

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

YA-WEN HSIAO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION,

Respondent(s).

CASE NO(S). 20-CU-08-383

DECISION NO. 498

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER

1. Introduction and Statement of the Case

Every court has its limitations on what it can and cannot do. As a quasi-judicial administrative agency, the Hawai'i Labor Relations Board (Board) is no different. In prohibited practice cases such as this case, the law constrains the Board to consider only what falls within Hawai'i Revised Statutes (HRS) Chapter 89. Regardless of what the Board's personal sympathies, the Board is required to issue decisions based solely on the law and facts before it.

For the past approximately fifteen years, Complainant Ya-Wen Hsiao (Ms. Hsiao), also known as Sarah, has lived, worked, and built a life in Hawai'i. Her husband and representative in this case, Bryan Feliciano (Mr. Feliciano), who has been diagnosed with terminal cancer, and her child both reside in Hawai'i. Although Mr. Feliciano is employed, Ms. Hsiao is the primary provider for her family through her employment.

During her time in Hawai'i, Ms. Hsiao has been employed by the University of Hawai'i (Employer, University, or UH), John A. Burns School of Medicine (JABSOM) as a member of bargaining unit 8 (BU 8). Since 2005, the Employer has sponsored Ms. Hsiao for a temporary employment-based visa for those in specialty occupations (H-1B visa), which has allowed her to work at JABSOM.

After issues arose with obtaining permanent residency for Ms. Hsiao, in November of 2019, the Employer informed Ms. Hsiao that it would not seek to extend her H-1B visa beyond the expiration date of November 1, 2020. After attempting discussions with the Employer's

staff, including the Office of General Counsel (OGC) and JABSOM's Dean, Jerris Hedges (Dean Hedges), Ms. Hsiao filed complaints against the Employer with the United States Equal Employment Opportunity Commission (EEOC) and the Hawai'i Civil Rights Commission (HCRC), alleging discrimination based on citizenship and national origin. Both were denied. After receiving her Right to Sue letter, Ms. Hsiao filed a Complaint for Discrimination (Circuit Court Complaint) in the Hawai'i Circuit Court (Circuit Court).

At the end of January 2020, Ms. Hsiao contacted John Clivio (Mr. Clivio), Business Agent for the exclusive representative of BU 8, Respondent Hawaii Government Employees Association (HGEA), and informed him that she wanted to file a grievance based on the Employer's refusal to renew her H-1B visa. Ms. Hsiao included copies of her EEOC filings for Ms. Clivio's review.

Mr. Clivio told Ms. Hsiao he would review the documents and get back to her. After several discussions between Ms. Hsiao, Mr. Feliciano, and Mr. Clivio via email and phone, HGEA did not file a grievance on Ms. Hsiao's behalf.

Ms. Hsiao filed a prohibited practice complaint (Complaint) with the Board, alleging, among other things, that HGEA committed prohibited practices under HRS § 89-13(b)(1), (4), and (5) and that it violated its duty of fair representation through its processing of her grievance.

1.1. Issues

The four issues in this case are:

1. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(4) by violating its duty of fair representation to Ms. Hsiao by acting arbitrarily, discriminatorily or in bad faith, through its conduct regarding Ms. Hsiao's grievance, including whether HGEA's processing of the grievance was perfunctory;
2. Whether the Employer violated the collective bargaining agreement for BU 8 (CBA) when it notified Ms. Hsiao that it would not be renewing its sponsorship of her employment-based visa;
3. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(1) by interfering, restraining, or coercing Ms. Hsiao, in the exercise of any right guaranteed under HRS Chapter 89, through its conduct regarding Ms. Hsiao's grievance; and
4. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(5) by violating the terms of the CBA through its conduct regarding Ms. Hsiao's grievance.

1.2. Statement of the Case

The Board chose to bifurcate this case for efficiency, first hearing evidence on whether HGEA violated HRS Chapter 89; and second, if necessary, hearing evidence on the wilfulness of HGEA's actions.

The Board heard this case on September 22-23, 2020. The only witness who testified was Ms. Hsiao. The following exhibits were entered in evidence through the course of the pre-trial conference and the hearing on the merits (HOM): Complainant Exhibits C, G, H, and S; and Union Exhibits U-1 through U-9.

After Ms. Hsiao rested her case on September 23, 2020, HGEA orally moved for a Directed Verdict. Ms. Hsiao submitted her written opposition on September 28, 2020.

Based on the entire record, the Board makes the below findings of fact and conclusions of law, decision and order, granting the Motion for Directed Verdict.

