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**STATE OF HAWAII Case No. CE-05-842**

**HAWAII LABOR RELATIONS BOARD**

In the Matter of

JANET WEISS,

Complainant,

and

KATHRYN MATAYOSHI, Superintendent,  
Department of Education, State of Hawai'i and  
VIRGINIA CHING, Director, DOE Project  
Control Section, Department of Education,  
State of Hawai'i,

Respondents.

CASE NO. CE-05-842

ORDER NO. 3112

ORDER DENYING COMPLAINANT'S  
REQUEST FOR AN INTERLOCUTORY  
ORDER REQUEST AND GRANTING  
RESPONDENTS' MOTION FOR  
SUMMARY JUDGMENT

**ORDER DENYING COMPLAINANT'S REQUEST FOR INTERLOCUTORY ORDER  
AND GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

**I. FINDINGS OF FACT**

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

**A. Procedural Background**

On June 2, 2014, Complainant JANET WEISS (Weiss) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) alleging that Respondents KATHRYN MATAYOSHI, Superintendent, Department of Education, State of Hawai'i and VIRGINIA CHING, Director, DOE Project Control Section, Department of Education (DOE), State of Hawai'i (collectively Respondents), committed prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(4), (7) and (8) by attempting to evict Weiss from the Halaula

**I do hereby certify that this is a full, true and  
correct copy of the original on file in this office.**

  
Hawaii Labor Relations Board

Teacher Housing Cottage.<sup>1</sup> Weiss stated in the Complaint that, “I consider this action Discriminatory and Retaliatory.”

On June 17, 2014, following the Prehearing/Settlement Conference held on that date, the Board issued its Notice of Filing Deadlines; Notice of Motion Hearing; and Waiver of §377-9(b), Hawaii Revised Statutes and §12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules, setting the following deadlines in this matter for all parties:

July 25, 2014, Deadline to file motions,  
August 29, 2014, Deadline to file responses,  
September 12, 2014, Deadline to file replies.

On June 23, 2014, Weiss filed an Interlocutory Order Request, with Exhibits Proving Evidence of Bad Faith of both DOE & HSTA (herein Weiss’ Interlocutory Request). Weiss seeks from the Board an “Order [which] would please stop Weiss’s [sic] eviction from Teacher Housing, slated for June 30, 2014[.]”<sup>2</sup>

On July 25, 2014, Respondents filed Respondents’ Motion for Summary Judgment, together with Memorandum in Support of Motion, Exhibits “1” – “2” (collectively Motion for Summary Judgment). In the Motion for Summary Judgment, Respondents contend that Weiss’ retaliation claim is “moot” because Weiss signed a one-year lease for the Halaula Teacher Housing Cottage (Kohala Teacher Housing) dated August 3, 2014 (8/3/14 Lease). As such, Respondents ask that summary judgment be granted in their favor.

On August 29, 2014, Weiss filed Complainant’s Memorandum in Support of Respondents’ July 25<sup>th</sup> Sum. Judgment Motion (Weiss’ Memo). In Weiss’ Memo, she focuses on Respondents’ Statement on page 1 of the Motion for Summary Judgment wherein it states that Respondents “hereby move this Board for summary judgment in Complainant’s favor on the Prohibited Practice Complaint (“Complaint”), Case No. CE-05-842, filed with the Hawaii Labor Relations Board (“Board”) by Janet Weiss (“Complainant”) on June 2, 2014 . . . .”

On September 4, 2014, Respondents filed Respondents’ Reply in Support of Their Motion for Summary Judgment, together with Exhibit “1” (collectively Reply Memo). In the Reply Memo, Respondents acknowledged its “inadvertent error” in drafting and clarified that

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<sup>1</sup> According to Respondents, Weiss incorrectly refers to her current place of dwelling as Halaula Teacher Housing and its proper name is Kohala Teacher Housing.

<sup>2</sup> See, Weiss’ Interlocutory Request at page 12.



Respondents seek a ruling in Respondents' favor on the Motion for Summary Judgment. In addition, Respondents point out that Weiss has failed to address the substantive issue regarding the mootness of the dispute in the 2014 Complaint since Weiss received the August 12, 2014 Lease and can no longer claim that she was being evicted from the Kohala Teacher Housing.

On September 12, 2014, Weiss filed Complainant's Final Reply to Respondents' Motion(s).

On October 9, 2014, the Board held a hearing on Respondents' Motion for Summary Judgment, heard oral arguments from the parties and took the matter under advisement.

Following the hearing on the Motion for Summary Judgment, Weiss continued to file with the Board additional written memoranda. Respondents responded by filing additional written arguments and new evidence in response to Weiss' post-hearing filings.<sup>3</sup>

B. Factual Background

Based on the record, the undisputed facts in this case are as follows.

By an eviction notice, dated May 16, 2014, Weiss was notified that the DOE was "unable to offer [her] a renewal for SY 2014.15" and that she "must vacate Cottage 8B on or before June 30, 2014, in accordance with [her] RENTAL AGREEMENT dated May 20, 2013."

