STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MYLES Y. EMURA, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-03-328 ORDER NO. 3028 ORDER GRANTING RESPONDENT HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

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I. FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2014, Complainant Myles Y. Emura (Complainant or Emura) filed a prohibited practice complaint (Complaint) against Respondent Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (Respondent or HGEA). The gravamen of the Complaint was that the HGEA's decision not to pursue Complainant's grievance to arbitration was unfair and was not investigated properly, and that the HGEA failed to conduct a thorough, fair, and complete investigation in the matter.

On June 24, 2014, the HGEA filed a Motion for Particularization of Complaint, asserting that while the Complaint alleged violations of Hawaii Revised Statutes (HRS) § 89-13(a)(7), (a)(8), (b)(4), and (b)(5), Complainant failed to articulate what provision(s) of the bargaining unit (BU) 3 collective bargaining agreement (CBA) was violated and how Respondent violated such provision(s); and, that Complainant failed to articulate what provision(s) of HRS chapter 89 was violated and how Respondent violated such provision(s).

On July 1, 2014, Complainant filed his Response to Respondent HGEA's Motion for

Particularization of Complaint, in which Complainant articulated the articles of the BU 3 CBA allegedly violated by actions of Respondent, namely, Articles 1 (Recognition), 3 (Maintenance of Rights and benefits), 8 (Discipline), and 11 (Grievance Procedure). Complainant asserted that Union Agent Dale Shimomura (Shimomura) told Complainant that pursuit of his grievance to arbitration had been approved; that Shimomura told Complainant the Employer had failed to consider all the evidence; that Union Agent Kevin Mulligan (Mulligan) lead Complainant to believe his termination was improper; that the doctor's reports do not support termination; and that HGEA violated its duty to fairly represent Complainant. Complainant further alleged violation of HRS §§ 89-2 (Definitions), 89-8 (Recognition and representation; employee participation), and 89-13 (Prohibited practices; evidence of bad faith), and that HGEA's decision not to pursue Complainant's grievance to arbitration violated such sections.

On July 8, 2014, the Board issued Order No. 3004, Order Granting Respondent Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Motion for Particularization of Complaint Filed on June 24, 2014. The Board ordered Complainant "to file with the Board a particularized statement of his Complaint, identifying the specific actions which Respondent took [which] violated the specific subsection(s) of HRS 89-8 and 89-13. The Particularization shall include a complete statement of the facts supporting the Complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper."

On July 14, 2014, Complainant filed a Motion to Extend Complainant's Deadline to Respond to Board's Order Dated July 8, 2014 Granting the Respondent's Request for Particularization of Complaint Dated June 24, 2014, asserting that Respondent's representative agreed to extend the deadline to July 18, 2014.

On July 18, 2014, Complainant filed his Response to the Board's Order of July 8, 2014 Granting the Respondent's Motion for Particularization of Complaint Dated June 24, 2014. Complainant reasserted allegations from his Response to Respondent HGEA's Motion for Particularization of Complaint with specific dates provided, as well as articulating the dates and contents of certain doctors' reports to support his claim that had HGEA conducted a proper and fair investigation, it would have gotten this evidence. Complainant further alleged that, after being informed on January 17, 2014, that his file was being submitted to HGEA's attorney because the grievance was being pursued to arbitration, Complainant was told on January 27, 2014, that the attorney did not have his file and Complainant was referred to "Wilbert Holk" (Holck), HGEA's Deputy Executive Director. Complainant further alleged that he urged Mr. Mulligan to contact Complainant's doctors for information, and was told by Mr. Mulligan that Mr. Mulligan would also call Complainant's civil attorney to better understand what options he should exercise in Complainant's grievance. Complainant also alleged that in an email dated March 3, 2014, Mr. Mulligan told Complainant his doctor "indicates a permanent restriction, and

it is unclear why the litigation has not proceeded." Complainant further alleged that in another email dated March 13, 2014, Mr. Mulligan wrote, "While we do not necessarily agree with the actions of the county, these letters allowed the county to take the actions that it did[,]" referring to a letter from Dr. Brown that permanently restricted Complainant from employment with the county. Complainant alleged that Mr. Mulligan failed to follow through with Complainant's psychologist, and violated its duty of fair representation. By letter dated March 21, 2014, Mr. Holck informed Complainant that his grievance was not being pursued to arbitration because "[t]he County of Kauai terminated your employment in accordance with county's Return-to-Work Policy and Procedures. The policy and procedures specifically state that a[n] employee disabled with a work injury shall be terminated from County service if the county was unable to place the employee in another position. As previously mentioned, there was a permanent restriction on your employment with the County of Kauai in any capacity that was placed by both your treating Physician Dr. Murray and Robert Brown, Ph.D., Clinical Psychologist." Complainant asserted that he has evidence to the contrary from the very same doctors mentioned in Mr. Holck's letter.

