STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SHELLY L. RODRIGUES, Complainant, and 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, Respondents.	CASE NO. CE-12-822 ORDER NO. 3133 ORDER DENYING 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] MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

ORDER DENYING
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] MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

For the reasons set forth below, the Hawaii Labor Relations Board (Board) hereby denies 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] Motion to Dismiss Prohibited Practice Complaint, filed on October 31, 2013 (10/31/13 Motion to Dismiss).

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

On May 7, 2013, Complainant SHELLY L. RODRIGUES (Complainant) filed a prohibited practice complaint (Complaint) against DARRYL PERRY (Perry) and MICHAEL CONTRADES (Contrades), the Chief of Police and Deputy Chief of Police, Kaua'i Police Department (KPD), County of Kaua'i (County), respectively (collectively Respondents) with the Board, alleging violations of HRS §§ 89-1, 89-13(a)(1), 89-13(a)(7) and 89-13(a)(8).[i] For purposes of the Motion to Dismiss, the allegations in the Complaint are deemed as true.

The Complaint alleges, among other things, that Complainant filed a formal grievance on August 20, 2012, pursuant to Article 32.1.1 ("Grievance Procedure/Step I") of the collective bargaining agreement (Agreement) between the employer group that includes the County and the State of Hawaii Organization of Police Officers (SHOPO or Union), the exclusive representative for bargaining unit (BU) 12 (police officers). The grievance was processed without Union assistance. The Complaint alleges that Contrades "willfully refused to render a decision on the grievance as required pursuant to Article 32.1.4."

The Complaint further alleges that the KPD set a meeting to discuss the grievance on September 14, 2012, but that date exceeded the time limit for KPD to respond to the grievance. On September 12, 2012, Complainant submitted the grievance to Step II by filing a letter of appeal with Perry pursuant to Article 32.J.1.

On September 12, 2012, Complainant submitted a request to Perry for "Relevant Information" pursuant to Article 32.F.2.

On September 24, 2012, Contrades transmitted KPD's decision to Complainant's Step II grievance, stating, in part, "While the charges were sustained, no administrative action"; "your grievance is moot"; and "Your grievance is denied and all subsequent requests for relevant information will not be provided at this time."

On October 9, 2012, Complainant submitted the grievance to Step III by filing a letter of appeal pursuant to Article 32.K.1 with Bernard P. Carvalho, Jr., Mayor, County of Kauai. On January 24, 2012, the Step III decision was rendered by Thomas Takatsuki, Department of Personnel Services, County of Kauai. The Complaint alleges that the "decision granted the remedy sought to rescind the discipline and to make the Complainant whole." The Complaint also alleges that on January 25, 2013, Contrades provided Complainant with a response to the Step III decision, and the response "clearly indicates KPD's willful refusal to accept the step III decision and comply with the Agreement to make the Complainant whole."

The Complaint further alleges that on February 17, 2013, Complainant made a request to Perry to comply with the Step III decision, including an accounting of the financial losses that occurred as a result of Complainant being denied F.T.O. assignments by KPD, which included the denial of at least one F.T.O. assignment. It was explained at the August 6, 2013 hearing on the motions that "F.T.O." refers to "Field Training Officer" which involves the assignment of recruits who complete training to specific officers for field training, and that it entails additional compensation for the officers assigned. The request further asked for information that was requested on September 12, 2012, and that application of the "G.O. 95-05 Dress Code policy" cease until the definition of "beyond the shirt collar" is determined without the current discrepancy between male and female officers. The Complaint alleges that as of the date of the Complaint, Perry had not responded to the February 17, 2013, request, and further alleges that "[t]he information continues to be important to the Complainant for other pending issues."

B. PREVIOUS MOTIONS

On May 17, 2013, Respondents filed a Motion for Particularization of the Complaint, which was denied by the Board at the Prehearing/Settlement Conference held on May 31, 2013.

