

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JANET WEISS,

Complainant,

and

WIL OKABE, President, Hawaii State
Teachers Association; LEROY SIMMS,
UniServe, West Hawaii, Hawaii State
Teachers Association; and HAWAII STATE
TEACHERS ASSOCIATION,

Respondents.

CASE NO. CU-05-321

ORDER NO. 3031

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, FILED APRIL 4, 2013; AND DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT, FILED APRIL 10, 2013; GRANTING RESPONDENTS' MOTION TO STRIKE COMPLAINANT'S MEMO: "OLD BUSINESS"- COMPLAINANT WISHES TO INFORM BOARD REGARDING THE RESULT OF RESPONDENTS' PROMISED ARBITRATION OFFERS [FROM APRIL 15TH 2013 HEARING], FILED AUGUST 28, 2013, FILED SEPTEMBER 3, 2013; AND GRANTING RESPONDENT'S MOTION TO STRIKE COMPLAINANT'S MEMORANDUM: REGARDING UNION'S BREACH OF DUTY - THERE'S NO FAIR REPRESENTATION - THERE'S NO REPRESENTATION AT ALL - DOE JUST TOOK MY PAY INCREMENT AWAY - TO WHOM CAN I TURN?, FILED OCTOBER 31, 2013, FILED NOVEMBER 6, 2013

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On March 22, 2013, Complainant JANET WEISS (Complainant or Weiss) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) alleging, *inter alia*, that the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union), HSTA President WIL OKABE (Okabe), and HSTA UniServe Director LEROY SIMMS (Simms) did not make a good faith effort to complete Complainant's grievance process for a July 25, 2012 violation (regarding the removal of computers from Weiss' classroom) in a timely manner, willfully violated the terms of the Unit 5 collective bargaining agreement (CBA), acted in an irresponsible manner, breached their duty of fair representation and acted in bad faith in violation of sections 89-8(a) and 89-13(b)(4), Hawaii Revised Statutes (HRS). Weiss also alleged that HSTA is not defending her before the Board in her retaliation complaint against the Hawaii Department of Education (DOE) in Case No. CE-05-817.

On March 25, 2013, the Board issued its Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference; and Notice of Hearing on the Prohibited Practice Complaint, setting a prehearing/ settlement Conference on April 15, 2013 at 11:00 a.m. and a hearing on the merits on April 29, 2013 at 1:00 p.m.

On April 4, 2013, Respondents filed their Motion to Dismiss Complaint and in the Alternative for Summary Judgment. On April 8, 2013, Respondents filed their Notice of Submission of Original Declaration of Leroy Simms.

On April 10, 2013, Complainant filed her Prehearing Statements; Complainant's Motion for Summary Judgment; Declaration by Complainant Janet Weiss.

On April 11, 2013, Respondents filed their Errata to Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment Filed April 4, 2013, and also filed Respondents' Pre-hearing Statement.

On April 15, 2013, the Board held a Prehearing/Settlement Conference (Conference) to clarify issues and set the hearing on the motions brought by the parties on April 29, 2013 at 1:00 p.m. At the Conference, Complainant identified the issues she wanted heard, as follows: 1) that her grievance was not processed in a timely fashion according to the collective bargaining agreement (CBA), and 2) HSTA's failure to file a grievance regarding her transfer by Employer to Kohala Middle School's Physical Education Department. Weiss also stated that she is not alleging that HSTA failed to represent her before the Board in her complaint filed against DOE (Case No. CE-05-817), because she did not expect HSTA to represent her in that matter. The Board notified the parties of the April 23, 2013 deadline for Complainant to file a memorandum in opposition to Respondents' Motion to Dismiss Complaint and in the Alternative Summary Judgment, and for Respondents to respond to Complainant's Motion for Summary Judgment.

On April 17, 2013, Complainant filed her "[Late] Exhibit List and Witness List."

On April 23, 2013, Complainant filed Complainant's Memorandum in Opposition to Respondent's [sic] Memo to Dismiss, and in the Alternative, for Summary Judgment Filed on 4/4/2013.

On April 23, 2013, Respondents filed Respondents' Memorandum in Opposition to Complainant's Motion for Summary Judgment; Supplemental Declaration of Leroy Simms; Affidavit of Rebecca L. Covert; Exhibits 18-24.

