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Case No. CU-05-303

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

STEPHANIE C. STUCKY,

Complainant,

and

WILFRED OKABE, President, Hawaii State
Teacher Association; WILBERT HOLCK,
UniServ, Hawaii State Teachers Association;
ERIC NAGAMINE, Maui UniServ, Hawaii
State Teachers Association; DAVID
FORREST, Oahu UniServ, Hawaii State
Teachers Association; and HAWAII STATE
TEACHERS ASSOCIATION,

Respondents.

CASE NO. CU-05-303

ORDER NO. 3145

ORDER DENYING RESPONDENTS'
SECOND MOTION TO DISMISS
COMPLAINT, AND NOTICE OF PRE-
HEARING CONFERENCE

ORDER DENYING RESPONDENTS' SECOND MOTION TO
DISMISS COMPLAINT, AND NOTICE OF PRE-HEARING CONFERENCE

I. 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. Factual Background

Complainant STEPHANIE C. STUCKY (Stucky), *pro se*, was employed by the Department of Education (DOE) as a teacher since 1985 at Iao Middle School on Maui, and at all relevant times, a member of bargaining unit 5 of the HAWAII STATE TEACHERS ASSOCIATION (HSTA).

On or about May 1, 2009, the DOE notified Stucky of its decision to terminate her employment due to an “unsatisfactory rating” as of May 25, 2006. On May 12, 2009, HSTA filed a step 1 grievance in case #M09-17 contesting Stucky’s discharge. On July 13, 2009, a step 2 decision denying the grievance was filed by DOE.

On July 15, 2009, HSTA notified DOE of its intent to proceed to arbitration, and HSTA initiated an arbitration on complaint on September 25, 2009. The parties selected Frank Yap, Jr. to serve as the arbitrator, and arbitral hearings were held on May 12, 13, 19, 20 and 26, 2010, June 9, 22 and 23, 2010, and October 10, 2010. After receiving post hearing memoranda from the parties, Arbitrator Yap rendered his decision and award on January 12, 2011, and sustained Stucky’s termination (Yap Award).

On or about January 18, 2011, Stucky was informed of the award by Arbitrator Yap and on January 22, 2011, a copy of the Yap Award was provided to her. Stucky requested HSTA to contest the Yap Award. According to HSTA, Stucky’s request and the Yap Award were reviewed by HSTA’s Uniserv directors and they recommended against filing a circuit court motion to vacate the Yap Award. On March 2, 2011, HSTA retained legal counsel to assess the probability of prevailing on a motion to vacate. Counsel opined as follows:

Given the narrow confines to which a court will review an arbitral award and the very limited terms by which a motion to vacate the award would be successful, even based on a public policy argument, it is our opinion that there may be insufficient grounds for vacating the award.

Subsequently, on March 7, 2011, Stucky was informed that HSTA would not file a motion to vacate the Yap Award.

B. Procedural Background

On April 7, 2011, Stucky filed a prohibited practice complaint (Complaint) against Respondents WILFRED OKABE (Okabe), President, Hawaii State Teachers Association; WILBERT HOLCK (Holck), Deputy Executive Director, Hawaii State Teachers Association; ERIC NAGAMINE (Nagamine), Maui UniServ, Hawaii State Teachers Association; DAVID FORREST (Forrest), Oahu UniServ, Hawaii State Teachers Association; and HSTA (collectively, Respondents or HSTA) with the Hawaii Labor Relations Board (Board). Stucky alleged that HSTA breached its duty of fair representation by acting in “bad faith” in the implementation of Article V of the Unit 05 collective bargaining agreement (CBA) and internal process guidelines for the submission of grievances through to arbitration; and by refusing to represent her in filing a motion to vacate the Yap Award, per Hawaii Revised Statutes (HRS) §

658A-9; and, therefore, committed prohibited practices as defined in HRS §§ 89-13(b)(3), (4), and (5).

On April 14, 2011, Respondents filed a Motion to Dismiss Complaint, asserting the Complaint should be dismissed for (1) lack of subject matter jurisdiction, and (2) failure to state a claim for relief. On July 22, 2011, the Board issued Order No. 2807 that granted in part and denied in part Respondents' Motion to Dismiss Complaint filed on April 14, 2011. The Board granted Respondents' Motion to Dismiss as to Respondents' alleged violation of HRS § 89-13(b)(3) and denied the Motion to Dismiss with respect to the alleged violation of HRS §§ 89-13(b)(4) and (5).

