STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SANDY I. WAKUMOTO, Complainant, and DARRYL PERRY, Chief of Police, Kauai Police Department, County of Kauai; and MICHAEL CONTRADES, Deputy Chief of Police, Kauai Police Department, County of Kauai, Respondents.	CASE NO.: CE-12-830 ORDER NO. 3106 ORDER DENYING RESPONDENTS' MOTION TO STRIKE; GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

ORDER DENYING RESPONDENT'S MOTION TO STRIKE; GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL AND FACTUAL 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. The Complaint and Motion to Dismiss

On August 6, 2013, Complainant SANDY I. WAKUMOTO (Complainant or Wakumoto) filed a prohibited practice complaint (Complaint) against DARRYL PERRY (Perry) and MICHAEL CONTRADES (Contrades), the Chief of Police and Deputy Chief of Police, Kauai Police Department (KPD), County of Kauai (County), respectively (collectively Respondents) with the Hawaii Labor Relations Board (Board). The Complaint alleges that KPD failed to comply with Wakumoto's information requests regarding his grievance filed with KPD, thereby

committing a prohibited practice in violation of Hawaii Revised Statutes (HRS) §§ 89-1(a) and (b), and 89-13(a)(1), (5), (7), and (8). The Complaint further alleges violations of "Due process and equal protection rights" under Article I, Section 5, of the Hawaii State Constitution, and the 5th and 14th Amendments of the United States Constitution.

At the Second Prehearing Conference held on September 24, 2013, the Board set deadlines in this case, which were confirmed by the Board's September 25, 2013, Notice of Deadlines and Motion Hearing (Notice of Deadlines). The Notice established deadlines of November 5, 2013, for filing a motion, November 19, 2013, for filing a response, and November 26, 2013, for filing a reply, and scheduled a motion hearing for December 2, 2013.

On November 5, 2013, Respondents filed DARRYL PERRY, CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT, COUNTY OF KAUA'I AND MICHAEL CONTRADES, DEPUTY CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT COUNTY OF KAUA'I'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT (Motion to Dismiss).

On November 20, 2013, Wakumoto filed MEMORANDUM IN OPPOSITION TO RESPONDENT'S [SIC] MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT DATED November 4, 2013 (Memorandum in Opposition) and attached exhibits consisting of copies of documents regarding Complainant's grievance filed on June 17, 2013, and a request for information relevant to the grievance.

On November 26, 2013, Respondents filed DARRYL PERRY, CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT, COUNTY OF KAUA'I AND MICHAEL CONTRADES, DEPUTY CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT, COUNTY OF KAUA'I'S MOTION TO STRIKE COMPLAINANT'S MEMORANDUM IN OPPOSITION FILED ON NOVEMBER 20, 2013 (Motion to Strike).

Also, on November 26, 2013, Respondents filed DARRYL PERRY, CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT, COUNTY OF KAUA'I AND MICHAEL CONTRADES, DEPUTY CHIEF OF POLICE, KAUA'I POLICE DEPARTMENT, COUNTY OF KAUA'I RESPONDENT'S [SIC] MEMORANDUM IN REPLY TO COMPLAINANT'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S [SIC] MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED NOVEMBER 20, 2013 (Reply Memorandum).

On December 2, 2013, the Board held a hearing on the Motion to Dismiss and the Motion to Strike. At the hearing, the Board orally denied the Motion to Strike, took the Motion to Dismiss under advisement, and stated that a written order would be issued on the Motions.

On August 17, 2015, the Board held a Status Conference to discuss the status of the case, clarify the issues, and to discuss other procedural matters.

On August 27, 2015, the Board conducted a Continued Status Conference to further address the issues and discuss other procedural matters. At this status conference, Respondents' counsel represented that the requested information at issue was 32 pages of documents.

B. Background Regarding The Information Request Dispute

For purposes of this Order, the following facts in this case are not in dispute.