On July 2, 2013, Complainant filed a Motion for Summary Judgment (Motion for Summary Judgment), asserting that there was a willful refusal to provide relevant information and comply with the Step III Decision in violation of HRS § 89-13(a)(1), (7), and (8). Complainant further argued that the Administrative Review Board (ARB) that is responsible for hearing and reviewing administrative charges against KPD employees and recommending appropriate disciplinary action violated due process.

On July 16, 2013, Respondents filed a Motion to Dismiss Prohibited Practice Complaint (7/16/13 Motion to Dismiss Complaint), asserting, among other things, that: Complainants received the Step III grievance decision on January 24, 2013 and the time elapsed from January 24, 2013 until the filing of the Complaint on May 7, 2013 is 104 days, and thus, the Complaint is untimely; Complainant was aware of the alleged violation regarding relevant information as of December 12, 2012, and thus, the Complaint is untimely; and the alleged back pay issue for missed temporary assignments from September 23, 2008 through January 24, 2013 is untimely and was not addressed during the whole of the grievance process.

On July 16, 2013, Respondents also filed a Motion to Strike Complainant's Exhibits and Documents Filed on July 1, 2013 (Motion to Strike Exhibits).

On August 6, 2013, the Board held a hearing on the foregoing motions, with the parties appearing by telephone.

On August 27, 2013, the Board issued Order No. 2942, the findings and conclusions of which are specifically incorporated herein. In that Order, the Board, among other things: 1) denied Respondents' Motion to Strike Exhibits but would give the exhibits their proper weight; 2) granted Respondents' 7/16/13 Motion to Dismiss with respect to the untimeliness of the Complaint regarding the failure to provide relevant information; 3) denied the 7/16/13 Motion to Dismiss with respect to the alleged failure to reimburse Complainant for lost F.T.O. opportunity and the retaliation claim; 4) denied the Complainant's Motion for Summary Judgment based on a genuine dispute of material facts; and 5) as a housekeeping matter, denied in writing the oral denial of the Respondents' Motion for Particularization at the May 31, 2013 Prehearing Conference. More specifically, in denying the 7/16/13 Motion to Dismiss, the Board determined that: 1) the allegation regarding the HRS § 89-1 violation was dismissed, and to the extent that the alleged violation of HRS § 89-1 was the basis for the prohibited practice claims pursuant to HRS § 89-13(a)(7) (failure to comply with any provision of chapter 89), this claim was dismissed; 2) the prohibited practice claims pursuant to HRS § 89-13(a)(1) (interfere, restrain, or coerce any employee in the exercise of any right guaranteed under chapter 89), 89-13(a)(7), or 89-13(a)(8) (violate the terms of a collective bargaining agreement) that were based on the alleged failure to provide information relevant to the processing of a grievance were dismissed as untimely; and 3) the prohibited practice claims pursuant to HRS § 89-13(a)(1), 89-13(a)(7), and 89-13(a)(8) that were based upon the alleged failure to reimburse Complainant for lost F.T.O. opportunity and the retaliation claim were not dismissed.

C. RESPONDENTS' 10/31/13 MOTION TO DISMISS

On October 31, 2013, Respondents filed the 10/31/13 Motion to Dismiss. In support of this Motion, Respondents argue that: 1) the retaliation claim should be denied for lack of any allegation or evidence in the Complaint; and 2) the lost F.T.O. opportunity claim should be denied for untimeliness because the Complainant was on notice of her ineligibility for F.T.O. opportunities as early as September 23, 2008 and as recently as December 2011; or alternatively, if not denied, the Board should limit the time period in which Complainant may request compensation for lost F.T.O. opportunity to the 20 days allowed by the Agreement or the 90 days allowed by Hawaii Administrative Rules (HAR) § 12-42-42A [sic].