On April 29, 2013, the Board conducted a hearing on Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment and Complainant's Motion for Summary Judgment, with Complainant participating by telephone. Counsel for Respondents appeared before the Board. Respondents' counsel presented oral arguments to supplement the written submissions filed with the Board and contended, *inter alia*, that Complainant had failed to present material facts to support her summary judgment motion, that the Board should dismiss her Complaint as untimely, that the remedies Complainant sought are outside the scope of the Board's authority, that material facts were not in dispute that Respondents were still pursuing Complainant's grievance regarding her assignment to teach physical education (PE), and that Complainant had failed to establish a breach of duty of fair representation, discrimination or bad faith by Respondents in processing her grievance. In response, Complainant argued that HSTA did not timely pursue her grievance. She stated that her Step 1 grievance was in arbitration, and that HSTA had provided her with legal representation for her grievance regarding her reassignment to a PE teaching position. Respondents' counsel replied that the HSTA representative assigned to represent her regarding the PE position reassignment was HSTA's in-service director, who was not practicing law. At the conclusion of oral argument, the Board's Chair stated that the Board would take the matter under advisement and issue a decision and order.ⁱ

On May 21, 2013, Complainant filed a "Notice of Activities-Update on new HSTA Grievance #WH1208 – Janet Weiss's [sic] Loss of Technology Line, Demotion to PE Line for SY 2012-2014 and Also EEOC May 2nd filing: J. Weiss vs. DOE: FEPA no. WH-17578; EEOC No. 486-2013-00217" (hereinafter "Complainant's Notice of Activities") with four exhibits attached.

On May 24, 2013, Respondents filed their Motion to Strike Complainant's Notice of Activities (Respondents' Motion to Strike), pursuant to Hawaii Administrative Rules (HAR) §12-42-8 (g)(3) (C), contending that Complainant's Notice of Activities was filed after the close of hearing on the cross motions of the parties to dismiss and/or for summary judgment, and the Board had established specific time limits to the briefing on the pending cross motions at the April 15, 2013 pre-hearing conference.

On June 12, 2013, the Board issued Order No. 2920, Order Granting Respondents' Motion to Strike, finding that Complainant's Notice of Activities was filed on May 19, 2013 after the April 23, 2013 deadline imposed by the Board and after the April 29, 2013 Board hearing on the dispositive cross motions.

On August 28, 2013, Complainant filed a "Memo: Old Business – Complainant Wishes to Inform Board Regarding the Result of Respondents' Promised Arbitration Offer [from April 15th 2013 Hearing]" (hereinafter Old Business Memo).

On September 3, 2013, Respondents' filed a Motion to Strike Complainant's Old Business Memo, contending that Complainant's submission to the Board was filed after close of hearing on the cross motions of the parties to dismiss and/or for summary judgment, and that the Board had established specific limits to the briefing on the pending cross motions at the April 15, 2013 Board pre-hearing conference.

On October 31, 2013, Complainant filed a "Memorandum: Regarding Union's Breach of Duty – there's no Fair Representation – there's no representation at all – DOE just took my Pay Increment away – to whom can I turn?" dated October 29, 2013 (hereinafter "Breach of Duty Memorandum").

On November 6, 2013, Respondents filed a Motion to Strike Complainant's Breach of Duty Memorandum, contending that the Board established specific limits to the briefing on the pending cross motions at the April 15, 2013 pre-hearing conference, the Board took the matter under advisement at the April 29, 2013 Board hearing on the motions, and therefore the Board should strike Complainant's Breach of Duty Memorandum filed October 31, 2013.

On November 15, 2013, Complainant filed a "Response to Respondents' Motion to Strike 10/29/13 Submittal-. " Complainant argued, *inter alia*, that she pled "no contest" to Respondents' counsel's accusation that her October 29, 2013 Breach of Duty Memorandum is a post-hearing filing and stated that she had filed "another grievance" in August 2013.

Based on a review of the record and consideration of arguments presented, the Board makes the following findings of fact and conclusions of law and hereby grants Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, denies Complainant's Motion for Summary Judgment and grants Respondents' Motions to Strike filed on September 3, 2013 and November 6, 2013 respectively.

FINDINGS OF FACT

The Board makes the following Findings of Fact. 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.