More specifically, the Board finds that as to issues one and two, Ms. Hsiao did not meet her burden of proof in the hybrid-case required for a complaint regarding a breach of the duty of fair representation. The Board's finding is based on Ms. Hsiao's failure to prove that she exhausted her administrative remedies prior to the filing of the Complaint, which is a requirement prior to filing a prohibited practice complaint. If administrative remedies are not exhausted, the Board cannot consider whether the Employer violated the CBA. Accordingly, the Board does not consider whether HGEA violated its duty of fair representation.

Additionally, the Board finds that as to issues three and four, Ms. Hsiao did not meet her burden of proof as to whether HGEA violated the collective bargaining agreement or interfered, restrained, or coerced Ms. Hsiao in the exercise of her rights under HRS Chapter 89.

Based on the Board's findings, the Board does not need to continue to the second phase of the bifurcated case.

Any conclusion of law improperly designated as a finding of fact is deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law is deemed or construed as a finding of fact.

2. Relevant Background and Findings of Fact

2.1. Ms. Hsiao and Immigration Background

Ms. Hsiao has been sponsored by the Employerⁱ for an H-1B visa for the past approximately 15 years. This H-1B visa has permitted Ms. Hsiao to work for the Employer as an employeeⁱⁱ who belongs to BU 8ⁱⁱⁱ. Her current H-1B visa expires on November 1, 2020.

In 2011, the Employer submitted an Application for Permanent Employment Certification (PERM Application) to the United States Department of Labor (DOL). Approval of a PERM Application is the first step towards obtaining an employment-based green card.

DOL denied the PERM Application in 2012, and the Employer requested reconsideration of the denial, which DOL also denied that same year. The Employer then submitted legal briefs to the Board of Alien Labor Certifications Appeals (BALCA) to appeal that denial. A three-judge panel from BALCA affirmed the denial of the PERM Application in 2016. The Employer requested *en banc* review, which BALCA denied in 2017. A Pro Se Motion for Relief from Judgment and Order was submitted to BALCA, which was denied in 2018, and the Chief Administrative Law Judge (ALJ) barred the Employer from raising further issues.

After receiving responsive documents from a Freedom of Information Act (FOIA) request, in 2018, Ms. Hsiao filed a Complaint for Review of Administrative Decision (District Court Complaint) in the District Court, where she alleged, among other things, that DOL erred in denying the PERM Application. The District Court dismissed Ms. Hsiao's case and ruled that Ms. Hsiao lacked standing to pursue the claim.

After the District Court dismissed the case, Ms. Hsiao appealed to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). On October 11, 2019, the Ninth Circuit granted Ms. Hsiao's emergency motion for injunctive relief pending appeal, which required DOL to stay entry of its final judgment of her PERM Application case to allow her PERM Application to remain in the "pending" status. As long as the PERM Application remains in the "pending" status, the Employer has the ability to renew Ms. Hsiao's H-1B visa on a year-to-year basis.

2.2. Renewal of Ms. Hsiao's H-1B Visa

Because the H-1B visa is temporary, from time to time, it must be renewed, or Ms. Hsiao will lose the rights she has under the H-1B visa. Without another visa status, Ms. Hsiao would be forced to leave the country. If Ms. Hsiao transferred to a dependent visa under her husband's visa, she would not necessarily have access to a work permit.

2.2.1. 2018 Letter from Dean Hedges

After receiving the final denial from BALCA in 2018, Ms. Hsiao's H-1B visa was set to expire on November 1, 2019. By letter dated November 2, 2018, the first date of Ms. Hsiao's renewed H-1B visa, Dean Hedges informed Ms. Hsiao that, among other things, "There are no further steps that can be taken or will be taken by the University to appeal the initial denial of the Application for Permanent Employment Certification."

The letter further stated that because the DOL had denied the PERM Application, the Employer's understanding was that it could not submit any further applications for visa extensions past the November 1, 2019 date of Ms. Hsiao's then-current visa. Further, the letter stated that "the University will not be taking further action to extend [Ms. Hsiao's] work authorization beyond the expiration of the current H-1B visa." The letter also urged Ms. Hsiao to seek legal advice on the immigration matters.

2.2.2. 2019-2020 Renewal of Ms. Hsiao's H-1B Visa; Notification from Employer

In early October 2019, in anticipation of the Ninth Circuit's decision on whether or not to grant Ms. Hsiao's emergency motion for injunctive relief pending appeal, JABSOM's Office of Medical Education (OME) prepared the paperwork to extend Ms. Hsiao's H-1B visa, which, at that point, was set to expire on November 1, 2019.

