days prior to the filing of the Complaint; 2) lack of standing regarding the HRS §89-11 allegation implicated by the HRS §89-13(b) (3) claim; 3) failure to state a claim for relief under HRS Chapter 89, the CBA, and for a hybrid claim against HSTA or its representatives; and 4) failure to exhaust internal Union remedies.

Applying the foregoing standards for motions to dismiss to the record herein, the Board grants in part and denies in part Respondents' Motion to Dismiss for the following reasons.

1. The Board Lacks Jurisdiction Regarding The Alleged Prohibited Practices Set Forth in The Complaint Occurring Prior to December 9, 2010 Based on Untimeliness.

Respondents take the position that claims arising from occurrences preceding December 9, 2010, which is 90-days prior to the March 9, 2011 filing of the Complaint, may not be considered under HRS §377-9(l) and Hawaii Administrative Rules (HAR) §12-42-2. Respondents maintain that such claims include the conduct of Chang set forth in allegations 5, 10, 11, and 12 and the November 23, 2010 recommendation of Nagasako. In her Memorandum in Opposition, Complainant refers to Chang's conduct and argues that if there is evidence of a continual violation by HSTA, the time period should be tolled because she was pursuing redress through the union grievance and appeal procedures.

The relevant statutory and administrative rule provisions provide as follows.

HRS §89-14 states that, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9...."

§377-9(l), HRS requires that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (Emphasis added)

HAR §12-42-2 **Complaint** (a) states, "A complaint that any...employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee...within ninety days of the alleged violation." (Emphasis added)

In interpreting and applying these provisions, the Board has ruled that statutes of limitations are to be strictly construed. Further, because time limits are jurisdictional, the Board is unable to waive the defect of missing the deadline even by one day. Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983) (Fitzgerald); Iwai v. HGEA, Local 152, 5 HLRB 132, 134 (1993); Cantan v. Dep't. of Envtl. Waste Mgmt., CE-01-698, Order No. 2599 at p. 8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., CE-05-440, Order No. 1825 at p. 4 (12/13/99).

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Rather, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, 6 HLRB 319, 330 (2003) (Okimoto) (citing Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Regarding Complainant's argument that the 90-day statute of limitations should be considered tolled during the period that her grievance was being processed through the contractual grievance procedure, the Board finds based on its own precedent that any tolling which occurred ended when Nagasako announced his recommendation to the HSTA Board not to arbitrate the matter on November 23, 2010. Kimura v. Waihee, 4 HLRB 543, 550-551 (1988) (The Board concluded that the Complainant's case ripened when the UPW's counsel announced his recommendation to the union not to arbitrate the matter at the Board hearing.). Based on the fact that Nagasako's announcement of his recommendation pre-dated December 9, 2010 and the Complaint allegation 13 stating that Ms. Valeho-Novikoff was aware of the rescission of the decision to arbitrate on December 8, 2010, the Board is not precluded based on tolling from finding that any alleged prohibited practices occurring prior to December 9, 2010 are time-barred and may not be considered. Accordingly, based on the foregoing statutory and HAR provisions, the Board agrees with Respondents that any alleged prohibited practices occurring prior to December 9, 2010 may not be considered.

Accordingly, the Board dismisses for lack of jurisdiction based on untimeliness the portion of the second allegation numbered 16[6] regarding not being "afforded her Step 2 meeting according to the language in the contract"[7] and the allegations 2-13, including but not limited to: 1) Chang's conduct made in allegations 2, 3, 5, 9,[8] 10, 11, 12, and 13; 2) the HSTA Board's December 4, 2010 decision reconsidering and rescinding their August 7, 2010 decision to take Arbitration Case #10-12 to arbitration, which the Complainant alleged in allegation 13 of the Complaint[9] that she became aware of on December 8, 2010; and 3) the Nagasako November 23, 2010 recommendation.

2. The Complainant Lacks Standing to Bring An HRS §89-13(b) (3) Claim.

The Complaint appears to allege a violation of HRS §89-13(b) (3).

