STATE OF HAWAIʻI

HAWAIʻI LABOR RELATIONS BOARD

In the Matter of	CASE NOS. 18-CE-07-917 18-CU-07-362
JOSEPH H. CAMPOS II, Ph.D., Complainant, and UNIVERSITY OF HAWAIʻI AT MĀNOA and UNIVERSITY OF HAWAIʻI PROFESSIONAL ASSEMBLY Respondents.	ORDER NO. 3488 ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UHPA'S MOTION TO RECONSIDER AND AMEND ORDER NO. 3455, FILED FEBRUARY 1, 2019; AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UHPA'S MOTION TO RECONSIDER AND AMEND ORDER NO. 3455, FILED FEBRUARY 1, 2019; AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

On February 1, 2019, the Hawaiʻi Labor Relations Board (Board) issued Board Order No. 3455 Granting in Part Respondent University of Hawaiʻi's Motion to Dismiss Prohibited Practice Complaint; and Granting in Part Respondent University of Hawaiʻi Professional Assembly's (UHPA) Motion to Dismiss, or in the Alternative for Summary Judgment (Order No. 3455). In Order No. 3455, the Board held, among other things, that: 1) the Board did not have subject matter jurisdiction over the Hawaiʻi Revised Statutes (HRS) § 89-13(a)(8) claim because Complainant JOSEPH H. CAMPOS II, Ph.D. (Dr. Campos) had not exhausted the grievance procedure; 2) Dr. Campos did not allege violations independent of HRS § 89-13 and thus, the HRS § 89-13(a)(7) claim must be dismissed; and 3) the HRS § 89-13(a)(1) and (4) claims would be held in abeyance

until moved on by a party after the grievance process had been exhausted. The Board further did not reach the other grounds set forth in the dispositive motions previously filed in the case.

On February 11, 2019, Respondent UNIVERSITY OF HAWAI'I PROFESSIONAL ASSEMBLY (UHPA) filed Respondent UHPA's Motion to Reconsider and Amend Order No. 3455, Filed February 1, 2019 (Motion to Reconsider), requesting that the Board reconsider their decision and amend Order No. 3455 because, among other things, Order No. 3455 did not conform to the oral ruling issued by the Board on November 14, 2018, and UHPA believed that the Board lacked subject matter jurisdiction over the case.

On February 11, 2019, UHPA further filed Respondent UHPA's Proposed Findings of Fact and Conclusions of Law.

On February 12, 2019, Dr. Campos filed Response/Comments to Respondent UHPA's Motion to Reconsider and Amend Order No. 3455, Filed February 1, 2019 (Response to Motion to Reconsider), arguing, among other things, that the Complaint is timely and that, if the Board reconsidered Order No. 3455, the Board should "consider the improper application of *Poe v. Hawaii Labor Relations Board* [i]n their decisions in this case…"

In Dr. Campos' Response to Motion to Reconsider, he also included a January 8, 2019 letter from UHPA informing Dr. Campos that the UHPA Board met on January 5, 2019 and that "The Board of Directors considered your request and voted to deny sending the April 30 grievance to arbitration." The January 8, 2019 letter also offered Dr. Campos to present a 10-minute presentation appealing the decision of the UHPA Board to deny his request for arbitration at the March 2, 2019 UHPA Board Meeting. (*See* Exhibit 1, Response to Motion to Reconsider)

On January 30, 2019, Dr. Campos sent an email to UHPA stating that he would be out of state on March 2nd and requested another day to present his 10-minute presentation. (*See* Exhibit 2, *ibid.)*

On February 5, 2019, UHPA sent a letter to Dr. Campos offering the next UHPA Board Meeting on April 27, 2019 to present a 10-minute presentation appealing the UHPA Board decision. (*See* Exhibit 3, *ibid.*)

On February 12, 2019, Dr. Campos sent an email responding to UHPA's February 5, 2019 letter stating that he would not be available on April 27, 2019 due to a previous commitment and requesting the dates of March 16, 23, 30, or April 6 as alternative days for his 10-minute presentation. (*See* Exhibit 4, *ibid.*)

UH did not file a response to the Motion to Reconsider.

On March 1, 2019, the Board heard oral arguments on the Motion to Reconsider (Motion Hearing), where UH took no formal position on the Motion to Reconsider.