After the Ninth Circuit's October 11, 2019 order, Ms. Hsiao reached out to, among others, Dean Hedges, to request that her H-1B paperwork be processed to allow her to remain in the United States and employed with the Employer. The Employer filed a timely H-1B visa extension petition with the United States Citizenship and Immigration Services (USCIS), requesting that Ms. Hsiao's H-1B visa be extended for another year.

By letter dated November 7, 2019, Dean Hedges, among other things, notified Ms. Hsiao that the Employer did not intend to submit future H-1B visa extension petitions on her behalf. Further, Dean Hedges informed Ms. Hsiao that the Employer did not intend to challenge any action by USCIS, regardless of the outcome of Ms. Hsiao's case before the Ninth Circuit.

Because Ms. Hsiao's ability to work is currently tied to the H-1B visa, without renewal of the H-1B or transfer to another status that provided her a work permit, Ms. Hsiao would not be able to continue to legally work in the United States after November 1, 2020. Dean Hedges informed Ms. Hsiao that the Employer would continue to employ her for the duration of her H-1B visa extension, absent other employment action from the Employer.

2.2.3. Communications Between Ms. Hsiao and Employer staff

On November 14, 2019, Ms. Hsiao texted with her direct supervisor, Jill Omori, M.D. (Dr. Omori). Dr. Omori informed Ms. Hsiao that, according to the Dean's Office and legal counsel, she could not speak with Ms. Hsiao about the November 7, 2019 letter until after Ms. Hsiao discussed it with certain other Employer Staff. Ms. Hsiao also texted with other Employer Staff who relayed the same restrictions on speaking to Ms. Hsiao about the November 7, 2019 letter before her meeting with certain Employer staff.

That same day, Ms. Hsiao emailed Carrie Okinaga, Esq. (Ms. Okinaga) and Elisabeth Contrades, Esq. (Ms. Contrades), who are both part of OGC. Ms. Hsiao copied David Lassner, President of UH (President Lassner), on the email. Ms. Hsiao expressed to Ms. Okinaga and Ms. Contrades some of her concerns about the November 7, 2019 letter and, among other things, asked if OGC had vetted and approved the November 7, 2019 letter. Ms. Hsiao also expressed concerns about a "secret meeting" between OGC and certain members of JABSOM's staff. Ms. Hsiao asked Ms. Okinaga and Ms. Contrades to respond as soon as possible.

Ms. Okinaga responded to Ms. Hsiao by email and confirmed that OGC did review the November 7, 2019 letter. Ms. Okinaga further stated that because UH administrators are OGC's clients, there was no "secrecy" in any meeting.

Ms. Hsiao responded to Ms. Okinaga by email the following morning and expressed many of her concerns. Ms. Hsiao informed Ms. Okinaga that Ms. Hsiao believed that the Employer was discriminating against Ms. Hsiao based on her lack of U.S. citizenship. Ms. Hsiao further informed Ms. Okinaga that she endeavored to keep the Employer out of her District Court and Ninth Circuit cases and that she tried to clear the obstacles that the Employer faced in applying for permanent residency for Ms. Hsiao.

Although Ms. Hsiao did not specifically reference the word "grievance" or a particular section of the CBA in her communications with the Employer Staff, Ms. Hsiao had a good faith belief that, through these communications, she was filing a grievance according to the grievance procedure in Article 17 of the CBA.

2.2.4. November 20, 2019 Meeting Between Ms. Hsiao and Employer Staff

On November 20, 2019, Ms. Hsiao participated in a meeting with Dean Hedges and other members of the Employer's staff including Director for Faculty and Scholar Immigration Services, Isis Bataluna (Ms. Bataluna). Mr. Feliciano accompanied Ms. Hsiao. At the meeting, the Employer's staff informed Ms. Hsiao that if she no longer had the ability to legally work in the United States, she would not be able to work for the Employer. However, should she manage to find another way to obtain a work permit, they would continue to employ her after November 1, 2020. However, the Employer did not intend to renew her employment-based visa.

Although the Employer has other employees on the same type of visa as Ms. Hsiao, Ms. Bataluna asserted that every immigration case is different. Accordingly, Ms. Bataluna stated that the decisions made about Ms. Hsiao's visa renewal were based on her particular situation.

