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Case No. CE-07-847, CU-07-330

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ANDRIA TUPOLA, Complainant, and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY, Respondent.	CASE NO. CU-07-330 ORDER NO. 3054 ORDER GRANTING RESPONDENT UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; AND GRANTING RESPONDENT UNIVERSITY OF HAWAII'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
In the Matter of ANDRIA TUPOLA, Complainant, and UNIVERSITY OF HAWAII, State of Hawaii, Respondent.	CASE NO. CE-07-847

ORDER GRANTING RESPONDENT UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; AND GRANTING RESPONDENT UNIVERSITY OF HAWAII'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. FACTUAL AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. Complaint and Pre-Hearing/Settlement Conference

In Case No. CU-07-330 (CU-07-330), on September 12, 2014, Complainant Andria Tupola (Ms. Tupola or Grievant), self-represented litigant (SRL or *pro se*), filed a prohibited practice complaint (CU Complaint) against the University of Hawaii Professional Assembly (UHPA or Union) with the Hawaii Labor Relations Board (Board or HLRB). The CU Complaint referenced a violation of Hawaii Revised Statutes (HRS) §89-13(6) and (8), alleging verbatim:

> The respondent has engaged in a prohibited practice by denying my right under the terms of the collective bargaining agreement to continue working while running for public office. In the event that the respondent encouraged me to file a grievance on a misinterpretation of the collective bargaining agreement and Board of Regents policy, they are in agreement that the collective bargaining agreement takes precedence and allows an employee to continue working. In the event that the Step 2 denial from the administration is misinterpreting the collective bargaining agreement, the union has failed to file for arbitration to make all decisions final and binding regarding employees working for the University of Hawaii and running for public office. The respondent is refusing to participate in good faith in mediation and arbitration procedures.

The CU Complaint had attachments of a "Statement for Arbitration," dated August 29, 2014, from Ms. Tupola to UHPA President David Duffy (Arbitration Statement); and a September 3, 2014 letter from UHPA Associate Executive Director James Kardash (Kardash) to Ms. Tupola regarding Request for Step 3, Arbitration.

On September 12, 2014, in Case No. CE-07-847 (CE-07-847), Ms. Tupola also filed with the Board a prohibited practice complaint (CE Complaint) against the University of Hawaii, State of Hawaii (UH or Employer). The CE Complaint specified a violation of HRS §89-13(8) alleging verbatim:

> The respondent has engaged in a prohibited practice by denying my right under the terms of the collective bargaining agreement to continue working while running for public office. In the event that the respondent has interpreted "continue working" as an employee that is on leave without pay, they are in

violation of Hawaii Revised Statues [sic] 383-2. In the event that the Step 2 denial from the respondent is personal opinion and speculation, the respondent has failed to uphold the terms under the collective bargaining agreement by canceling my classes for the fall semesters and thus not allowing me to collect wages for the contract period beginning on August 1, 2014.

The CE Complaint had attachments of an August 20, 2014 Letter from UH Interim Executive Vice-President for Academic Affairs Joanne Itano (Itano) to Kardash (UH Step 2 Decision), a document entitled "Consequence of Step 2 Denial," and an April 16, 2014 letter from Michael C.K. Wong (Wong), Human Resources Manager for UH, Leeward Community College (LCC) to Ms. Tupola.

On September 15, 2014, the Board issued a Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint to both Respondents UHPA and the UH.

On September 25, 2014, in CU-07-330, UHPA filed Respondent University of Hawaii Professional Assembly's Answer to Prohibited Practice Complaint Filed September 12, 2014.

On that same date, in CE-07-847, UH filed Respondent University of Hawaii's Answer to Prohibited Practice Complaint Filed September 12, 2014.

On October 9, 2014, the Board held a Pre-hearing/Settlement Conference in CU-07-847. On its own initiative, the Board raised the issue of consolidation of these cases, which the parties did not oppose. At this conference, UHPA's attorney sought clarification regarding whether Ms. Tupola was alleging the right to proceed to arbitration under the CBA without UHPA agreement or consent; or that UHPA breached the duty of fair representation because of an arbitrary and capricious recommendation by the UHPA staff to the UHPA Board against arbitration. Ms. Tupola responded that her allegation is the second ground based on the insufficiency of UHPA's reason for not recommending arbitration to the UHPA Board; and that there were more reasons and evidence that would have made her case to the UHPA Board "more substantial" than the Kardash recommendation. She further stated that she filed the CU Complaint because: 1) arbitration was the best step as a neutral opinion based upon the evidence; 2) as an employee, Steps 1 and 2 were stacked against her and would not have resulted in any kind of settlement or decision; and 3) the recommendation against arbitration meant that the UHPA Board was presented with no evidence showing that her case warranted arbitration and UHPA would not look into any further evidence. UHPA then stated its intention to file a motion for summary judgment or to dismiss based on Ms. Tupola's lack of request to the UHPA Board to proceed to Step 3 arbitration.

Following the CU-07-847 conference, the Board then held a Pre-Hearing/Settlement Conference in CE-07-847. The Board also raised the consolidation issue, which the parties did not oppose. The UH also stated an intention to file a motion.

Accordingly, on October 13, 2014, the Board issued Order No. 3027 Order Consolidating Cases for Disposition; Notice of Deadlines and Hearing on the Merits; and Notice of Deadlines and Hearing on Motions. The Board scheduled deadlines of October 24, 2014 to file motions, October 31, 2014 to respond; November 7, 2014 to reply; and a Motion hearing for November 14, 2014.

B. Respondents' Motions to Dismiss or in the Alternative for Summary Judgment

On October 24, 2014, Respondent UH filed Respondent University of Hawaii's Motion to Dismiss or in the Alternative for Summary Judgment (UH Motion), a Memorandum in Support of Motion (UH Memorandum), and a Declaration of Joanne Itano with exhibits attached. In these pleadings, the UH asserts that: 1) the HLRB should defer to the grievance process in the 2009-2015 Agreement between the University of Hawaii Professional Assembly and the Board of Regents of the University of Hawaii (CBA); and 2) in the alternative, that the UH is entitled to summary judgment because there are no genuine issues of material fact that both Article III, Section H of the CBA and Board of Regents (BOR) Policy 9-5, Political Activity (BOR Policy or Policy 9-5) require a faculty member seeking public office to either request or be placed on a leave of absence.

On that same date, UHPA filed Respondent University of Hawaii Professional Assembly's Motion to Dismiss or in the Alternative for Summary Judgment (UHPA Motion), a Memorandum in Support of Motion (UHPA Memorandum), and a Declaration of James D. Kardash (Kardash Declaration) with exhibits attached. In its Memorandum, UPHA takes the position that: 1) in Dr. Kardash's judgment, the grievance would not have been successful at arbitration because placement of Ms. Tupola on leave without pay (LWOP) did not violate the CBA nor was there evidence that other faculty members were treated differently than Ms. Tupola; 2) dismissal of the Complaint is proper where there is no CBA breach; 3) dismissal of the duty of fair representation claim is proper where there are no allegations of discrimination or bad faith; 4) there is no genuine issue of material fact; 5) CBA Section H. and the BOR Policy are clear on their face that an employee must be placed on leave while campaigning after the deadline to file for office; and 6) there is no evidence of differential treatment.

On October 31, 2014, UH filed Respondent University of Hawaii's Joinder to Respondent University of Hawaii Professional Assembly's Motion to Dismiss or in the Alternative for Summary Judgment Filed on October 24, 2014.

On November 3, 2014,[i] Ms. Tupola filed her Response to Motion to Dismiss (Tupola's Response) without any supporting affidavits, declarations, or exhibits. In her Response, Ms. Tupola generally asserts that summary judgment is not appropriate because there are genuine issues of material fact regarding UH's inconsistent application of the BOR Policy in question and more specifically that: 1) the HLRB should have provided a written decision explaining its denial of her motion to present telephonic evidence; 2) granting summary judgment would be premature because of Ms. Tupola's intent to appeal the HLRB's inappropriate denial of her motion to present telephonic evidence, which presents a genuine issue of material fact; 3) but for the HLRB's premature denial of the motion for telephonic evidence, she was ready to present relevant information and testimony addressing UH's inaccurate and misleading information regarding the consistent application of this BOR Policy, including statements made by and information obtained from UH and UHPA and testimony from Jeremy Harris (Harris) and Kitty Largarhetta [sic]; 4) if there is a case against UH, then there is a case against UHPA; 5) there are genuine issues of material fact regarding UH's inconsistent application of the BOR Policy; 6) the HLRB's refusal to accept the information that Ms. Tupola was ready to submit at hearing was based on technicalities; 7) the HLRB, UH, and UHPA were disappointed in her refusal to waive the right to a hearing within 40 days and made it impossible for her to prepare for the hearing by not responding to her during the week prior to the hearing; and 8) the HLRB's actions denied her access to justice and "placed a chilling effect" upon SRL State employees.

On November 7, 2014, UHPA filed Respondent University of Hawaii Professional Assembly's Reply Memorandum in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment Filed on October 24, 2014 (UHPA Reply Memorandum). In that Reply Memorandum, UHPA argues that Ms. Tupola's duty of fair representation claim must fail; and therefore, dismissal or summary judgment is warranted because Ms. Tupola has not: 1) presented any affidavits or declarations creating a genuine issue of material fact that UH breached the CBA; 2) offered any evidence that there is a current Bargaining Unit 7 faculty member who is campaigning for public office while continuing to work at UH; and 3) addressed UHPA's argument that the CU Complaint failed to allege that UHPA acted in a discriminatory manner or in bad faith in handling her grievance.