While the Board's administrative rules do not explicitly provide for motions for reconsideration, the Board has previously addressed such motions for reconsideration of its final decisions and orders. *See, e.g.*, UPW v. Hannemann, et al., Board Case No. CE-01-647, Order No. 2489 (January 17, 2008); Banos v. Dep't. of Public Safety and UPW, Board Case No. CU-10-341, Order No. 3172 (June 28, 2016). In considering such motions, the Board has adhered to the well-established principles set forth by the Hawai'i Supreme Court that "the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated [decision]." Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 114, 839 P.2d 10, 26-27 (1992); Omerod v. Heirs of Kainoa Kupuna Keheananui, 116 Hawai'i 239, 270, 172 P.3d 983, 1014 (2007). Further, reconsideration "is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.3d 924, 930 (2005).

As stated above, UHPA is requesting reconsideration of Order No. 3455 based on the Board's previous oral ruling and UHPA's belief that the Board lacks subject matter jurisdiction over the case. Although the Board disfavors disturbing the finality of a decision in the absence of express procedural guidance or statutory direction, the Board has concluded that HRS § 89-5(i)(3) to "resolve controversies" provides the Board with discretionary authority to grant a motion for reconsideration if the circumstances are appropriate. Applying the foregoing standards for a motion for reconsideration, the Board concludes that reconsideration is warranted inasmuch as the Board is willing to clarify its Order No. 3455 so that the parties have a fuller understanding of the Board's decision.

The Board notes that in Exhibits 1and 3, *supra*, UHPA offered Dr. Campos the opportunity to make a 10-minute presentation appealing UHPA Board's denial of arbitration. Dr. Campos has ninety (90) days from the date that UHPA informs him of the UHPA Board's final decision not to proceed to arbitration to file a new prohibited practice complaint under HRS § 377-9.

For the reasons set forth above, the Board hereby grants, in part, UHPA's Motion for Reconsideration. In reconsidering Order No. 3455, the Board notes that UHPA does not bring up any issue regarding new evidence in the case. Therefore, the Board will not reopen the record in the case but will address the reconsideration by issuing the attached Order No. 3455A, Amended

Order Granting in Part Respondent University of Hawai‘i’s Motion to Dismiss Prohibited Practice Complaint; and Granting in Part Respondent University of Hawai‘i Professional Assembly’s Motion to Dismiss, or in the Alternative for Summary Judgment.

DATED: Honolulu, Hawai‘i, April 24, 2019.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Joseph H. Campos II, Ph.D., Self-Represented Litigant
Elisabeth A.K. Contrades, Esq.
David Sgan, Esq.

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of JOSEPH H. CAMPOS II, Ph.D., Complainant, and UNIVERSITY OF HAWAI‘I AT MĀNOA and UNIVERSITY OF HAWAI‘I PROFESSIONAL ASSEMBLY Respondents.	CASE NOS. 18-CE-07-917 18-CU-07-362 ORDER NO. 3455A AMENDED ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAI‘I’S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAI‘I PROFESSIONAL ASSEMBLY’S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

AMENDED ORDER GRANTING IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAI‘I’S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAI‘I PROFESSIONAL ASSEMBLY’S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

In accordance with Order No. 3488 Granting, in Part, and Denying, in Part, Respondent UHPA’s Motion to Reconsider and Amend Order No. 3455, Filed February 1, 2019, the Board reconsiders Order No. 3455 and hereby amends and supplements the relevant Findings of Fact, Conclusions of Law, Decision and Order contained therein and issues Order No. 3455A to read as follows. Any finding of fact or conclusion of law not included in this amended order is deemed rejected by the Board.

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

I. BACKGROUND AND FINDINGS OF FACT

A. Procedural History

On June 8, 2018, Complainant JOSEPH H. CAMPOS II, Ph.D., self-represented litigant (SRL) (Complainant or Dr. Campos), filed a Prohibited Practice Complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging violations of Hawai'i Revised Statutes (HRS) §§ 89-13(a)(1), (4), (7), and (8) by Respondents UNIVERSITY OF HAWAI'I AT MĀNOA[i] (UH) and UNIVERSITY OF HAWAI'I PROFESSIONAL ASSEMBLY (UHPA) (collectively, Respondents).

On June 13, 2018, the Board notified Respondents of receipt of the Complaint through Order No. 3371 (Order No. 3371), and, among other things, scheduled a Prehearing Conference for June 22, 2018 (Prehearing Conference) and a Hearing on the Merits (HOM) for July 17, 2018.

