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**Transaction ID 57704093**  
**Case No. CE-03-812, CU-03-319**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

CHAD VINCENT MEDEIROS,

Complainant,

and

ROBERT F. WESTERMAN, Fire Chief,  
Fire Department, County of Kauai and DALE  
SHIMOMURA, Business Agent, Hawaii  
Government Employees Association,  
AFSCME, Local 152, AFL-CIO and  
HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Respondents.

CASE NOS.: CE-03-812

CU-03-319

ORDER NO. 3085

ORDER GRANTING IN PART AND  
DENYING IN PART RESPONDENTS  
DALE SHIMOMURA and HAWAII  
GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO'S MOTION TO STRIKE  
COMPLAINANT'S AUDIO RECORDING  
AND DOCUMENTS FILED ON JANUARY  
31, 2013; GRANTING IN PART AND  
DENYING IN PART RESPONDENT  
ROBERT F. WESTERMAN (in his official  
capacity), FIRE CHIEF, FIRE  
DEPARTMENT, COUNTY OF KAUA'I'S  
MOTION TO STRIKE COMPLAINANT'S  
AUDIO RECORDING AND DOCUMENTS  
FILED ON JANUARY 31, 2013;  
GRANTING RESPONDENTS DALE  
SHIMOMURA and HAWAII  
GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO'S MOTION TO DISMISS  
AMENDED PROHIBITED PRACTICE  
COMPLAINT; AND GRANTING  
RESPONDENT ROBERT F. WESTERMAN  
(in his official capacity), FIRE CHIEF AND  
COUNTY OF KAUA'I FIRE  
DEPARTMENT'S MOTION TO DISMISS  
THE AMENDED PROHIBITED PRACTICE  
COMPLAINT FILED ON DECEMBER 18,  
2012

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS DALE SHIMOMURA and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S MOTION TO STRIKE COMPLAINANT'S AUDIO RECORDING AND DOCUMENTS FILED ON JANUARY 31, 2013; GRANTING IN PART AND DENYING IN PART RESPONDENT ROBERT F. WESTERMAN (in his official capacity), FIRE CHIEF, FIRE DEPARTMENT, COUNTY OF KAUA'I'S MOTION TO STRIKE COMPLAINANT'S AUDIO RECORDING AND DOCUMENTS FILED ON JANUARY 31, 2013; GRANTING RESPONDENTS DALE SHIMOMURA and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S MOTION TO DISMISS AMENDED PROHIBITED PRACTICE COMPLAINT; AND GRANTING RESPONDENT ROBERT F. WESTERMAN (in his official capacity), FIRE CHIEF AND COUNTY OF KAUA'I FIRE DEPARTMENT'S MOTION TO DISMISS THE AMENDED PROHIBITED PRACTICE COMPLAINT FILED ON DECEMBER 18, 2012

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I. PROCEDURAL AND FACTUAL BACKGROUND

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

A. PROCEDURAL BACKGROUND

On November 19, 2012, Complainant CHAD VINCENT MEDEIROS (Complainant or Mr. Medeiros), self-represented litigant (SRL), filed a Prohibited Practice Complaint (Complaint) against Respondent DALE SHIMOMURA (Shimomura), HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA, Union, or Union Respondent), and ROBERT F. WESTERMAN (in his official capacity) (Westerman), Fire Chief, Fire Department, County of Kaua'i (County Respondent). The Complaint alleged, among other things, that during an October 17, 2012 meeting attended by Mr. Medeiros, Shimomura, Westerman, County Secretary Rose Bettencourt (Bettencourt), and County of Kauai Personnel Manager Tom Takatsuki (Takatsuki), which was being audio-recorded "in a legal manner," Mr. Medeiros was asked to leave the meeting while they discussed other matters. The Complaint further alleges that while the meeting was being recorded, "some very disturbing comments were made" by Shimomura, Westerman, and Bettencourt evidencing misrepresentation and breach of contract by the County Respondent and bad faith by the Union Respondent against Mr. Medeiros and violation of Hawaii Revised Statutes (HRS) § 89-13 prohibited practices.