For all times relevant to the Complaint, Wakumoto is and was a "public employee" as defined in HRS § 89-2, and included within bargaining unit 12, consisting of police officers under HRS §89-6(a)(12), as a police officer with KPD. The State of Hawaii Organization of Police Officers (SHOPO) is the "exclusive representative" for bargaining unit 12, as defined in HRS § 89-2.

For all times relevant to this Complaint, Darryl Perry is and was the Chief of Police, Kauai Police Department, County of Kauai and a "public employer" as defined in HRS § 89-2, as an individual who represents or acts in the interest of the Mayor of the County of Kauai in dealing with public employees.

For all times relevant to this Complaint, Michael Contrades is and was the Deputy Chief of Police, Kauai Police Department, County of Kauai, and a "public employer" as defined in HRS § 89-2, as an individual who represents or acts in the interest of the Mayor of the County of Kauai in dealing with public employees.

On June 17, 2013, Wakumoto filed a Step 1 grievance for an alleged June 6, 2013, violation of SHOPO collective bargaining agreement (CBA) Articles 1, 2, 4, 12, 13, 14, 32, 35, and 53, together with a request for information from KPD. On June 26, 2013, the grievance proceeded to Step 2. Wakumoto's grievance was denied by KPD at both Steps 1 and 2, and Wakumoto filed a Step 3 grievance.

By a June 24, 2013, letter, Contrades offered to make the information requested available for Wakumoto to review, stating:

> Pursuant to Article 32.F.1. of the State of Hawaii Organization of Police Officers collective bargaining agreement entitled "Relevant Information", the information you requested is being made available for your review at the Office of the Chief of

Police. Please make an appointment with the Chief's Secretary to view the material.

By a June 26, 2013 Memorandum, Wakumoto rejected Contrades's offer to make the information available for review at Perry's office stating, "Your refusal to provide the information as requested in my June 17, 2013 SIW-1-6-2013-Article 32.F.-Relevant Information Request of the unit 12 collective bargaining agreement (agreement) is clearly a violation of Article 32.F.2.. I request compliance with my Article 32.F.2. Relevant Information Request."

Contrades responded by a July 1, 2013 letter and suggested that Wakumoto discuss the relevant information request with a union official, stating in relevant part:

> In terms of the relevant information, again, I suggest that you discuss this with a Union official as your interpretation is incorrect. According to Article 32.F.2., entitled **Relevant Information**, "*The Employer shall, upon request of* ***the Union, make available*** *to the requesting party any and all written information relevant to the grievance. Said information shall be presented within the (10) working days after receipt of the request.*" The article is clear that the request must come from the Union. It is also clear that the Employer must, "make available" the relevant information. Although you are making the request and not the Union, we are still making all the relevant information available to you. As stated in my previous letter, you may contact the Chief's secretary, Gayle Kuboyama, to view the relevant information.
>
> Again, I suggest you consult with a SHOPO representative to get a clearer understanding of the contract and its interpretation as we are following and in compliance with the articles of the collective bargaining agreement.

In a July 10, 2013, letter to Wakumoto, Contrades again reiterated that "the information you requested has been made available to you at the Office of the Chief of Police. As of this date, you have not scheduled an appointment or made any attempt to view the material."

II. CONCLUSIONS OF LAW, DISCUSSION, 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. Motion to Strike

As stated above, at the December 2, 2013, Motions hearing, the Board orally denied the Respondents' Motion to Strike for the following reasons.

A denial of a motion to strike is within the discretion of the Board. *See* 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).

As stated above, the Notice of Deadlines established November 19, 2013, as the deadline for the filing of a response to a motion filed by November 5, 2013. There is no dispute that Wakumoto's Memorandum in Opposition was mailed on November 19, 2013, but not received by and filed with the Board until November 20, 2013, which was one day after the deadline established by the Notice of Deadlines. In support of their Motion to Strike, Respondents rely on Hawaii Administrative Rule (HAR) §§ 12-42-8 and 12-42-45 of the Board's rules of practice and procedure:

> HAR **§12-42-8 (a) Filing of documents**:
>
> (1) All complaints, pleadings, submittals, petitions, reports, exceptions, briefs, memoranda, and other papers required to be filed with the board shall be filed at the board's office.
>
> ***
>
> (3) The date on which the papers are actually received by the board shall be deemed to be the date of filing.
>
> HAR **§12-42-45 Answer**. (a) A respondent shall file a written answer to the complaint within ten days after service of the complaint. One copy of the answer shall be served on each party, and the original and give copies, with certificate of service on all parties, shall be filed with the board.
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> ***
>
> (g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

At the hearing, Respondents stood on their written Motion to Strike. Complainant argued in opposition that the Respondents' citation to HAR § 12-42-45 was in error because the administrative rule referenced applies to an answer to the complaint.

The Board concurs with Complainant that HAR § 12-42-45 applies only to answers to the complaint and not to an opposition to a motion to dismiss. However, the Board agrees with

Respondents that HAR § 12-42-8(a)(3) is applicable. In accordance with that provision, because Wakumoto's Memorandum in Opposition was not received by with the Board until November 20, 2013, the Memorandum was filed one day later than the November 19, 2013, deadline for filing. Nonetheless, the Board in its discretion finds that the circumstances in this case compel denial of Respondents' Motion to Strike. Wakumoto and his representative Mr. Rodrigues are not attorneys,[i] reside on Kauai, and have been filing their pleadings by mail. Wakumoto and Mr. Rodrigues did mail the Memorandum in Opposition on the November 19, 2013, the deadline for filing of his opposition, and there is no dispute that both the Board and Respondents' counsel received the opposition only one day after the deadline. Respondents have not asserted and the record fails to reflect any undue hardship or prejudice to the Respondents by receipt of the Memorandum in Opposition one day late. Hence, the Board is unable to find, based on these circumstances, that there is undue hardship or prejudice to the Respondents by receipt of the Memorandum in Opposition one day after the deadline. Shanghai Inv., 92 Hawaii at 493-94, 993 P.2d at 527-28.

For these reasons, the Board hereby incorporates its oral ruling denying the Motion to Strike into this Order.

B. Mootness

At the status conferences, Respondents asserted that this case should be dismissed on the additional ground of mootness because Wakumoto failed to go forward with the underlying grievance. In support, Respondents argue that the two conditions for justiciability, adverse interest and effective remedy have been compromised. Based on Wakumoto's failure to object to the raising of this issue at the status conferences, the Board will consider this additional ground in support of dismissal of the Complaint.

In Diamond v. State, 112 Hawaii 161, 170, 145 P.3d 704, 713 (2006) (Diamond), the Hawaii Supreme Court articulated the applicable principles regarding the mootness doctrine:

> It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events...have so affected the relations between the parties that the two conditions for justiciability relevant on appeal—adverse interest and effective remedy—have been compromised.
>
> ***

> Nevertheless, we have "repeatedly recognized an exception to the mootness doctrine in cases involving questions that affect the public interest and are 'capable of repetition yet evading review.'" In Okada, we stated:
>
> Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. The phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

(Citations omitted). The Board holds that this particular case falls within the exception noted in Diamond for questions affecting the public interest and capable of repetition yet evading review. The Board finds that all of the Okada criteria for the requisite degree of public interest are met in this case. The parties are the County, a governmental entity, and Wakumoto, a public employee; the dispute between the parties involves the interpretation and implementation of the grievance process established by the unit 12 SHOPO CBA to which the County was a signatory; and the grievance process at issue is an integral part of the good faith collective bargaining process, which the Court has deemed "fundamental in bringing to fruition the legislatively declared policy 'to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.'" Bd. of Educ. v. Hawaii Pub. Emp't Relations Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974) (per curiam); United Pub. Workers, AFSCME, Local 646 v. Yogi, 101 Hawaii 46, 61, 62 P.3d 189, 204 (2002) (Acoba, concurring) (*citing* Bd. of Educ. v. Hawaii Pub. Emp't Relations Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974)). The desirability of an authoritative determination for the future guidance of public officers is evident based on the fact that Respondents are public officers who represent the County and implement the SHOPO CBA and the specific provision in dispute. The likelihood of future recurrence of the question is established based on Wakumoto's position, which was not disputed by the County, that the issue arises in a number of grievances under the SHOPO CBA and which is confirmed by the Board's acknowledgment that other prohibited practice cases currently before the Board present similar issues. Finally, the Board concludes that the element of "capable of repetition, yet evading review" is also satisfied in this case based on the interplay of the SHOPO CBA provisions setting the time requirements for an expeditious processing of grievances and for obtaining the requested relevant grievance information. Based on these provisions, the grievant may not obtain the requested information in sufficient time to adequately process the grievance and exhaust his contractual remedies. The challenged conduct of