On July 30, 2014, HGEA filed its Answer to Prohibited Practice Complaint Filed June 18, 2014 and Complainant's Response to the Board's Order of July 8, 2014 Granting the Respondent's Motion for Particularization of Complaint Dated June 24, 2014.

On September 17, 2014, HGEA filed its Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment. The HGEA asserts that Complainant failed to plead sufficient facts to show that Respondent committed a prohibited practice, that there was no violation of HRS 8§ 89-13(a)(8) or (b)(5), and that Respondent's conduct was not arbitrary, discriminatory, in bad faith, or in violation of HRS § 89-13(b)(4) or 89-13(b)(5). Specifically, the HGEA asserts the following, with references to declarations and exhibits attached to its motion:

> That Complainant was a Water Safety Officer employed by the County of Kauai (County or Employer) and a member of HGEA's BU 3. That on or about May 29, 2012, Complainant suffered a compensable workers' compensation injury. That on July 2, 2013, Complainant's psychologist Robert Brown, Ph.D. (Brown) informed Senior Insurance Adjuster Ele Wood (Wood) that, in his opinion, it was in the best interest of Complainant's psychological health that Complainant "not return to work for the County of Kauai and that this is a permanent work restriction." Dr. Brown further stated that "[n]ow that we know for sure that [Complainant] will not return to the County, I believe it is in his best interest to attend Vocational Rehabilitation."
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> On July 5, 2013, Complainant's treating physician, J. Michael Murray (Murray)

imposed a "permanent" work restriction that stated "No working for the County of Kauai." Dr. Murray also issued a Medical Excuse Form which included a statement under "Permanent Restrictions" that Complainant "not work for the County of Kauai" effective July 1, 2013.

On July 22, 2013, the County informed Complainant about the doctors' notifications of Complainant's permanent restriction; enclosed a copy of the County's Return to Work Program Policy and Procedures 2012 Edition; and notified Complainant that he may be entitled to Vocational Rehabilitation benefits under HRS chapter 386.

After Complainant and Mr. Shimomura met with the County's Human Resources Manager on August 5, 2013, Complainant elected not to resign or retire, and the County decided to proceed with termination. On September 5, 2013, the County notified Complainant that he would be terminated effective the close of business September 30, 2013.

On September 4, 2013, Mr. Shimomura sought further information from Dr. Brown regarding whether Complainant was permanently restricted from County employment. Mr. Shimomura received the following reply from Dr. Brown:

> At this point if [Complainant] is offered a job possibility with the County as part of the settlement and if [Complainant] wants to consider the offer he would have to be reevaluated at that point in time by a psychologist, a psychiatrist or his primary care physician, to see if the permanent restriction can be lifted. I have thought that at some point if and when a settlement is being considered that part of the proposed settlement could be for [Complainant] to work in a different County department which would require that he be reevaluated to be sure he was not a danger to self or others.

On September 9, 2013, Mr. Shimomura again asked Dr. Brown whether Complainant was permanently restricted from County employment and whether Complainant may be evaluated/rated by another psychologist, and asked the doctor to check "yes" or "no." Mr. Shimomura received the following reply:

> The "permanently restricted" applies only until a psychologist or psychiatrist determines otherwise. This could occur prior to or after litigation is completed. I had thought a work comp settlement

> could include being transferred to another department provided that a psychologist or psychiatrist lifted the permanent restriction. Any settlement offer is a change of circumstances in which the restriction possibly could be lifted.

Mr. Shimomura attended a pre-termination hearing with Complainant on September 20, 2013, asserting that termination was not warranted and that Dr. Brown's report should not be taken out of context.

On September 25, 2013, the HGEA again attempted to get Dr. Brown to check either "yes" or "no" to its previous question. On September 26, 2013, the HGEA received the following response:

> In response to your letter of September 25, 2013, requesting clarification as to the restriction on [Complainant] returning to work for the County, let me be clear. It is my position that only a licensed psychologist or a licensed psychiatrist can lift the permanent restriction. [Complainant] cannot choose to have the restriction lifted at anytime. [Complainant] can only request from a licensed psychologist or licensed psychiatrist an evaluation. At that point and time, the licensed psychologist or psychiatrist would evaluate [Complainant] to see if he was a possible danger to others, meaning any worker employed by the County of Kauai.

On September 26, 2013, Complainant was informed that he would be terminated effective the close of business on September 30, 2013. The County had reviewed the documents submitted by Dr. Murray and Dr. Brown, which stated that Complainant's restriction of not working for the County was a permanent one.