1. For purposes of this Order, and for consideration of Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment filed with the Board on April 4, 2013, the Board accepts the factual allegations in the Complaint as true, and, as the party against whom the motion is made, the Board views the allegations in the light most favorable to Complainant.
2. Complainant was, at all times relevant, a teacher employed by the DOE at Kohala Middle School and a "public employee"ⁱⁱⁱ within the meaning of HRS § 89-2, included in bargaining unit (Unit) 05, as set forth in HRS § 89-6.ⁱⁱⁱ Complainant was an HSTA Chapter president in 1996-1997.

3. DOE was, at all times relevant, an “employer”^{iv}, within the meaning of HRS § 89-2, of employees of the DOE.
4. Respondent HSTA was, at all times relevant, the “exclusive representative”,^v for Unit 05 within the meaning of HRS § 89-2.
5. Respondent Okabe was, at all times relevant, president of HSTA.
6. Respondent Simms was, at all times relevant, a UniServe Director of HSTA assigned to the West Hawaii District, which includes Kohala Middle School.
7. HSTA and the DOE have been parties to at least 15 successive collective bargaining agreements. In the present case, the relevant grievance procedure is contained in the Unit 05 CBA with effective dates from July 1, 2009 through June 30, 2011.
8. Article V of the Unit 05 CBA covers grievances, arbitration and the processing of the grievance. Except for suspensions, terminations, or class grievances, a grievance is to be submitted at Step 1 to the Complex Area Superintendent (CAS) (or Assistant Superintendent for State Office teachers) within twenty (20) days after the occurrence of the alleged violation.
9. Article V.F. c of the Unit 05 CBA calls for a Step 1 meeting within five (5) days of receipt of the grievance, and once the Step 1 meeting is held, the CAS has five (5) days after the meeting to deliver a decision of the grievance.
10. Pursuant to Article V.F. d, if for any reason the CAS does not deliver a decision within five (5) days of the Step 1 meeting, or if the Step 1 decision is not favorable, HSTA may appeal such a decision to arbitration. HSTA must present a request for arbitration of the grievance within ten (10) days after receipt of the Step 1 decision, in accordance with Article V.H.
11. By mutual agreement between HSTA and DOE, pursuant to Article V.H., HSTA may appeal the grievance to Step 2, instead of appealing directly to arbitration. The Unit 05 CBA does not specify the time period within which HSTA must appeal to Step 2, when it is agreed by the parties to use a Step 2 appeal. Pursuant to Article V.G. b, Step 2 is filed with the DOE Superintendent, who must hold the Step 2 meeting within five (5) days of receipt of the Step 2 grievance.
12. Respondent Simms stated in his April 3, 2013 Declaration that prior to the start of the 2012-2013 school year, Kohala Middle School Principal, Patricia Champagne (Champagne) replaced the computer towers in Weiss’ classroom with a mobile unit of computers. Weiss was not consulted regarding this change in her classroom computers, and she objected to the change. As a result,

on August 20, 2012 Simms filed Grievance #WH-11-10 on behalf of Weiss. After filing the grievance, Simms spoke with CAS Arthur Souza (Souza), who intervened and had the computer towers returned to Weiss' classroom. It was soon determined, however, that the computer towers were not in good working order.