HRS §89-13(b) (3) states in pertinent part:

> (b) It shall be a prohibited practice...for an employee organization or its designated agent wilfully to:
> ***
> (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
> ***

HRS §89-11 states in relevant part:

§89-11 Resolution of disputes; impasses. (a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement.
***
(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit (10), institutional, health, and correctional workers; bargaining unit (11), firefighters; bargaining unit (12), police officers; bargaining unit (13), professional and scientific employees; or bargaining unit (14), state law enforcement officers and state and county ocean safety and water safety officers, the board shall assist in the resolution of the impasse as follows:

(1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.
***

Respondents maintain that Ms. Valeho-Novikoff lacks standing to allege a claim for refusal to participate in good faith in the mediation, fact finding, and arbitration procedures set forth in §89-11, HRS, because: 1) these procedures are inapplicable to bargaining unit 5 and Complainant has not been injured in any way by the refusal to proceed with an interest arbitration; 2) the arbitration requested by the Complainant in this case is not an interest arbitration, but rather a rights arbitration; and 3) the allegation for relief for §89-13(b) (3) fails to state a claim for relief. Complainant fails to present any arguments opposing this contention.

The Board agrees with all of Respondents' reasons. First, the Board has concluded in previous cases in which a public employee brought a prohibited practice case against his union under §89-13(b) (3) for a failure to participate in good faith in the mediation, fact-finding, and arbitration procedures provided in §89-11, HRS, that §89-13(b) (3) is not applicable to grievance arbitrations. *See, e.g.*, LePere v. Waihee, Case No. 5 HLRB 263, 272 (2/8/94);

Stucky v. Takeno, Case No. CU-05-283, Order No. 2834 at p. 12 (3/15/2012) (Stucky). Second, from the face of HRS §89-11(e), there is no question that bargaining unit 5 is not subject to the mediation and arbitration procedures set forth in this provision. Hence, because Respondents cannot violate HRS §89-13(b) (3), the claim is clearly without any merit because of an absence of law to support the claim and of facts sufficient to make a good claim. Fuddy, 125 Hawaii at 108, 253 P.3d at 669.

Consequently, the Board concludes that the Complainant fails to state a claim for relief regarding a violation of HRS §89-13(b) (3); and this allegation must be dismissed.

3. The Complainant Is Not Required to Exhaust Internal Union Remedies.

Regarding their position that the Complaint should be dismissed for failure to exhaust internal Union procedures and remedies, Respondents contend that as an HSTA member, Ms. Valeho-Novikoff is obligated to exhaust HSTA procedures and remedies set forth in Article XV, Section 3 of the HSTA By-laws. In support of that position, Respondents point out that: 1) the HSTA Board has not rendered a final decision regarding rescission of its prior decision to arbitrate; and 2) Ms. Valeho-Novikoff has filed no complaint with the HSTA judicial panel against the HSTA staff.[10] Ms. Valeho-Novikoff opposes HSTA's position by simply stating that this theory is inapplicable to her.

Article XV, Section 3 of the Bylaws of the Hawaii State Teachers Association (Bylaws) states in relevant part:

> Section 3. Exhaustion of Internal Procedures and Remedies.
>
> a. Prior to initiating or filing any action in any judicial, administrative, or legislative tribunal against the Corporation, its officers, agents, representatives, or Members, a Member is required to exhaust internal procedures and remedies.
>
> b. All member complaints, charges, protests, suits, grievances, or other legal challenges against the Corporation, its officers, agents, representatives or Members shall be filed with the President within thirty (30) calendar days after its occurrence, and referred to the judicial panel for a hearing and determination within sixty (60) calendar days. An "occurrence" shall mean the date the member actually knew or should have known of the alleged violation. The findings, conclusions, decision and order of the judicial panel shall be final and binding unless an appeal is filed with the Board of Directors within thirty (30) calendar days. In the event of an appeal the decision and action of the Board shall be final and binding on all parties.
>
> c. Any Member who files a complaint, charge, protest, suit, grievance, or other legal challenge against the Corporation, its officers, agents, representatives or Members without exhausting internal procedures and

remedies shall be subject to disciplinary action and be required to pay all reasonable attorney's fees, costs and litigation expenses incurred to defend against the judicial, administrative, or legislative proceeding.

(Emphasis added) HSTA By-laws Section 5 states in relevant part:

> Section 5. The Judicial Panel.
> ***
> b. The judicial panel shall have original and primary jurisdiction to hear and determine all complaints, charges, protests, suits, grievances, or other legal challenges against the Corporation, its officers, agents, representatives, or Members filed by a Member.
> ***
> d. The judicial panel shall conduct a full and fair hearing on complaints, charges, protests, suits, grievances, or other legal challenges against the Corporation, its officers, agents, representatives, or Members by a Member in good standing within sixty (60) calendar days and afford all parties to the proceeding an opportunity to be heard orally or in writing. Notice of the date, time and place of the hearing shall be provided to all parties in writing by mail sent to the last known address of all parties according to the corporate records, and such notice shall be sent not less than ten (10) calendar days prior to the commencement of the hearing.
> ***
> g. The decision of the judicial panel shall be final and binding, unless an appeal is filed with the Board of Directors within thirty (30) calendar days after the date of the panel's decision and order.