On October 2, 2013, the HGEA filed a Step 1 grievance on Complainant's behalf regarding the termination, citing violations of CBA Article 2 – Conflict; Article 3 – Maintenance of Rights and Benefits; Article 8 – Discipline; Article 14 – Workers' Compensation Leave Benefits; Article 17 – Personal Rights & Representation; and Article 19 – Safety & Health.

On October 17, 2013, the HGEA filed a Step 3 grievance.

On December 19, 2013, the HGEA informed the Employer that because the HGEA had not received a response from the Employer regarding the grievance, the HGEA was notifying the Employer of its intent to proceed to arbitration.

Shortly thereafter, the Employer responded to the HGEA, but the parties were unable to resolve the grievance.

On January 17, 2014, Mr. Shimomura told Complainant that his case was approved for arbitration and his file was being sent to HGEA's attorney. On January 27, 2014, HGEA's attorney responded to an email from Complainant, stating she did not have his file, that his file was being reviewed by the HGEA, and that Complainant should call Mr. Holck with any questions about his case. Upon calling Mr. Holck on January 27, 2014, Complainant was told that his grievance was not approved to proceed to arbitration.

Pursuant to Article 11.H. of the CBA, if a grievance is not satisfactorily resolved at Step 3, the Union must serve written notice on the Employer of its desire to proceed to arbitration within ten (10) working days after receipt of the reply at Step 3. In this case, Mr. Shimomura transmitted a notice of intent to arbitrate to preserve the Union's right to pursue the grievance to arbitration. Mr. Shimomura recommended that the grievance proceed to arbitration, relying on the same arguments made to the County at the pre-termination hearing and grievance meetings. Mr. Shimomura was initially informed by Mr. Holck that his recommendation to proceed to arbitration was approved. However, the initial approval occurred before the grievance file was provided to the HGEA's Oahu office for internal review.

On January 28, 2014, Complainant sent an email to Mr. Holck, requesting that another HGEA agent be assigned to his case. On January 29, 2014, Mr. Holck replied via email that Complainant would be receiving a call from Mr. Mulligan, who was in the process of reviewing Complainant's case.

In evaluating the case, Mr. Mulligan researched the County's Return to Work Policy, HRS chapter 386, arbitration decisions, and conducted a comprehensive review of the grievance file.

On February 25, 2014, Complainant sent an email to Mr. Mulligan, asserting that the "permanent" restriction was only "until" a psychologist or psychiatrist determined otherwise, and thus the County's termination of his employment was a premature, wrongful, and unjust act. On March 3, 2014, Complainant sent another email to Mr. Mulligan, asserting that the County should have addressed "the litigation" prior to terminating him, and that despite Dr. Brown's use of the word "permanent," Dr. Brown's report suggests the restriction is "temporary."

On March 3, 2014, Mr. Mulligan responded to Complainant's March 3, 2014, email, noting that the doctor's letter indicates a "permanent" restriction. On March 13, 2014, Mr. Mulligan responded to Complainant's February 25, 2014, email, informing Complaint that while the HGEA does not necessarily agree with the actions of the County, the letters from Dr. Brown and Dr. Murray allowed the County to take the action that it did, and further explained that even if Dr. Brown's progress notes contain provisions for the removal of the "permanent" restriction, those conditions were hypotheticals at that point.

On March 13, 2014, Complainant requested a hard copy letter stating that arbitration was not an option for his grievance and an explanation as to why not. On March 21, 2013, Mr. Holck sent Complainant a letter via certified mail, stating that after a thorough review of his case, the HGEA determined there was no contractual violation that would enable HGEA to pursue to grievance to arbitration. The letter stated that the determination was based on an analysis of the evidence on file, including the July 2, 2013, statement of Dr. Brown that Complainant "not return to work for the County of Kauai" and that it was "a permanent work restriction"; Dr. Brown's letter to the insurance carrier dated July 3, 2013, stating the work restrictions preventing Complainant from being employed by the County of Kauai were "permanent" and specifically stating "No working for the County of Kauai"; Dr. Brown's letter dated September 26, 2013, stating that only a licensed psychologist or licensed psychiatrist, not Complainant, can lift the permanent restriction; and the County's Return to Work Policies and Procedures, which state that an employee disabled with a work injury shall be terminated from County service if the County was unable to place the employee in another position.

On or about May 6, 2014, Complainant's representative obtained a letter from Dr. Murray, which stated in part, "[Complainant's] status with respect to working for the County of Kauai is neither a permanent restriction nor a temporary one, but rather indeterminate at this time." On or about May 22, 2014, Complainant's representative obtained a letter from Dr. Brown that stated he was "in complete agreement" with Dr. Murray's letter.