On July 25, 2014, the DOE sent a letter to Weiss informing her that, "After much deliberation, the DEPARTMENT OF EDUCATION has decided to renew your Rental Agreement for Cottage 8B at the Kohala Teacher Housing Complex for SY 2014-15, beginning July 1, 2014, ending June 30, 2015[.]"

Weiss received a one-year lease, dated August 3, 2014, for a cottage in the Kohala Teacher Housing (8/3/14 Lease). The 8/3/14 Lease had a term commencing on July 1, 2014 and ending on June 30, 2015.

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<sup>3</sup> As stated above, the Board established deadlines in the June 17, 2014 Notice following the Prehearing/Settlement Conference on that date. In conformance with the deadlines established in the Notice and the fact that a hearing on the Motion for Summary Judgment was held on October 9, 2014, the Board will not consider these additional written memoranda filed by both parties subsequent to the hearing on the Respondents' Motion for Summary Judgment.

## II. LEGAL STANDARDS

### A. Motion for Summary Judgment

Under Hawaii Rules of Civil Procedure (HRCP) Rule 56(b), a party "may move with or without supporting affidavits for a summary judgment in the party's favor[.]" Ralston v. Yim, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013). "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 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 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 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

#### 1. 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, which is the case here in the 2014 Complaint, the Hawaii Supreme Court has adopted the burden shifting paradigm: 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; once the moving party satisfies its initial burden of production, the burden shifts 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 Hawaii 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 Hawaii at 56-57, 292 P.3d at 1286 - 1287; French, 105 Hawaii at 472, 99 P. 3d at 1056. However, "[w]hen a motion for summary judgment is made and



supported as provided in [HRCF Rule 56], 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 Hawaii 51 , 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

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).

## 2. 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).

## III. DISCUSSION, CONCLUSIONS OF LAW 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. Weiss' Interlocutory Request.

Weiss' Interlocutory Request asks for "one Member of the Board to please create an Interlocutory Order in this Instant Case [to last at least one year or until these legal matters are

settled], The Order would please stop Weiss's [sic] eviction from Teacher Housing, slated for June 30, 2014[.]"

Weiss' Interlocutory Request is based on Hawaii Administrative Rules (HAR) § 12-41-32. Clearly, Weiss' Interlocutory Request was improperly filed under HAR § 12-41-31 which applies to a Board order in a case brought under Chapter 377, HRS. The present Complaint alleges violations of HRS § 89-13(a)(4), (7) and (8), not Chapter 377. Accordingly, HAR § 12-41-31 is not applicable in this proceeding and Weiss' Interlocutory Request must be denied.

The relief sought by Weiss in her Interlocutory Request appears to be more appropriately brought as a motion for summary judgment in accordance with HAR § 12-42-8(g)(3) and Hawaii Rules of Civil Procedure Rules 7 and 56. Accordingly, the Board will liberally construe her Interlocutory Request as a cross motion for summary judgment in this case.

B. Respondents' Motion for Summary Judgment.

As stated above, Respondents move for summary judgment based on two arguments. First, Respondents request the Board to issue a ruling on a February 4, 2013 motion to dismiss or in the alternative for summary judgment in another prohibited practice case Board Case No. CE-05-817 brought by Weiss and apply that ruling to both cases "since they are pretty much identical (Except, as explained above, the retaliation allegation) and dismiss Weiss' PPC CE-05-817 and PPC CE-05-842 or grant summary judgment in favor of Respondents." Second, Respondents argue that summary judgment should be granted as the retaliation allegation in this case is moot because subsequent to the eviction notice, Respondents have informed Weiss by a July 25, 2014 letter "that she will be allowed to stay at the Kohala Teacher Housing for another year."

1. Applicability of the February 4, 2013 Motion to Dismiss or in the Alternative for Summary Judgment Filed in Board Case No. CE-05-817

The Board rejects Respondents' first argument in support of their Motion for Summary Judgment. The Board does not agree with Respondents that the allegations made in Board Case No. CE-05-817 and Board Case No. CE-05-842 are "pretty much identical." The Board finds that the prohibited practice allegations of the Complaint in this case are contained in paragraph 5<sup>4</sup> of

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<sup>4</sup> Paragraph 5. Of the Complaint form is entitled "Allegations" and states:

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes,



the Complaint which alleges that Respondents have retaliated against Weiss by their attempt to evict her from the Halaula Teacher Housing. In contrast, a review of Order No. 3081 issued in Weiss v. Champagne, Board Case No. CE-05-817, Order No. 3081, at \*1-2 (July 30, 2015) (Order No. 3081) unequivocally shows that the alleged prohibited practices arose out of Weiss' discovery on or about November 7, 2012 of an alleged conspiracy and stealing of almost \$20,000 worth of computer technology and five years' worth of Weiss' work product. Based on Order No. 3081, there is no question that some of the facts alleged as the basis for the complaint filed in Board Case No. CE-05-817 are contained in paragraph 6 of the Complaint in this case, which permits the Complainant to provide "any other relevant facts." Also, Based on Order No. 3081 and the Complaint filed in this case, it is obvious that the complaints filed in both Board Case No. CE-05-817 and Board Case No. CE-05-842 contain similar facts under "any other relevant facts." However, the facts contained in paragraph 6 are not the basis for the prohibited practice allegations in this Complaint. Accordingly, there is no merit to Respondents' contention that the Complaint allegations in this case are "pretty identical" to the allegations in the complaint filed in Board Case No. CE-05-817 and that the February 4, 2013 motion to dismiss or in the alternative for summary judgment or Order 3081 is dispositive of the Respondents' Motion for Summary Judgment in this case. Accordingly, the Board is unable to grant summary judgment based on identical issues in these two cases.

## 2. The Complaint Should Be Dismissed Based on Mootness

Regarding the second argument, the Board agrees with Respondents that summary judgment should be granted in their favor because the retaliation allegation is rendered moot based on Respondents' July 25, 2014 notice to Weiss that she will be allowed to stay at the Kohala Teacher Housing for another year.

In re Application of Thomas, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992), the Hawaii Supreme Court articulated the mootness doctrine as follows:

A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance found in concern about the proper—and properly limited—role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar.

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Section 89-13 (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

Additionally, the Hawaii appellate courts have held that mootness is an issue of subject matter jurisdiction (Hamilton ex rel. Lethem v. Lethem, 119 Hawaii 1, 4, 193 P.3d 839, 842 (2008)). "It is well-established . . . that lack of subject matter jurisdiction can never be waived by any party at any time" (Williams v. Aona, 121 Hawaii 1, 210 P.3d 501 (2009), *citing* In re Application of Rice, 68 Haw. 334, 713 P.2d 426 (1986)); and, subject matter jurisdiction "can be challenged at any time" (Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaii 425, 903 P.2d 1246 (1995), *citing* Bush v. Hawaiian Homes Commission, 76 Hawaii 128, 133, 870 P.2d 1272, 1277 (1994)).

However, the courts recognize exceptions to the mootness doctrine in cases involving questions that affect the public interest and are capable of repetition yet evading review (Okada Trucking Co. v. Board of Water Supply, 99 Hawaii 191, 196, 53 P.3d 799, 804 (2002)), and cases involving the "public interest" exception (Doe v. Doe, 116 Hawaii 323, 327, 172 P.3d 1067, 1071 (2007)). In evaluating the "public interest" exception, the courts look to "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question" (*id.*, *citing* Kahooohanohano, 114 Hawaii 302, 333, 162 P.3d 696, 727 (2007)).

Applying the foregoing standards, the Board finds and concludes that the eviction issue involved the Complaint has lost its character as a present, live controversy.

The gravamen of the Complaint is that Weiss' eviction from the Halaula Teacher Housing Cottage pursuant to the 5/16/14 Eviction Notice was retaliation. The basis of the Complaint is confirmed in Weiss' 9/1/14 Memo, in which she states that "[t]his Labor Board Case **CE-05-842** is about Respondents retaliating against me by calling for my senseless eviction from Kohala Teacher Housing in June 2014." (*See* footnote 4 for citation.)

The Board finds that despite receiving the 5/3/14 Eviction Notice, Weiss was never evicted from the Kohala Teacher Housing. In addition, in the July 25, 2014 letter to Weiss, the DOE notified Weiss that her Rental Agreement for Cottage 8B at the Kohala Teacher Housing Complex was being renewed for SY 2014-15, beginning July 1, 2014 and ending June 30, 2015. In fact, Weiss does not dispute that she received and accepted the 8/3/14 Lease and was a tenant in the Halaula Teacher Housing Cottage for the full one-year term which commenced on July 1, 2014 and ended on June 30, 2015. Weiss has made no additional claim that she is not living in the Halaula Teacher Housing Cottage beyond the June 30, 2015 ending date of the 8/3/14 Lease. Finally, Weiss never raised nor argued the "public interest" and "capable of repetition yet evading review" exceptions to the mootness doctrine. Thus, the Board holds that this case is moot.



IV. Order.

Based on the foregoing, the Board grants Respondents' Motion for Summary Judgment, and denies Weiss' Interlocutory Request. This case is closed.

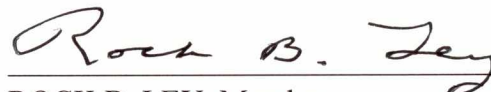
DATED: Honolulu, Hawaii, November 2, 2015.

HAWAII LABOR RELATIONS BOARD



  
KERRY M. KOMATSUBARA, Chair

  
SESNITA A.D. MOEPONO, Member

  
ROCK B. LEY, Member

Copies to:

Janet Weiss, Pro Se Complainant

Bosko Petricevic, Deputy Attorney General, Attorney for Respondents