On November 15, 2013, Complainant filed her Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint dated October 30 [sic], 2013. Complainant asserts, among other things, that Respondents' argument that the retaliation claims should be denied for lack of an allegation or evidence in the Complaint is "erroneous and fraudulent" based on the fact that the August 20, 2012 grievance included in the Complaint, the May 30, 2013 prehearing statement, and the July 1, 2013 memorandum in support of Complainant's Motion for Summary Judgment include the undisputed claim of retaliation; and Complainant will submit evidence during the hearing regarding the past and continuing retaliation

against Complainant. Complainant further argues, among other things, that: the Respondents' contention regarding the untimeliness of the F.T.O. claim is also "erroneous and fraudulent" because: 1) the September 23, 2008 notice (Chong Tim letter) from F.T.O. Supervisor Randolph T. Chong Tim (Chong Tim) clearly states that there was more than one investigation pending contrary to Respondents' claim, the basis for denying F.T.O. to Complainant is P.S.B. SOP 04-01, paragraph IV J (SOP 04-01), and SOP 04-01 is supported by the entire chain of command; Complainant did not have the option to file a grievance or a prohibited practice complaint when Chong Tim denied F.T.O. based on SOP 04-01 because she was under investigation when it was denied; 2) Complainant was required to wait almost four years after this denial to file a grievance because of the retaliation, which Respondents deliberately planned by delaying a simple investigation of a bogus complaint filed by Perry; 3) the retaliation prevented Complainant from pursuing a grievance until the investigation and ARB decision were completed in 2012 after which Complainant filed the grievance sustained at Step III; 4) Complainant was ordered to perform F.T.O. by a different F.T.O. supervisor when she was allowed to return and did perform F.T.O. duty during December 2011; and 5) the Second Motion to Dismiss repeats the same claim as the First Motion to Dismiss that the Complaint does not meet the 90-day requirement of HAR §12-42-42, which is erroneous because the time limit did not begin until Complainant was aware of the violation after Respondents did not respond to the February 17, 2013 letter; and 6) Complainant learned for the first time on July 16, 2013 upon receipt of Respondents' First Motion to Dismiss that Respondents had no intention of responding to the letter based on Agreement Article 32.B.1.; and 7) Order No. 2942 found that Complainant's F.T.O. reimbursement and retaliation were not dismissed and Respondents' Motion to Dismiss was denied in that respect.

On November 22, 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 Respondents' Memorandum in Reply to Complainant's Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint, dated October 30, 2013. In this Reply, Respondents take the position that regarding the retaliation claim, Complainant is still unable to articulate the manner in which the actions of KPD rise to the level of retaliation and connect the employment actions taken by the County to the retaliation. Regarding the F.T.O. compensation allegation, Respondents maintain that Complainant fails to articulate the reason that she could not have brought the issue to the County anytime within the four-year period between the Chong Tim letter and the filing of the Complaint.

On December 2, 2013, the Board held a hearing on the 10/31/13 Motion to Dismiss. At the hearing, Mr. Rodrigues, representative for Complainant, stated that their definition of retaliation under Chapter 89 is that the employee is being retaliated against for exercising her rights under the contract by filing grievances. Mr. Rodrigues further stated that he responded to Respondents' claim that the Complaint fails to mention retaliation by citing all the various dates and times that they did cite retaliation in the Complaint and that based on the Board's previous

dealings in refusing to dismiss the Complaint in this case "just because" for these two pending items, he thought that he did not have to provide evidence prior to a hearing on the Complaint or in opposition to the motion. The Board took the matter under advisement and stated that a written decision would be issued.

On September 9, 2015, Respondents filed Respondent's [sic] Second Memorandum in Support of Respondent's [sic] Motion to Dismiss dated October 31, 2013 (9/9/15 Memorandum in Support of 10/31 Motion to Dismiss). In this Memorandum, Respondents take the position that the Complaint should be dismissed regarding: 1) the F.T.O. opportunity claim based on mootness because of the Hawaii Supreme Court (Court) decision in Rodrigues v. Cnty. of Kaua'i, 135 Hawaii 456, 353 P.3d 998 (2015)[ii] (Rodrigues); 2) the retaliation claim should be dismissed because the Complaint failed to state any allegations of retaliation or a violation of HRS § 89-13(a)(4); and 3) the retaliation claim is moot based on an August 23, 2015 Settlement Agreement (Settlement Agreement).