On June 22, 2018, the Board held the Prehearing Conference, where the parties agreed to waive the requirements of HRS § 377-9(b) and Hawai'i Administrative Rules (HAR) § 12-42-46(b), mandating that the HOM "be held no less than ten nor more than forty days after the filing of the complaint or amendment thereof…" Based on that waiver, the parties agreed to reschedule the HOM for July 30, 2018.

At the Prehearing Conference, the Board also set the deadline for dispositive motions to be filed on or before July 3, 2018, for responses to dispositive motions to be filed on or before July 10, 2018, and for oral arguments on dispositive motions to be heard on July 23, 2018.

On July 3, 2018, UHPA filed Respondent UHPA's Motion to Dismiss, or in the Alternative, for Summary Judgment (UHPA's Dispositive Motion). UHPA's Dispositive Motion argued, among other things, that the Complaint was "a defective complaint, [filed] in the wrong forum, at the wrong time, without stating a legal claim upon which relief can be granted by the Board, and without exhausting the contractual grievance procedure…"

Also, on July 3, 2018, UH filed Respondent University of Hawaii's Motion to Dismiss Prohibited Practice Complaint (UH's Dispositive Motion), arguing, among other things, that Dr. Campos had failed to exhaust contractual remedies and failed to state a claim upon which relief could be granted.

On July 10, 2018, Dr. Campos filed Rebuttal to Respondent University of Hawaii at Manoa's Motion to Dismiss (Rebuttal to UH's Dispositive Motion). In the Rebuttal to UH's Dispositive Motion, Dr. Campos argued, among other things that:

…the University's non-contact of [Complainant] within the specified timeframe stopped the process and did not allow the process to continue or be exhausted…

***

…the [grievance] process is stopped by UH-Manoa's Chancellor's office non-contact within the specified 15 days [in the collective bargaining agreement]. Thus, the University's violation…prohibited the grievance process to continue and the University prohibited any further exhaustion of the grievance process…Since [Complainant] did not receive any contact, the University is in violation of the contract as step 2 is predicated on receiving a response. So, if there is no contact then there can be no decision, and no response. Therefore, because there was no contact or meeting to address the grievance, the University did not permit me to exhaust the process as step 2 is predicated on having contact, a meeting to discuss the grievance, and then rendering a decision.

In addition, [Complainant] attempted to exhaust the grievance and administrative procedures rather than sidestepping the process…Unfortunately, it was the University that did not permit the process to continue…Nowhere in the response [Complainant] received on June 5, 2018, from Dr. Straney was there any indication that there would be any continuation of the grievance process step 1…there was no acknowledgment of a continuation of the grievance process…

***

…this argument [of failure to exhaust] should not justify a dismissal or summary judgement as per the facts presented regarding how the University prevented me from exhausting the grievance process and case law that sets precedents for interpreting the exhaustion of process clause. [sic]

On July 10, 2018, Dr. Campos also filed Rebuttal to Respondent University of Hawaii Professional [Assembly]'s Motion to Dismiss (Rebuttal to UHPA's Dispositive Motion), which argued, among other things, that:

Other agencies have not litigated this claim nor any other claim at this moment.

***

[Complainant] did not allege that the grievance is still pending. [Complainant] did state directly that the University is in violation of Article XXIV [of the collective bargaining agreement]…UH's violation of Article XXIV stopped the grievance and it is not pending.

***

…The complaint is based on UHPA's refusal to represent [Complainant's] April 30, 2018 claim which [Complainant] was informed of on May 11, 2018…

The complaint before the HLRB has nothing to do with the non-tenure decision or any other aspects of the continuing violations doctrine put forward by the Respondent UHPA's attempt to have this complaint time-barred.

***

UHPA's refusal to support [the Complainant] is based on a non-factual rationale and is arbitrary, bad faith (*Vaca v. Sipes*, 386 U.S. 171 (1967)) and reckless disregard of my rights…

1) UHPA's rationale for not representing me is non-factual and ill-conceived…UHPA inadequately investigated my grievance and could not make a rational determination of merit by overlooking critical facts or witnesses…

2) The representation [Complainant] received from the Union was perfunctory during the tenure appeal process…

3) …Mr. Fern stated that UHPA would not represent [Complainant] as [Complainant] was going to file a law suit [sic] against UH and "the Union will become a party to the lawsuit."…

***

This complaint has nothing to do with discrimination, harassment, workplace violence or retaliation.