On that same date, UH filed Respondent University of Hawaii's Reply Memorandum in Support of its Motion to Dismiss or in the Alternative for Summary Judgment Filed on October 24, 2014 (UH Reply Memorandum). In its Reply Memorandum, UH asserts that Ms. Tupola: 1) fails to establish a genuine issue of material fact regarding whether UH has consistently applied the BOR Policy because she did not attach any declaration or other competent evidence; 2) makes numerous conclusory statements in her Memorandum; and 3) fails to address UH's primary argument that the HLRB defers to the contractual grievance and arbitration procedure absent evidence that the employee has been prevented from access to that procedure. Lastly, UH

contends that Ms. Tupola's disagreement with the Board's decision to not allow telephonic testimony is not a basis for denying UH's motion.

At the November 14, 2014 hearing on the UHPA and UH Motions to dismiss or in the alternative for summary judgment (collectively Respondents' Motions), UH and UHPA counsel both appeared. Ms. Tupola appeared telephonically due to her misunderstanding regarding the motion procedure. Both UH and UHPA essentially argued the positions set forth in their written Motions and Memoranda. Ms. Tupola responded to UHPA's Motion by stating that: 1) she was "spurred on" by UHPA's Executive Director J. N. Musto (Musto) to file a grievance clarifying the CBA language because of UHPA's fight over the BOR Policy language for 30 years; 2) at Step 1, UHPA argued that because of a conflict between the CBA and the BOR Policy language, the CBA language prevails in accordance with CBA provisions; 3) the ambiguity arises from the fact that the particular clause at issue regarding political leave in this case is not correctly placed under the CBA LWOP provision; 4) there is an ambiguity in the wording because it is not clear in the CBA that an employee upon campaigning must take a leave without pay; 5) nowhere in the CBA does it state that "continue working" is the same as LWOP; 6) at the arbitration step, UHPA changed its stance and told her that UH was correct because "continued employment" is the same as LWOP; 7) she did not proceed with her request to the UHPA Board to pursue arbitration because she received only two-days' notice regarding UHPA's switch in stance, and her position would be in conflict with the UHPA representative technically representing her before the UHPA Board; and 8) she consulted with lawyers regarding how to proceed[ii]. At the close of these arguments, the Board stated that a written order would be issued; and further, if the Respondents' Motions were denied, a prehearing conference would be scheduled to establish further deadlines for a hearing on the merits.

C. Factual Background Leading to Complaint

Ms. Tupola is and was, for all times relevant, a "public employee" as defined in HRS §89-2 and included in bargaining Unit 7 (Faculty of the University of Hawaii and the community college system) (Unit 7), as defined by HRS §89-6(a)(7). Since August 2011, Ms. Tupola has been employed by UH, LCC, as a Voice and Choir Instructor.

Respondent UHPA is and was, at all times relevant, an "employee organization" and the "exclusive representative," as defined in HRS §89-2, of the employees in Unit 7.

Respondent BOR, UH is and was, at all times relevant, the "employer" or "public employer," as defined in HRS §89-2, of the employees in Unit 7.[iii]

Respondents UHPA and UH are parties to the CBA containing the following provisions:

ARTICLE III, CONDITIONS OF SERVICE, H. POLITICAL LEAVE states:

H. POLITICAL LEAVE

Faculty Members may request leave of absence without pay or use vacation leave while campaigning for elective political office. Faculty Members may continue working while campaigning for elective political office as long as the campaigning does not interfere with the duties and responsibilities of the Faculty Member, as determined by the Chancellor or Vice-President, and the Faculty Member complies with the Board of Regents' Policy, Section 9-5 (see R-05 of Reference Section), Political Activity (and subsequent amendments) and other applicable rules of the University.

The REFERENCE SECTION contains BOR Policy 9-5 and states:

Section 9-5 Political Activity. (See also the appropriate collective bargaining agreement). The Board believes that it is the right of employees as citizens to engage in politics so long as these activities do not interfere with their University duties or violate established rules of the University. Furthermore, the Board has expressed the belief that political activities by employees, in accordance with the following statement, should result in no embarrassment to the University.

a. It is expected that University employees will use appropriate discretion in the exercise of the political rights which they share in common with other citizens; that they will be careful always to emphasize that their utterances and actions in political matters are theirs as individuals and in no manner represent the University; that they will always recognize that their first obligation is to the University; that they will accord the University administration the courtesy of prior notice of any political commitment which is likely to bring them into prominence.

b. Because of a conflict in interest and/or an appearance of impropriety in campaigning for and holding a public elective office and being employed at the University, the Board has established the following policy in regard to campaigning for and holding such an office.

c. All employees under the jurisdiction of the Board seeking a public elective office shall, without exception:

(1) Request, or in absence of such request, to be placed on a leave of absence without pay in accordance with University policy upon actively seeking political office, but in no event later than the filing of nomination papers or the announcement of candidacy for such office;

(2) Be subject to the general University policies governing appearances and activities of political candidates on campus;

(3) Insure that they do not give the appearance that their views, utterances and/or actions are representative of the University; and

(4) Be separated from University service through either resignation, or termination upon assumption of the elective office.

On June 3, 2014, UH LCC Vice-Chancellor Michael H. Pecsok (Pecsok) sent a Memorandum (Pecsok Memorandum) informing James A. West, Chair of the Arts & Humanities Division for LCC, of Ms. Tupola's notice of filing of papers to run for the Hawaii State House of Representatives. Pecsok referenced the CBA provisions set forth above and concluded stating in relevant part that:

> Because it is unclear exactly when the Chancellor's discretion ends, we asked for and received an opinion from the Hawaii State Ethics Commission. In their determination, the employee may continue to teach up until the employee files for candidacy.
>
> As Andria Tupola has filed for candidacy, she cannot continue to teach her summer session class effective immediately. While I realize this will be disruptive for students, in this instance, we have no choice. If a replacement cannot be found for Andria, we must cancel the class and refund tuition to students.
>
> Further, as long as she is a viable candidate for state office, she must be placed on leave and cannot teach classes. This may affect your fall teaching schedule. She must also resign upon the assumption of elective office.

On June 6, 2014, Ms. Tupola sent an e-mail to Kardash (Tupola June 6, 2014 email) stating in relevant part:

I am on the faculty of Leeward Community College as Voice & Choir Instructor. I was hired in August 2011 and have been working continuously since that time.

I filed nomination papers with the State of Hawaii Office of Elections as a candidate for the State House of Representatives, District 43. On Tuesday June 3rd, I received notice from my division chair Jim West that I would be put on leave without pay because I am running for a partisan public office. Jim West told me he received directive from Mike Pecsok, Vice Chancellor of Academic Affairs at Leeward Community College. Mike Pecsok indicated that I needed to be on leave without pay starting IMMEDIATELY which would cause my current MUS 107 summer course to be cancelled and I would be on leave without pay for the fall semester.

On the morning of June 6th, I spoke with J N Musto, Executive Director of UHPA concerning my situation. He indicated that they had been fighting the contract language for 30 years and did reach an agreement that UH professors could maintain their position while campaigning but upon being elected needed to resign. He indicated that the agreement language should be interpreted to allow professors to maintain their employment while campaigning. He told me to contact you to pursue this matter.

As of June 3rd, I have been told that I am on leave without pay. No paperwork has been processed in this regard. Jim West supports my efforts to maintain employment for Summer and Fall. There is a possibility that IF we promptly file a grievance, I can get this mandate lifted or suspended. This action would affect my summer course and 7 courses I'm teaching in the fall. Please let me know how you can advocate on my behalf.

Kardash discussed with Ms. Tupola the names of possible Unit 7 faculty members who were candidates for political office and may not have been placed on leave. Ms. Tupola indicated that she spoke with Panos Prevedouros who was on leave while a City and County of Honolulu mayoral candidate and Harris who was not on leave from Kauai Community College while a candidate for political office.

On or about July 29, 2014, Kardash prepared a request for information regarding possible Unit 7 faculty members, who may have been public office candidates, particularly the employment status of Harris, Brian Schatz (Schatz), and Jarrett Keohokalole (Keohokalole).

The UH responded that it had no information regarding Harris' Kauai Community College employment; Schatz was neither a BOR employee nor a Unit 7 faculty member; and Keohokalole was a current Unit 7 faculty member placed on leave from the UH on May 16, 2014 during his present state house district campaign. Kardash checked the UHPA dues records for Harris but found none.

In the UH Step 2 Decision, the UH President's Designee Itano, responded to the grievance filed by Ms. Tupola at Step 2. This Decision delineated the procedural background of the grievance filed in this case at Steps 1 and 2, stating verbatim, in relevant part:

> **Grievance Background:**
>
> I. Step 1 Grievance
>
> On June 7, 2014, the UHPA electronically filed a Step 1 Grievance Memorandum (Step 1 grievance memorandum) on behalf of Andria P. Tupola ("Grievant") with Leeward Community College Chancellor Manual J. Cabral stating:
>
> *"Alleged 2009-2015 CBA violations: Article III.H that states in part, "... Faculty Members may continue working while campaigning for elective political office as long as the campaigning does not interfere with the duties and responsibilities of the Faculty Member..." This language supersedes BORP 9-5 section c(1). The Employer must provide evidence that the Grievant's campaigning is interfering with her work, Article XXVIII, Conflict, states "If there is any conflict between the provisions of this Agreement and any rules, regulations, and policiels <sic> of the Employer, the terms of this Agreement shall prevail."*
>
> Along with the Step 1 Grievance Memorandum was the following attachment of the Grievant's Statement:
>
> *"I am on the faculty of Leeward Community College as Voice & Choir Instructor. I was hired in August 2011 and have been working continuously since that time.*
>
> *I filed nomination papers with the State of Hawaii Office of Elections as a candidate for the State House of Representatives, District 43. On Tuesday June 3rd, 1 received notice from my division chair Jim West that 1 would be put on leave without pay because I am running for a partisan public office. Jim West told me he received directive from Mike Pecsok, Vice Chancellor of Academic Affairs at Leeward Community College, Mike Pecsok indicated that I needed to be on leave without pay starting IMMEDIATELY which would cause my current MUS*

l07 summer course to be cancelled and I would be on leave without pay for the fall semester.