Dean Hedges stated that it was not desirable to have materials representing the university filed by Ms. Hsiao. According to Dean Hedges, the proper process for documents filed with the courts on behalf of the Employer is to go through OGC. Because the Employer submitted the PERM Application, Ms. Bataluna took the position that the actions Ms. Hsiao took to appeal the denial of the PERM Application appeared to be on behalf of the Employer.

2.3. EEOC and HCRC Complaints

By letter dated January 20, 2020, Ms. Hsiao submitted a charge of discrimination (EEOC Charge) against the Employer to the EEOC. Ms. Hsiao detailed her allegations against the Employer in her EEOC Charge and expressed her concerns and belief that the Employer discriminated against her based on the fact that Ms. Hsiao is not a U.S. citizen.

On February 7, 2020, the EEOC issued a determination that EEOC could not conclude that the information it had established violations of the applicable statutes. This determination did not certify that the Employer was in compliance with the applicable statutes and did not make any finding as to the other issues that may have been raised by the charge.

Ms. Hsiao also filed a complaint with the HCRC. By letter dated March 6, 2020, HCRC dismissed her complaint because the EEOC issued its final determination regarding her EEOC Charge. The letter, among other things, serves as Ms. Hsiao's Right to Sue document to bring a charge against the Employer in the State Circuit Court.

2.4. HGEA and Communications Between Ms. Hsiao and Mr. Clivio

HGEA serves as the exclusive representative^{iv} for BU 8. Ms. Hsiao has been a dues-paying member of BU 8 for her entire employment with the Employer. In its capacity as the exclusive representative for BU 8, HGEA is responsible for representing the interests of all of its bargaining unit members without discrimination and without regard to whether or not the member pays dues to HGEA^v.

Ms. Hsiao contacted Mr. Clivio by email on January 30, 2020 and informed him that she had filed her EEOC Charge against the Employer which, among other things, alleged constructive termination due to discrimination based on national origin. Ms. Hsiao stated that she wanted her email to serve as filing an official grievance with HGEA so that she could be compliant with the CBA's grievance procedures. In the email, Ms. Hsiao included a copy of her EEOC charge. Ms. Hsiao received an email response from Mr. Clivio containing follow up questions and informing her that he would try to contact her the following. In response to Mr.

Clivio's questions, Ms. Hsiao provided Mr. Clivio with additional background on her case by email.

Ms. Hsiao received a phone call from Mr. Clivio on January 31, 2020. Both she and Mr. Feliciano informed Mr. Clivio that they believed the Employer was constructively terminating Ms. Hsiao by refusing to file for an H-1B extension and that the Employer had not provided them with any explanation of why the Employer would not file for the H-1B extension. During the conversation, Mr. Clivio told Ms. Hsiao that he would send her a grievance form.

Ms. Hsiao followed up the conversation with Mr. Clivio with an email stating her position that there were two items at issue in her case, first, that under the CBA members cannot be discriminated against without a bona fide occupational or legal reason and second, that Ms. Hsiao was not given an opportunity to respond to the Employer's decision not to file for the H-1B extension. After receiving Ms. Hsiao's email, Mr. Clivio noted that he needed to follow up with Ms. Hsiao but that he needed to get through the documents she had sent him first.

On February 11, 2020, Ms. Hsiao emailed Mr. Clivio to follow up and ask him to send the grievance form that he had previously mentioned. Ms. Hsiao also informed Mr. Clivio that she intended to file a court complaint based on the same issues.

Mr. Clivio followed up with Ms. Hsiao by phone and informed her that the CBA states that grievance filings must take place within 20 working days after the alleged violation. Additionally, Mr. Clivio took the position that Ms. Hsiao's best approach was to follow through with the court challenge to her termination, as immigration laws fall under federal jurisdiction, which HGEA does not interpret. Mr. Clivio further stated that he believed the Employer was not constructively terminating Ms. Hsiao because Ms. Hsiao would be employed through November 1, 2020.

During the phone conversation, Ms. Hsiao and Mr. Feliciano requested that HGEA provide them with something in writing regarding HGEA's position. Mr. Clivio stated that HGEA's standard practices did not include providing such a written document. Mr. Clivio asked Ms. Hsiao and Mr. Feliciano if he could reach out to Ms. Bataluna to ask if the Employer would provide a reason for refusing to file the H-1B visa, but Ms. Hsiao and Mr. Feliciano expressed their desire for Mr. Clivio not to speak to Ms. Bataluna. Mr. Clivio told Ms. Hsiao that he would look into her case further.