(Emphasis added) HSTA RULES OF PROCEDURE OF THE JUDICIAL PANEL (Panel Rules) states in relevant part:

> 6. Answer
>
> Upon receipt of the complaint respondent(s) shall file an answer with the president within ten (10) calendar days, unless any extension is granted by the judicial panel for good cause.
> ***
> 8. Pre-hearing conference
>
> The judicial panel may in its discretion direct complainant(s) and respondent(s) to appear before it for a pre-hearing conference.
>
> 9. Notice of hearing
>
> A notice of the date, time, and place of a hearing before the judicial panel shall be sent to all parties in writing by mail to the last known address of each party

not less than ten (10) calendar days prior to the commencement of the hearing. A hearing shall be held no later than sixty (60) calendar days from the date of the complaint, unless stipulated to by all parties or continued for good cause by the judicial panel upon motion duly served on all parties prior to the scheduled date of the hearing.
***
11. Motions

All motions to extend the time to file an answer to the complaint, to continue or postpone the date of the hearing, or for any other action by the judicial panel shall be filed with the judicial panel in writing and served on all parties. Any party opposing the motion shall file a response by no later than five (5) calendar days from the date of receipt of the motion with the judicial panel and shall serve a copy of the response to movant. The judicial panel may decide to hear oral argument or testimony on the motion, in which case it shall notify the parties of the date, time, and place for oral argument or testimony....
***
20. Final and binding decision and order

A decision and order of the judicial panel shall be final and binding, unless an appeal is filed with the board of directors of the HSTA within thirty (30) calendar days after the date of the panel's decision and order.

(Emphasis added)

The Board finds that under the criteria set forth by the U.S. Supreme Court (Court) in Clayton v. Int'l. Union, United Auto., Aerospace and Agric. Implement Workers of America, 451 U.S. 679 (1981) (Clayton),[11] cited by the HSTA in support of its position, exhaustion of the HSTA internal procedure would not be required based on the time frame for processing.

Clayton involved a factual situation with many similarities to the present case. The issue before the Court was whether, and in what circumstances, an employee who alleged both that his union breached its duty of fair representation in processing his grievance and that his employer breached the collective bargaining agreement had to exhaust internal union appeals established by the union constitution before maintaining a §301 suit under the Labor Management Relations Act, 29 U.S.C. §185(a). In reversing dismissal of the employee's suit against the union and affirming the reversal of the dismissal of the employee's suit against the employer, the Court ruled that the determination regarding whether to require exhaustion of internal union procedures[12] was discretionary for the court. In rendering such determination, however, the Court ruled that at least three factors should be relevant:

> ...first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and

> third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

Clayton, 451 U.S. at 689 (citing N.L.R.B. v. Marine Workers, 391 U.S. 418, 426 (1968) (Marine Workers)).

Applying these factors to the facts of this case, the most relevant issue is whether exhaustion of the HSTA's internal procedures would unreasonably delay the Complainant's opportunity to bring prohibited practice charges before this Board.

The Board has already determined in a prior decision that exhaustion of the same HSTA internal procedures is not required because of the lack of a timeline for the HSTA Board's consideration of the appeal and an issue regarding whether the Board's 90-day statute of limitations for filing of prohibited practice charges would be tolled during the HSTA's internal procedures. *See* Stucky, Order No. 2834, at p.15. A review of the HSTA internal procedures required to be exhausted by Bylaws Article XV, Section 3.b. set forth above further shows that this process may extend well beyond this 90-day prohibited practice statute of limitations. Bylaws Article XV, Section 3.b. requires a Member to file "complaints, charges, protests, suits, grievances, or other legal challenges against the Corporation, its officers, agents, representatives, or Members" with the President within 30 calendar days after its occurrence. Panel Rules Paragraph 6 requires the Respondent to file an answer with the President within ten (10) calendar days. Panel Rules Paragraph 8 allows the Judicial Panel to hold a pre-hearing conference. Panel Rules Paragraph 9 requires ten (10) calendar days notice of the hearing. Panel Rules Paragraph 11 further permits motions to be filed to extend the time to file an answer to the complaint, to continue or postpone the hearing date, and for any other action by the judicial panel. Panel Rules Paragraph 9 and Bylaws Article XV, Section 3.b. and 5.d. provide that the judicial panel has 60 calendar days to hear and determine the case unless stipulated to or continued for good cause upon motion. Bylaws Article XV, Section 5.g. and Panel Rules Paragraph 20 then permits an appeal to be filed from that judicial panel with the Board of Directors within 30 calendar days after the panel's decision and order without any time limitations on the processing or resolution of that appeal.