Respondents is likely to evade full review because Wakumoto and other grievants would be unable to obtain review of this issue and still meet the time requirements to process a grievance and exhaust their remedies under the procedure set forth in the SHOPO CBA.

For these reasons, the Board holds that this matter is not moot based on the exception for matters affecting the public interest and capable of repetition yet evading review.

C. The Board Dismisses Certain Claims Sua Sponte

1. The Board Dismisses The Constitutional Claim for Lack of Jurisdiction

The Complaint alleges that the Respondents' failure to comply with the information request violates the due process clause of both the United States[ii] and Hawaii State[iii] Constitutions. At the status conferences, Complainant took the position that he was entitled to summary judgment on these issues.[iv]

However, it is well-recognized by both the Hawaii state court and Board decisions that the Board, as an administrative agency, is without jurisdiction to consider constitutional issues. Hawaii Gov't Employees Ass'n. v. Hawaii State Teachers Ass'n., 124 Hawaii 197, 218, 239 P.3d 1, 22 (2010). *See also:* United Public Workers, AFSCME, Local 646, AFL-CIO v. Lum, Board Case No. CE-01-634, Decision 471, 7 HLRB 58, 60 (2007); Ching v. Fasi, Board Case No. CE-12-25, Decision No. 89, 2 HPERB 23, 31 (1978) (Board held that constitutional challenges to the validity of a provision in the unit 12 contract, or to provisions of Chapter 89, HRS, are not within its jurisdiction).

"The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)). Consequently, the Board *sua sponte* dismisses this constitutional claim for lack of jurisdiction and denies the Complainant's Motion for Summary Judgment.

2. The Board Dismisses the HRS §§ 89-1 and 89-13(a)(7) Claims

Based on the Hawaii Supreme Court (Court) decision in Poe v. Hawaii Labor Relations Bd., 97 Haw. 528, 540, 40 P.3d 930, 942 (2002) (Poe), the Board dismisses both the HRS §§ 89-1[v] and the 89-13(a)(7) claims. The Poe complainant made a similar allegation that the employer in that case "contravened the declared policy of HRS Chapter 89 as set forth in HRS § 89-1" by not "promoting harmonious and/or cooperative relations between itself and...its employees[.]"

The Court held that the HRS § 89-1 statement of purpose does not impose rights or duties upon which an enforceable claim will lie. Rather, the Court clarified that the purpose of HRS § 89-1 is to "provide a useful guide for determining legislative intent or purpose" specifically holding and reasoning as follows:

> Finally, we observe that HRS § 89-1, the statement of policy does not impose rights or duties upon which an enforceable claim will lie. The general rule of statutory construction is that policy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves a substantive part of the law which can limit or expand upon the express terms of the operative statutory provisions. Thus, as one court noted,
>
> > while some statutes have a policy section and some have a preamble, the effect to be given these provisions is the same: they provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive party of the statute. They may be used to clarify ambiguities, but they do not create rights that are not found within the statute, nor do they limit those actually given by the legislation.
>
> Therefore, the broad policy statements within HRS § 89-1, entitled "Statement of findings and policy," do not impose binding duties or obligations upon any parties but, rather, provide a useful guide for determining legislative intent and purpose. These statements, therefore, do not implicate the prohibited practice provision of "refus[ing] or failing to comply with any provision of [HRS] chapter [89]," as set forth in HRS § 89-13(a)(7). Hence, Poe's claim that the Employer violated HRS §89-1 was properly dismissed.