Attached to the Complaint was a copy of HRS § 89-13 with HRS §89-13(a)(4), (5), and (8) and (b)(2) and (3) highlighted and a November 5, 2012 memorandum from Mr. Medeiros to



Westerman regarding legal notice requesting that any or all documents, envelopes and paperwork pertaining to Mr. Medeiros be submitted to HGEA union representative Gerald Ako (Ako) and his union lawyer “[t]o prevent any further, Retaliation [sic] or harassment from the COUNTY OF KAUA’I FIRE DEPARTMENT.”

On November 26, 2012, the Union Respondent filed Respondents Dale Shimomura and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO’s Motion for Particularization of Complaint (Union Motion for Particularization).

On November 28, 2012, the County Respondent filed County of Kauai Respondent’s Motion for Particularization of the Complaint (County Motion for Particularization).

On November 30, 2012, the Board by Order No. 2867 granted the Motions for Particularization and ordered: Complainant to file a particularized statement of his Complaint, identifying the specific actions which the HGEA and Kauai County took in violation of HRS § 89-13 and include a complete statement of the facts supporting the complaint, including specific facts regarding names, dates, time, and places involved in the acts alleged to be improper within five days of service of the Order; and Respondents to file an answer within five days after service of the Particularization.

On December 11, 2012, the Board received a letter from Mr. Medeiros requesting an extension regarding the filing of the particularized statement. Following a December 13, 2012 prehearing/settlement conference, in Order No. 2869, the Board established deadlines of December 20, 2012 for Complainant to file an Amended Complaint and January 4, 2013 for Respondents to file their respective answers to the Amended Complaint.

On December 18, 2012, Complainant filed the Amended Prohibited Practice Complaint (Amended Complaint). An attachment entitled “To whom it may concern, CASE NO. CE-03-812 CU-03-319” alleged that on October 17 [2012] at 10:30 a.m. a meeting was held and attended by Shimomura, Westerman, Taksuki [sic], Bettencourt, and Medeiros. The Complainant alleged that there was an audio recording approximately 26 minutes and 22 seconds in length. The Complainant also alleged that “only some of the disturbing comments made on the audio recording” included: a statement by Bettencourt “referring to lifeguards as a CANCER[!];” a statement by Shimomura stating, “he can file a grievance to align with the Problem [sic] but he’s trying not to get technical so we can just wash this away ‘[!];” a statement by Shimomura, “Tell them we did it, and shut up already;” right after Shimomura’s statement, Bettencourt laughing out loud; and a statement by Westerman to Mr. Medeiros, “Grow some Balls [sic] and just do your job. If you don’t like it, you can go find a job someplace else.” A second attachment to the Amended Complaint further alleged that the audio recording clearly shows his union representative Shimomura “coo berating” [sic] with county personnel” and

“representing Chad V. Medeiros to the Least [sic] of his ability,” and that “It is to my knowledge that my union rep. is to get as technical as He [sic] or she can, present the fact’s [sic] and follow the union guidelines to the best of there [sic] Ability’s [sic]. Which I feel was not done in this case.” The second attachment further alleged that “I feel that the fire chief who is in direct command of the lifeguard dept. Would [sic] have more sympathy for us, not the do as I say not as I do attitude and if You [sic] don’t like it ‘you can go find a job somewhere else.’” A third attachment to the Amended Complaint was a copy of HRS § 89-13 with HRS §§ 89-13(a) (5) and (b) (2), (3), and (5) highlighted.

On January 3, 2013, the Union Respondent filed Respondents Dale Shimomura and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO’s Motion to Dismiss Amended Prohibited Practice Complaint (Union Motion to Dismiss).

On January 4, 2013, the County Respondent filed Respondent Robert F. Westerman (in his official capacity), Fire Chief, and County of Kaua’i Fire Department’s Motion to Dismiss the Amended Prohibited Practice Complaint Filed on December 18, 2012 (County Motion to Dismiss).