Finally, the Board finds that there is nothing in HRS Chapter 89 or the CBA requiring the Complainant to file an intra-Union appeal in order to acquire the right to bring her prohibited practice claim to the HLRB. *See* Poe v. Haw. Labor Rels. Bd., 97 Haw. 528, 538, 40 P.3d 930, 940 (2002). Moreover, because the intra-Union appeal is not within the scope of HRS Chapter 89 or contained in the CBA, the Board further finds that the allegations regarding the intra-Union appeal cannot form the basis for prohibited practice claims. Accordingly, the Complaint allegations regarding that appeal must also be dismissed.

Accordingly, in its discretion, the Board rejects Respondents' contention on this issue and adheres to its previous determination in Stucky that exhaustion of these HSTA internal procedures would not be reasonable[13] and is not required in this case.

4. The Complaint in This Case Does Sufficiently Allege A Hybrid Claim for Relief

Finally, the Respondents take the position that the Complaint should be dismissed for failure to state a hybrid claim for relief in accordance with HRS Chapter 89 and the CBA. In support of that position, Respondents assert that: 1) Complainant failed to allege and establish both a breach of the duty of fair representation by the union, and a breach of the CBA by the employer; 2) the duty of fair representation does not apply to matters affecting the internal affairs between a union member and a union; and 3) Complainant failed to cite any HRS Chapter 89 or CBA provision violated by the Employer in the Complaint Section 5 Allegations.

The Board recognizes that the Respondents are correct that to prevail on a hybrid claim, a complainant must allege and establish both the breach of the duty of the duty of fair representation by the union and a breach of the collective bargaining agreement by the employer. In Poe v. Haw. Labor Rels. Bd., 105 Hawaii 97, 102, 94 P.3d 652, 657 (2004) (Poe) (citing DelCostello v. Int'l. Bhd. of Teamsters, 462 U.S. 151, 164 (1983)), the Hawaii Supreme Court explained the nature of the relationship between the two separate claims involved in a hybrid action, the one against the employer alleging a breach of the collective bargaining agreement and the other against the union for breach of the duty of fair representation:

> The two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

See also: Bell v. Daimler Chrysler Corp., 547 F.3d 796, 804 (7th Cir. 2008). Accordingly, motions to dismiss under Rule 12(b) (6) have been granted in a hybrid action where the employee cannot raise a triable issue for one of these interdependent claims. *See, e.g.*, Fuentes v. Ralphs Grocery Store, 1993 U.S. Dist. LEXIS 20789, at * 28-29 (D.Cal. July 28, 1993).

Nevertheless, the Board further ascribes to the principle that a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would enable him to relief. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520-521 (1972); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000). Moreover, a court may dismiss a plaintiff's claims for failure to state a claim

when no additional proceedings would enable the plaintiff to prove facts entitling him or her to prevail. Burlison v. United States, 75 Fed. Cl. 736, 739 (2007). The Board further notes that HRCP Rule 8(f) states that, "All pleadings shall be so construed as to do substantial justice."

The Complaint in this case states verbatim, in pertinent part:

> 1. The complainant Shanye N. Valeho-Novikoff, a living, breathing human being, known as the complainant, was discharged without proper cause on December 31, 2009 by Patricia Hamamoto.
>
> ***
>
> 15. On January 21, 2011, I requested to exercise my right to Wilbert Holck to appeal the decision by the HSTA Board of Directors to rescind or not to go to arbitration for the HSTA Board did not have the benefit of very relevant information that was erroneously withheld regarding my case.
>
> 16. The Board was informed of retaliatory and discriminatory actions of the employer against me. The Board was informed of key witnesses who could testify on my behalf which includes a very conspiratorial and collusive conversation between DOE administrators in the presence of a witness.
>
> 16. I have not been afforded my due process rights and have been prejudiced in that I was not afforded her [sic] Step 2 meeting according to the language in the contract. I, the complainant, have not received fair representation in that HSTA and its representatives have first approved my case to Arbitration and then arbitrarily refused to process this meritorious grievance to Arbitration based on Uniserv Chang's whims and prejudices which was also based on Wilbert Holck's advisement.