On September 23, 2015, Complainant filed a Memorandum in Opposition to Respondent's [sic] Motion to Dismiss Prohibited Practice Complaint Dated September 9, 2015. In addition to reiterating their prior arguments, Complainant contends that: 1) the Court decision does not negate the fact that Respondents did not comply with the Step III decision, so the Chapter 89 issue remains an issue; 2) the Settlement Agreement was based on an arbitration arising from a June 30, 2014 unlawful termination of Complainant because of a workers' compensation injury; and 3) the failure to state a claim has no merit because the August 20, 2012 grievance, which was based on the retaliation, was included in the Complaint.

On October 1, 2015, Respondents filed Respondents' Reply to Complainant's Memorandum in Opposition to Respondents' Second Memorandum in Support of their Motion to Dismiss. In this Reply, Respondents assert regarding the retaliation claim that Complainant: 1) fails to respond to Respondents' arguments that her Complaint actually did not include her August 20, 2012 grievance; 2) is required to actually plead her retaliation allegations in her Complaint and did not; 3) does not allege in her Complaint that the anti-retaliation provision of HRS § 89-13 was violated; 4) fails to classify a retaliation claim in her summary of issues in her pretrial statement; and 5) fails to state that she is adopting the claims in her grievance in her prohibited practice complaint.

On October 5, 2015, the Board held a second hearing on the 10/31/13 Motion to Dismiss and took the Motion under advisement and stated that a written order would be issued.

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. Legal Standards for a Motion to Dismiss

The Board adheres to the legal standards used by the 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, " [d]ismissal 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) (*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).

Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 9987 (2006) (*citing* McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

B. Failure to State A Claim for Retaliation

HRS § 89-13(b) states:

(a) It shall be a prohibited practice for a public employer or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
***
(7) Refuse or fail to comply with any provision of this chapter; [or]
(8) Violate the terms of a collective bargaining agreement[.]

Further, to prevail on a retaliation claim under the traditional *prima facie* case of retaliation, Complainant must show that: (1) the complainant engaged in protected activity; (2) the employer subjected the complainant to an adverse employment action; and 3) a causal link exists between the protected activity and the adverse employment action. *See*: Lales v. Wholesale Motors Co., 133 Hawaii 332, 356-57, 328 P.3d 441, 365-66 (2014) (*citing* Schefke, 96 Hawaii at 426, 32 P.3d at 70).

As stated above, Respondents contend in their 10/31/13 Motion to Dismiss that the retaliation claim should be dismissed because of Complainant's failure to plead the claim. In support, Respondents maintain that the Complaint is "completely void of any reference of any retaliation or even a claim of retaliation." Further, to move ahead without identifying the specificity of the retaliation claim would violate due process because Respondents "would not be 'sufficiently apprise[d]' of the allegations levied against them and would thus be unable to adequately and fairly defend itself." Complainant, on the other hand, argues that the Motion should be denied because the statement of facts set forth in the Complaint state that "On August 20, 2012, Grievant (Complainant) filed a formal grievance pursuant to Article 32.1.1" and both the Complainant's prehearing statement exhibit list and attachments to her July 1, 2013 Motion for Summary Judgment include the filed August 20, 2012 formal Step I grievance, which includes a retaliation claim.

The Board notes its adherence in past decisions to the principle that the pleadings for a *pro se* or self-represented litigant[iii] must be held to less stringent standards than formal pleadings drafted by lawyers and read more liberally than pleadings drafted by counsel. Tupola v. University of Hawaii Professional Assembly, Board Case No. CU-07-330, Order No. 3054, at *36 (2015) (Tupola Order); Erickson v. Pardus, 551 U.S. 89, 94 (2007); Estelle v. Gamble, 429 U.S. 97, 106 (1976). The Board further notes HRCP Rule 8(f) stating that, "All pleadings shall be construed as to do substantial justice." Nonetheless, the Ninth Circuit has held 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). Finally, 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).