On January 11, 2013, the County Respondent filed Errata to Respondent Robert F. Westerman (in his official capacity), Fire Chief, and County of Kaua’i Fire Department’s Motion to Dismiss The Amended Prohibited Practice Complaint Filed on December 18, 2012.

On January 15, 2013, the Board held a prehearing conference/settlement conference in this case. At the prehearing conference, the Board clarified with Mr. Medeiros that the Amended Complaint is limited to the statements made on the audio recording of the October 17, 2012 meeting but did not include any allegations regarding a workers’ compensation claim or a harassment investigation against his supervisor.

On January 22, 2013, Mr. Medeiros filed a Document from Chad Medeiros.

On January 24, 2013, the Board held a hearing on the Union and the County Respondents’ Motions to Dismiss (Motion Hearing). In response to Mr. Medeiros’ request made at that hearing to submit the audio recording, the Board set a January 30, 2013 deadline for the audio recording to be filed and copies provided to the parties.

On January 29, 2013, Mr. Medeiros mailed the audio recording and other material, which were received by the Board and by counsel for the Union and County Respondents on January 31, 2013.



On February 11, 2013, the Union Respondent filed Respondents Dale Shimomura and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Motion to Strike Complainant's Audio Recording and Documents Filed on January 31, 2013 (Union Motion to Strike).

On February 13, 2013, Mr. Medeiros filed Complainant's Response to HGEA's Motion to Strike (Response to Union Motion to Strike).

On February 14, 2013 the County Respondent filed Respondent Robert F. Westerman (in his official capacity), Fire Chief, Fire Department, County of Kaua'i's Motion to Strike Complainant's Audio Recording and Documents filed on January 31, 2013 (County Motion to Strike).

On February 20, 2013, Mr. Medeiros filed Complainant's Response to Respondent's Motion to Strike (Response to KFD's Motion to Strike).

#### B. BACKGROUND FACTS

On October 17, 2012, Mr. Medeiros attended a meeting with his HGEA representative Shimomura and County representatives Westerman, Takatsuki, and Bettencourt regarding issues with his workers' compensation and an alleged incident with his supervisor. Mr. Medeiros audio recorded this meeting with the knowledge of only Shimomura.

During this meeting, Mr. Medeiros was requested to and left the meeting while the other attendees discussed other matters. The audio recording continued, however, and the alleged "disturbing comments" were made by the Respondents and audio recorded during Mr. Medeiros' absence from the meeting.

#### II. DISCUSSION, CONCLUSION, AND ORDER

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

#### A. MOTIONS TO STRIKE

At the January 24, 2013 Motion Hearing, Complainant requested that the Board permit him to submit a copy of the audio recording of the October 17, 2012 meeting. Accordingly, the Board orally established a deadline of Wednesday, January 30, 2013 for Mr. Medeiros to file the

audio recording with the Board and provide copies to the parties. There is no dispute that the Board and the counsel for the Respondents received their copies of the audio tape on January 31, 2013; and that Complainant further enclosed with the audio recording additional material consisting of an apparent informal transcript of the audio recording, p. 38-39 of the Unit 03 Agreement July 1, 2007-June 30, 2009 setting forth Article 19-Health and Safety, a "LABOR AGREEMENT GRIEVANCE FORM HGEA Unit 03 Step 1" from Mr. Medeiros to Westerman regarding a June 12, 2012 alleged violation of **Article 3 Maintenance of Rights & Benefits; Article 8 Discipline; Article 19 Safety and Health, (A) and (D)**; KFD 103 forms submitted by several lifeguards, a letter from Mr. Medeiros to "To whom it may concern" stamped as received by the Office of the Mayor of the County of Kauai on June 6, 2012, a KFD Incident Sheet for a June 2, 2012 incident involving harassment, and a Kauai Police Department Statement Form filed by Mr. Medeiros regarding this incident.