On July 10, 2018, UH filed Respondent University of Hawaii's Joinder to Respondent UHPA's Motion to Dismiss, or in the Alternative, for Summary Judgment Filed on July 3, 2018.

On July 13, 2018, UHPA filed Respondent UHPA's Reply in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment, Filed July 3, 2018. Dr. Campos then, on July 20, 2018, filed Rebuttal to Respondent University of Hawaii Professional [Assembly]'s Reply Submitted on July 13, 2018.

On July 23, 2018, the Board held a motion hearing (Motion Hearing) and heard oral arguments on both UH's Dispositive Motion and UHPA's Dispositive Motion (collectively, Dispositive Motions). At the conclusion of the Motion Hearing, the Board took the matters under advisement and held the HOM in abeyance pending rulings on the Dispositive Motions.

B. Findings of Fact

Until his termination on July 1, 2018, Campos was an "employee" or "public employee"[ii], as defined in HRS § 89-2 of the University of Hawai'i and a member of Bargaining Unit 7 (Unit 7) (faculty of UH and the community college system), as provided in HRS § 89-6(a)(7).

At all relevant times in the instant case, UHPA was, and is, an employee organization,[iii] as defined in HRS § 89-2, and was the exclusive representative[iv] and collective bargaining agent for bargaining unit 7 (Unit 7), defined in HRS § 89-6(a)(7) as "faculty of the University of Hawaii and the community college system."

"[T]he board of regents…of the University of Hawaii,"[v] at all relevant times in the instant case, was, and is, an "employer" or "public employer,"[vi] as defined in HRS § 89-2.

UHPA and the State of Hawai'i are, and have been, for all relevant times, parties to a collective bargaining agreement for Unit 7 (CBA).

Article XXIV, section C, of the CBA states in relevant part:

1. Requirements for Filing a Formal Grievance.

   ***

   …The Faculty Member may request the assistance and representation of the Union in the Grievance Procedure. Alternatively, the Faculty Member may file a grievance and have the grievance heard without intervention of the Union provided the Union is afforded an opportunity to be present at the conference(s) with the grievant, in which case a copy of the grievance shall be furnished to the Union. Any adjustment made shall not be inconsistent with the terms of this Agreement.

   ***

2. Formal Grievance Procedure.

   a. **Step 1.** A grievance shall be filed with the Chancellor, or the respective designee (herein all referred to as Chancellor). The Chancellor shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the grievance and shall issue a decision in writing to the grievant within fifteen (15) calendar days after the close of the meeting.

b. **Step 2.** If the response at Step 1 does not resolve the grievance, the grievant may appeal the Step 1 response by filing an appeal with the President of the University or the President's designee within fifteen (15) calendar days after receipt of the Step 1 response. Such appeal shall be in writing and shall specify the reason why the Step 1 decision is unsatisfactory. The President need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. The President or the President's designee shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the appeal or grievance is filed and shall render a response in writing to the grievant within twenty (20) calendar days after the close of the meeting.

c. **Step 3. Arbitration.** If the grievance has not been settled at Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the President's designee…

(Emphasis added)

On April 30, 2018, Dr. Campos filed a Step 1 grievance against UH (Grievance). Dr. Campos informed UHPA of the Grievance on May 1, 2018 by email.

By letter dated May 11, 2018, UHPA informed Dr. Campos that they would not represent him in his Grievance. Dr. Campos responded to this letter on June 1, 2018.

On June 4, 2018, Dr. Campos sent a letter to UH regarding the lack of response to his Grievance.

II. STANDARD OF REVIEW

A. Motion to Dismiss

The Board follows the legal standards set forth by the Hawai'i appellate courts for motions to dismiss under the Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b).[vii]

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 the complaint 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 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

B. Motion for Summary Judgment

Under HRCP Rule 56(b),[viii] a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013) (Ralston).

In Thomas v. Kidani, 126 Hawai'i 125, 129-30, 267 P.3d 1230, 1234-35 (2011), the Hawai'i Supreme Court (Court) stated:

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. We review the evidence in the light most favorable to the party opposing the motion for summary judgment.
>
> The party moving for summary judgment bears the burden of proof to show the absence of genuine issues of material fact and entitlement to judgment as a matter of law.

(Citations omitted) Ralston, 129 Hawai'i at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005). French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 473, 99 P.3d 1046, 1057 (2004) (French).