On the morning of June 6th, I spoke with J N Musto, Executive Director of UHPA concerning my situation. He indicated that they had been fighting the contract language for 30 years and did reach an agreement that UH professors could maintain their position while campaigning but upon being elected needed to resign. He indicated that the agreement language should be interpreted to allow professors to maintain their employment while campaigning. As of June 3rd, 1 have been told that l am on leave without pay. Jim West supports my efforts to maintain employment for Summer and Fall."

The Step 1 Grievance requested remedies were as follows: *"1) to be made whole; immediate return to duty of full compensation for summer session course assignment; 2) continuation of work assignments as anticipated for academic year 2014-2015; and 3) reassurance that the Grievant is protected against retaliation for appealing alleged violations."*

II. Step 1 Grievance Response

By letter dated June 30, 2014, Chancellor Cabral rendered a Step 1 grievance response pursuant to Article XXIV, Grievance Procedure, Section C. Procedures, subsection 2. Formal Grievance Procedure, part a. stating: *"Thank you for taking the time from your non-duty period to meet with me in a Step 1 meeting regarding your June 7, 2014 grievance. In your grievance, you alleged that this College violated Article III. H. of the 2009-2015 collective bargaining agreement when it informed you that you would be placed on leave without pay (LWOP) when you filed nomination papers to become a candidate for State of Hawaii political office.*

I have listened to the arguments presented by you and James Kardash, Associate Executive Director, University of Hawaii Professional Assembly, as well as those of Michael Wong, Human Resources Manager of this College. After much consideration of the information I have decided that the officials of this College acted appropriately in following the letter of the collective bargaining agreement that mandates compliance with Board of Regents Policy as iterated in R-05 of the Reference Section of the agreement.

I wish you well."

III. Step 2 Grievance Memorandum

On July 9, 2014, UHPA electronically filed a Step 2 grievance memorandum appealing Chancellor Cabral's Step 1 grievance response with University of Hawaii President David Lassner stating:

"The decision at Step 1 does not satisfactorily address the grievance filed on June 7, 2014. *According to the CBA it states "Faculty Members may continue working while campaigning for elective political office as long as the campaigning does not interfere with the duties and responsibilities of the Faculty member; as determined by the Chancellor or Vice-President." During our Step 1 meeting with Chancellor Cabral and Mike Wong it was determined that my campaigning HAS NOT interfered with my work and they are pleased with my service to the College which is why they extended me a job promotion. The CBA states "AND the Faculty Member complies with the Board of Regents Policy, Section 9-5, Political Activity and other applicable rules of the University." In BOR Policy 9-5 it reiterates that it is the BOR belief that it is the right of employees to engage in politics as long as it does not interfere. It further stipulates that activities and statements of a faculty Member campaigning for office should cause no "embarrassment" to the University, nor "represent" the University, nor take precedence over University obligations. These items specifically define the word "interference" as it relates to the opening statement of the CBA and Section 9-5. If the Faculty Member were to engage in any of the three listed items there would be a CONFLICT and reason to place the Faculty Member of <sic> Leave without pay. I disagree with the decision from our Step 1 meeting. The contract is* ***very clear*** *that I am allowed to be a Political Candidate without being required to take leave without pay whereas my conduct shows no CONFLICT with the specified items."*

IV. Step 2 Grievance Memorandum Receipt and Acceptance

By letter dated July 11, 2014, I acknowledged receipt and acceptance of the Step 2 grievance memorandum received on July 9, 2014 and offered you various dates, times, and locations to conduct a Step 2 grievance meeting. Thereafter, we mutually agreed to hold the Step 2 grievance meeting on Tuesday, July 29, 2014, in Bachman Hall, Room 105.

V. Step 2 Grievance Meeting

On July 29, 2014, a Step 2 grievance meeting was held between the Grievant, the University's Director of Collective Bargaining and Employee Relations Dwight Takeno, and yourself. For the record, I was informed that prior to the commencement of the meeting Director Takeno notified you and the Grievant that I would be unable to attend the Step 2 grievance meeting. Director Takeno offered the Grievant the choice of either rescheduling the meeting or to continue the meeting without my presence. It was also reported that you asked for an opportunity to discuss the offer with the Grievant privately and then informed Director Takeno that the Grievant elected to proceed with the meeting without my presence. I further understand that Director Takeno did communicate to the Grievant that he normally assists me in the management and analysis of the grievance and that he would report back to me over the arguments and issues raised during the meeting. I understand that after the Grievant expressed her arguments, concerns, and issues surrounding the grievance, the parties agreed to continue the grievance so that additional information could be exchanged.

VI. Grievance Information Request

On July 29, 2014, UHPA submitted a written request for grievance information pursuant to Article XXIV, B.2. By letter dated August 4, 2014, Director Takeno responded back by providing responses to the majority of the grievance information requested.

VII. Closing of the Step 2 Grievance Meeting

On August 7, 2014, you sent Director Takeno an email stating: *"Hello Dwight, This is to follow-up on our Formal Grievance meeting held on Tuesday, July 29th with Prof Tupola. The parties agreed to recess the meeting until your office could research the Union's requested information under Article XXIV, B2. On Monday, August 4th you forwarded the quested <sic> information related to political candidates who worked at the University. You addressed the Union's questions about specific current and former employees. We have no further requests for information. We appreciate the timely response.*

In addition, your office considered the Grievant's request for an extension to the LCC-campus' August 1, 2014 deadline to notify it of whether Prof Tupola would continue her leave of absence to continue her campaign for public office or whether she plans to return. On Thursday, July 31st you reported that matter was

given serious consideration but that the Administration was unable to change the August 1st deadline. One result was that the Division Chair recently informed Prof Tupola that she was placed on LWOP for Fall Semester.

Therefore on behalf of Prof Tupola the Union hereby requests that the Step 2 meeting be closed as of today (Thursday, August 7, 2014) and that a Step 2 Decision be issued within the required 20-calendar days (Wednesday, August 27th).

Please indicate your concurrence"

After outlining the procedural history of this grievance, Itano confirmed that Article III, Section H. and the BOR Policy were the pertinent provisions. In the "Grievance Analysis" section of the UH Step 2 Decision, Itano reviewed those provisions and the Grievant's arguments in support of her position. Based on those provisions, Itano then provided the specific reasons for UH's disagreement with the positions of UHPA and Ms. Tupola that Ms. Tupola's placement on LWOP from her 2014 summer teaching assignment while she was actively seeking/campaigning for political office was in violation of those provisions and that Article III, Section H was in conflict with the BOR Policy. Itano further maintained that UH has consistently applied this BOR Policy to all BOR employees. Finally, she denied the remedies of: "1) to be made whole; immediate return to duty of full compensation for summer session course assignment;" and 2) "continuation of work assignments as anticipated for academic year 2014-2015," requested by the Grievant in Step 1. Regarding the third remedy, the request for protection from retaliation, Itano took the position that this remedy was automatic.

In a subsequent September 3, 2014 letter to Ms. Tupola (Kardash Letter), Kardash confirmed receipt of an August 29, 2014 email from Ms. Tupola requesting Step 3 Arbitration. He further notified her that the UHPA Board would consider that request on September 6, 2014, but the staff would not recommend support of her request. Kardash then set forth the reasons for the staff position, stating in relevant part:

> Staff <u>will not recommend</u> that the BOD support your request for Step 3 Arbitration. Your right to employment was protected. As a candidate you were not forced to resign. For many years the Union sought contact [sic] language which would protect faculty members seeking political office. Current contract language achieved this standard and as a consequence the administration granted you a Leave Without Pay. The administration met its contractual obligation. The following comments address points presented in your statement.

A. Breach of UHPA Collective Bargaining Agreement 2009-2015 1. There is no breach of Article XXIV. Article XXIV, Procedures, provides that the Chancellor shall schedule a grievance meeting within fifteen (15) days after receipt of the grievance. The practice of the parties is to communicate within the initial fifteen days after the grievance filing. The parties communicated within the applicable period. The meeting between the parties may occur later than the initial fifteen day period. Thus, there is no violation of Article XXIV.

2. There is no breach of Article XXIV. Article XXIV, Procedures, provides that the President or the President's designee shall schedule a grievance meeting within fifteen (15) days after receipt of the grievance. The practice of the parties is to communicate within the initial fifteen days after the Step 2 grievance filing. The parties communicated within the applicable period. The meeting between the parties may occur later than the initial fifteen day period. Thus, there is no violation of Article XXIV.

3. There is no breach of Article XXIV. An explanation for the President's Designee's absence was provided to the Union and the Grievant. The July 29, 2014, Step 2 grievance hearing commenced after a complete discussion of the available options, including a continuance of the hearing. The presence of the President's designee, Joanne Itano, was waived by the Union and Grievant, and the Step 2 hearing proceeded as scheduled.