Subsequently, both the Union and County Respondents filed the Motions to Strike the audio recording and additional materials attached to the recording. The Respondents assert that the audio recording should be stricken because Mr. Medeiros failed to submit and file the recording by the January 30, 2013 deadline. Further, the Respondents argue that the additional materials should also be stricken because allowing the new matters to be considered at this point in the proceedings is extremely prejudicial to the Respondents and the orderly disposition of the pending motions to dismiss and well beyond the scope of what the Board's decision allowed the Complainant to submit by the January 30, 2013 deadline. In his Responses to the Motions to Strike, Mr. Medeiros argues that: the documents and the audio recording were sent on January 29<sup>th</sup> [2013] before the January 30<sup>th</sup> [2013] deadline; the U.S. Postal Service flaws or delays are totally beyond his control; the Board should be lenient on this matter; and the documents sent with the transcript of the recording are to show the Board and the parties [w]hat article 19 of the unit 3 union handbook is all about."

A denial of a motion to strike is within the discretion of the Board. Shanghai Inv. Co. v. Aletka Co., 92 Hawaii 482, 494, 993 P.2d 516, 528 (2000) (Shanghai Inv.), *overruled in part on other grounds*, Blair v. Ing, 96 Hawaii 327, 331 n.6, 31 P.3d 184, 188 n.6 (2001).

The Board finds that the circumstances in this case compel the denial of Respondents' motions to strike the audio tape recording. Mr. Medeiros is an SRL residing on Kauai and has been filing his pleadings in this case by mail. There is no dispute that the Board orally ordered that the deadline for Mr. Medeiros to file the audio recording and provide copies to the parties was by January 30, 2013; Mr. Medeiros did mail the audio recording and the copies on January 29, 2013; and the Board and counsel for Respondents received the audio recording copies on January 31, 2013. Based on these circumstances, the Board finds that there simply is no undue hardship or prejudice to the parties by receipt of the audio recording one day after the deadline. Shanghai Inv., 92 Hawaii at 493-494, 993 P.3d at 527-528. The counsel for the parties do not



appear to disagree because their contentions regarding extreme prejudice appear to focus not on the audio recording but rather on the additional materials enclosed with that recording. However, the Board will exclude from consideration in accordance with HRS § 91-10(1) set forth below any evidence on the audio recording not relevant to the present case.

Regarding those additional materials, the Board finds that HRS § 91-10(1) providing for rules of evidence in contested cases is applicable.

HRS § 91-10(1) states:

§91-10 Rules of evidence; official notice. In contested cases:

- (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law[.]

(Emphasis added) The Board concurs with Respondents that these additional materials were not specifically addressed in its oral order rendered at the Motion Hearing. The Board finds that with the exception of the apparent informal transcript of the audio recording, the other documents relate to the investigation into the alleged harassment charge by Mr. Medeiros against his supervisor. Since the Board clarified at the prehearing/settlement conference that this harassment investigation is not part of the Amended Complaint, these documents regarding the harassment charge and investigation are irrelevant to this case and will not be considered.

Regarding the remaining issue of the apparent informal transcript of the audio recording, based on HRS § 91-10(1), the Board will exclude the transcript as evidence to the extent that the transcript is unduly repetitious evidence of the matters addressed on the audio recording and contains information not relevant to this case.

## B. MOTIONS TO DISMISS

### 1. Standard for Review

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 plaintiffs 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. Paysek 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.

## 2. Motions to Dismiss

On January 3, 2013, the Union Respondent filed its Motion to Dismiss in lieu of an answer asserting that Complainant has failed to allege any facts entitling him to relief under HRS § 89-13 and more specifically, how Respondents violated HRS § 89-13(b)(2), (3), or (5).<sup>i</sup> Alternatively, the Union Respondent argues that the Complaint should be dismissed pursuant to HRCP Rules 12(b)(6) for failure to state a claim.



On January 4, 2013, the County Respondent filed its Motion to Dismiss based on analogous arguments to those made by the Union Respondent that Complainant has both failed to provide sufficient facts to allow the County Respondent to reply and to show how the County Respondent has violated HRS § 89-13(a)(5) and (8);<sup>ii</sup> and even assuming arguendo that the few facts alleged in the Complaint and Amended Complaint are true that Complaint has failed to state a claim upon which relief can be granted. Complainant does not appear to dispute that the Amended Complaint alleges violations of HRS § 89-13(a)(5) and (b)(2), (3), and (5).

a. Complainant Lacks Standing to Assert A Violation of HRS § 89-13(a)(5) and (b)(2).