13. After filing the Step 1 grievance on Weiss' behalf, Simms began coordinating a Step 1 meeting date with the necessary participants: Champagne, Souza, Weiss, Employer's West Hawaii Personnel Regional Officer Don Merwin (Merwin), and Simms. Because of these individuals' particular schedules, except for Weiss' (who was available at any time), the first available meeting date was allegedly November 9, 2012. Prior to the Step 1 meeting, Simms spoke with Champagne, who indicated that the school did not have the budget to purchase computer upgrades and software requested by Weiss. Simms also discussed the computer issues with Weiss on multiple occasions. On November 7, 2012, Simms met with Weiss in her classroom, where she demonstrated to him that some of the computers were in working order, while others could be turned on but the typed entries would disappear when typing commenced.
14. On November 9, 2012, the Step 1 meeting was convened at Kohala Middle School. On Weiss' behalf, HSTA requested that the computers in Weiss' classroom be updated with appropriate software; that she be provided with the science component of the WIN 2000 computer based program; that she be included in the process of updating the school's technology plan; and that the DOE address the issue of discrimination against Weiss. At the meeting, according to Weiss, Souza threatened to dissolve her "Educational Technology line", and Weiss asked Simms to immediately file for a Step 2 grievance.^{vi}
15. In the Step 1 decision issued on November 29, 2012, Souza stated that there were no violations of contractual provisions of the CBA. Also, there were no requirements that the DOE provide the science component of the WIN 2000 program or include Weiss on the Technology Committee, and there was no testimony or documentation to show any discriminatory treatment of Weiss. Notwithstanding the decision, the parties agreed that an upgrade to the computer operating system in Weiss' classroom would be purchased, Weiss was invited to participate in the committee formed to update the school's technology program, and Weiss was to be given the opportunity to meet with Champagne and the Edison Learning consultant working with the school to discuss the appropriate curriculum for the Study Skills class.
16. Weiss was not satisfied with the DOE's response, as she wanted study skills information and programs to use to teach students science and social studies to be loaded on her computer.
17. Based upon the November 29, 2012 date of the Step 1 response from DOE, an appeal by HSTA to arbitrate Weiss' grievance would have been due December

13, 2012. No such appeal was filed. Instead, on December 1, 2012, Simms met with Souza, and they agreed that if an appeal was filed it would go to Step 2 instead of arbitration.

18. After the Step 1 meeting, Weiss left voice messages for Simms on December 8, 2012 and December 17, 2012. In neither message did she inquire whether the DOE had sent its Step 2 response and whether the HSTA was appealing.
19. On January 4, 2013, Weiss met with Simms and told him that four of the 16 computer terminals were not working correctly, eight of the lap tops were not working, the Windows 7 and updates had not been installed and the technician coordinator had not responded to address those concerns. Weiss and Simms discussed that a Step 2 seemed to be necessary as the measures the DOE said would occur in the Step 1 response had not been realized.
20. On February 5, 2013, Simms filed a Step 2 grievance after contacting Weiss, who explained to him that the computer situation had not improved, and Champagne had provided no information that complete correction of the computer problems would take place, and the steps outlined in the DOE Step 1 response were a priority.
21. On February 7, 2013, Kalei Rapoza (Rapoza), DOE Personnel Specialist for the Hawaii Regional Office, wrote to Simms that the DOE did not agree to hear the grievance at Step 2.
22. On March 4, 2013, Simms sent an e-mail message to Rapoza requesting that the DOE reconsider its Step 2 response position.
23. On March 22, 2013, Weiss filed a Prohibited Practice Complaint with the Board for an alleged July 25, 2012 violation. Weiss alleged that pursuant to HRS § 89-13(b)(5), HSTA violated the terms of the CBA by not making a good faith effort to complete her July 25, 2012 WH-11-10 grievance process in a timely manner, as "all the timelines to continue Weiss' grievance to Arbitration were missed." Weiss alleged that HSTA acted in an irresponsible manner, thereby breaching its duty of fair representation, and, by not pursuing the grievance as requested frequently by Weiss, HSTA acted in bad faith in violation of HRS § 89-8(a) and § 89-13(b)(4). Weiss also alleged a claim for relief against Okabe and Simms. She alleged that Okabe showed no concern to protect her contractual rights, and that Simms never told her the outcome of the Step 1 meeting nor did he file for Step 2 as Weiss allegedly requested after the November 9, 2012 Step 1 meeting. Weiss further alleged that HSTA was not defending her before the Board in her retaliation complaint against the DOE, in Case No. CE-05-817, for "trying to get away" with dissolving her 8 year technology line to make her teach PE. Weiss also alleged that a fellow teacher

was “stuck” teaching science and wanted to teach physical education, and Champagne had terminated the school’s original science teacher.