On October 1, 2014, Complainant filed his Response to Respondent Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment. Complainant asserts that he provided the HGEA with letters from Dr. Brown and Dr. Murray that show the HGEA's reasons for not pursuing his case to arbitration were no longer valid, and that the County of Kauai did take the doctor's letter out of context, as Mr. Shimomura had argued to the County. Complainant further

asserts that Dr. Brown's reference to the possibility of a "settlement" with the County indicated that Complainant's status could not have been considered "permanent." Complainant also asserts that the HGEA, as the Complainant's representative, has the obligation and responsibility to pursue the matter for clarification; and, that the "hypothetical" situations referred to by Mr. Mulligan could be resolved through a proper and fair investigation. Additionally, Complainant asserts that Mr. Mulligan failed to contact Complainant's doctors as he said he would, and thus Mr. Mulligan did not obtain the doctors' letters that would indicate Complainant's restriction was not permanent. With respect to the County's Return to Work Policy and Procedures, Complainant asserts that the HGEA could/must negotiate with the County and explore whether some type of negotiated settlement might be possible, and once Complainant's employment status is definitively determined, then and only then can the County implement its Return to Work Policy and Procedures. Complainant refers to Mr. Shimomura's recommendation that his case be taken to arbitration as evidence that the HGEA's later refusal to proceed to arbitration was arbitrary, discriminatory, and in bad faith as shown by Mr. Mulligan's disregard for Mr. Shimomura's reasoning.

Complaint further offered the following explanations for the alleged violations of the Unit 3 CBA:

> Article 1 – Recognition: Recognizes the HGEA as the exclusive bargaining agent of the Complainant. As the exclusive representative, the Complainant believes and interprets this to mean that the Respondent has the duty to fairly represent the Complainant in matters such as grievances and labor disputes.
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> Article 3 – Maintenance of Rights and Benefits: Provides that the Complainant shall retain all rights and benefits pertaining to their [sic] conditions of employment as contained in the Departmental and Civil Service rules and regulations and Hawaii Revised Statutes at the time of execution of this Agreement. The Complainant believes and interprets this to mean that the rules, regulations and procedures used by his Employer to terminate his employment as well as those used by the Respondent fall within the parameters of this Article. Therefore where the Employer's action terminating the Complainant is improper, the same is said for the Respondent's decision not to pursue the Complainant's grievance to arbitration.
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> Article 8 – Discipline: Maintains that the termination be "proper." It further provides that the Complainant be allowed to respond prior to the effective date of the Complainant's termination (pre-termination hearing). The Complainant and his Union Agent attended and participated in the pre-termination hearing at which time, and according to the Complainant, both he and Mr. Shimomura told

Employer that the report from Dr. Brown, the same report on which the Employer would rely on to terminate the Complainant, was taken out of context.

Article 11 – Grievance Procedure: Allows the Respondent to pursue the grievance to Step 4 (arbitration) if the grievance is not satisfactorily resolved at Step 3. As such, by letter dated December 19, 2014, Mr. Shimomura informed the Employer of the Union's intent to pursue the Complainant's grievance to arbitration.

Complainant makes the following assertions to support him claim that the Respondent breached its duty of representation and committed a prohibited practice:

1. In a voice mail to the Complainant dated January 13, 2014, Mr. Shimomura, told Complainant that the recommendation to proceed to arbitration had been approved.

2. Mr. Shimomura, throughout the grievance process, including the pre-termination hearing, maintained that the Employer's basis for the subject termination was "taken out of context" and the Employer failed to consider all the available evidence. This is contained in Mr. Shimomura's letter to the Employer dated November 13, 2013.

3. Mr. Shimomura argues that the doctor's reports do not support the Employer's termination of Complainant. Mr. Shimomura is in possession of various doctors' reports, including a report dated September 3, 2013, from Dr. Brown indicating the only way the "permanent restriction" would be removed would be for the issues to be resolved. Mr. Shimomura believes this to mean that the "permanent restriction" only applies until the issues are resolved. This is what Mr. Shimomura meant when he told the Employer, at the pre-termination hearing, that Dr. Brown's report was taken out of context.

4. Complainant has evidence from his doctors that contradict the basis used to terminate the Complainant. Both Dr. Brown and Dr. Murray stated that Complainant's status with respect to working for the County of Kauai is neither a permanent restriction nor a temporary on, but rather indeterminate at this time. This is contained in a letter from Dr. Murray dated May 6, 2013, and one from Dr. Brown dated May 22, 2014. Given the dates of these letters, it is understood that the Respondent was not in possession of said letters; however, Complainant believes and expects that the Respondents should have, through proper and fair investigation, gotten the same evidence.