(Emphasis added; citations omitted). Moreover, the Board has construed HRS § 89-13(a)(7)[vi] to require that the statutory violation alleged "must occur independently of Section 89-13, H.R.S," reasoning that, "[a]ny other interpretation would render Subsection 89-13(a)(7), H.R.S., meaningless and redundant." Burns v. Anderson, Board Case No. CE-12-76, Decision No. 169, 3 HPERB 114, 123 (1982). Since a review of the Complaint shows that the only HRS Chapter 89 allegation in this case independent of HRS § 89-13 is the one based on HRS § 89-1, the Board, like the Court in Poe, must hold that dismissal of both the HRS § 89-1 and 89-13(a)(7)[vii] allegations is proper.

D. Respondents' Motion to Dismiss and Complainant's Motion for Summary Judgment

The Board notes that because Respondents in their Motion to Dismiss, and the Complainant in his opposition, both attached exhibits[viii] in support for the Board's consideration, and in addition, the facts are undisputed for purposes of this Order, the Board is required to treat the Motion to Dismiss as a motion for summary judgment. Au v. Au, 63 Haw. 210, 212, 626 P.2d 173, 176 (1981); Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 214, 664 P.2d 745, 749 (1983). Rather than disputed facts, the issue in this case rests on the interpretation of the portion of CBA Article 32.F.2, which states in pertinent part, "The Employer shall, upon request ...make available to the requesting party any and all written information relevant to the grievance." Respondents base their Motion to Dismiss on the position that the County met its contractual obligations under this provision by presenting the Complainant with the opportunity to view the information in accordance with the practice in which relevant information is provided to SHOPO, the exclusive representative for unit 12, of which Complainant is a member. Complainant takes the position that the CBA Article 32.F.2 language requires that the Respondents provide copies of the information to the Complainant and that the failure to provide those copies constitutes U.S. and Hawaii constitutional violations of due process. At the August 17, 2013, status conference, Wakumoto made a motion for summary judgment on this issue without any objection from the Respondents. Consequently, the Board is required to treat Respondents' Motion to Dismiss and Complainant's oral motion for summary judgment as cross-motions for summary judgment.

1. Legal Standards for Motion for Summary Judgment

Under Rule 56(b) of the Hawaii Rules of Civil Procedure, a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatives, 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 1285-86; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Haw. 125, 129-30, 267 P.3d 1230, 1232-33 (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 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

a. Standard for Cases in Which the Non-Movant Bears the Burden of Proof at Trial

In addition, for cases in which the non-movant bears the burden of proof at trial, the 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.

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 57, 292 P.3d at 1287; French, 105 Haw. at 472, 99 P.3d at 1056.

Finally, when 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 the adverse party 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); Tri-S Corp. v. Western World Insurance Co., 110 Haw. 473, 494 n. 9, 135 P.3d 82, 103 n. 9 (2006).

b. Standard for Cases in Which the Moving Party Bears the Burden of Proof at Trial

"Where the moving party is the plaintiff, who will ultimately bear the burden of proving [the] plaintiff's claim at trial, the plaintiff" has the initial burden of establishing by the quantum of evidence required by the applicable substantive law, each element of its claim for relief. That is the plaintiff must establish, as a matter of law, each element of this claim for relief by the proper evidentiary standard applicable to that claim.

Where a plaintiff-moving party has satisfied its obligation of showing, prima facie, that there is no genuine issue of material fact and the plaintiff is entitled to a judgment as a matter of law, the burden shifts to the defendant-non-moving party to produce materials regarding any affirmative defenses that have been raised pro forma in the pleadings. If the defense produces material in support of an affirmative defense, the plaintiff is then "*obligated* to disprove an affirmative defense in moving for summary judgment[.]" Ocwen Fed. Bank v. Russell, 99 Hawaii 173, 182-183, 53 P.3d 312, 321-322 (Haw. Ct. App. 2002). (Citations omitted) (Italics in original)

2. Constitutional Claims

Given that the Board *sua sponte* dismissed the constitutional allegations for lack of jurisdiction, the Board is compelled to deny Complainant's motion for summary judgment on those issues.