(Emphases added) Further, section 6 requesting a clear and concise statement of other relevant facts, further states the factual basis for the Employer's alleged retaliatory and discriminatory actions against the Complainant as follows:

> Briefly, in 2001, while in an educational exchange trip to Tahiti, I blew the whistle and reported the Hana School principal's daughter involved in drinking alcohol and smoking marijuana in Tahiti. Upon return, and to cover it up, the principal was not following thru with chapter 19 procedures and I questioned it. This case, as some of you may recall, for I stood here in front of you then, went up to the BOE, State legislature/representatives, newspapers, and the Governor. Hamamoto was sickened by this and ended up having to remove the Hana principal and placing her on Moloka'i. I was going to pay for this, and I am, and I did. I have been a victim of continual violation of discrimination, retaliation, and adverse actions by certain DOE administrators. I have been terminated and I humbly need HSTA to properly represent me in this case.

(Emphasis added)

HRCP Rule 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Under Hawaii law, the rule is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests. Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 543 (1971); Au v. Au, 63 Haw. 210, 221, 626 P.2d 173, 181 (1981) (citing Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 543 (1971)); Kellberg v. Yuen, 2014 Haw. App. LEXIS 146, at *28 (March 28, 2014) (citing Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 543 (1971)); Kam Ctr. Specialty Corp. v. LWC IV Corp., 2007 Haw. LEXIS 283, at *59 (September 27, 2007) (citing Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 543 (1971)).

Viewing the Complaint in a light most favorable to her and deeming these albeit bare bones allegations to be true, the Board finds that allegation 1 and the first allegation numbered 16 allege that Complainant's discharge was without proper cause. Along with the supporting facts contained in Section 6, these portions of the Complaint do allege a violation of the CBA. Regarding the alleged breach of the duty of fair representation, as the Poe Court further stated, "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." 105 Hawaii at 104, 94 P.3d at 659. The Board concludes that the second allegation 16 stating, "I, the complainant, have not received fair representation" is sufficient to state a claim of a breach of fair representation. Based on the face of the Complaint, the Board is unable to find that the Respondents were not provided with fair notice of the breach of CBA claim against the Employer and the breach of fair representation allegations against the Union; and that additional proceedings would not enable the Complainant to prove facts entitling her to relief. Hence, the Board is unable to dismiss the Complaint for failure to state a hybrid claim.

Respondents further take the position that there is no duty of fair representation regarding matters affecting the internal affairs between a union member and a union. A review of the Respondents' cited cases and others compel the Board to find that this articulation of the rule is overly broad. Rather, the more precise, appropriate rule is that a matter involving only the relationship between the union and its members that does not also involve the employer, is viewed as an internal union matter that does not give rise to a duty of fair representation. (Emphasis added) Ass'n. of Contracting Plumbers, Inc. v. Local Union No. 2 United Ass'n. of Journeymen and Apprentices of Plumbing & Pipefitting Industry, 841 F.2d 461 (2nd Cir. 1988); Price v. Int'l. Union, United Auto., 795 F.2d 1128 (2nd Cir. 1986), *vacated on other grounds*, 108 S.Ct. 2890 (1988) (Price); Miller v. Hotel, Motel & Restaurant Emp. & Bartenders Union, Local 471, 1990 U.S. Dist. LEXIS 12286, at *37-39 (D.N.Y. September 17, 1990). While the Respondents cite several cases, most of which support the Board's more precise articulation of the rule, none of these cases appear to involve a reconsideration of a decision to take a grievance over a discharge to arbitration. *See, e.g.* Bass v. Int'l. Bhd. of Boilermakers, 630 F. 2d 1058 (5th Cir. 1980) (Plaintiff employees were awarded damages against the union participating in an apprenticeship program on the ground that they were improperly expelled.); Kolinske v. Lubbers, 712 F.2d 471 (D.C. Cir. 1983) (Nonunion member who paid agency fees was denied strike benefits and sued

the union based on U.S. constitutional violations and for breach of the duty of fair representation.); Price, 795 F.2d 1128 (2nd Cir. 1986) (Union members were seeking relief from paying full dues and fees under a collective bargaining agreement union security clause between the employer and the union.); Moore v. Local 569 of the Int'l. Bhd. of Elec. Workers, 989 F.2d 1534 (9th Cir. 1990) (Union member brought an action against his employer and the union local, international, and officials for alleged retaliation for his efforts to organize a vote to decrease dues.). Based on the Board's conclusion that this Complaint was sufficient to state a hybrid claim and the allegations are based in part on the refusal to proceed to arbitration, this matter does appear to involve the employer. Consequently, these cases are not dispositive of this issue in this case.