5. Complainant further contends that Mr. Shimomura informed him on January 17, 2014 that, his file was being submitted to Respondent's attorney because the Complainant's grievance was being pursued to arbitration. However, by email dated January 27, 2014, Complainant was informed that the attorney did not have his file, and referred Complainant to Mr. Holck.

6. Upon calling Mr. Holck on or about January 27, 2014, Mr. Holck informed Complainant that his grievance has not been approved to proceed to arbitration. At this point, Complainant believes that he has been lied to and believes that he is not being represented properly.

7. In an email to Mr. Holck dated January 28, 2014, Complainant asked Mr. Holck to assign him another Union Agent. At that point, Mr. Mulligan was assigned to the represent Complainant. Mr. Mulligan informed Complainant that he would negotiate with the Employer on his behalf. At this point, Complainant worked with Mr. Mulligan to achieve this goal. For example, in an email to Mr. Mulligan, the Complainant informed Mr. Mulligan to call his psychologist, Dr. Brown. In a responding email dated February 11, 2014, Mr. Mulligan told Complainant that he would call the psychologist. Mr. Mulligan then sent another email also dated February 11, 2014, informing the Complainant that he needed authorization from him to speak with the psychologist. In a responding email to Mr. Mulligan dated February 11, 2014, Complainant asked Mr. Mulligan to send him the consent forms. Mr. Mulligan replied on February 11, 2014, "Myles: OK will do." Complainant contends that Mr. Mulligan failed to contact Dr. Brown as he said he would. Furthermore, in an email to the Complainant dated January 30, 2014, Mr. Mulligan informed Complainant that he would call his civil attorney to better understand what specific actions he is taking so he is better informed about what options he should exercise in Complainant's case. In another email to Complainant dated February 19, 2014, Mr. Mulligan asked Complainant for a copy of the court order relative to the case being handled by Complainant's civil attorney. In the same email, Mr. Mulligan tells Complainant that the copy of the court order is an important piece of information. At this point, the Complainant believed that Mr. Mulligan had an accurate understanding of his grievance. However, in an email dated March 3, 2014, Mr. Mulligan told Complainant, "However, the letter from your doctor indicates a permanent restriction, and it is unclear why the litigation has not proceeded. There is a definite problem there. There is nothing in the order that would preclude the lawsuit from moving forward." It is important to note the change Mr. Mulligan's tone, for he fails to discuss any options or the important piece of information that he mentioned

above; rather, he referred to the letter from Complainant's doctor regarding the permanent restriction. It appeared that Mr. Mulligan agreed with the Complainant's Employer. This is wrong because, as cited above, the Complainant has letters, including a letter from the same doctor that Mr. Mulligan referred to, which state that it is not a permanent restriction. To further illustrate this point, in another email to Complainant dated March 13, 2014, Mr. Mulligan wrote, "While we do not necessarily agree with the actions of the county, these letters allowed the county to take the action that it did." Mr. Mulligan again referred to the letter from Dr. Brown that permanently restricts the Complainant from employment with the County, being the sole basis for the County's action terminating the Complainant, yet Mr. Mulligan failed to follow through with calling Complainant's psychologist, as he told Complainant he would. As such, not only did Mr. Mulligan dispense with discussing the options of the Complainant's case and how important a piece of information the court order was, he also failed to obtain the same clarification that Complainant obtained from his doctors because he failed to follow through with what he told Complainant he would do.

8. While the Union has the right to determine whether a grievance is pursued to arbitration, the facts of this case show Mr. Shimomura clearly recommended that Complainant's grievance be pursued to arbitration.

9. The facts also show that while Mr. Mulligan does not agree with the termination, he maintained that the County of Kauai had the doctor's note indicating permanent restriction. The facts will also show that he chose not to contact Complainant's doctor. Complainant disagrees with the Respondent that this does not amount to a failure to fairly represent Complainant or investigate the merits of the case.

II. STANDARDS OF REVIEW

A. Motions to Dismiss

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).

B. Motions for Summary Judgment

Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any ("relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawaii 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawaii 118, 905 P.2d 624.

The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

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).

III. DISCUSSION AND CONCLUSIONS

As the exclusive bargaining representative of the employees, a union has a duty to fairly represent those employees, both in collective bargaining and in its enforcement of the resulting collective bargaining agreement (Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 909-910 (1967). However, mere negligence, even in the enforcement of a collective bargaining agreement, would not state a claim for breach of the duty of fair representation. United Steelworkers of America v. Rawson, 495 U.S. 362, 372-73, 110 S. Ct. 1904, 1911 (1990).