On August 1, 2011, Respondents filed a Motion for Summary Judgment. The parties submitted arguments to the Board and on March 15, 2012, the Board issued Order No. 2835 that granted in part and denied in part Respondents' Motion for Summary Judgment. The Board granted Respondents' Motion for Summary Judgment on the issue of whether Respondents violated the provision of Article V of the CBA. The Board denied Respondents' Motion for Summary Judgment with respect to the issues of whether HSTA breached its duty of fair representation by failing to follow its practice and procedure for review of an arbitration decision such that HSTA violated HRS § 89-13(b)(4).

Thus, the sole remaining issue after Order Nos. 2807 and 2835 is whether HSTA followed its internal guidelines in determining whether an arbitrator's award should be contested, and thereby breaching its duty of fair representation by not seeking judicial review of the Yap Award.

On May 24, 2012, Respondents filed Respondents' Second Motion to Dismiss Complaint, together with the Memorandum in Support of Motion, Declaration of Wilbert Holck, Exhibits 1 through 22, and Appendices 1 through 22 (herein collectively Second Motion to Dismiss). On May 30, 2012, Complainant filed the Memorandum in Opposition to Respondents' Second Motion to Dismiss Complaint (Memo in Opposition to Second Motion to Dismiss).

The Board heard the parties' oral arguments on the Second Motion to Dismiss on June 19, 2012.

II. STANDARDS OF REVIEW

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the 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).

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.

Respondents seek a dismissal in the Second Motion to Dismiss based on the following arguments: (i) the matter is moot since the time to move to vacate the Yap Award has expired, and (ii) Stucky no longer has standing because the Yap Award is final and cannot be further contested and thus leaves Stucky with no injury in fact.

A. Stucky's claim that HSTA breached its duty of fair representation is not moot.

The gravamen of Stucky's sole remaining issue in this case is the allegation that HSTA failed to adhere to its internal practice and procedure in determining whether to file a circuit court action to vacate the Yap Award. HSTA argues that whether or not HSTA followed its procedures is, in essence, irrelevant because the decision was made to not challenge the Yap Award. HSTA further claims that "the time has run on filing a motion to vacate, making the remaining issue moot. Factually it is impossible to now vacate the award, making the complaint moot." *See*, Respondents' Memorandum in Support of Second Motion to Dismiss, at page 9.

The Board disagrees with Respondents' argument and conclusion that the question of whether HSTA breached its duty of representation is moot simply because the Yap Award is final and bind, precluding any basis for back pay and that the Complaint does not come within one of the exceptions to the mootness doctrine.

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

"[T]he 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. 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) (Citations omitted).

In Stucky v. Takeno, Board Case No. CU-05-283, Order No. 2854, at *6 (2012) (Stucky I), the Complainant filed similar allegations based on the Union's failure to follow strict guidelines in the CBA and the Union's internal process guidelines for the submission of grievances to arbitration to secure an expedited arbitration. The Board concluded that the Yap Award rendered Stucky's prohibited practice claim moot. In so concluding, the Board noted that Arbitrator Yap had specifically determined that counsel for the Employer and the UniServ Directors representing Stucky and HSTA had "fully represented their clients;" appropriately presented their respective positions at the arbitration hearing and in post-arbitration memoranda; that the parties "stipulated this matter is arbitrable, that the preliminary steps in the grievance process had either been met or mutually waived, and that his matter is properly before the Arbitrator for disposition. Unlike Stucky I, in which Arbitrator Yap determined the issues at the heart of the prohibited practice complaint, the alleged breach of duty of fair representation in this case occurred subsequent to the Yap Award. Accordingly, because the allegations in this Complaint cannot be deemed to have been resolved by the Yap Award, the adverse interest and effective remedy have not been compromised.

As such, the Board must deny the Second Motion to Dismiss to the extent it relies on the grounds of mootness.