Indeed, courts have recognized that the duty of fair representation is applicable to the grievance process. Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-1090 (9th Cir. 1978); Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1482 (9th Cir. 1985) (Castelli). Accordingly, the standard of arbitrary, discriminatory, or bad faith applies to a claim against a union for refusal to proceed to arbitration.[14] While the Board rejects the Respondents' argument insofar as they maintain that the proceedings regarding the decision to proceed or not to proceed to arbitration is an internal matter not subject to the duty of fair representation, the Board does not at this point in the proceedings make a specific finding regarding whether there was a breach of the duty in this particular case.

Finally, the Board concludes that there is no merit to Respondents' assertion that the Complainant failed to state a claim for relief because she failed to cite any Chapter 89 provision violated because the Board notes that the Complaint on its face refers to HRS §89-13(b)(3), (4), and (5). Regarding their assertion that Complainant failed to cite to any violation of the CBA, the Board finds that given her *pro se* status, her allegation 1 that she was discharged without just cause suffices.

In summary, for the reasons set forth above, the Board dismisses all of the claims set forth in the Complaint, with the exception of any claims regarding Complainant's request for copies of documents from her file that occurred on or after December 9, 2010.

ORDER

Based on the foregoing, the Board hereby grants in part and denies in part Respondents' Motion to Dismiss Complaint filed on March 17, 2011.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing/settlement conference in this matter on **Monday, November 10, 2014** at **10:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu,

Hawaii. The purpose of this second prehearing/settlement conference is to arrive at a settlement or clarification of the only remaining issue of the claims regarding Complainant's request for copies of documents from her file occurring on or after December 9, 2010; to identify and exchange witness and exhibit lists, if any; to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues remaining; and address any other prehearing matters; establish deadlines; and schedule the hearing on the merits. The parties shall file any amendments to their previously filed Prehearing Statements which addresses the foregoing matters with the Board two days prior to the prehearing/settlement conference.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata, Board Secretary at (808) 586-8610, (808) 586-8847 (TTY) or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten (10) days prior to the prehearing/settlement conference.

DATED: Honolulu, Hawaii, October 6, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Shanye N. Valeho-Novikoff
Herbert R. Takahashi, Esq.

[1] Complainant's grievance case number was changed from #10-02 to #10-12.

[2] The Board notes that there are numerous, significant distinctions between Anaconda and the present case, which make Anaconda inapplicable to the jurisdictional issue in this case. Most significant is that the jurisdictional issue in Anaconda was whether the NLRB should retain jurisdiction based on an unfair labor practice allegation against the employer or defer to the arbitration process in accordance with a prior NLRB decision National Radio Company, Inc., 198 NLRB No. 1 (National Radio). The NLRB concluded that there were significant differences between National Radio and the case before them precluding the application of the National Radio rationale to Anaconda. Most important was that the Anaconda union and employee were not interested in pursuing arbitration, and there was sufficient divergence between their respective positions to preclude an assumption that there interests were in the "substantial harmony," relied on in National Radio. Accordingly, the NLRB found that deferral was not warranted. In this case, the jurisdictional issue raised is based on untimeliness of certain Complaint allegations, rather than deference to arbitration. Hence, Anaconda is inapplicable to the jurisdictional issue before us.

[3] CBA, Article V – GRIEVANCE PROCEDURE states in relevant part:

> F. **STEP 1.** a) If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved, then the teacher or the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific term or provision of the Agreement allegedly violated and the remedy sought.
>
> b) The grievance must be presented to the CAS or Assistant Superintendent in the case of State Office teachers, in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved.
>
> c) The CAS or Assistant Superintendent in the case of State Office teachers shall hold a meeting within five (5) days of receipt of the grievance, for the purpose of obtaining evidence pertaining to the grievance and for the purpose of attempting to settle the matter. Attendance in the Step 1 meeting shall be limited to all decision makers associated with the grievance (i.e. CAS/AS, PRO, principal/supervisor), the Association representative, and the grievant, unless otherwise mutually agreed upon. The decision will be in writing and delivered to the grieving party within five (5) days after the meeting.
>
> d) If the answer to the grievance in Step 1 meeting is not delivered within five (5) days or does not satisfactorily resolve the matter, then the Association may appeal such decision to arbitration. However, by mutual agreement between the association [sic] and the Superintendent or designee, the Association may appeal a grievance to Step 2.
>
> G. **STEP 2.** a) Any grievance involving...terminations...shall be filed with the Superintendent or designee in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved. The Superintendent or designee shall hold a meeting within five (5) days.
>
> b) If by mutual agreement by the parties a grievance is appealed from Step 1 of the grievance procedure, the Superintendent or designee shall hold a meeting within five (5) days of receipt of the Step 2 grievance.

c) The grievance must be set forth in writing on a form set forth in Appendix I and specifically state which portion of the answer to the grievance in Step 1 is being appealed and the remedy sought.

d) The parties shall not have the right to present different allegations than those presented at the Step 1 meeting.

e) The Superintendent or designee's answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the meeting.