4. There is no breach of Article XXIV. Information was provided to the Union and Grievant. It is the Grievant's responsibility to show why the information provided by the Employer is incomplete. There was no further showing by the Union or Grievant that the Employer withheld information.

B. Response to the Step 2 Denial The Union is satisfied with the response from the President's Designee. The Step 2 Decision is consistent with the language of the Collective Bargaining Agreement and the language in Article III, Section H that specifically requires compliance with BORP 9-5, Political Activity (and subsequent amendments) and other applicable rules of the University. While this conclusion is disappointing to you, it does provide for leave from the University system while pursuing a public office, In other words, the faculty member maintains her employment and is only required to resign upon assumption of the elective office.

C. Inconsistent Application of the Article III, Section H The Union is satisfied with the information provided by the University by letter dated August 4,

2014. The Collective Bargaining Agreement addresses the employment terms for Faculty Members in Bargaining Unit 7. It appears that Jeremy Harris and Brian Schatz were not employed within Bargaining Unit 7 while they were candidates for public office. Further, the Union is not aware that Panos Prevedouros either opposed the Leave Without Pay status while campaigning for City and County of Honolulu Mayor or filed a grievance over his leave status. In conclusion, the Union is not aware that you've been treated differently than other Bargaining Unit 7 employees under the terms of Article III. Section H.

D. Implications 1. The Union does not understand your claim that BORP 9-5 restricts a constitutional right that is contingent upon the burden of loss of wages. There is a constitutional right to vote, but no recognized constitutional right to be a candidate for public office. It also does not appear that the Employer is restricting your right to free speech by placing you on Leave Without Pay while you are a candidate for office.

2. The Union does not understand your claim that the Employer has seized your property (wages) for engaging in political activity. It is the Union's understanding that you have been paid for the classes that you taught up to the point of being placed on Leave Without Pay.

3. As addressed above in Section C, the Union is not aware that you are being treated differently from other Bargaining Unit 7 members.

E. Remedy. It has come to the Union's attention that the BORP 9-5 that appears in the 2009-2015 Reference Section R-05 (page 57) has been amended. The Policy stated in the Step 2 Decision is the current version of BORP 9-5. The language in the current BORP 9-5 does not refer to "partisan" public elective office, but rather the word "partisan" has been removed. Thus, the Policy applies to candidates for public elective office.

On September 4, 2014, Ms. Tupola sent Kardash an email and left a voicemail, both withdrawing her request for arbitration.

The UHPA Board did not consider or act upon Ms. Tupola's request to move her grievance to Step 3 Arbitration.

II. STANDARDS OF REVIEW

A. Motions 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).

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. It has also been held that when ruling on a Rule 12(b)(6) motion to dismiss, the court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion

for summary judgment. U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); Morris v. McHugh, 997 F.Supp.2d 1144, 1154 (D. Haw. 2014).

B. Motions for Summary Judgment

Under HRCP Rule 56 (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 5-1286 (2013) (Ralston). "Summary judgment is appropriate 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 that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." *Id.* at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Haw. 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Haw. 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Haw. 462, 473, 99 P.3d 1046, 1057 (2004) (French).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court (Court) has adopted the burden shifting paradigm:

> The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.
>
> First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.
>
> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to

> convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.
>
> *French*, 105 Hawai'i at 470, 99 P.3d at 1054 (citation and emphasis omitted).
>
> Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial.

Ralston, 129 Haw. at 56-57, 292 P.3d at 1286-1287; French, 105 Haw. at 472, 99 P.3d at 1056.

However, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Haw. 51, 58, 25 P.3d, 826, 833 (2001) (Foronda); Tri-S Corp. v. Western World Insurance Co., 110 Haw. 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

III. DISCUSSION, CONCLUSIONS, 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. Preliminary Issues

1. Board Conduct

Prior to focusing on the proper issues presented by the Motions, the Board must address Ms. Tupola's assertions that summary judgment is not appropriate in this case based on certain Board conduct. Ms. Tupola's assertions include that: 1) the Board should have provided a written decision explaining its denial of her motion to present telephonic evidence; 2) the Board refused to accept the information that she was ready to submit at the hearing based on technicalities; 3) "the HLRB and UH, and UHPA were disappointed in the complainants [sic] refusal to waive the 40 day right and made it impossible for the complainant to prepare for the hearing by not responding to the complainant the week prior[;]" and 4) the Board's actions denied her "access to justice and placed a chilling effect" upon SRL State employees. Although Ms. Tupola attempts to link these arguments to the Motions, the Board finds that all of these arguments pertain to issues regarding the hearing on the merits of this case. Accordingly, such contentions have no bearing on the issues presented by the Motions. Further, based on the

summary judgment standards set forth above, the Board's conduct is not the focal point in determining a motion for summary judgment. The appropriate inquiry is whether the Respondents, as the moving parties, and Ms. Tupola, as the non-moving party, have carried their respective evidentiary burdens under the summary judgment standards articulated above.

More specifically regarding Ms. Tupola's contention that but for the denial of her motion for telephonic evidence, she was "ready to submit... relevant information and testimony," including the potential testimony of Harris, Schatz, and Largarhetta [sic], addressing UH's alleged inaccurate and misleading information regarding the consistent application of the policy, the Board must point out that this contention is simply inadequate to carry her burden of responding to the Motions. Both UHPA and UH submitted declarations and exhibits in support of their Motions. To withstand the Motions, Ms. Tupola, as the adverse non-moving party with the burden of proof at trial, is required under the standard set forth above to "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial" and may not rest upon the mere allegations or denials of her pleading, but her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If she does not so respond, summary judgment if appropriate, shall be entered against her. Foronda, 96 Haw. at 58, 25 P.3d at 833. Accordingly, for the purposes of properly contesting and responding to the Respondents' Motions, Ms. Tupola was required to submit her own supporting affidavits, declarations, and other evidence disputing the issues, facts, and evidence raised in Respondents' Motions. The denial of Ms. Tupola's motion for telephonic evidence at the hearing on the merits does not excuse her failure to dispute the Respondents' declarations and exhibits presented in support of their Motions with her own declarations, affidavits, or other evidence. Moreover, the Board must point out that even if Ms. Tupola's proffered relevant information and testimony from a UH employee and a former BOR member that the policy was not applied consistently had been properly presented in response to the Motions, such information and testimony has little relevance to a determination of UH's Motion in the absence of a showing that this information and testimony is focused on the implementation and application of the Policy to other similarly situated Unit 7 members. Further, this proffered information and testimony has even less relevance to a determination of UHPA's Motion which, as further discussed below, requires a focus on whether the Union's conduct in handling Ms. Tupola's grievance was arbitrary, discriminatory, or in bad faith. In short, as will be more fully discussed below, in her Response, Ms. Tupola fails to present any evidence that UHPA's failure to recommend taking her grievance to arbitration was a breach of the duty of fair representation.

2. The CU and CE Complaints

The Board is also compelled to address two other preliminary matters regarding the allegations in the CU and CE Complaints.

a. The CU Complaint

In the CU Complaint, Ms. Tupola cites HRS §89-13(6) and (8). These citations are erroneous because there are no HRS §89-13(6) and (8). The only paragraphs (6) and (8) in HRS §89-13 are contained in subsection (a) of that provision. HRS §89-13(a)(6) and (8) state:

> §89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> ***
>
> (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11; [or]
>
> ***
>
> (8) Violate the terms of a collective bargaining agreement[.]

(Emphasis added) The plain language of HRS 89-13(a)(6) and (8) limits these provisions to prohibited practices by the "public employer or its designated representative." Accordingly, because UHPA does not fall within the definition of a "public employer or its designated representative" contained in HRS §89-2, Ms. Tupola is unable to prove that any UHPA conduct violates these provisions.

On the other hand, HRS §89-13(b)(3) and (5), establish parallel prohibited practices for similar conduct by "a public employee or for an employee organization, or its designated agent," stating:

> (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 and arbitration procedures set forth in section 89-11; [or]
>
> ***
>
> (5) Violate the terms of a collective bargaining agreement.

(Emphasis added) UHPA does fall within the definition of an "employee organization" set forth in HRS §89-2 and is subject to prohibited practice allegations under these provisions.

As discussed more fully below and incorporated herein, the Board has ascribed 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 facts in support of her claim which would enable her to relief. The Board will; therefore, construe the CU Complaint as alleging violations of HRS §89-13(b)(3) and (5).

Despite the Board's construction, the HRS §89-13(b)(3) allegation of a refusal to participate in the mediation and arbitration procedures set forth in HRS §89-11 must nevertheless be dismissed. In prior decisions, the Board has noted that HRS §89-11 refers to mediation, fact-finding and arbitration in the context of an interest arbitration arising from an impasse over the terms of an initial or renewed agreement. Hence, the Board has held that HRS §89-13(b)(3) is not applicable to complaints, such as the present one, arising out of grievance rather than interest arbitrations. Kohl v. Takushi, 6 HLRB 245, 249 (2002); LePere v. Waihee, 5 HLRB 123, 127 (1993); LePere v. Waihee, 5 HLRB 263, 272 (1994); Cabatbat v. United Public Workers, Local 646, 4 HLRB 718, 726 (1990). Based on these decisions and for these reasons, the Board holds that UHPA's actions simply cannot constitute a prohibited practice under HRS §89-13(b)(3) and dismisses the allegation that UHPA violated this provision. Regarding the HRS §89-13(b)(5) allegation, the Board will address the issue thoroughly below.

b. The CE Complaint

Regarding the CE Complaint, while Ms. Tupola alleges that UH has engaged or is engaging in a prohibited practice within the meaning of HRS §89-13, the specific statutory provision referenced by her in the CE Complaint is "89-13 subsection [sic] (8)." Like the circumstances regarding the CU Complaint, this statutory reference is also erroneous because there is no HRS §89-13(8). As stated previously, the only paragraph (8) is contained in HRS §89-13(a), which makes it a prohibited practice for "a public employer or its designated representative wilfully to...[v]iolate the terms of a collective bargaining agreement." Based on its approach to *pro se* complaints, the Board interprets the CE Complaint to allege a violation of HRS §89-13(a)(8).