After two months, on May 3, 2020, Ms. Hsiao sent an email to Mr. Clivio which included a timeline of their interactions. In the email, Ms. Hsiao informed Mr. Clivio that she believed that HGEA was not behaving professionally because they had not responded to her and that HGEA, by refusing to even provide her with the grievance form, was acting in bad faith. Ms. Hsiao also told Mr. Clivio that she believed that HGEA acted in bad faith when it took a position contrary to Ms. Hsiao's position.

2.5. Circuit Court Complaint

Ms. Hsiao filed her Circuit Court Complaint which, among other things, argues that the Employer discriminated against her because of her race, ancestry, or national origin. Ms. Hsiao's Circuit Court Complaint includes a claim that the Employer breached the following articles of the CBA: Article 2 – Non-Discrimination and Article 16 – Discipline.

In the Circuit Court Complaint, Ms. Hsiao also includes allegations that HGEA did not fairly represent Ms. Hsiao, that HGEA acted arbitrarily by asserting a position contrary to Ms. Hsiao's and that it acted in bad faith by allegedly ignoring Ms. Hsiao's attempts to file a grievance.

Ms. Hsiao's case at the Circuit Court is currently proceeding.

3. Analysis and Conclusions of Law

3.1. Witness Credibility

The only witness called in this case was Ms. Hsiao. In assessing her credibility, the Board primarily relied upon her demeanor and also considered the context of her testimony, the quality of her recollections, and the consistency of her testimony. The Board further analyzed Ms. Hsiao's credibility by considering the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences from the record as a whole. Most of the credibility findings regarding Ms. Hsiao are incorporated into the findings of fact above.

Based on the Board's observations at the hearing, the Board found Ms. Hsiao a credible witness, and her testimony is credited to the extent consistent with the findings of fact above.

Ms. Hsiao's testimony was largely straightforward, consistent, and plausible. Her recollections were clear and detailed.

HGEA attempted to question Ms. Hsiao's credibility by implying, among other things, that Ms. Hsiao and Mr. Feliciano could not possibly have put together their filings in the various cases without the benefit of an attorney or other legal professional assisting them. The Board finds no evidence in support and no merit to HGEA's implications.

On the contrary, Ms. Hsiao admitted that Mr. Feliciano assisted her in her filings, and both Ms. Hsiao and Mr. Feliciano expressed to the Board the dedication they have to ensuring that they present Ms. Hsiao's case in the best way they can. The Board does not think it at all improbable that non-legally trained individuals, if dedicated enough to their cause, could utilize resources to, among other things, research cases and view filings others have made in similar cases.

With this determination made, the Board now turns to the issues at hand in this case.

3.2. Motion to Dismiss

As a preliminary matter, the Board will address the dispositive motion previously filed. HGEA submitted a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), arguing, among other things, that Ms. Hsiao's complaint failed to state a claim upon which relief could be granted. The Board denied the Motion to Dismiss and stated that it would address the Motion to Dismiss in the final decision. Accordingly, the Board rules upon HGEA's Motion to Dismiss as follows.

3.2.1. Legal Standards for Failure to State a Claim

Dismissal of a complaint on a motion to dismiss stating that it fails to state a claim is appropriate only if the complaint is clearly without merit and that its lack of merit leads to a finding that no law that supports the claims in the complaint." Justice v. Fuddy, 125 Hawai'i 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy). Complaints should not be dismissed for failure to state a claim unless there is no doubt that the complainant cannot prove any set of facts in support of her claim that would entitle her to relief. Fuddy, 125 Hawai'i at 107-108, 253 P.3d at 668-669. Accordingly, the Board must consider the complaint in the light most favorable to the complainant to determine whether the allegations in the complaint could warrant relief under any alternate theory. Fuddy, 125 Hawai'i at 108, 253 P.3d at 669.

When the Board considers a motion to dismiss for failure to state a claim, the Board is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, the Board is not required to accept legal conclusions made in the complaint. Paysek v. Sandvold, 127 Hawai'i 390, 402-403, 279 P.3d 55, 67-68 (App. 2012).

The Board follows the pleading standards established by the Hawai'i appellate courts. Paio, et al. v. UPW, Board Case Nos. 16-CU-10-344, 16-CU-10-345, Decision No. 497, at *26 (February 21, 2020) (Paio). Accordingly, the Board requires only that the complaint contain a short and plain statement of the claim to provide the respondent with fair notice of the complaint and the grounds that the complainant is arguing. Suzuki v. State of Hawai'i, 119 Hawai'i 288, 296, 196 P.3d 290, 298 (App. 2008). Further, the Board must construe pleadings liberally. Id. 119 Hawai'i at 296, 196 P.3d at 298.