H. ARBITRATION. If a claim made by the Association or teacher has not been satisfactorily resolved, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the decision.

***

I. The Employer acknowledges the right of the Association's grievance representative to represent any grievant at any level if so requested by the grievant.

J. The Employer and Association by mutual written agreement may waive Steps 1 and 2 of the Grievance Procedure and proceed with arbitration. In addition, the parties may voluntarily and mutually agree to mediation at any time prior to arbitration.

***

[4] The Board finds that all of the references contained in this paragraph to dates in January 2010 are typographical errors based on the context of the entire email for two reasons. First, the email containing these dates was sent on January 14, 2011. In addition, the Board takes judicial notice of the fact that there was no Friday, January 21, 2010, but that Friday, January 21, 2011 was a correct date.

HAR §12-42-8(g) (8) (F) states that "The board may take notice of judicially recognized facts." Hawaii Rules of Evidence Rule 201 states in relevant part:

> Rule 201. Judicial notice of adjudicative facts.
> ***
> (b) Kinds of facts. A judicial noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Emphasis added) A calendar has been found to fall within the "sources whose accuracy cannot reasonably be questioned." Walker v. Woodford, 454 F.Supp.2d 1007, 1022 (D.Cal. 2006); Capcom v. MKR Grp., Inc., 2008 U.S. Dist. LEXIS 83836, at *10 (D.Cal. October 10, 2008).

[5] The Board relies upon the Hawaii Rules of Civil Procedure (HRCP) in resolving ambiguities in its rules or procedures. Poe v. Hawaii Gov't. Emp. Ass'n., Local 152, 6 HLRB 361, 362 (2004) (The Board looked to HRCP Rule 6(b) providing for enlargement of time for guidance in interpreting HAR §12-42-8(g) (17)(D) providing for requests of extension of time to file a brief or proposed findings.). *See. e.g.* Hawaii Federal of College Teachers, Local 2003 v. Bd. of Regents, Univ. of Hawaii, 1 HPERB 428, 429-431 (1974) (The Board applied HRCP Rule 30(a) to deny an application to take depositions during the 3-day waiting period.); United Public Workers, AFSCME, Local 656 v. Cayetano, 6 HLRB 81, 84 (2000) (The Board applied the relevancy requirement under HRCP Rule 26(b) to the information requested by the union in that case.).

[6] The Board notes that there are two allegations in the Complaint, numbered 16. The Board refers to them as the first allegation numbered 16 and the second allegation numbered 16. The first allegation numbered 16 refers to the February 19, 2011 appeal, and the second allegation numbered 16 refers to Complainant's denial of due process rights, prejudice by not being afforded her Step 2 meeting, and her failure to receive fair representation by the HSTA.

[7] Since the demand for arbitration was made on February 2, 2010, Ms. Valeho-Novikoff obviously was aware on or by that date that she was not going to have the Step 2 hearing. Accordingly, the 90-day statute of limitations would have started running on this occurrence from that date at the latest. *See* Okimoto, 6 HLRB at 330 *infra* at note 9. Hence, her allegation that she was denied a Step 2 hearing is untimely because the occurrence transpired before December 9, 2010.

[8] In its Memorandum in Support of Motion, HSTA states:

> The complaint in this case refers to occurrences which extend well beyond the jurisdictional authority of the Hawaii labor Relations Board (Exh. 3-3 to 3-4). Since the complaint was filed on March 9, 2011 (Exh. 3-1), the claims which arose from occurrences which precede December 9. 2010 may not be considered under Section 377-9(l), HRS, and Hawaii Administrative Rule §12-42-42(a). This applies to the conduct of Christopher Chang made in allegations 5, 10, 11, and 12 (Exh. 3-3 and 3-4), and the November 23, 2010 recommendation of Al Nagasako to rescinded [sic] the discharge grievance from arbitration. (Exh.10) (Emphasis added)

To clarify, in addition to these specific allegations designated by Respondents as beyond the jurisdiction of the Board for untimeliness, the Board notes that allegations 2, 3, 9 and 13 also refer to Chang's conduct pre-dating December 9, 2010. The Board finds these allegations untimely and is compelled to dismiss them, as well. This concept of subject-matter jurisdiction because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in court. U.S. v. Cotton, 535 U.S. 625 (2002).