The Complaint further claims that UH has violated HRS §383-2 "in the event that the respondent has interpreted 'continue working' as an employee that [sic] is on [LWOP.]" In its Memorandum, UH asserts that HLRB has no jurisdiction regarding Chapter 383, HRS, the Hawaii Employment Security Law claims. The Board finds that HRS §383-91(a) unequivocally authorizes the department of labor and industrial relations to administer Chapter 383, HRS, through the director of labor and industrial relations pursuant to Chapter 371, HRS. Hence, the Board agrees with UH and concludes that to the extent that Ms. Tupola is alleging a violation of HRS §383-2, this claim is dismissed.

B. The Applicable Principles

In these consolidated prohibited practice cases, Ms. Tupola has alleged two claims. One against UH for a breach of the CBA for her placement on LWOP while running for public office, and one against UHPA for failure to file for arbitration on her grievance. The Board finds that the circumstances of the present case fall squarely within the Court's decision in Poe v. Haw. Lab. Rels. Bd., 105 Haw. 97, 94 P.3d 652 (2004) (Poe). In Poe, the Court was reviewing a circuit court decision affirming the HLRB's dismissals of five prohibited practice complaints filed by the same employee against his employer based on the same collective bargaining agreement violations. The Board's dismissals were based on a failure to exhaust contractual remedies because of an inability to establish that the union breached its duty of fair representation. In considering whether the circuit court's decision affirming the Board's dismissals was proper on this ground, the Court, relying on federal precedent[iv] and its prior decisions, articulated the principles and analysis applicable to these "hybrid" cases that allege a breach of the collective bargaining agreement claim against the employer and a breach of fair representation claim against the union:

> This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it "well-settled that an employee must exhaust any grievance...procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." "The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means."
>
> The final stages of the grievance procedure in the instant case requires the union to advance the employee's claim. "A labor union is charged with the duty of protecting the interests of its members as a group, and a union's interests are therefore broader than those of any one of its members." "When the interest of members of the bargaining unit are not identical, a union may be unable to achieve complete satisfaction of everyone. It is granted a 'wide range of reasonableness' so long as it acts with 'complete good faith and honesty of purpose.'" Thus an employee does not have an absolute right to have the union pursue his or her claim. As the Supreme Court observed:
>
> > Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right

to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement... In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas on the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

However, when the union wrongfully refuses to pursue an individual grievance, the employee is not left without recourse. Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. In Vaca, the Supreme Court noted:

> [A] situation when the employee may seek judicial enforcement of his contractual rights arises, if, as is true here, the union has the sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful

> refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstance would, in our opinion, be a great injustice....
>
> For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim 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 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.

105 Hawaii at 101-102, 94 P.3d at 656-657. (Emphases added) (Citations omitted)

Applying the foregoing principles, the Court held regarding four of the claims that the employee failed to establish that he was prevented from exhausting his contractual remedies

because he did not request that his union advance those claims to Step 4 arbitration. Regarding the fifth claim, the Court ruled that the employee lacked standing to pursue his claim before the HLRB because he failed to prove that his union breached its duty of fair representation in denying his request to advance his grievance to arbitration. *Id.* at 104, 94 P.3d at 659.

Accordingly, based on these principles, to establish a prohibited practice claim against UHPA, UH, or both, Ms. Tupola must demonstrate both that: 1) UH violated the CBA; and 2) UHPA has breached the duty of fair representation to satisfy the exhaustion requirement. Through their collective Motions, the Respondents appear to take the position that Ms. Tupola is unable to satisfy this two-part burden. The Board concurs.

C. UHPA's Motion

1. Arguments by the Parties:

As stated above, UHPA supports its Motion with the Kardash Declaration, certain CBA provisions, the BOR Policy, the Pecsok Memorandum, the Tupola June 6, 2014 e-mail, the UH Step 2 Decision, and the Kardash Letter. UHPA contends that: 1) its determination that the grievance would not be successful at arbitration because the UH's Step 2 Decision was consistent with the language of CBA Article III, Section H language specifically requiring compliance with the BOR Policy was an exercise of its discretion; 2) because this consolidated action is a hybrid case, Ms. Tupola cannot prevail against either UHPA or UH without proving both a breach of the duty of fair representation by UHPA and a breach of contract by UH; 3) there is no breach of the duty of fair representation because of the lack of a discrimination or bad faith allegation; 4) there is no genuine issue of material fact in this case; 5) CBA Article III, Section H. and the BOR Policy were correctly applied to Ms. Tupola; and 6) there is no evidence of differential treatment.

In her Response, Ms. Tupola opposes UHPA's Motion with various contentions. However, as UHPA asserts in its Reply and the Board agrees, significantly missing from her Response are any supporting affidavits or declarations creating a genuine issue of material fact regarding the issue of whether UH breached the CBA; and an answer to UHPA's position that the CU Complaint fails to allege that UHPA acted in a discriminatory manner or in bad faith. At the Motion hearing, Ms. Tupola made additional arguments that: 1) between Step 2 and the recommendation not to proceed to arbitration, UHPA reversed its original position that the CBA and BOR Policy were in conflict; 2) an arbitrator should have clarified the ambiguity regarding whether an employee must take a LWOP while campaigning caused by the CBA political leave clause not being under the CBA LWOP provisions; and 3) she withdrew her request to the UHPA Board to take her case to arbitration because she had received only two-days' notice regarding UHPA's reversal of stance and the conflict between her position and Kardash's.

2. Breach of Duty of Fair Representation

As the Poe Court stated, a union as the exclusive bargaining representative of the employees in the bargaining unit has a duty to fairly represent all of those employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. 105 Haw. at 101, 94 P.3d at 656; Vaca v. Sipes, 386 U.S. 171, 177 (1967) (Vaca); Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, CU-03-328, Order No. 3028, at *12 (October 27, 2014) (Emura Order), *citing* Vaca, 386 U.S. at 177. To prevail on this showing, the duty of fair representation is to be narrowly construed because unions must retain discretion to act in what they perceive to be their members' best interest. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953); Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (Johnson). Any substantive examination of a union's performance must be highly deferential. Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991) (O'Neill).

More specifically, a breach of the duty of fair representation occurs only when a union's conduct toward a collective bargaining unit member is arbitrary, discriminatory, or in bad faith. Vaca, 386 U.S. at 190. Poe, 105 Haw. at 104, 94 P.3d at 659, *citing* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) and DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983) (DelCostello); Trnka v. Local Union No. 688, United Auto., Aerospace & Agric. Implement Workers, 30 F.3d 60 (7th Cir. 1994) (Trnka); Emura Order, at *12. In order to defeat a motion for summary judgment, a plaintiff must proffer evidence supporting at least one of those three elements. Trnka, 30 F.3d at 61; Emura Order, at *12, *citing* Filippo v. Nothern [sic] Indiana Pub. Serv. Corp., Inc., 141 F.3d 744, 748 (7th Cir. 1998). Further, whether a union acted arbitrarily, discriminatorily, or in bad faith requires a separate analysis because each of these requirements represents a distinct and separate obligation. Simo v. Union of Needletrades, 322 F.3d 602, 617 (9th Cir. 2003) (Simo).

Applying these standards and analysis to the evidence in this case, the Board concludes that none of the three required elements were shown.

a. The Arbitrary Element:

A union's actions are arbitrary "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." O'Neill, 499 U.S. at 78; Emura Order, at *13. "Arbitrary conduct" has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests.'" Johnson, 756 F.2d at 1465, *citing* Robesky v. Qantas Empire Airways Ltd., 573 F.2d

1082, 1089 (9th Cir. 1978) (Robesky). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo, 322 F.3d at 618.

In cases in which a breach of the duty of fair representation based on a union's arbitrary conduct has been found, it is clear that: the union failed to perform a procedural or ministerial act; the act in question did not require the exercise of judgment; and there was no rational and proper basis for the union's conduct. Galindo v. Stoody Co., 793 F.2d 1502, 1514 (9th Cir), *citing* Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985) (Peterson). In Peterson, the Ninth Circuit stated that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." The Ninth Circuit noted as examples of a union acting arbitrarily, where it failed to: 1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer; 2) file a timely grievance after it decided that the grievance was meritorious and should be filed; 3) consider individually the grievances of particular employees where the factual and legal differences among them were significant; or 4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration. In granting summary judgment for the union in that case, the Ninth Circuit found that the alleged error was one of judgment and not arbitrary, concluding, "In short, we do not attempt to second guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts to decide whether and in what manner a particular grievance should be pursued." 771 F.2d at 1254.