Notice pleading is a fundamental tenet of Hawai'i law, particularly regarding pleadings prepared by self-represented litigants. Waltrip v. TS Enterprises, Inc., 140 Hawai'i 226, 239, 398 P.3d 815, 828 (2016). Although Ms. Hsiao is represented by Mr. Feliciano, neither Ms. Hsiao nor Mr. Feliciano is an attorney or otherwise legally trained. Accordingly, the Board considers the Complaint as a complaint brought by a self-represented litigant.

Further, even if it may be improbable for a complainant to prove a claim, the complainant is entitled to an opportunity to make the attempt to prove the claim. Bank of America, N.A. v. Reyes-Toledo, 142 Hawai‘i 249, 263, 428 P.3d 761, 775 (2018).

3.2.2. The Complaint Contains Sufficient Facts to Support a Claim

The Complaint, among other things, lists three alleged prohibited practices committed by HGEA, under HRS §§ 89-13(b)(1), (4), and (5), and provides a timeline of Ms. Hsiao’s interactions with Mr. Clivio. The Complaint further provides allegations regarding Ms. Hsiao’s issues regarding Mr. Clivio’s responses or lack thereof, including, among other things, allegations about Mr. Clivio failing to provide Ms. Hsiao with a promised grievance form, Mr. Clivio’s statement that he would look into the matter further and would be in contact, and Mr. Clivio’s failure to respond to Ms. Hsiao.

If the Board finds that HGEA breached its duty of fair representation in handling a grievance, the Board is able to find a violation of HRS § 89-13(b)(1). Lum v. Anderson, Board Case Nos. CE-13-65 and CU-13-39, Decision No. 203, at *17-22 (1985).

After reviewing the Complaint in the light most favorable to Ms. Hsiao, the Board finds that HGEA did not establish beyond a doubt that Ms. Hsiao could prove no set of facts in support of her claims that would entitle her to relief. Accordingly, the Board denied the Motion to Dismiss and moved to the hearing on the merits.

3.3. Motion for Directed Verdict

While considering a motion for directed verdict, the Board must consider the evidence and inferences in the case in the light most favorable to the non-moving party. Richardson v. Sport Shinko, 76 Hawai‘i 494, 502, 880 P.2d 169, 177 (1994). Further, the Board may only grant a motion for directed verdict when there is only one reasonable conclusion as to the proper judgment. Id., 76 Hawai‘i at 502, 880 P.2d at 177.

3.4. Hybrid Case Under Poe

The first two issues identified in this case comprise the “hybrid case” established in Poe v. Hawaii Labor Relations Board, 105 Hawai‘i 97, 101-102, 94 P.3d 652, 656-57 (2004) (Poe II). As the Court noted in Poe II, the claims of an employer breaching the collective bargaining agreement and a union breaching the duty of fair representation are “inextricably interdependent.” Poe II, 105 Hawai‘i at 102, 94 P.3d at 657. An employee may, if they choose, sue only the employer or only the union, but the case that must be proven is the same, regardless of who is named as a respondent. Id. at 102, 94 P.3d at 657.

Accordingly, based on Poe II, Ms. Hsiao must carry the burden of showing both the breach of the CBA by the Employer and the breach of the duty of fair representation by HGEA.

As a threshold issue, the Board must determine that it has jurisdiction to render a valid judgment on these issues. Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006). Lack of subject matter jurisdiction can never be waived by any party at any time. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 84, 222 P.3d 979, 1003 (2010)

The Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile. *See, e.g.,* University of Hawaii Professional Assembly v. Board of Regents, Case No. CE-07-804, Board Order No. 2939 (August 22, 2013). The Hawai'i Supreme Court has held that an employee must exhaust any grievance procedures provided for in a collective bargaining agreement before bringing an action regarding an alleged breach of the collective bargaining agreement. Poe II, 105 Hawai'i at 101, 94 P.3d at 656.

Ms. Hsiao contacted her immediate supervisor, Dr. Omori, who responded to her on November 14, 2019 and again on November 20, 2019. The Board concludes that Ms. Hsiao attempted to discuss her concerns with Dr. Omori, as laid out as the informal step in the BU 8 grievance procedure. However, the Board has been presented with no evidence that shows that Ms. Hsiao referred to her concerns as a grievance.