3. The Alleged HRS § 89-13 Violations

Finally, the Complaint alleges violations of HRS § 89-13(a)(1), (5), and (8).

HRS § 89-13(a) states in relevant part:

> It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9; [or]
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement[.]

(Emphasis added).

There is no question based on prior Board decisions relying on United States Supreme Court precedent interpreting and applying the analogous § 8(a)(5) of the National Labor Relations Act that arising out of the employer's duty to bargain in good faith is the obligation of an employer to provide information relevant to a grievance filed by the union. State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 33-36 (1982) (*citing* N.L.R. B. v. Truitt Manufacturing Co., 351 U.S. 149 (1956) (SHOPO). The Board has ruled that a failure to provide relevant grievance information constitutes a prohibited practice under HRS § 89-13(a)(1), (5), and (8). *See, e.g.*, SHOPO, *id.*; Hawaii Gov't. Emp. Ass'n.

v. Bd. of Regents, Board Case No. CE-08-158, Decision No. 340, 5 HLRB 198, 209 (1993); Poe v. Cayetano, Board Case No. CE-03-286, Decision No. 391, 5 HLRB 736, 739-40 (1997); United Public Workers, AFSCME, Local 846, AFL-CIO v. Cayetano, Board Case No. CE-10-267, Decision No. 408, 6 HLRB 89, 94 (2000). However, the HRS § 89-13 issue in this case is not whether Respondents had a duty to provide information relevant to the grievance but rather whether Respondents complied with that duty under CBA Article 32.F.2 by providing Wakumoto with the opportunity to view the 32 pages of documents at the KPD Office rather than mailing copies of the documents to Wakumoto.

CBA Article 32.F.2. states in relevant part, "The Employer shall, upon request of the Union, make available to the requesting party any and all written information relevant to the grievance." Accordingly, more specifically, the issue raised is whether the "make available" requirement in CBA Article 32.F.2. means as Respondents assert that the requested information be produced for viewing or whether as Complainant asserts that Respondents are required to mail copies of the requested information to him. The Board concludes that there does not appear to be genuine issues of fact in this case requiring further hearing. While Respondents' interpretation regarding the manner in which the requested information is provided under CBA Article 32.F.2. is disputed by Complainant, even viewing the evidence in the light most favorable to the Complainant, the Board holds that the requisite element of "wilfull[ness]" is not shown in this case for the several reasons. First, from the face of this CBA provision, there is no language that establishes a requirement that copies of the requested information must be provided or that copies must be provided without a cost. Second, there is no evidence in the record showing any intention by the parties to the CBA, such as by a past practice, that under this CBA provision, Respondents are required to provide copies of the relevant information requested or bear any copying costs. To the contrary, the evidence in the record, which Wakumoto does not controvert, shows that the past practice between these parties under this CBA provision was consistent with Respondents' position in this case to make such information available to SHOPO for viewing at the KPD Office. Finally, no arbitrator or other decisionmaker[ix] has rendered any decision or interpretation of CBA Article 32.F.2. requiring Respondents to send copies of the requested information to Complainant.

"[T]o make out a prohibited practice under Subsection 89-13(b), HRS, conscious, knowing, and deliberate intent to violate the provisions of chapter 89, HRS, must be proven." Hawaii Gov't. Emp. Ass'n. v. Casupang, 116 Hawaii 73, 99, 170 P.3d 324, 350 (2007); Aio v. Hamada, 66 Haw. 401, 409-10, 664 P. 2d 727, 732-33 (1983). Based on the undisputed evidence and reasons set forth above showing the absence of any CBA language or evidence demonstrating an intent by the parties to the CBA that Respondents be required to provide copies of the requested information and Respondents' offer to adhere to its past practice with SHOPO in this case, the Board is unable to find that Complainant has proven that Respondents' conduct by offering to produce the requested information for viewing at the KPD Office constitutes a "conscious, knowing, and deliberate intent to violate the provisions of chapter 89, HRS." Consequently, the

Board is unable to find the requisite "wilfull" conduct required by HRS § 89-13; and therefore, grants summary judgment for the Respondents and denies summary judgment to Complainant on this issue. Since all of the issues before the Board in this matter are resolved, this case is hereby closed.