24. On April 2, 2013, Rapoza indicated in an e-mail message to Simms that the Step 2 grievance was still active, that the DOE’s February 7, 2013 rejection of hearing a Step 2 grievance was being reconsidered, and the timeline to submit the intent to arbitrate was “reset” and had not started running.
25. On April 3, 2013, Champagne informed Simms that the master schedule for the 2013-2014 school year at Kohala Middle School had been prepared, and due to budget constraints she was going to assign the study skills program (formerly taught by Weiss) to teachers in each designated classroom. Because Weiss was a highly qualified PE teacher, Weiss was assigned to a PE position at the school for the 2013-2014 school year.
26. On April 8, 2013, HSTA filed a grievance on Weiss’ behalf regarding the change in her teaching assignment (to teach PE) for the 2013-2014 school year.
27. On April 12, 2013, Simms received an e-mail message from Rapoza stating that DOE would not hear the Step 2 grievance (regarding the computer issue), and the denial stood.
28. On April 16, 2013, HSTA gave notice to DOE of its demand for arbitration of the July 2012 grievance.
29. Based upon the record, and viewing the factual allegations of the Complaint as true and construed in the light most favorable to Complainant, the Board finds that Weiss’ first allegation is that HSTA did not process her grievance in a timely manner between the time when the grievance was filed in August 2012 and the Step 1 meeting was held in November 2012, and did not timely take the grievance to the Step 2 level. The Board finds that Weiss knew about the timing of when the grievance was moved to a Step 1 meeting by November 9, 2012, as she attended the Step 1 meeting on that date. She did not file her Complaint until March 22, 2013, however, well beyond the statutory 90 day filing period. Therefore, the Complaint fails regarding a delay in moving Weiss’ grievance to the Step 1 meeting. The Board also finds that although Weiss alleges that she wanted the Step 2 filed immediately after the November 9, 2012 meeting, the record is devoid of any documentation regarding her discussion with Simms to support a finding that her request (to Simms) to proceed to Step 2 was made and ignored by HSTA within 90 days (beginning December 22, 2012) prior to the filing of her complaint with the Board on March 22, 2013. In any event, the CBA does not specify a time period in which a grievance must be moved to Step 2, when the parties agree to use a Step 2 appeal.
30. The Board finds that based on the timing of the November 9, 2012 grievance meeting, Weiss also knew or should have known that the deadline for HSTA to

appeal to arbitration was December 5, 2012, and nevertheless Weiss did not file the Complaint until March 22, 2013, more than 90 days after the arbitration appeal deadline.

31. The Board also finds that Weiss does not have a claim for relief against Respondents Okabe and Simms, who are employees of HSTA. A breach of duty of fair representation may only be brought against a union as an entity and not against individual employees of a union.
32. Weiss identified the second part of her complaint as HSTA's failure to pursue a grievance on the issue of the schedule for the 2013-2014 school year at Kohala Middle School whereby Weiss was assigned to teaching PE, which she does not accept. On or about April 8, 2013, Simms timely submitted to DOE a Step 1 grievance on this action. Based upon the record, the Board finds that this portion of Weiss' Complaint, which concerns a grievance that has not been reviewed by HSTA (as of the April 29, 2013 Board hearing), is not yet ripe for determination; and that Complainant has failed to exhaust contractual remedies with respect to this grievance.
33. The Board finds that Complainant's "Old Business" Submission filed August 28, 2013, and Complainant's Memorandum filed October 31, 2013, were filed after the April 23, 2013 deadline imposed by the Board at the April 15, 2013 pretrial conference for responses or answering affidavits to two pending cross motions and after the Board hearing on the dispositive cross motions on April 29, 2013. Therefore, Complainant's August 28, 2013 and October 31, 2013 filings are considered late and are not given any weight by the Board in its adjudication of this Complaint.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. 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.

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Review of a motion to dismiss is based on the contents of the complaint, the factual 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. See Yamane v. Pohlson, 111 Hawai'i 74, 81,137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989).

3. However, when considering a motion to dismiss pursuant to Hawaii Rules of Civil Procedure, Rule 12(b)(1) the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual issues concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C.Wright & Miller, Federal Practice and Procedure § 1350, at 213 (1990).
4. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
5. 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.
6. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
7. HRS § 89-14, provides that any controversy concerning prohibited practices may be submitted to the Board in the same manner and with the same effect as provided in HRS § 377-9, and the Board shall have exclusive original jurisdiction over such controversy.
8. HRS § 377-9(l) states that no complaint "shall be considered unless filed within ninety days of its occurrence." Hawaii Administrative Rules § 12-42-42 provides that a complaint for prohibited practices may be filed by a public employee "within ninety days of the alleged violation."
9. The ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. TriCounty Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").
10. The failure to file a complaint within ninety days of the occurrence of the alleged violation divests the Board of jurisdiction to hear the complaint. The