A union's decision not to arbitrate a grievance that it considers to be meritless is an exercise of its judgment. Stevens v. Moore Business Forms, 18 F.3d 1443, 1447 (9th Cir. 1994) (Stevens); Wellman v. Writers Guild of Am., 146 F.3d 666, 671 (9th Cir. 1998) (Wellman); Peterson, 771 F.2d at 1254. A union has not been held to have acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, unions are consistently not held liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. A union's decision is arbitrary only if it lacks a rational basis. Further, a union's conduct may not be deemed arbitrary "simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing." Patterson v. Int'l. Bhd. Of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997); Stevens, 18 F.3d at 1447; Peterson, 771 F.2d at 1254. Rather, if it is determined that the union's refusal to pursue the appellants' grievance was an act involving its judgment, the appellants must provide some evidence of the union's bad faith or discrimination in order to prevail. Stevens. 18 F.3d at 1448. Moreover, in the handling of a grievance, the union typically has broad discretion in its decision whether and how to pursue an employee's grievance against the employer.

Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-568 (1990). While both intentional and unintentional conduct can constitute arbitrariness, a showing of mere negligence in grievance processing does not suffice. Eichelberger v. NLRB, 765 F.2d 851, 854 (9th Cir. 1985), *citing* Robesky, 573 F.2d at 1089-1090; Aijifu v. Int'l. Ass'n of Machinists and Aerospace Workers Dist. Lodge 141, 2003 U.S. Dist. LEXIS 26086, at p. *7-8, *aff'd* by 2006 U.S. App. LEXIS 26047 (9th Cir. 2006) (Aijifu). While a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, the individual employee has no absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement, and a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious. Vaca, 386 U.S. at 191; Stevens, 18 F.3d at 1447; Peters, 914 F.2d 1298-1299; Poe, 105 Haw. at 101, 94 P.3d at 656, *citing* Vaca, 386 U.S. at 191.

Accordingly, under the wide degree of deference given to the union's actions, declining to pursue a grievance as far as a union member might like has been held not a violation of the duty of fair representation. Trnka, 30 F.3d at 61; Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013) (Yeftich). Nor is rejection of an employee's interpretation of a collective bargaining agreement alone a violation of the duty of fair representation. Rather, on summary judgment, the employee is required to submit evidence that the union's rejection of his interpretation was arbitrary, not just incorrect. Trnka, 30 F.3d at 62.

Finally, a union's change in position regarding the merits of the grievance is also not necessarily a violation of the duty of fair representation. In Humphrey v. Moore, 375 U.S. 335, 348 (1964) (Humphrey), the U.S. Supreme Court held that there was no breach of the duty of fair representation where a union initially advised one group of employees that they represented that they had nothing to worry about but then later adopted a contrary position supporting another group of employees that they also represented. In so ruling, the U.S. Supreme Court relied on the lack of substantial evidence of fraud or deceitful or dishonest conduct and further reasoned that while the union official's early assurances to the first group of employees were not well-founded, the union official was acting upon available information received by him from the company. Further, based on subsequent information received by the union, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. To similar effect is the Second Circuit's decision in Simberlund v. Long Island R. Co., 421 F.2d 1219 (2nd Cir. 1970) (Simberlund). In that case, the circuit court ruled that the union's change of mind regarding the validity of the employees' claims did not show a breach of the duty of fair representation despite the employees' argument that the union withdrew their grievance claim without any prior consideration of its merits. The evidence showed that the local union officials in that case diligently pursued the grievance, asserting the merits of the grievance until an experienced negotiator deemed the grievance without merit. In so ruling, the circuit court noted that the function of the court is not to inquire into the merits of the grievance, reasoning:

> The evidence shows, however, that Porch gave careful consideration to the merits of the appellants' claim at a meeting with them before deciding against its validity. And it also appears that other union officials had previously given close attention to appellants' claim. Had the Brotherhood ignored the grievance claim or processed it in a perfunctory manner, it might well be held to be guilty of a breach of its duty. Here, as in *Vaca*, however, the local union officials diligently pursued appellants' grievance until it was determined by Porch, an experienced negotiator from the International, to be without merit. The fact that the Brotherhood changed its mind as to the claim's validity, without more, avails, nothing.

Id. at 1226 (Emphasis added). *See also*: De Hart v. United Steelworkers of Am., Local 3494, 1982 U.S. Dist. LEXIS 12788, at * 6 (D.N.Y. 1982) (The federal district court held in ruling that summary judgment was warranted regarding the breach of the duty of fair representation issue in that case that the court's function is not to inquire into the merits of the grievance but to look to a showing of malice or hostility.).

In handling a grievance, however, it is well-recognized that a union's duty of fair representation does include the duty to perform some minimal investigation, the thoroughness of which varies with the circumstances of the particular case. Evangelista v. Inlandboatmen's Union of the Pac., 777 F.2d 1390, 1395 (9th Cir. 1985); Johnson, 756 F.2d at 1465; Emura Order, at *13.

Applying these principles, the Board finds that the evidence in this case viewed in the light most favorable to Ms. Tupola unequivocally shows that UHPA more than satisfied the requirement of a minimal investigation. The documents in this case substantiate that UHPA processed Ms. Tupola's grievance through Steps 1 and 2. During that process, Kardash requested and obtained information from Ms. Tupola and from UH through its request for information under CBA Article XXIV, B.2 regarding political candidates who had worked at UH, and from UHPA records. Kardash's Declaration outlines UHPA's steps taken to investigate Ms. Tupola's grievance and the results of that investigation. Kardash declares that he: 1) discussed with Ms. Tupola the names of possible Unit 7 members who were candidates for political office but who may not have been placed on leave, including Prevedouros, Harris, Shatz [sic], and Keohokalole; 2) requested information from UH regarding possible Unit 7 members that may have been candidates for political office and the employment status of Harris, Shatz [sic], and Keohokalole; and 3) checked UHPA records and found no dues receipts from Harris. Regarding his investigatory findings, Kardash declared that: 1) UH had no information on Harris' Kauai Community College employment, Shatz [sic] was not a BOR employee or Unit 7 member, and Keohokalole was, at that time, a Unit 7 member placed on leave on May 16, 2014

while campaigning for State House District 48; 2) Harris was never a Unit 7 member subject to the CBA based on the absence of dues receipts from Harris; 3) his communications with Ms. Tupola did not raise the names of any other faculty members who were candidates for public office and may not have been on leave; and 4) he was not aware of any recent Unit 7 employees who were political office candidates who were not on leave while campaigning. Based on these findings, Kardash declares that his conclusions were that: 1) Ms. Tupola was treated no differently from any other Unit 7 employee who is a candidate for public office; 2) the Step 2 Decision correctly interpreted CBA Article III, Section H. and the facts of Ms. Tupola's pursuit of public office; and 3) there was no meritorious grievance to pursue at Step 3 arbitration.

Ms. Tupola, in fact, does not dispute that UHPA fulfilled the investigation requirement nor does she argue that UHPA ignored or perfunctorily processed her grievance. Her sole allegation is that UHPA "failed to file for arbitration." Ms. Tupola appears to more particularly rely on UHPA's change in stance between the filing of the Step 1 grievance and the Kardash Letter as the basis for her prohibited practice claim against UHPA. The Board finds that such allegation is insufficient to establish that UHPA acted arbitrarily in failing to recommend taking her grievance to arbitration. As the Ninth Circuit decisions discussed above have held, a union's decision not to arbitrate a grievance which it considers to be meritless is an exercise of its judgment, which is arbitrary only if lacking a rational basis. Therefore, if the union's refusal to pursue the grievance is an act of judgment, the employee must provide some evidence of the union's bad faith or discrimination in order to prevail. Stevens, 18 F.3d at 1447-1448. As more fully discussed below, Ms. Tupola failed to allege in the CU Complaint, argue, or provide any evidence that UHPA acted in bad faith or in a discriminatory manner in recommending against taking her grievance to arbitration. Even if considered, the documents attached to the CE Complaint do not provide such support. The Arbitration Statement, attached to the CU Complaint, is more relevant to her CE Complaint because the focus is on the UH's conduct in applying the CBA provisions. The Kardash Declaration and the supporting exhibits sustain UHPA's position that the recommendation not to arbitrate Ms. Tupola's grievance after proceeding through Steps 1 and 2 was a rationally based exercise of its judgment that this grievance lacked merit. In his Declaration, Kardash states that his recommendation to the UHPA Board not to move this grievance to Step 3 Arbitration was based on his conclusion that, "Complainant Andria Tupola was treated no differently than any other Bargaining Unit 7 employee who is a candidate for public office" and that "the Step 2 Decision dated August 20, 2014, correctly interpreted Article III, H, 'Political Leave' and the facts of Complainant's pursuit of public office and that there was no meritorious grievance to pursue at Step 3 Arbitration." Further, in his Letter, Kardash states that:

> The Union is satisfied with the response from the President's Designee. The Step 2 Decision is consistent with the language of the Collective Bargaining Agreement and the language in Article III, Section H that specifically requires

> compliance with BORP 9-5, Political Activity (and subsequent amendments) and other applicable rules of the University. While this conclusion is disappointing to you, it does provide for leave from the University system while pursuing a public office. In other words, the faculty member maintains her employment and is only required to resign upon assumption of the elective office.