B. Stucky has standing to pursue her claim of HSTA's breach of duty of fair representation.

As to the issue of standing, generally it has been declared by the Hawaii Supreme Court that "[s]tanding is concerned with whether the parties have the right to bring suit." Pele Def. Fund v. Puna Geothermal Venture, 77 Hawaii 64, 67, 881 P.2d 1210, 1213 (1994) (internal quotation marks and citation omitted). "[T]he crucial inquiry with regard to standing is whether the plaintiff has *alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.*" Mottl v. Miyahira, 95 Hawaii 381, 389, 23 P.3d 716, 724 (2001) (*quoting In re Matson Navigation Co. v. Fed. Deposit Ins. Corp.*, 81 Hawai'i 270, 275, 916 P.2d 680, 685 (1996)) (emphasis added). In determining whether a plaintiff has standing, the court "look[s] solely to whether [the plaintiff] is the proper plaintiff . . . , without regard to the merits

of the allegations. Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989).

Thus, "[i]n deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury." Akinaka v. Disciplinary Bd. of the Hawai'i Supreme Court, 91 Hawai'i 51, 55, 979 P.2d 1077, 1081 (1999) (citing Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996)). Furthermore, "[w]ith respect to the first prong of this test, the plaintiff must show a distinct and palpable injury to himself or herself. The injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical." *Id.* (internal quotation marks, brackets, and citations omitted) (emphasis added). Because "the test is stated in the conjunctive, [a plaintiff] must satisfy all three prongs to establish its standing." Sierra Club v. Hawaii Tourism Auth., 100 Hawaii 242, 250, 59 P.3d 877, 885 (2002).

Respondents' state in their Memorandum in Support of Motion to Dismiss at page 17 that "[i]f a case becomes moot, the parties lose standing to maintain those moot claims." Accordingly, Respondents' claim that Stucky lacks standing to pursue her claim is based on a finding that her claims are moot. Since the Board determined that Stucky's claims are not moot, Respondents' "no standing" argument must fail. In addition, unlike in Stucky I, Order No. 2854, at *7, in which the Board concluded that Complainant had no injury in fact because the grievance had already been submitted to arbitration and the Yap Award rendered, the Board finds that Complainant satisfied all three prongs of the foregoing test such that Complainant has standing before this Board. In this case, Complainant has alleged that she was denied the opportunity to have the Yap Award vacated and presumably back pay because of the Union's breach of duty of fair representation by acting in bad faith in the implementation of the CBA, Article V and internal process guidelines for submission of grievances through to arbitration; and by refusing to represent her in filing a motion to vacate the Yap Award. A favorable decision by the Board could provide relief for Complainant's concerns as the Board is authorized to provide a make-whole remedy by HRS § 377-9. Hence, unlike Stucky I, in which the issue was resolved by the Yap Award, there is no analogous resolution on the issue of vacating the Yap Award. Accordingly, the Board concludes that Complainant has "suffered an actual or threatened injury;" and has standing to bring her Complaint to this Board.

C. Conclusion.

Based on the above, the Board denies the Second Motion to Dismiss and orders that this case be set for a hearing on the merits.

NOTICE OF PRE-HEARING CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-49, the Board will conduct a pre-trial conference on **March 9, 2016, at 10:00 a.m.**, before Hearings Officer Paul H. Sato, in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii. The purpose of the pre-trial conference is to set this matter for a hearing on the merits and to establish a timetable and deadlines for all pre-hearing matters.

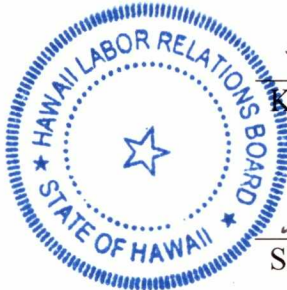
All parties have the right to appear in person and to be represented by counsel or a representative.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata, Board Secretary at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai or Maui). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata of the Board at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands) to make the necessary arrangements no later than ten (10) days prior to the prehearing/settlement conference.

DATED: Honolulu, Hawaii, February 11, 2016.

HAWAII LABOR RELATIONS BOARD



KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Ms. Stephanie C. Stucky, Pro Se Complainant

Herbert R. Takahashi, Esq., Attorney for Respondents

Shawn Luiz, Esq.