Board has construed the 90 day limitation period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 198-199 (1983). The beginning of the limitation period does not depend on actual knowledge of a wrongful act. Instead, the period begins to run when, “an aggrieved party knew or should have known that his statutory rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

11. Complainant contended that the Board has jurisdiction, and, as set forth above, she invoked the Board’s jurisdiction by filing a prohibited practice complaint which is governed by HRS §§ 89-14 and 377-9, which clearly require complaints to be filed within 90 days of the occurrence of a prohibited act.
12. Having reviewed the allegations of the Complaint in the light most favorable to the Complainant, the Board nevertheless concludes that the claim that HSTA untimely processed Weiss’ claim is itself untimely since the Complaint was filed more than 90 days after Complainant knew or should have known that any cause of action under HRS Chapter 89 had accrued. The Board finds that Complainant is familiar with the statute of limitations because of her complaint against HSTA in Decision No. 420, *Janet Weiss*, 6 HLRB 151 (2001) and against former Kohala High and Intermediate School principal Catherine Bratt in Decision No. 425, *Janet Weiss*, 6 HLRB 425 (2001). The Board finds that Complainant knew when the Step 1 grievance meeting was held on November 9, 2012, because she attended that meeting. She also knew or should have known that the deadline for HSTA to appeal to arbitration was December 5, 2012. However, she did not file her Complaint until March 22, 2013, more than 90 days after both the Step 1 meeting and the arbitration appeal deadline. Further, the record shows that on January 4, 2013 Weiss discussed filing a Step 2 grievance with Mr. Simms who filed a Step 2 grievance on February 5, 2013; there is nothing in the record to support a finding that Weiss’ request for a Step 2 meeting was made and ignored within the 90 day period before she filed her Complaint with the Board. Any alleged prohibited practices occurring prior to December 22, 2012 may not be considered by the Board.

Based on the foregoing, the Board lacks jurisdiction over this aspect of the Complaint.

13. The Board also concludes that it lacks jurisdiction over Complainant’s allegations in her Complaint related to the DOE’s conduct toward two other teachers at Kohala Middle School, as she lacks standing to bring a complaint on their behalf. If anyone has a valid claim, it would only be those teachers who allegedly sustained an actual injury. See In re Kohl v. Takushi et al., Dec. No 432, 2002 WL 34404632 (Mar. 8, 2002). Weiss failed to present any arguments to support a finding of standing for her Complaint with regard to her fellow teachers.

14. The Board further concludes that Weiss has no claim for relief against Respondents Okabe and Simms. Individual union officers or agents are not proper defendants in a complaint on a duty of fair representations brought by employees in bargaining Unit 5. See Section 89-8 (a); See Stucky v. Takeno et al., Order No. 28334, CU-05-283 (Mar. 15, 2005).
15. With regard to the second part of Weiss' Complaint, her reassignment to teach PE for the school year 2013-2014, the Board finds that HSTA timely filed a grievance, which was proceeding at the time of the Board hearing on April 29, 2013 in the instant matter and therefore concludes that this portion of her Complaint is not ripe for adjudication by the Board.
16. The ripeness doctrine examines whether a dispute has matured to a point that warrants a decision. There are two factors relevant to a ripeness decision; i.e. the fitness of the issue for judicial resolution and the hardship to the parties of withholding court consideration. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (as cited in Granville House v. Depart. of Health and Human Services, 715 F.2d 1292, 1299 (8th Cir. 1983).
17. A complaint for a prohibited practice should be dismissed if the complainant is unable to establish that he (or she) has exhausted contractual remedies through a grievance procedure of the applicable collective bargaining agreement. See Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 40 P.3d 930 (2002).
18. Since HSTA was pursuing a grievance on DOE's decision to assign Weiss to a PE position at Kohala Middle School for the 2013-2014 school year (as of the April 29, 2013 Board hearing), Complainant has failed to exhaust her contractual remedies, and the Complaint against HSTA for a breach of the duty of fair representation is not ripe for adjudication by the Board under the instant claim.
19. Considering the evidence of record, the Board concludes that Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment should be granted.
20. With respect to Complainant's Motion for Summary Judgment filed on April 10, 2013, the Board concludes that her Complaint is untimely and not ripe. As discussed above, Weiss' concerns about the timing of when her grievance was moved to a Step 1 meeting were known to her no later than when the November 9, 2012 Step 1 meeting was held. Nevertheless, she did not file her Complaint until March 22, 2003, beyond the 90 day statutory period to file a complaint. Also, she knew or should have known that the time for HSTA to appeal to arbitration would toll on December 5, 2012. Weiss provides no dates and times when she spoke with Simms allegedly directing him to cease