The Board notes that even if Kardash's conclusion was in error, unions have consistently been held not liable for good-faith and non-discriminatory errors of judgment made in the processing of grievances. Stevens, 18 F.3d at 1447-1448; Peterson, 771 F.2d at 1554-1555. As further discussed below, Ms. Tupola has not alleged or shown that in processing her grievance that UHPA was discriminatory and treated substantively similar grievances differently from hers. In fact, there is no evidence in the record indicating that there were any substantively similar grievances. Nor has Ms. Tupola made any allegation or showing that UHPA's actions were not in good-faith. While she alludes to Musto's "spurring" her on to file the grievance to clarify the CBA language, UHPA's staff reversal between Steps 1 and 2, and the Kardash Letter, based on Humphrey and Simberlund, UHPA's adoption of a contrary position is insufficient to establish a breach of the duty of fair representation. The Board finds that whereas in this case, there appear to be competing interpretations of the collective bargaining agreement, it was entirely reasonable for UHPA to decide not to expend its resources for the uncertain benefit of only one member of the bargaining unit. It is also not unreasonable for UHPA to change its position when presented with new evidence or resistance from the other party, particularly when the initial strong demand showed UHPA's efforts to obtain the best result possible for Ms. Tupola. Hardwick v. Sunbelt Rentals, Inc., 719 F.Supp.2d 994, 1007-1009 (D. Ill. 2010). Declining to pursue a grievance as far as a union member might like is also not by itself a violation of the duty of fair representation. Yeftich, 722 F.3d at 916.

Lastly, there is simply no evidence in the record that UHPA failed to perform a procedural or ministerial act, that the staff's recommendation not to proceed arbitration had no rational or proper basis, or that its conduct was akin to those examples deemed "arbitrary" in Peterson. To the contrary, the Kardash Letter shows that the recommendation not to proceed to arbitration was an exercise of judgment and that UHPA articulated the rational and proper basis for this action to Ms. Tupola. Accordingly, for these reasons, the Board is unable to find that UHPA staff's refusal to recommend arbitration rose to the level of negligence. Nor is the Board able to find that "in light of the factual and legal landscape at the time of [UHPA's] actions," that UHPA's conduct in the processing of Ms. Tupola's grievance, including the staff's refusal to recommend and UHPA's failure to proceed to arbitration, was "so far outside 'a wide range of reasonableness' to be irrational." O'Neill, 499 U.S. at 78. UHPA provides sufficient evidence that it presented the claim at every step of the grievance procedure and did not ignore or handle the claim in a perfunctory manner. Like the Ninth Circuit, the Board will not second guess UHPA's judgment when, as will be determined below, a good faith, non-discriminatory

judgment has in fact been made. Peterson, 771 F.2d at 1254. Accordingly, the Board grants UHPA's Motion regarding this element.

b. The Discriminatory Element:

Whereas the arbitrariness analysis looks to the objective adequacy of UHPA's conduct, the discrimination and bad faith analyses look to the subjective motivation of UHPA officials. Simo, 322 F.3d at 618.

As stated previously, unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. Discriminatory conduct may be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge, 403 U.S. 274, 301 (1971) (Lockridge).

In Simo, the Ninth Circuit acknowledged that the U.S Supreme Court and the Ninth Circuit have provided little guidance regarding what constitutes discrimination in the duty of fair representation context. The Simo court noted that the O'Neill U.S. Supreme Court decision suggested that only "invidious" discrimination is prohibited by the duty of fair representation. After citing the Tenth Circuit's explanation that "discrimination is invidious if based upon impermissible or immutable classifications such as race or other constitutionally protected categories, or arises from prejudice or animus," the Ninth Circuit deemed these grounds too restrictive, noting that they have held for example, that a union may not "discriminate on the basis of union membership." 322 F.3d at 618. The Ninth Circuit then concluded that there was no evidence of discriminatory intent in that case.

Regardless of the standard for discrimination, the Board finds and concludes that Ms. Tupola has not alleged nor presented any evidence supporting a claim of "discriminatory" conduct by UHPA. As stated above, Ms. Tupola has not even alleged any discrimination by UHPA. Her sole discrimination argument appears to be directed against UH. Like the Ninth Circuit in Simo, the Board in this case is unable to find evidence that UHPA sought to grant benefits to some members of the bargaining unit that it denied to others, nor did it treat similarly situated individuals differently in deciding whether to take their case to arbitration. *Id.* at 619. When faced with the union's motion for summary judgment, conclusory allegations of discrimination cannot satisfy the burden placed on the plaintiff to come forward with facts evidencing the union's bad faith, discriminatory, or arbitrary acts. It is incumbent upon the plaintiff to demonstrate some evidence of discrimination. If she does not, grant of summary judgment for the union is warranted on a breach of fair representation claim. Hanson v. Knutson, 1981 U.S. Dist. LEXIS 17849, at *p. 6-7 (D. Mt.).

Based on the applicable standard and the lack of sufficient facts and evidence in the present case, the Board finds and concludes that Ms. Tupola has not produced any evidence of discrimination by UHPA. Therefore, the Board grants UHPA's Motion regarding this element.

c. The Bad Faith Element:

"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. Bare assertions of the state of mind required for the claim—here 'bad faith' –must be supported with subsidiary facts." Yeftich, 722 F.3d at 916. (Citations omitted); Emura Order, at *15. For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct." Humphrey, 375 U.S. at 348; Lockridge, 403 U.S.at 299. To show bad faith, the plaintiff must provide subjective evidence that the union official's decisions were improperly motivated. Truhlar v. United States Postal Serv., 600 F.3d 888, 893 (7th Cir. 2010) (Truhlar). Moreover, the structure of the duty is that bad faith is required to show a breach; it is not simply that good faith is a defense to liability. The burden is on the worker to produce evidence of bad faith. Simo, 322 F.3d at 618. As this Board has noted based on Truhlar, our [court's] role is not "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." Emura Order No. 3028, at *15-16, *citing* Truhlar, 600 F.3d at 893.

As stated previously, the CU Complaint contains no allegation of bad faith nor has Ms. Tupola presented any opposing affidavits or other proof substantiating any evidence of bad faith by UHPA. Upon similar showing, courts have granted summary judgment and dismissed the complaint. Nagel v. Int'l Bhd. of Teamsters, 396 F.Supp. 391, 394 (D.N.Y. 1975) (Where plaintiff did not offer opposing affidavits or other proof tending to show bad faith on the part of the union and a complete absence in plaintiff's pleadings of even an allegation of bad faith on the part of the union, summary judgment dismissing the plaintiff's complaint was proper.); Yeftich, 722 F.3d at 916 (Conclusory allegations that the union was guilty of bad faith because it "diverted, stalled, and otherwise terminated" their grievances lacks factual specificity required to state a plausible breach of fair representation claim.). Hence, the Board grants UHPA's Motion regarding this third element.

Based on the Board's grant of UHPA's Motion regarding the elements of arbitrary, discriminatory, or bad faith, the Board holds that there was no breach of the duty of fair representation by UHPA based on any of its alleged conduct, including the refusal to proceed to arbitration, UHPA staff's recommendation not to proceed to arbitration, or in the processing of Ms. Tupola's grievance. The Board grants UHPA's Motion based on the issue of the duty of fair representation.

The Board notes, however, Ms. Tupola's implication of other reasons that exhaustion of contractual remedies in this case would have been futile. We find these reasons also untenable to except her from the requirement of exhausting contractual remedies. First, she references UHPA's reversal of its position that there is a conflict between the CBA and the BOR Policy language to concurrence with UH's position that continued employment is the same as LWOP. Second, she states that she withdrew her arbitration request because her position became at odds with that of Kardash. Regarding her first argument, the Board finds that similar excuses have been rejected by courts in other cases. Employees' claims of failure to exhaust available remedies through the grievance process because of a subjective belief that the union was in agreement with the company and would not have pursued their claim have been deemed insufficient to excuse them from attempting to utilize the procedures. "The Court has generally insisted upon a 'clear and positive showing of futility' before excusing a failure to exhaust." Miller v. Chrysler Corp., 748 F.2d 323, 326 (6th Cir. 1984) (Miller); Emswiler v. CSX Transportation, Inc., 691 F.3d 782, 791 (6th Cir. 2012) (Emswiler); Millheisler v. Lincoln High School, 2008 U.S. Dist. LEXIS 72719, at *p. 21-25 (D. Wa. 2008). As the Fifth Circuit stated, "We are unwilling to embrace a rule that would allow disgruntled employees to circumvent mandatory grievance procedures solely because they may subjectively believe, even in good faith, that resort to those procedures would be a hollow act." Parham v. Carrier Corp., 9 F.3d. 383, 391-392 (5th Cir. 1993) (Parham). *See also*: Terwilinger v. Greyhound Lines, Inc., 882 F.2d 1033, 1039 (6th Cir. 1989) (An employee's subjective belief that pursuing such remedies would have been futile or because the employer repudiated the contract and its dispute resolution procedures is not a sufficient excuse for not attempting to utilize the procedures.). Regarding the withdrawal of her request to the UHPA Board to take her case to arbitration, under Poe, if the employee fails to request that the union advance her claim to arbitration, she fails to establish that she was prevented from exhausting her contractual remedies. 105 Haw. at 104, 94 P.3d at 659. While citing reasons for the withdrawal at the Motion hearing, she presented no evidence. Even if her reasons were shown, lack of sufficient notice of the staff recommendation and the conflict between her position and that of Kardash do not demonstrate futility. While this withdrawal appears to be due to a lack of faith in her UHPA representative, the Board further finds that this justification for "sidestepping" the grievance mechanism in the CBA appears to be a voluntary abandonment insufficient to establish a breach of the duty of fair representation. *See:* Maisonet v. Trailer & Marine Transp., Inc. (TMT), 514 F.Supp. 1129, 1133 (D. P.R. 1981). The Board finds that Ms. Tupola's conflict argument merely amounts to a subjective belief of futility similar to those found insufficient to excuse her from exhausting contractual remedies in Miller, Emswiler, and Parham.