ORDER

Based on the foregoing, the Board hereby:

1. Denies Respondents' Motion to Strike;
2. Determines that this matter is not moot based on exceptions for public interest and repetitious but evading review;
3. Dismisses the constitutional claims for lack of jurisdiction;
4. Dismisses the HRS § 89-1 and 89-13(a)(7) allegations;
5. Grants in part and denies in part Respondents' motion to dismiss, which the Board considers to be Respondents' cross-motion for summary judgment;
6. Grants in part and denies in part Wakumoto's cross-motion for summary judgment; and
7. Closes this case.

DATED: Honolulu, Hawaii, October 19, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies to:
Gary Rodrigues
Philip Dureza, Deputy County Attorney

[i] HAR § 12-42-7 (a) and (b) do not require that a public employee be represented by an attorney. This provision states:

> § 12-42-7 Appearance and practice before the board. (a) A public employee may appear in his own behalf; an employee organization may be represented by a person or persons duly designated and authorized by the employee organization; and a public employer may appear on its own behalf or through a person or persons duly designated and authorized by such employer.
>
> (b) In any proceeding under this chapter, any public employee, employee organization, or pubic employer may be represented by counsel or any other authorized person.

(Emphases added).

[ii] Amendment XIV, Section 1, of the Constitution of the United States of America states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added).

Article V of the Constitution of the United States of America states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added).

[iii] The Constitution of the State of Hawaii, Article I, Section 5, states:

DUE PROCESS AND EQUAL PROTECTION

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. (Emphasis added).

[iv] *See* Section D. below for further discussion regarding Wakumoto's motion for summary judgment.

[v] HRS § 89-1 states:

HRS § 89-1 Statement of findings and policy.

(a) The legislature finds that joint decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to sustain a more favorable political and social environment.

(b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:

(1) Recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives with matters of wages, hours, and other conditions of employment, while at the same time, maintaining a merit principle pursuant to section 76-1; and

(3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

(Emphases added).

[vi] HRS § 89-13(a)(7) makes it a prohibited practice for an employer or its designated representative to "refuse or fail to comply with any provision of this chapter."

[vii] In a footnote to its Poe decision, the Court noted that although in its conclusions of law, the Board stated that "[Poe] failed to state a claim for relief of §89-13(a)(7), HRS, where it was beyond a doubt that [Poe] could not prove a set of facts in support of his claim that would entitle him to relief for violations of §§ 89-1 and 89-11(a), HRS." the Board failed to mention HRS § 89-13(a)(7) in its order. The Court then stated,

However, inasmuch as the HRS § 89-13(a)(7) claim (referring to the "refus[al] or failure to comply with any provision of this chapter") was dependent upon purported violations of HRS §§ 89-1 and 89-11(a) and no such violations were found, the claim was subsumed in the order's denial of Poe's HRS § 89-1 and 89-11(a) claims.

97 Hawaii at 534 n. 15, 40 P.3d at 936 n. 15.

[viii] The Board notes that the exhibits attached to the Motion to Dismiss and the Memorandum in Opposition were not properly authenticated by an affidavit or declaration. However, because there does not appear to be a dispute regarding the facts or the authenticity of exhibits, the Board will consider these exhibits in ruling on the cross motions for summary judgment.

[ix] The Board must also note that even if an arbitrator had resolved this dispute regarding the interpretation of CBA Article 32.F.2. and whether a CBA violation occurred, this would not be dispositive of whether the Respondents committed a prohibited practice under HRS § 89-13 because the standards applied by the arbitrator in an arbitration under HRS Chapter 658A and those applied by the Board under HRS § 89-13 are different.