The Board acknowledges that from a technical standpoint, the face of the Complaint and the documents attached to the complaint do not specifically contain allegations regarding the retaliation claim, nor is there any reference to HRS § 89-13(a)(4) (prohibiting retaliation by a public employer or its designated representative to discriminate against an employee who has filed a complaint under this chapter or who has informed, joined, or chosen to be represented by any employee organization).[iv] However, in this case, the statement of facts attached to the Complaint does explicitly reference the filing of the August 20, 2012 grievance in which retaliation is clearly stated. Further, Respondents' assertions that they lack knowledge of the retaliation claim appear to be somewhat disingenuous based on the record submitted by the parties in this case. This record reflects that Complainant's alleged retaliation in this case is just the most recent incident in a lengthy series of alleged retaliatory acts against Complainant by the Respondents, which include the events that led to the filing of the August 20, 2012 grievance and culminated not only with the Step III decision, but with Respondents' alleged failure to comply with that decision. Accordingly, the Board finds that in construing the pleadings more liberally and to do substantial justice, the Complaint should be construed to include the retaliation claim.

As stated above, in Order 2942, the Board has ruled the retaliation claim to be timely. To fall within the 90-day statutory limitations, the occurrences contained in the May 7, 2013 Complaint must have occurred on or after February 7, 2013. The sole occurrence alleged in the Complaint taking place during that period was Complainant's February 17, 2013 request to Perry to comply with the Step III decision, which Perry allegedly failed to address. Accordingly, the Board concludes that the retaliation claim is limited to this occurrence, and the hearing on the merits of this retaliation claim is to be confined to the alleged February 17, 2013 request to comply with the Step III decision and Perry's alleged response or lack thereof. Weiss v. Champagne, Board Case No. CE-05-817, Order No. 3081, at *11-12 (2015).

C. Mootness

"[M]ootness is an issue of subject matter jurisdiction." State v. Nakanelua, 134 Hawaii 489, 501, 345 P.3d 155, 167 (2015) (Nakanelua).

In Lathrop v. Sakatani, 111 Hawaii 307, 312-13, 141 P.3d 480, 485-86 (2006) (*quoting* Wong, 62 Haw. at 394, 616 P.2d at 203-04) (Lathrop), the Court stated regarding the doctrine that it is well-established that:

> ... the mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court 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.

(Citations omitted) The Lathrop Court further noted, however:

> There is a well settled exception to the rule that appellate courts will not consider moot questions. *When the question involved [(1)] affects the public interest, and [(2)] it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked.*

Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (emphasis added). In other words, the case must involve questions that affect the public interest and are "capable of repetition, yet evading review." *Carl Corp. v. State of Haw., Dep't of Educ.*, 93 Haw. 155, 165, 997 P.2d 567, 577 (2000) (internal quotation marks and citation omitted).

> Among the criteria considered in determining 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.

Okada Trucking Co., 99 Haw. at 196-97, 53 P.3d at 804-05 (internal quotation marks and citation omitted).

Id. at 314-15, 141 P.3d at 487-88. Respondents argue that both the retaliation and the F.T.O. claims are moot. In support of their position that the retaliation claim is moot, Respondents argue that because of the Agreement that Complainant is not and will never be on active duty, does not have any police powers, and is not subject to any KPD supervision, management, or control. Respondents also contend that the appropriate remedy for a prohibited practice under HRS § 89-14 is a cease and desist order. However, "the Board would be unable to render any 'effective remedy' to an 'actual' controversy in light of the parties' mutual agreement for Complainant to physically separate from KPD." Finally, specifically regarding the mootness of the F.T.O.

opportunity claim, Respondents take the position that because of Complainant's retroactive promotion to sergeant pursuant to the Rodrigues decision, Complainant has already received compensation greater than what she would have otherwise received as a Police Officer I on F.T.O. assignment retroactive to 2008, when she was rendered ineligible for F.T.O. assignments due to a misconduct investigation. The Board finds these arguments unconvincing for several reasons.