For cases in which the non-movant bears the burden of proof at trial, the Court has adopted the burden shifting paradigm: The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components. First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving

party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion.

This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawai'i at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Hawai'i at 57, 292 P.3d at 1287; French, 105 Hawai'i at 472, 99 P.3d at 1056.

Finally, regardless of which evidentiary standard is required of the moving party, "Once the moving party has satisfied its initial burden of showing the absence of a genuine issue of material fact and its entitlement to a judgment as a matter of law, the opposing party 'may not rest upon the mere allegations or denials of [the opposing party's] pleading' but must come forward, through affidavit or other evidence with 'specific facts showing that there is a genuine issue for trial.' Rule 56(e). If the opposing party fails to respond in this fashion, the moving party is entitled to summary judgment as a matter of law." Suzuki v. State, 119 Hawai'i 288, 296-297, 196 P.3d 290, 298-299 (*citing* Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988)); Foronda v. Hawaii International Boxing Club, 96 Hawai'i 51, 58, 25 P.3d 826, 833 (2001); Tri-S Corp. v. W.World Ins. Co., 110 Hawai'i 474, 494, n. 9, 135 P.3d at 103, n. 9 (2006).

III. CONCLUSIONS OF LAW

As a preliminary issue, the Board must address whether it has jurisdiction over the instant case. "[I]t is well established…that 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) (*citing* Chun v. Employees' Ret. Sys., 73 Haw. 9, 13, 828 P.2d 260, 263 (1992) (Chun); In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986). If the parties do not raise the issue, the Board, *sua sponte*, will, as the Board requires jurisdiction to render a valid judgment. Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun, 73 Haw. at 14, 898 P.2d at 263).

UHPA has argued that Dr. Campos "fail[ed] to file a prohibited practice charge within 90 days of the date when he first knew or should have known about the discrete, qualifying event that allegedly constitutes a prohibited practice. The Board concurs with UHPA to the extent that the Complaint was filed on June 12, 2018, and, therefore, the 90-day period began on March 14, 2018. However, the Board finds that discrete, qualifying events did occur within that 90-day period,

centering around the filing of Dr. Campos' grievance on April 30, 2018 and UHPA's letter to Dr. Campos on May 11, 2018. Therefore, the Complaint must be viewed as timely. Having established the timeliness of the Complaint, the Board next looks to Dr. Campos' allegations.

A. HRS § 89-13(a)(8) – Hybrid Claim

Dr. Campos argues that UH breached the collective bargaining agreement in violation of HRS § 89-13(a)(8) and that UHPA breached the duty of fair representation when they failed to represent him. This type of action is known as a "hybrid claim" and, as the Court has stated:

> …such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation.
>
> The two claims are inextricably interdependent. To prevail against either the company or the union, employee-plaintiffs must not only show that their discharge was contrary to the contract but also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 101-102, 94 P.3d 652, 656-57 (2004) (Poe II) (citations omitted).

Accordingly, based on Poe, Dr. Campos must carry the burden of showing not only the breach of the CBA by UH but also the breach of the duty of fair representation by the Union.

1. Breach of the CBA by UH

UH argues that Dr. Campos' HRS § 89-13(a)(8) claim should be dismissed for a failure to exhaust contractual remedies, as Dr. Campos bases his Complaint on Article XXIV of the CBA, section C.

HRS § 89-10.8(a) provides in relevant part:

> A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable[.]

The guiding principle set forth by the courts is that "it is well-settled that an employee must exhaust any grievance or arbitration procedures provided under a collective bargaining agreement

before bringing a court action pursuant to the agreement." See, Hokama v. University of Hawaii, 92 Hawai'i 268, 271 990 P.2d 1150, 1153 (1999) (Hokama); Poe v. Hawaii Labor Relations Board, 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) (Poe I); Poe II, 105 Hawai'i at 101, 94 P.3d at 646. The courts have recognized that this rule is based on strong policy considerations:

> The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process allowing the parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging orderly and less time-consuming settlement of disputes through alternative means.

Hokama, 92 Hawai'i at 272, 990 P.3d at 1154; Poe I, 97 Hawai'i at 537, 40 P.3d at 939; Poe II, 105 Hawai'i at 101, 94 P.3d at 656. On a procedural level, this principle means that "[i]n such cases, in the interest of judicial economy, 'the doctrine of exhaustion temporarily divests a court of jurisdiction.'" Leone v. County of Maui, 128 Hawai'i 183, 192, 284 P.3d 956, 965 (App. 2012).