A union breaches its duty of fair representation when its actions are arbitrary, discriminatory, or in bad faith. Air Line Pilots Ass'n., Int'l. v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 1129 (1991); Vaca v. Sipes, 386 U.S. 171, 190, 87 S. Ct. 903 (1967). In order to defeat a motion for summary judgment, a plaintiff must proffer evidence supporting at least one of those three elements. Filippo v. Nothern Indiana Public Service Corp., Inc., 141 F.3d 744, 748 (7th Cir. 1998).

A. The "Arbitrary" Standard

With respect to the "arbitrary" standard, a union's actions are arbitrary "only if . . . the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Filippo, 141 F.3d at 749; Air Line Pilots Ass'n., Int'l., 499 U.S. at 67, 111 S. Ct. at 1129-30 (*citing* Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S. Ct. 681, 686 (1953)).

In conducting grievance investigations, a union is required only to undertake some "minimal investigation" of employee grievances (Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995); Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985)), but must not process a grievance in an "arbitrary or perfunctory" manner (Tenorio v. N.L.R.B., 680 F.2d 598, 601 (9th Cir. 1982). The thoroughness of the investigation depends on the particular case (Garcia, 58 F.3d at 1176), and only an "egregious disregard" for union members' rights will constitute a breach of the union's duty (Castelli, 752 F.2d at 1483, *citing* Tenorio, 680 F.2d at 601; Emmanuel v. International Brotherhood of Teamsters, 426 F.3d 416 (1st Cir. 2005)).

For example, in Castelli, the Ninth Circuit Court of Appeals held that, even accepting the plaintiff's version of events, there was no breach of the duty of fair representation where the union representative spent no more than one and a half hours in investigation and preparation for the arbitration, and did not call key witnesses.

On the other hand, in Tenorio, the Ninth Circuit found that the union's handling of the plaintiffs' grievance was arbitrary and perfunctory where the union departed from its policy of interviewing all discharged employees, where the union made no effort to learn the plaintiff's version of events, and where there was a possible conflict of interest present.

In Emmanuel, the First Circuit Court of Appeals held there was no breach of the duty of fair representation where the union representative was willing to speak with potential witnesses but told the plaintiff to have the witnesses seek him out, where the union actively investigated the plaintiff's claim by speaking to several mechanics about the incident whose statements discouraged the representative from pursuing a "defect" theory, and where the representative ultimately did not discover evidence to support a mechanical defect theory. The Court held that the union actively investigated the plaintiff's claim and satisfied its duty.

In Truhlar v. U.S. Postal Service, 600 F.3d 888 (7th Cir. 2010), the Seventh Circuit Court of Appeals considered a union's decision to withdraw a member's grievance while the member's separate appeal from adverse Department of Labor (DOL) decision was still pending, where the member did not tell the union representative that he had appealed DOL's decision, and the representative, before withdrawing grievance, met with the local postmaster, reviewed the employer's investigative memorandum and the DOL's unfavorable decision, and considered the

U.S. Attorney's rationale for declining to bring criminal charges against the member. The Court concluded that, even though some minimal additional investigation would have revealed that the member appealed the adverse DOL decision, it was not irrational for the representative to rely on the information conveyed by the postmaster; and further, that even if the representative's failure to verify the information could be considered negligent, more is needed to establish a breach of the union's fiduciary duty (*citing* Rawson, 495 U.S. at 372-73). To demonstrate that a union acted arbitrarily, so as to breach its duty to represent a member fairly during the grievance process, the member must show that in light of the factual and legal landscape at the time the union acted, its decision to abandon member's grievances was so far outside a wide range of reasonableness, as to be irrational (*citing* Air Line Pilots Ass'n., Int'l., 499 U.S. at 67, 111 S. Ct. at 1129-30).