First, the Board finds that this case falls squarely within the Court's decision in Nakanelua. In that appeal, the HLRB made an argument similar to Respondents' in this case, specifically that its order, which found that both the UPW and the State had committed prohibited practices was moot because the order imposed no other sanctions or directives for which this court could grant relief, or for which the HLRB could continue to seek enforcement. The Court rejected the HLRB's position, reasoning that this argument failed to take in account that an agency, such as the HLRB, can give consideration to its past decisions when determining future decisions. The Court stated:

> There is nothing to preclude the HLRB, like the NLRB in Sun Oil Co., from taking into consideration past decisions when determining current prohibited practice complaints against either UPW or the State. Indeed, under *HRS § 377-9(d)*, the HLRB is authorized to assess a monetary penalty against an employer or employee based on past findings of unfair or prohibited practices. *HRS § 377-9* (1993 and Supp. 2009) ("[A]n employer or employee who wilfully or repeatedly commits unfair or prohibited practices that interfere with the statutory rights of an employer or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a civil penalty not to exceed $10,000 for each violation."). Although *HRS § 377-9(d)* specifically addresses employer-employee relations, and thus does not appear to apply to a collective bargaining representative such as UPW, the provision nonetheless suggests that it is permissible for the HLRB to consider past prohibited practices decisions within the context of a collective bargaining dispute such as the one in the instant case. The HLRB has not pointed to any law that prevents it from doing so. Although Order No. 2686 no longer imposes any directives, it still presents a live controversy for which a court can provide an effective remedy. Were this court to vacate Order No. 2686, thereby expunging the finding of a prohibited practice from both UPW's and the State's employment relations record, it would relieve them from having the order used against them in later prohibited practice determinations. In sum, the HLRB's Order No. 2686 was not moot.

134 Hawaii at 502-03, 345 P. 3d at 168-69. (Emphasis added) Applying the reasoning of the Nakanelua decision to the present case, the Board concludes that these issues are not moot. Under HRS § 377-9(d), if the Board finds that the Respondents committed prohibited practices in this case based on the allegations of retaliation and the failure to pay for the F.T.O. opportunity in compliance with the Step III decision, these findings of prohibited practice violations may be

considered in determining future prohibited practice cases against the Respondents. In addition, unlike Nakanelua, which involved the UPW, a collective bargaining representative, this case involves an employer-employee situation. Accordingly, pursuant to the Nakanelua decision set forth above, Respondents may further be subject to a civil penalty under HRS § 377-9(d), for a prohibited practice violation. For the reasons articulated in Nakanelua, the Board concludes that these issues are not moot.

There is also no merit to Respondents' argument that the F.T.O. opportunity claim is moot because there is no longer "any adverse interest" or "effective remedy" since F.T.O. assignments are compensated at a Police Officer II PO9 level, whereas the sergeant's back pay owing to Complainant retroactive to September 23, 2007 pursuant to the Rodrigues decision is compensated at the higher PO11 level of the CBA salary schedule. A review of the Rodrigues decision shows that Respondents' argument must be rejected for several reasons.

In Rodrigues, the County and KPD filled five police sergeant position vacancies through internal promotions. SHOPO, the BU 12 exclusive representative, challenged the non-promotions of three police officers to these vacancies through the grievance procedure of the collective bargaining agreement between the employers and SHOPO (SHOPO CBA). The challenge was submitted to arbitration. The arbitrator determined that the promotions were subjective, arbitrary, and capricious, in violation of the CBA, and awarded promotions and back pay to the three police officers. Upon a motion to confirm the award, the circuit court for the Fifth Circuit (circuit court) granted in part and denied in part SHOPO's motion to confirm the award, finding, among other things, that the award of promotions was beyond the scope of the arbitrator's authority under the CBA and vacated the arbitrator's remedy. In affirming in part and vacating in part the circuit court's ruling, the Hawaii Intermediate Court of Appeals (ICA) held regarding the arbitrator's remedy that the arbitrator did not exceed his authority and the circuit court erred in failing to find otherwise. The principal issue before the Court was whether it was proper for the circuit court to vacate the arbitrator's remedy. 135 Hawaii at 458-61, 353 P.3d at 1000-03. The Court affirmed the ICA's judgment on appeal holding that the ICA majority correctly concluded that "the arbitrator's award did not exceed his authority and the circuit court erred in failing to so conclude," and that the arbitration award did not violate public policy. *Id.* at 462-67, 353 P.3d at 1004-09.