Based on these decisions, the Board has consistently dismissed prohibited practice complaints alleging violations of HRS § 89-13(a)(8) if there is a failure to exhaust available grievance/arbitration remedies under the collective bargaining agreement. See, e.g., HGEA v. Ige, et al., Board Case No. 17-CE-13-904, Order No. 3369 (June 8, 2018); Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F (April 5, 2018).

However, as Dr. Campos argues, the courts and the Board have recognized several exceptions to this exhaustion doctrine, such as where such administrative procedures would be wholly futile. Poe I, 97 Hawai'i at 536, 40 P.3d at 938.

The Court has defined futility as "the inability of an administrative process to provide the appropriate relief." Hokama, 92 Hawai'i at 273, 990 P.2d at 1155; Poe I, 97 Hawai'i at 536-37, 40. P.3d at 938-39; Poe II, 105 Hawai'i at 102, 990 P.2d at 657.

Poe I and Poe II were both appeals from Board decisions that involved the application of the futility exception to a situation in which an aggrieved employee individually pursued their grievance through the CBA but was unable to take the grievance to arbitration because of a failure by the union to assist. In Poe I, the court ruled that the futility exception applies to prohibited practice complaint cases. Poe I, 97 Hawai'i at 537-38, 40 P.3d at 939-40. In Poe II, the court clarified that, based on analogous federal cases and the policy considerations in those cases, this futility exception applies only upon a showing by the complainant that the union breached its duty of fair representation by the failure to pursue the grievance to arbitration. Poe II, 105 Hawai'i at 101-04, 94 P.3d at 656-59.

Dr. Campos has argued that he attempted to follow the grievance procedure and that UH did not permit the process to be exhausted, thus meaning that he was unable to exhaust his

remedies. However, the Board finds that similar excuses have been rejected by the courts in other cases. "The Court has generally insisted upon a 'clear and positive showing of futility' before excusing a failure to exhaust." Tupola v. University of Hawaii Professional Assembly et al., Board Case No. CU-07-330, Order No. 3054 (February 25, 2015) (*citing* Miller v. Chrysler Corp., 748 F.2d 323, 326 (6th Cir. 1984); Emswiler v. CSX Transportation, Inc., 691 782, 791 (6th Cir. 2012); Millheisler v. Lincoln High School, 2008 U.S. Dist. LEXIS 72719, at *p. 21-25 (D. Wa. 2008)). Further, an employee's subjective belief that pursuing such remedies would have been futile or because the employer repudiated the contract and its dispute resolution procedures is not a sufficient excuse for not attempting to utilize the procedures. Terwilinger v. Greyhound Lines, Inc., 882 F.2d 1033, 1039 (6th Cir. 1989).

While Dr. Campos claims that UH's alleged failure to respond to his grievance within the fifteen days required in the collective bargaining agreement "stopped the process and did not allow the process to be continued or exhausted," the Board finds that the grievance did, in fact, continue after that step. Dr. Campos himself submitted evidence to the Board that shows that the grievance continued after the filing of the Complaint, including a consideration by UHPA of whether to take the grievance to arbitration. Therefore, the Board finds that the grievance procedure was not exhausted when Dr. Campos filed the Complaint and that no exceptions apply.

Accordingly, the HRS § 89-13(a)(8) claim is dismissed.

2. Breach of the Duty of Fair Representation

Although, because of Dr. Campos' failure to exhaust, the Board is not required to reach a conclusion on the breach of the duty of fair representation, the Board finds that there is no genuine issue of material fact as to UHPA's relevant actions in this case, and thus will consider the question.

A union, as the exclusive bargaining representative of the employees in the bargaining unit, has a duty to fairly represent all of those employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. Poe II, 105 Hawai'i at 101, 94 P.3d at 656; Vaca v. Sipes, 386 U.S. 171, 177 (1967) (Vaca). Because the unions must retain the discretion to act in what they perceive to be their members' best interest, the duty of fair representation is to be narrowly construed. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) Any substantive examination of a union's performance must be highly deferential. Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991).