In the present case, taking the evidence in the light most favorable to Complainant, the Board holds that the HGEA conducted sufficient investigation prior to deciding not to proceed to arbitration, to satisfy its duty of fair representation. Mr. Shimomura accompanied Complainant to meet with the County's Human Resources Manager on August 5, 2013. Mr. Shimomura sought more information from Dr. Brown regarding Complainant's "permanent" restriction on September 4, 2013. Not satisfied with Dr. Brown's response, Mr. Shimomura again sought further information on September 9, 2013. Mr. Shimomura also attended the pre-termination meeting on September 20, 2013, where he argued that Complainant's termination was not warranted and that Dr. Brown's report should not be taken out of context. On October 2, 2013, the HGEA filed a grievance on Complainant's behalf, and pursued that grievance up to providing notice of its intent to proceed to arbitration. Thereafter, the HGEA was unable to resolve the grievance with the County, and elected not to proceed to arbitration after all. At Complainant's request (after he learned from Mr. Holck that the grievance would not proceed to arbitration), the HGEA assigned another agent, Mr. Mulligan, to Complainant's case on January 29, 2014. Mr. Mulligan researched the County's Return to Work Policy, HRS chapter 386, arbitration decisions, and reviewed the grievance file. On March 3, 2014, and March 13, 2014, Mr. Mulligan responded to Complainant's emails sent on March 3, 2014, and February 25, 2014, respectively, explaining that the doctor's letter upon which the termination was based indicated a "permanent" restriction that allowed the County to take the action that it did. Mr. Holck sent Complainant a hard copy letter explaining the HGEA's position and the bases for that determination, including an analysis of the grievance file; the doctor's letter to the insurance carrier stating the restriction was "permanent"; Dr. Brown's letter of September 26, 2014 (which was in response to Mr. Shimomura's inquiry) that only a licensed psychologist or psychiatrist, and not Complainant, could lift the "permanent" restriction; and the provisions of the County's Return to Work Policy that state an employee disabled with a work injury shall be terminated from County service if the County was unable to place the employee in another position. The Board finds that the HGEA conducted sufficient investigation, and advocated on Complainant's behalf to the County against termination, to satisfy its duty of fair representation.

It is undisputed that on or about May 6, 2014, Complainant's representative obtained a letter from Dr. Murray which stated in part, "[Complainant's] status with respect to working for the County of Kauai is neither a permanent restriction nor a temporary one, but rather indeterminate at this time"; and, on or about May 22, 2014, Complainant's representative obtained a letter from Dr. Brown that stated he was "in complete agreement" with Dr. Murray's letter. However, the doctors' letters written in May of 2014 do not establish that, in light of the *factual and legal landscape at the time the union acted*, the union's decision not to proceed with arbitration was so far outside a wide range of reasonableness, as to be irrational (Truhlar v. U.S. Postal Service, 600 F.3d 888 (7th Cir. 2010) *citing* Air Line Pilots Ass'n., Int'l., 499 U.S. at 67, 111 S. Ct. at 1129-30)).

As the Court in Truhlar reasoned, even if some minimal additional investigation would have revealed that the member appealed the adverse DOL decision (or in this case, that the doctors' diagnoses had been revised), it was not irrational for the representative to rely on the information previously conveyed by the postmaster (or in this case, the doctors); and further, that even if the representative's failure to verify the information could be considered negligent, more is needed to establish a breach of the union's fiduciary duty. Here, the Board cannot find that the HGEA's actions, or inaction, even rise to the level of negligence, yet alone the level of "irrational." Mr. Shimomura had twice requested clarification from Dr. Brown regarding Complainant's "permanent" restriction, and did not receive a clear response from the doctor. It appears Complainant is asserting that the HGEA was required to request clarification a minimum of three times in order to avoid breaching its duty of fair representation. The Board cannot agree. Looking at the totality of the HGEA's actions, the Board finds that the HGEA satisfied its duty of fair representation.

B. The "Bad Faith" Standard

Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted, or failed to act, due to an "improper motive." Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013), *citing* Neal v. Newspaper Holdings, Inc., 349 F.3d 363 (7th Cir. 2003). Fraud, deceitful action, or dishonest conduct can be evidence of bad faith (see, Humphrey v. Moore, 375 U.S. 335, 348, 84 S. Ct. 363 (1964)), but a plaintiff must go beyond conclusory allegations (Yeftich at 916). A plaintiff fails to show "bad faith" by failing to present subjective evidence of an improper motive; merely suggesting that an improper motive is the only "reasonable explanation" for the conduct is not sufficient to overcome a motion for summary judgment. Truhlar at 893.

In Truhlar, the Seventh Circuit held that it is not the Court's role "to decide with the benefit of hindsight whether [the union representative] made the right calls – we ask only

whether his decisions were made rationally and in good faith." Id.

In Jaubert v. Ohmstede, Ltd., 574 Fed. Appx. 498 (5th Cir. 2014), the union learned that unauthorized phone calls had been made, and that whoever placed those calls would be terminated. The plaintiffs admitted they placed certain phone calls on the date in question. Representatives from the union met with management to discuss the grievance, and requested a copy of the employer's policy regarding the phone calls. After reviewing the policy, the union decided not to take the grievance to arbitration. The Fifth Circuit Court of Appeals held that the undisputed facts did not rise to the level of arbitrary, discriminatory, or bad faith representation. As indicated in their letter denying the grievance, the union representatives were satisfied that the policy had been violated simply because contact with the client had occurred. The Court held that "this imperfection in representation does not amount to arbitrary, discriminatory, or bad faith conduct[,]" and that "the union's determination that unauthorized contact with a customer constitutes just cause for termination remains reasonable" where the union requested and independently reviewed the policy the employer claimed was violated." Whether the union was correct in its determination that the employees were fired for just cause was not dispositive, as the "union may come to an incorrect conclusion without breaching its duty."