Complainant has alleged that the County Respondent and the Union Respondent refused or failed to bargain in good faith in violation of HRS § 89-13(a)(5) and (b)(2), respectively. HRS § 89-13(a)(5) provides that it is a prohibited practice for the employer to refuse to bargain collectively in good faith with the exclusive representative. As Complainant is a public employee and not the exclusive representative, there is no duty upon the employer to bargain in good faith with an individual employee under HRS § 89-9(a). Accordingly, the Board is constrained to conclude that Complainant lacks standing to allege a violation against the County Respondent for failure to bargain collectively in good faith and dismisses Complainant's HRS § 89-13(a)(5) violation. *See, e.g., Hikalea v. Dept. of Env. Serv.*, Case No. CE-01-808, Order No, 2950, at \*12 (Hikalea Order).

HRS § 89-13(b)(2) provides that it is a prohibited practice for an exclusive representative to refuse to bargain collectively in good faith with the employer. Since Complainant is a public employee and not the employer, he lacks standing to allege an HRS § 89-13(b)(2) against the Union Respondent. Consequently, the Board dismisses Complainant's HRS §89-13(b)(2) allegation. *See, e.g., Lepere v. Waihee*, Case No. CE-132, Board Decision No. 348, 5 HLRB 263, 272 (1994) (Lepere); Hikalea Order, at \*12.

b. Complainant Lacks Standing to Assert A Violation of HRS § 89-13(b)(3).

Complainant has alleged that the Union Respondent has refused to participate in good faith in the mediation and arbitration procedures set forth in section 89-11 in violation of HRS § 89-13(b)(3). However, HRS § 89-11 governs the resolution of an impasse over the terms of an initial or renewed agreement, and not the resolution of a dispute concerning the interpretation or application of an agreement. Since an impasse and the procedure set forth in HRS § 89-11 can only apply to a public employer and an exclusive representative, there is no duty upon the exclusive representative to participate in good faith in those procedures with an individual

employee under HRS §89-11. *See, e.g., Lepere, id.* Hence, the Board finds that Complainant lacks standing to allege an HRS § 89-13(b)(3) violation and dismisses this allegation.

c. There Is An Absence of Adequate Facts in Support of The HRS § 89-13(b)(5) Allegation.

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Complainant has alleged that the Union Respondent has violated the terms of a collective bargaining agreement in violation of HRS § 89-13(b)(5). The only facts that Complainant has alleged are the “disturbing comments” made by the Shimomura, Bettencourt, and Westerman in the October 17, 2012 meeting. In addition, the only evidence in the record of a collective bargaining agreement was a copy of Article 19-HEALTH AND SAFETY of the Unit 03 Agreement July 1, 2007 – June 30, 2009,<sup>iii</sup> which was applicable to the harassment charge and investigation, which the Board clarified at the prehearing conference was not an issue in this prohibited practice case.

Even taking the evidence in the light most favorable to the Complainant, based on the failure to specify the particular collective bargaining provision that was violated by these alleged “disturbing comments” and/or how the alleged comments constitute a violation of the collective bargaining agreement in the Amended Complaint, in the record, or by arguments, the Board is unable to find adequate facts to support a prohibited practice violation by the Union Respondent under HRS § 89-13(b)(5). Accordingly, the Board concludes that the Amended Complaint fails to state a claim for relief under HRS §89-13(b)(5); and dismisses these allegations. *See, e.g., Last v. Dept. of Pub. Works*, Case No. CE-01-278, Board Order No. 1315, at \*4-5 (1996)