3. Ms. Tupola's HRS §89-13(b)(5) Claim

As stated above, the Board construes the CU Complaint to also claim a violation of HRS §89-13(b)(5) that makes it a prohibited practice for a public employee or any employee

organization or its designated representative to wilfully violate the terms of a collective bargaining agreement. Ms. Tupola fails to allege any facts in support of this violation. Moreover, for the reasons discussed above, the Board has already ruled that Ms. Tupola fails to establish that UHPA breached its duty of fair representation in processing her grievance, by the UHPA's staff's recommendation not to take her grievance to arbitration, and UHPA's failure to take her case to arbitration. Based on her failure to demonstrate that UHPA violated any CBA terms or breached its duty of fair representation in the processing of her grievance, recommending that the matter not be submitted to arbitration, or failing to take her grievance to arbitration, the Board holds that she is unable to establish that UHPA violated the CBA. *See, e.g.,* Emura Order, at *17. For these reasons, the Board grants summary judgment to UHPA regarding this claim.

4. The Complaint Fails to Allege that UHPA Acted in a Discriminatory Manner or in Bad Faith

Finally, UHPA also takes the position that the CU Complaint must be dismissed because of a failure to state a claim regarding a breach of the duty of fair representation. Ms. Tupola did not specifically address this argument in her Memorandum or at the hearing. The Board holds that in addition to Ms. Tupola's failure to establish a breach of the duty of fair representation claim by UHPA, the CU Complaint should also be dismissed for failure to state a claim for the following reasons.

In applying the standard for a motion to dismiss for failure to state a claim, the Board has adhered to the principle that the pleadings for a *pro se* complainant must be held to less stringent standards than formal pleadings drafted by lawyers and read more liberally than pleadings drafted by counsel. Accordingly, the complaint 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. *See, e.g.,* 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); Valeho-Novikoff v. Okabe, et. als., CU-05-302, Order No. 3024, at *17 (10/6/2014). The Board further notes HRCP Rule 8(f) stating that, "All pleadings shall be construed as to do substantial justice." The Ninth Circuit has held, however, that "a *pro se* complainant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-1108 (9th Cir. 2000).

The Board acknowledges, as discussed previously, that to prevail on her breach of fair representation claim, Ms. Tupola must show that UHPA's conduct towards her, as a collective bargaining member, was arbitrary, discriminatory, or in bad faith. From the face of the CU Complaint set forth above, Ms. Tupola articulates three grounds for her prohibited practice claims against UHPA. Specifically, that UHPA: 1) encouraged her to file a grievance on a

misinterpretation of the CBA and the BOR Policy; 2) failed to file for arbitration; and 3) refused to participate in good faith in mediation and arbitration procedures. Significantly absent is an allegation that UHPA breached its duty of fair representation and specific facts supporting that any of this alleged conduct is arbitrary, discriminatory, or in bad faith.

Under HRCP Rule 12(b)(6), the Board is permitted to consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. U.S. v. Ritchie, 342 F.3d 903, 907-908 (9th Cir. 2003); Morris v. McHugh, 997 F.Supp.2d 1144, 1154 (D. Haw. 2014), *reconsideration denied by* 2014 U.S. Dist. LEXIS 47921 (D. Haw. 2014). Attached to the CU Complaint are copies of a Statement for Arbitration and the Kardash Letter, which as discussed above, do not adequately provide the appropriate allegation and specific facts required to survive a motion to dismiss. The Kardash Letter is not helpful in this regard because the content actually supports the UHPA's position that there was no breach of the duty of fair representation. The Arbitration Statement appears to be the presentation that Ms. Tupola intended to provide to the UHPA Board before she withdrew her request for arbitration. This Statement articulates very specific facts and references CBA Article II, Non-Discrimination, prohibiting UHPA from discriminating "for lawful political activity." Significantly absent from the Statement are: 1) any specificity regarding the conduct of UHPA that allegedly violated the CBA or showed a breach of the duty of fair representation; and 2) any claim or supporting facts that UHPA's actions were arbitrary, discriminatory, or in bad faith. The Statement refers to Harris and Prevedouros and "testimonial proof from UH employees, among others, that the policy was **not** applied consistently." However, there are no allegations, facts, or evidence that these individuals were Unit 7 members who: were subject to CBA Article III, Section H. and the BOR Policy 9-5; filed a grievance regarding the same issues; and were treated differently than Ms. Tupola by UHPA because their grievance was recommended for and taken to arbitration. Consequently, even viewing the CU Complaint in a light most favorable to Ms. Tupola and deeming these allegations to be true, and construing this pleading more liberally, the Board is unable to find the allegations and facts sufficient to state a valid claim of breach of fair representation.

In Aijifu, 2003 U.S. Dist. LEXIS 26086, at p. *6-7, the Hawaii federal district court considered whether the complaint should be dismissed for failure to state a breach of fair representation claim based on the applicable standards for HRCP Rule 12(b)(6) motions. The district court found that while the plaintiff in that case claimed that the union breached the duty in its handling of her grievance, she failed to articulate any facts indicating discrimination or bad faith on the part of the union. Rather, the plaintiff, among other things, complained that the union failed to interview certain witnesses that plaintiff believed would have supported her grievance and failed to submit her "meritorious grievance" to arbitration. Noting that the U.S. Supreme Court has specifically held that a union does not breach its duty of fair representation merely

because it settled the grievance short of arbitration, the district court concluded that such claims did not rise to the standard of discrimination or bad faith required for a court to review a union's discretion in pursuing an employee grievance. In addition, while finding that these allegations may sustain a negligence claim, the district court further noted that a showing of mere negligence in grievance processing is insufficient to constitute a breach of the duty of fair representation; and further, that an error in judgment, even if negligent, does not rise to the standard of bad faith or discrimination required to sustain a breach of the duty of fair representation. Hence, the district court held that in the absence of any allegation by the plaintiff that the union processed her grievance in bad faith or with a discriminatory purpose, she failed to state a claim for duty of fair representation.

Similar to the complaint allegations before the district court in Aijifu, the Board finds that the CU Complaint allegations lack any facts regarding UHPA's conduct rising to the standard of discrimination or bad faith in processing Ms. Tupola's grievance. Consequently, the Board agrees with UPHA and grants its Motion that the Complaint be dismissed for failure to state a claim for breach of the duty of fair representation.

D. The UH's Motion

As stated above, the CE Complaint alleges a violation of HRS §89-13(a)(8), which makes it a prohibited practice for a public employer or its designated representative wilfully to violate the terms of a collective bargaining agreement. In its Motion for dismissal or in the alternative for summary judgment, UH argues that: 1) the Board should defer to the grievance process regarding the issue of whether UH violated Article III Section H because of the lack of countervailing policy considerations; and 2) the UH has satisfied its burden to show that there are no disputed issues of material fact. As stated, Ms. Tupola fails to address these issues in her Response and her arguments made during the Motions hearing.

The Board finds that this HRS §89-13(a)(8) claim against UH is governed by the principle set forth in Poe that if an employee does not prove his union breached its duty of fair representation, the employee lacks standing to pursue his claim against the employer before the HLRB. 105 Hawaii at 104, 94 P.3d at 659. As the Poe Court reasoned:

> 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.

Id. at 102, 94 Haw. at 657.

Accordingly, this case is a hybrid action which if the employee fails to demonstrate that the union breached its duty of fair representation, the claim against the employer must also fail. DelCostello, 462 U.S. at 164-165; Poe, 105 Hawaii at 104; 94 P.3d at 659; Slevira v. Western Sugar Co., 200 F.3d 1218, 1221-1222 (9th Cir. 2000); Yoon v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, Cases No. CU-13-217, CE-13-526, Order No 2224, at *6-7 (November 16, 2003). Based on the Board's grant of UHPA's Motion on the breach of fair representation claim, the Board is compelled to grant UH's Motion on the breach of collective bargaining agreement claim.

ORDER

For all of the foregoing reasons, the Board hereby grants Respondent UHPA's Motion to Dismiss, or in the alternative, for Summary Judgment; and grants Respondent UH's Motion to Dismiss or in the alternative for Summary Judgment.

DATED: Honolulu, Hawaii, _____.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Andria Tupola
Richard Rand, Esq.
Wade Zukeran, Esq.

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[i] In UH's Reply Memorandum in Support of its Motion to Dismiss or in the Alternative for Summary Judgment Filed on October 24, 2014, UH references this Response Memorandum as filed on October 31, 2014, the File and Serve Express (FSX) filing date. The Response Memorandum was e-filed on October 31, 2014 with FSX at 5:16 p.m. HST. The Hawaii Labor Relations Board Protocols for E-Filing (FSX User Agreement), signed by Ms. Tupola and the UH and UHPA attorneys, provides that, "for the purpose of computing time for any other party to respond, any document filed on a day or at a time when the Board is not open for business shall be deemed to have been filed on the next day the Board is open for business." Accordingly, because the Board was closed on October 31, 2014 at the time that the Response Memorandum was filed, the filing date is deemed to be the next business day November 3, 2014.

[ii] Ms. Tupola stated during the Motion hearing that she had been consulting with many attorneys regarding this matter. The record shows that no attorneys have entered an appearance on her behalf. She stated at that hearing that an attorney was unnecessary for filing a grievance or appearing before the Board.

[iii] In accordance with HRS §89-2, the "Employer" or "public employer" for UH is the BOR. However, none of the parties have raised the issue of whether the CE Complaint was brought against the proper entity. Based on Ms. Tupola's SRL status, the Board will, for the reasons discussed more fully in this Order, hold the CU Complaint to less stringent standards than the formal pleadings drafted by lawyers and read more liberally than pleadings drafted by counsel. For purposes of this case, the Board will simply refer to the Employer in this case as "UH."

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