The CBA states that grievants, if they are not satisfied with an informal discussion between the grievant and their immediate supervisor, may submit a written statement of the grievance within seven days of receiving answers to the informal discussion. Ms. Hsiao contacted OGC and President Lassner on November 14, 2019 to present her position that the Employer was discriminating against her.

Even when viewing the evidence and inferences in the light most favorable to Ms. Hsiao, the Board cannot find that Ms. Hsiao exhausted her contractual remedies. At no point did Ms. Hsiao inform the Employer that she wanted to file a grievance. In her communications with OGC and President Lassner, Ms. Hsiao did not allege that the Employer violated a particular provision of the CBA. Accordingly, the Board cannot find that Ms. Hsiao filed a grievance, went through the entire grievance procedure, and exhausted her contractual remedies.

Because Ms. Hsiao did not exhaust her contractual remedies, the Board cannot consider the merits of her position about whether the Employer violated the CBA by refusing to extend her H-1B visa. The law requires the Board to rule that it does not have jurisdiction to consider the hybrid claim. Therefore, the Board further does not consider the second issue of whether HGEA breached its duty of fair representation.

3.5. HRS § 89-13(b)(1) and (b)(5) Allegations

The Board heard testimony from Ms. Hsiao about her belief that the Employer discriminated against her due to citizenship and national origin, and about her belief that HGEA breached the duty of fair representation through its conduct in the processing of her grievance.

However, Ms. Hsiao did not submit evidence or argument that HGEA violated the CBA or interfered with her rights under HRS Chapter 89. The CBA does not require that HGEA file a grievance on behalf of its members. In fact, the CBA Article 17 - Grievance Procedure, Paragraph B, explicitly permits members to file a grievance without HGEA's interference.

Mr. Clivio failed to provide Ms. Hsiao with the grievance form as promised. However, by the time Ms. Hsiao requested the form, the 20-day period in which to file a grievance had passed. Accordingly, although the Board may disagree with Mr. Clivio's decision not to provide Ms. Hsiao with the form, Ms. Hsiao did not have the right or ability to file a grievance on the issues that arose in November 2019. Therefore, HGEA's failure to provide Ms. Hsiao with the form did not violate her rights under HRS Chapter 89.

4. Order

The Board can act only as the law dictates, not according to its sympathies. Accordingly, based on the foregoing, the Board hereby GRANTS the Motion for Directed Verdict and finds that Ms. Hsiao did not meet her burden of proof before the Board. This case is closed.

DATED: Honolulu, Hawai'i, October 14, 2020.

HAWAI'I LABOR RELATIONS BOARD



ARCUS R. OSHIRO

ARCUS R. OSHIRO, Chair

SESNITA A. D. MOEPONO

SESNITA A.D. MOEPONO, Member

J.N. MUSTO

J.N. MUSTO, Member

Copies sent to:

Ya-Wen Hsiao, Self-Represented Litigant
Bryan Feliciano, Representative for Ms. Hsiao
Stacy Moniz, HGEA Advocacy Chief

ⁱ HRS § 89-2 Definitions defines “Employer” or “public employer” as:

“Employer” or “public employer” means...the board of regents in the case of the University of Hawaii...and any individual who represents one of these employers or acts in their interest in dealing with public employees...

ⁱⁱ HRS § 89-2 Definitions defines “Employee” or “public employee” as:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

ⁱⁱⁱ HRS § 89-6(a)(8) Appropriate bargaining units defines BU 8 as:

(8) Personnel of the University of Hawaii and the community college system, other than faculty[.]

^{iv} HRS § 89-2 Definitions defines “Exclusive representative” as:

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

^v HRS § 89-8 Recognition and representation; employee participation states in relevant part:

(a)The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership...

CONCURRING OPINION OF BOARD MEMBER SESNITA A.D. MOEPONO

I concur with the Board's decision. However, this member is troubled and feels compelled to write a concurring opinion regarding an email sent by Respondent's representative to Complainant, Ya-Wen Hsiao, on August 12, 2020 at 3:15 p.m., filed in Complainant's Exhibit A of Complainant's Opposition to Respondent's Motion to Continue Proceedings (Opposition). The email states, in part:

This email is to put you on notice that if you do not withdraw your motion by 4:30 pm on August 13, 2020, HGEA will seek sanctions, including, but not limited to fees and costs, in opposing your motion.

In her Opposition, Complainant expressed that she felt intimidated and threatened by the email.

As this issue was not specifically raised to the Board, this Board Member makes no finding on whether the contents of the email are sufficiently intimidating and/or threatening to an employee to constitute a violation of Hawai'i Revised Statutes Chapter 89.