This case is factually distinguishable from the Rodrigues case in several respects. While both cases involved grievances filed based on SHOPO collective bargaining agreements, the issues underlying the Rodrigues case and the present case arose out of two completely different and separate disputes. While both involved the County of Kauai as a party, the opposing party in Rodrigues was SHOPO, who was a party to the SHOPO CBA involved, unlike in this case, in which Complainant is bringing this case as an individual employee. This prohibited practice case brought under HRS Chapter 89 arose out of Respondents' failure to comply with a Step III decision on a grievance regarding a dispute over a disciplinary action taken against Complainant. The Rodrigues case, on the other hand, arose out of a grievance filed by SHOPO on behalf of three

police officers, including the Complainant, regarding their non-promotions to sergeant. The Rodrigues grievance proceeded to the arbitration step, culminating in an award, which was then pursued for confirmation and enforcement under the procedure set forth in HRS Chapter 658. Most significantly, regarding the monetary compensation involved, Rodrigues upheld an award of back pay retroactive to 2007, unlike in this case, in which the prohibited practice alleged involves the failure to comply with a Step III decision "to make Grievant whole," which allegedly includes F.T.O. opportunity compensation. While Respondents take the position that the Rodrigues back pay award included this alleged F.T.O. opportunity compensation, there is nothing in the Rodrigues decision, in the record, or even an argument by Respondents that supports this position. In fact, Respondents themselves fail to point to any evidence in the record to support their position. The argument that because Complainant received back pay compensation under Rodrigues paid at the higher rate of sergeant that the F.T.O. opportunity claim is mooted ignores the fact that the prohibited practice claim in this case based on the failure to comply with the Step III decision on a disciplinary action is a distinct and independent HRS Chapter 89 claim from the non-promotion claim, involving different and separate remedies.

Accordingly, there is simply no showing that the events subsequent to the judgment of the trial court, including the Rodrigues back pay award 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. The issues in this case have not lost their justiciability because of the Rodrigues case and remain alive where an effective remedy can still be rendered.

Finally, even if the retaliation and F.T.O. opportunity issues are moot, under the guidance provided in Nakanelua, the public interest exception to the mootness doctrine would also apply to the retaliation and the failure to pay F.T.O opportunity claims. As the Court noted in Nakanelua, "When analyzing the public interest exception, this court looks 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. In applying the analysis, the Court stated:

> The above factors support the ICA's conclusion. First, it is clear that both issues are of a public nature. Each issue concerns a CBA between public employers and the collective bargaining representative of their Unit 10 employees. See K*aho'ohanohano v. State, 114 Hawai'I 302, 333, 162 P.3d 696, 727 (2007)* (holding that the subject appeal was of a public nature because the outcome would affect all state and county employees). Second, it is also clear that deciding the two issues would assist the HLRB in adjudicating future cases implicating similar issues, and would provide guidance to parties to comparable CBAs. Third, without a ruling on both issues, it is likely that similar disputes would arise in the future. For example, the issue of whether the HLRB or the circuit court has

> jurisdiction over an arbitration dispute has already come before this court in the past year. See *Hawai'i State Teachers Ass'n v. Univ. Lab. Sch. (hereinafter "**HSTA**"), 132 Hawai'i 426, 322 P.3d 966 (2014)*. Given all of this, the ICA properly considered the two issues under the public interest exception.

134 Hawaii at 503-04, 345 P.3d at 169-70.

Similar to the analysis of the Nakanelua Court, first, regarding the public nature factor, the present case involves the CBA between the County, a public employee, and the exclusive representative for BU 12 employees, of which Complainant is a member. Further, the dispute between the parties involves the interpretation and implementation of the grievance process established by the Agreement 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)). Second, regarding the guidance provided for future cases, there is no question that resolution of these issues would assist the Board in adjudicating future cases implicating similar issues under the Agreement. The desirability of an authoritative determination for the future guidance of the parties is evident based on the fact that Respondents are public officers who represent the County and implement the Agreement. Finally, regarding the element of without a ruling on the issues, the likelihood that similar disputes will arise in the future, Complainant maintains and the Respondents have not disputed that the issue will arise regarding other police officers under the Agreement.