[9] The Board dismisses the portion of allegation 13 regarding the HSTA Board's December 4, 2010 decision based on subject-matter jurisdiction discussed above. *See supra*, note 8. As stated above, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Okimoto, 6 HLRB at 330. Complaint allegation 13 unequivocally states that "On December 08, 2010, I was first made aware that HSTA was intending to rescind my case #10-12 to arbitration." As another occurrence predating the December 9, 2010 cutoff date, the Board finds that this allegation is barred by the 90-day statute of limitations. (Emphasis added) Since time limits are jurisdictional, the Board is unable to waive the defect of missing the deadline by even one day. Fitzgerald, 3 HPERB at 199.

[10] The Board concludes that Complainant in this case did not have to exhaust the HSTA internal procedures and remedies in this case. Nevertheless, the Board notes that even if she was required, she did file internal complaints against Chang as documented by her November 9, 2010 email to Holck and her January 14, 2011 email to Okabe. While the Board determines that the occurrences set forth in the November 9, 2010 email are time-barred because the occurrences pre-date December 9, 2010, some of the occurrences set forth in the January 14, 2011 email regarding obtaining copies of her file occurred after December 9, 2010.

[11] In Poe, 105 Haw. at 101, 94 P.3d at 656, the Hawaii Supreme Court noted that this Court has used federal precedent to guide its interpretation of state public employment law. *See also*: Hokama v. Univ. of Hawaii, 92 Hawaii 268, 272 n. 5, 990 P.2d 1150, 1154 n .5 (1999).

[12] In so ruling, the Court noted the significant differences between the internal union procedures and the contractual procedures, which the Court has required the employee to exhaust. Specifically, the Court found that internal union procedures are wholly a creation of the union constitution and are not bargained for by the employer and union nor mentioned in the collective bargaining agreement that Clayton sought to have judicially enforced. Accordingly, the Court rejected the argument by the employer and union that exhaustion of these procedures will further national labor policy, should be required as a matter of federal common law by enabling unions to regulate their internal affairs without undue judicial interference, and also promote the broader goal of encouraging private resolution of disputes arising out of a collective bargaining agreement. The Court further reasoned:

> We do not agree that the policy of forestalling judicial interference with internal union affairs is applicable to these cases. This policy has been strictly limited to disputes arising over *internal* union matters such as those involving the interpretation and application of a union constitution. As we stated in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), the policy of deferring judicial consideration of internal union matters does not extend to issues "in the public domain and beyond the internal affairs of the union." *Id.* at 426, n. 8. Here, Clayton's dispute against his union is based upon an alleged breach of the union's duty of fair representation. This allegation raises issues rooted in statutory policies extending far beyond internal union interests.

Clayton, 451 U.S. 679, 687-688 (Some citations and footnotes omitted)

[13] The Board finds further support for its ruling based on the Court's decision in Marine Workers, 391 U.S. at 428. In that case, a union member brought proceedings against the union before the NLRB alleging unlawful expulsion by the union for filing an earlier charge against the union for violation of National Labor Relations Act §8(b)(1)(A) with the NLRB without exhausting union remedies and appeals in accordance with the union constitution. The Court held, among other things, that "unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did not consume more than four months of time; but that a court or agency might consider whether a particular procedure was 'reasonable' and entertain the complaint even though those procedures had not been 'exhausted.'" (Emphasis added) A review of the HSTA internal procedure required to be exhausted by Article XV, Section 3.b. may also extend well beyond the four month period, which the Court determined reasonable in Marine Workers.

[14] In applying these standards, the Board notes that an employee has no absolute right to have a grievance taken to arbitration. A union may not arbitrarily ignore a meritorious grievance nor process it perfunctorily. To prevail on this showing, however, the duty of fair representation must be narrowly construed because unions must retain discretion to act in what they perceive to be in their members' best interests. Castelli, 752 F.2d at 1482; Scott v. Machinists Auto. Trades Dist. Lodge No. 190, 827 F.2d 589, 593 (9th Cir. 1987). Accordingly, mere negligence does not suffice. Rather, there must be substantial evidence of fraud, deceitful action, or dishonest conduct. In some cases, however, "an act of omission by a union may be so egregious and unfair as to be arbitrary, thus constituting a breach of the duty of fair representation." Galindo v. Stoody Co., 793 F.2d 1502, 1513-1514 (9th Cir. 1986) (Galindo) (citing Castelli, 752 F.2d at 1482)). "In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational basis for the union's conduct." Galindo, *id.* at 1514 (citing Peterson v. Kennedy, 771 F.2d 1244, 1254) (9th Cir. 1985)).