However, this Board Member finds that this type of behavior is contrary to her personal expectation of appropriate conduct, which the Board expects of parties and representatives appearing before them. This appropriate conduct is measured by decorum, etiquette, civility, courtesy, integrity, and fairness. Definitions of these words found in the Merriam Webster Dictionary are as follows:

“decorum”: propriety and good taste in conduct or appearance;

“etiquette”: the conduct or procedure prescribed by authority to be observed in social or official life;

“civility”: civilized conduct;

“courtesy”: behavior marked by polished manners or respect for others;

“integrity”: firm adherence to a code of especially moral values; and

“fairness”: fair or impartial treatment.

As an administrative agency and a quasi-judicial body¹, the Board takes seriously its duty to enforce *standards of fairness, impartiality, and independence of judgment*, as affirmed by the

Hawai‘i Supreme Court and restated by J. Pollack in his dissenting opinion in Kilakila ‘O Haleakalā v. Bd. of Land & Nat. Res., 138 Hawai‘i 383, 425, 382 P.3d 195, 237 (2016):

At the same time, we cannot emphasize strongly enough that all adjudicative proceedings conducted by [administrative agencies] must conform to the same exacting standards of fairness, impartiality, and independence of judgment applicable in any court of law.” Waiāhole I, 94 Hawai‘i at 124, 9 P.3d at 436.

Further, in 1985, the United States Supreme Court stated:

All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.

In re Snyder, 472 U.S. 634, 647, 105 S. Ct. 2874, 2882 (1985)

Therefore, this Board must have standards for judicious decorum and etiquette, which require courtesy and civility, and in which *fairness, impartiality, and independent judgment* are imbedded.

Without these rules and standards, a quasi-judicial body loses its integrity and respectability.

In other words, courts are respected if they are respectable. Society allocates decisional authority and its functions to the authorities that it accepts. Etiquette is a bridge to acceptance.

Catherine Thérèse Clark, *Missed Manners in Courtroom Decorum*, 50 Md. L. Rev. 946, 962, 971 (1991).

While the Board does not currently have definitive rules on judicious decorum or etiquette which apply both during and outside of a Board hearing, the Board may set a standard of behavior to enforce the following Hawai‘i Administrative Rules § 12-42-8(g)(9)(A), which governs attorney or representative conduct at a hearing. This section states:

Contemptuous conduct: (A) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if

of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board after due notice and hearing.

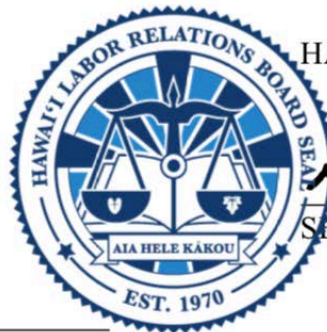
It is important to note that the above rule only pertains to conduct at any hearing. The rule does not apply to any conduct outside of a hearing. Perhaps in the future, this rule will include all conduct performed adjudicating a case before the Board, in or outside of a hearing.

Accordingly, unethical, derogatory, or demeaning comments regarding another party or a party's argument or made to another party or their representative, whether written or oral at a hearing, do not meet the requirement of judicious decorum that upholds *standards of fairness*. In short, zealous representation of your client does not require that a representative compromise civility and courtesy to another party or their attorney or representative.

Further, in the opinion of this Board member, the requirement of civility and courtesy to another party, attorney, or representative should also extend more broadly to conduct during the proceedings as a whole, whether in or out of a hearing.

By this concurring opinion, this Board Member puts all parties, representatives, and participants appearing before this Board on notice that this Board Member expects judicious decorum and etiquette reflecting courtesy and civility where *standards of fairness, impartiality, and independent judgment are imbedded* during the proceedings, whether during or outside of a hearing.

DATED: Honolulu, Hawai'i, _____ October 14, 2020 _____.



HAWAII LABOR RELATIONS BOARD

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

¹ The U.S. Federal Court for the District of Hawai'i in Jordan v. Hawai'i Government Employees' Asso., etc., 472 F. Supp. 1123 (1979) ruled that the members of the Board's predecessor, Hawai'i Public Employment Relations Board (HPERB) were entitled to quasi-judicial immunity because:

In the present case, HPERB performs many of the quasi-judicial duties described in

Butz. It may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See Butz, 438 U.S. at 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895. HPERB's purpose is to resolve disputes arising under Hawai'i's Collective Bargaining in Public Employment Act. 7.

Id. at 1127 (footnotes omitted).