Based upon the standard articulated above and the facts of the present case, the Board finds and concludes that Complainant has not asserted facts sufficient to support a claim of "bad faith" and, accordingly grants the HGEA's Motion with respect to this standard.

C. The "Discriminatory" Standard

When examining a union's act of judgment, a plaintiff seeking to prove discriminatory conduct on the part of the union must present "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Association of Street, Elec. Railway and Motor Coach Employee s of America v. Lockridge, 403 U.S. 274, 301, 91 S. Ct. 1909, 1925 (1971).

Based upon the applicable standard and the facts of the present case, the Board finds and concludes that Complainant has not asserted facts sufficient to support a claim of "discriminatory" conduct by the HGEA, and accordingly grants the HGEA's Motion with respect to this standard.

D. Complainant's Claims of Prohibited Practices

Complainant alleges prohibited practices pursuant to HRS § 89-13(a)(7) and (8), and (b)(4) and (5), and alleges the HGEA violated HRS §§ 89-2 and 89-8 by failing to conduct an adequate investigation and fairly represent him.

As a preliminary matter, the Board holds that an alleged violation of HRS § 89-2 (which provides "Definitions" for purposes of chapter 89) cannot form the basis of a prohibited practice charge. In Poe v. Hawaii Labor Relations Board, 97 Hawaii 528, 40 P.3d 930 (2002), the Hawaii Supreme Court considered a claim of prohibited practice based upon alleged violation of HRS § 89-1, entitled "Statement of findings and policy." The Court held that the broad policy statements within HRS § 89-1 "do not impose binding duties or obligations upon any parties but, rather, provide a useful guide for determining legislative intent and purpose" and therefore the plaintiff's prohibited practice claim that the employer violated § 89-1 was properly dismissed. 97 Hawaii at 540-41, 40 P.3d at 942-43. For similar reasons, the Board holds that HRS § 89-2 does not impose binding duties or obligations upon the parties, but provide useful definitions for purposes of interpreting the provisions of chapter 89, and therefore allegations of violation of § 89-2 cannot form the basis for a prohibited practice complaint.

With respect to alleged prohibited practice pursuant to HRS § 89-13(a)(7) and (8), those provisions make it a prohibited practice for a public employer or its designated representative willfully to refuse or fail to comply with any provision of chapter 89, or violate the terms of a collective bargaining agreement, respectively. The HGEA is not a public employer or its designated representative, and accordingly the Board dismisses these allegations against the HGEA. To the extent Complainant may have alleged § 89-13(a)(7) and (8) violations by a public employer to establish a "hybrid" claim against the HGEA, the Board has already concluded that Complainant is unable to establish a breach of the duty of fair representation by the HGEA, and accordingly, any "hybrid" claim must also fail.

With respect to alleged prohibited practice pursuant to HRS § 89-13(b)(5), that provision makes it a prohibited practice for a public employee or for an employee organization or its designated agent willfully to violate the terms of a collective bargaining agreement. Complainant alleges the HGEA violated the following Articles if the CBA: 1 – Recognition; 3 – Maintenance of Rights and Benefits; 8 – Discipline; and 11 – Grievance Procedure. The Board holds that Complainant cannot show that HGEA breached its duty of fair representation in the investigation and processing of his grievance, and therefore Complainant cannot establish that the HGEA violated the Articles of the CBA articulated by Complainant. The Board is persuaded by the arguments presented by the HGEA in pages 19-20 of its Memorandum in Support of Motion and accordingly grants summary judgment in favor of the HGEA with respect to Complainant's § 89-13(b)(5) charge.

Finally, with respect to Complainant's allegation of prohibited practice pursuant to HRS § 89-13(b)(4), that provisions makes it a prohibited practice for a public employee or for an employee organization or its designated agent willfully to refuse or fail to comply with any

provision of chapter 89. Complainant further alleged violation of HRS § 89-8, which governs recognition and representation, and employee participation, and provides in relevant part in paragraph (a):

> The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

However, as discussed above, the Board holds that Complainant cannot establish a breach of the duty of fair representation, and therefore the Board grants the HGEA's Motion with respect to this allegation.

IV. CONCLUSION

For the reasons discussed above, the Board hereby GRANTS the HGEA's Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment. This case is closed.

DATED: Honolulu, Hawaii, October 27, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

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ROCK B. LEY, Member

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