ORDER

For all of the reasons set forth above, the Board hereby: 1) denies the Union Respondent’s Motion to Strike and the County Respondent’s Motion to Strike regarding the audio recording of the October 17, 2012 meeting but excludes any evidence irrelevant to this case; 2) grants the Union Respondent’s Motion to Strike and the County Respondent’s Motion to Strike regarding the documents submitted on January 31, 2013 regarding the harassment charge and investigation; 3) denies the Union Respondent’s Motion to Strike and the County Respondent’s Motion to Strike regarding the apparent informal transcript but excludes the transcript to the extent that the transcript is unduly repetitious of the matters addressed on the audio recording and contains information irrelevant to this case; and 4) grants the Union Respondent’s Motion to Dismiss the Amended Complaint and the County Respondent’s Motion to Dismiss the Amended Complaint. The case is hereby dismissed.



DATED: Honolulu, Hawaii August 12, 2015.

HAWAII LABOR RELATIONS BOARD

  
KERRY M. KOMATSUBARA, Chair

  
SESNITA A.D. MOEPONO, Member

  
ROCK B. LEY, Member

Copies sent to:

Chad Vincent Medeiros  
Debra Kagawa, Esq.  
Mauna Kea Trask, Esq.

<sup>i</sup> The Board notes that in the initial Complaint, filed on November 19, 2012, Mr. Medeiros attached a copy of HRS §89-13 with HRS § 89-13(a)(4), (5), and (8) and (b)(2) and (3) highlighted. However, on the copy of HRS § 89-13 attached to his Amended Complaint, filed on December 18, 2012, Mr. Medeiros highlighted HRS § 89-13(a)(5) and (b)(2), (3), and (5). Accordingly, the Board determines that the violations being alleged in this case are those highlighted in the attachment of HRS § 89-13 to the Amended Complaint. The Board; therefore, considers the County Respondent's Motion to Dismiss as moving for dismissal of HRS § 89-13(a)(5) and the Union Respondent's Motion to Dismiss as moving for dismissal of HRS § 89-13(b)(2), (3), and (5).

<sup>ii</sup> See endnote i, *supra*.

<sup>iii</sup> ARTICLE 19 – SAFETY AND HEALTH states:

- A. Safety and Health Requirements. The Employer shall conform to and comply with applicable regulations requiring safe, healthy, and sanitary working conditions prescribed by the Department of Health, Department of Labor, or any other governmental body. In addition, the Employer shall insure compliance with the applicable provisions of the Hawai'i Occupational Safety and Health Law, Act 57, SLH, 1972. The Employer shall provide, among other things:

1. When feasible in the renovation or construction of government buildings, the Employer shall endeavor to include in the specifications, provisions to provide, but not limited to the following air

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conditioning; cold water fountains; rest rooms for Employees separate from public rest rooms; areas for meals.

2. When adequate lighting is essential to the performance of a specific function, the Employer shall provide necessary lighting equipment.

B. Protective Clothing and Safety Equipment and Tools.

1. Whenever the Employer requires that Employees wear protective clothing or use safety equipment and tools, the Employer shall provide and replace such items.

2. When an Employee performs work requiring the use of protective clothing and the Employee's garment is damaged because the protective clothing is inadequate, the Employer shall be responsible for reimbursing the reasonable value of the garment. The reasonable value shall be mutually agreed upon by the department head or designee and the affected Employee. Whenever such damage occurs, it shall be reported immediately to the Employee's supervisor.

3. Each Employee whose duties require protective shoes as provided under this section shall be provided with a second pair of such shoes when all of the following conditions are met:

a. Such shoes become wet frequently and on a regular basis such as a result of the Employee's duties.

b. Wetness results from water or muddy conditions.

c. Wetness which saturates the shoes will occur in spite of reasonable precautions and preventive measures.

d. Rubber boots when provided are not reasonable to wear (1) due to the nature of work or (2) for more than four hours per work day.

C. Working Conditions.

1. Toilet facilities will be provided.

2. Clean, cool, potable drinking water shall be made accessible.

3. All office and work areas shall be provided with natural or mechanical systems of ventilation.

D. The Employer shall endeavor to provide security and protection for public Employees in offices where there have been experiences of frequent threats or violence.