discussions with Merwin and proceed with a Step 2 grievance. She cannot show that the request to file a Step 2 grievance was made and ignored within 90 days of her Complaint being filed with the Board. Accordingly, her Complaint is time barred. The second part of her Complaint, regarding her reassignment to teach physical education for school year 2013-1014, is not ripe to warrant a decision under this Complaint, as HSTA filed a timely grievance, and the HSTA Board of Directors had not reviewed and decided the merits of proceeding to arbitration.

21. HAR § 12-42(g)(3)(C) (iii)^{vii} governs all answering affidavits to motions filed with the Board. After reviewing the record and the submission of the parties, the Board concludes that Complainant's "Old Business" Memo filed on August 28, 2013 and Complainant's Breach of Duty Memorandum filed on October 31, 2013 were both filed after the April 23, 2013 deadline to file responses or answering affidavits imposed by the Board and after the April 29, 2013 Board hearing on the motion. Complainant did not request an extension of time within to which to file a response or affidavit after the April 23, 2013 deadline, and the Board did not allow the filing of any additional responses or answering affidavits. Therefore, the Board grants Respondents' Motions to Strike filed on September 3, 2013 and on November 6, 2013 respectively, and excludes from the record Complainant's "Old Business" Submission filed August 28, 2013 and Complainant's Breach of Duty Memorandum filed on October 31, 2013.

ORDER

Accordingly, based on the foregoing, the Board grants Respondent HSTA's Motion to Dismiss Complaint and in the Alternative for Summary Judgment filed on April 4, 2013 and denies Complainant's Motion for Summary Judgment filed on April 10, 2013. The Board also grants Respondents' Motion to Strike filed on September 3, 2013 and Respondents' Motion to Strike filed on November 6, 2013. This case is dismissed.

DATED: Honolulu, Hawaii, November 12, 2014.

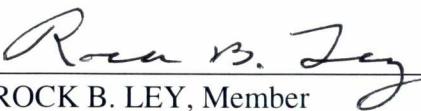
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

Copies sent to:

Janet Weiss
Rebecca Covert, Esq.

ⁱ On May 19, 2013, Complainant filed Complainant's Notice of Activities – Updated on New HSTA Grievance #WH1208 – Janet Weiss's Loss of Technology Line, Demotion to PE Line for SY 2013-14 and Also EEOC May 2nd Filing: J. Weiss Vs. Doe: FEPA No. WH-17578; EEOC No. 486-2013-00217, with four exhibits attached (Complainant's Notice of Activities), and on May 24, 2013 Respondents filed a Motion to Strike Complainant's Notice of Activities (Motion to Strike). On June 12, 2013, by Order No. 2920, the Board granted Respondents' Motion to Strike having found, *inter alia*, that Complainant's Notice of Activities was filed after the briefing period (on the cross motions) was closed and after the Board had conducted the April 29, 2013 hearing on the dispositive cross motions and had taken the matter under advisement.

ⁱⁱ HRS 89-2, as amended, provides in part as follows:

"Employee" or "public employee" means any person employed by public employer, except elected and appointed officials and other Employees who are excluded from coverage in section [89-6(f)].

ⁱⁱⁱ Pursuant to HRS section 89-6(a), governing appropriate bargaining units, BU 05 consists of "[t]eachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]"

^{iv} HRS section 89-2 defines "employer" or "public employer" as:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

^v HRS section 89-2 defines "exclusive representative" as:

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership."

^{vi} See Exhibit 3B, January 16, 2013 e-mail message from Weiss to Simms, attached to Complainant's Memorandum in Opposition to Respondent's Memo to Dismiss, and in the Alternative for Summary Judgment Filed on 4/4/3013, filed of April 23, 2013.

^{vii} Answering affidavits, if any shall be served on all parties and the original and five copies, with certificates of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise. (Emphasis added)