D. Untimeliness of F.T.O. Claim

Finally, regarding the dismissal of the F.T.O. opportunity claim, Respondents have also made the assertion that the F.T.O. opportunity claim is untimely because Complainant was on notice of her ineligibility for F.T.O. opportunity as early as September 23, 2008 and as recently as December 2011; or alternatively, that the Board should limit the time period in which Complainant may request compensation for lost F.T.O. opportunity to the 20-days allowed by the Agreement or the 90-days allowed by HAR § 12-42-42A [sic].

Regarding this untimeliness argument, the Board finds that Order No. 2942, the findings and conclusions of which are specifically incorporated herein, has already resolved this issue.

ORDER

Based on Order No. 2942 and for the reasons set forth above, the Board hereby denies Respondents' 10/31/13 Motion to Dismiss and orders a hearing, specifically confined to the two allegations of retaliation, which is further limited to the failure by Perry to address Complainant's February 17, 2013 request to comply with the Step III decision and of the F.T.O. opportunity.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN, that the Board will conduct a second status conference on **January 12, 2016 at 1:30 p.m.**, HST, in the Board's Hearing Room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of this second status conference is to arrive at a settlement or clarification of the issues regarding the merits of the hybrid claim; to identify and exchange witness and exhibit lists, if any; to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues remaining; address any other prehearing matters; establish deadlines; and schedule the hearing on the merits. The parties shall file their Prehearing Statements or any amendments to previously filed Prehearing Statements which address the foregoing matters with the Board two days prior to the status conference.

Given the nature of the issues to be discussed, the Board strongly urges the parties to appear **personally** at the prehearing/status conference. If any party not residing on the island of Oahu cannot reasonably appear in person, she or he may appear telephonically at the status conference by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY) or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten (10) days prior to the status conference.

DATED: Honolulu, Hawaii, December 21, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

EXCUSED

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies to:
Gary Rodrigues
Philip Dureza, Deputy County Attorney

---

[i] The Complaint alleges violation of HRS "Section 89-1"; "Section 89-13,1"; "Section 89-13,7"; and "Section 89-13,8." However, as there are no sections "89-13,1"; "89-13,7"; or "89-13, 8" and because the Complaint is against the public employer, the Board considers the Complaint as alleging violations of HRS §§ 89-1, 89-13(a)(1), 89-13(a)(7), and 89-13(a)(8).

HRS § 89-1 states:

§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 maintain a 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.

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

§89-13 Prohibited Practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative willfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
***
(7) Refuse or fail to comply with any provision of this chapter; [and]

(8) Violate the terms of a collective bargaining agreement[.]

[ii] Respondents attached a copy of the Court's decision as Exhibit 3 to the 9/9/15 Memorandum in Support of 10/31/13 Motion to Dismiss and referred to the decision as Matter of State of Hawaii Organization of Police Officers and County of Kauai, SCWC-10-0000077 (2015). The case is currently named and cited as Rodrigues v. Cnty of Kaua'i, 135 Hawaii 456, 363 P.3d 998 (2015) and will be referenced as such in this Order.

[iii] The Board's Rules of Practice and Procedure, Hawaii Administrative Rules § 12-42-7(b) provides that, "In any proceeding under this chapter, any public employee…may be represented by…any other authorized person. Complainant is represented by Mr. Gary Rodrigues, who is not an attorney." As Complainant in this case is represented by Mr. Gary Rodrigues, who is not an attorney, the Board is compelled to apply the principles relevant for a *pro se* or self-represented litigant in this case.

[iv] HRS § 89-13(a)(4) states in relevant part:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
***
(4) …otherwise discriminate against an employee because the employee has…filed [a] …complaint…under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization[.]