Specifically, a breach of the duty of fair representation occurs only when a union's conduct toward a collective bargaining member is arbitrary, discriminatory, or in bad faith. Vaca, 386 U.S. at 190; Poe II, 105 Hawai'i at 104, 94 P.3d at 659. To defeat a motion for summary judgment, the

complainant must offer evidence supporting at least one of those three elements. Trnka v. Local Union No. 688, United Auto., Aerospace & Agric. Implement Workers, 30 F.3d 60 (7th Cir. 1994).

Dr. Campos claims that UHPA breached the duty of fair representation through arbitrary and bad faith actions and points to a variety of cases to make his point. The Board is not persuaded by Dr. Campos' arguments. The cases that he relies upon look specifically at situations where the unions allegedly breached the duty of fair representation by refusing to take a grievance to arbitration. In other words, Dr. Campos points to cases where the union had a duty to take an action to determine to whether or not to take a grievance to arbitration.

In the present case, the CBA's Article XXIV, Grievance Procedure, Section C, Procedures, states in relevant part:

> 1. Requirements for Filing a Formal Grievance.
>
> ***
>
> …The Faculty Member may request the assistance and representation of the Union in the Grievance Procedure. Alternatively, the Faculty Member may file a grievance and have the grievance heard without intervention of the Union provided the Union is afforded an opportunity to be present at the conference(s) with the grievant, in which case a copy of the grievance shall be furnished to the Union. Any adjustment made shall not be inconsistent with the terms of this Agreement.
>
> ***
>
> 2. Formal Grievance Procedure.
>
> ***
>
> c. **Step 3. Arbitration.** If the grievance has not been settled at Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the President's designee…

(Emphasis added.)

HRS § 89-8(b) further provides, "An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization…"

The plain language of the CBA and HRS § 89-8(b) makes it clear that UHPA may, but is not required to, provide assistance and representation during the grievance procedure; however, if a faculty member wishes to file a grievance without UHPA's assistance, they may do so. UHPA's choice not to assist or represent a faculty member through the grievance process does not impact the faculty member's ability to file a grievance or see the grievance through the step 2 process. See, e.g., Conway v. HGEA et al., Board Case No. CU-13-268, Order No. 2603 at *19 (April 6, 2009),

Although Dr. Campos argues that UHPA's failure to represent him during the grievance process constitutes a breach of the duty of fair representation, the fact that UHPA had no duty to participate in the grievance process until Step 3, where they would make a decision as to whether or not to take the grievance to arbitration. Given that UHPA had no duty to represent Dr. Campos in the grievance process, the Board cannot find a breach of the duty of fair representation.

Accordingly, the Board finds that there is no genuine issue of material fact that, under the foregoing CBA provision, UHPA had no obligation to participate in the grievance procedure until Step 3; therefore, UHPA has demonstrated its entitlement to judgment as a matter of law. Accordingly, because UHPA has met its initial burden, Dr. Campos is required "to come forward, through affidavit or other evidence with 'specific facts showing that there is a genuine issue for trial.'" The Board further finds that Dr. Campos failed to meet this burden; and therefore, concludes that UHPA is entitled to judgment as a matter of law.

B. HRS § 89-13(a)(7)

Under HRS § 89-13(a)(7), if an employer "[r]efuse[s] or fail[s] to comply with any provision of" Chapter 89, they have committed a prohibited practice.

The Board has long held that statutory violations under HRS 89-13(a)(7) must occur independently of HRS § 89-13. See, Burns etc., v. Anderson, Board Case No. CE-12-76, Decision No. 169, 3 HPERB 114, 123 (1982). In his complaint, Dr. Campos did not allege any statutory violations other than violations of HRS § 89-13. Therefore, even if the Board were to find a violation of HRS § 89-13, the Board cannot find a violation of HRS § 89- 13(a)(7).

Accordingly, the HRS § 89- 13(a)(7) claim is dismissed.

C. Remaining Claims

As discussed above, the Board finds that Dr. Campos' filing of the April 30, 2018 grievance and the subsequent processing of the grievance occurred within the 90-day period prior to the filing of the Complaint. When viewing the Complaint through the light most favorable to the Complainant, as required under the applicable standards, the Board finds that Dr. Campos' arguments regarding his HRS § 89-13(a)(1) and (4) claims cannot be dismissed at this time.

Accordingly, the Board holds the HRS § 89-13(a)(1) and (4) claims in abeyance until the exhaustion of the grievance process.

ORDER

Based on the foregoing, the Board hereby:

1. Grants Respondent UH's Motion to Dismiss in part, regarding dismissal of the HRS § 89-13(a)(8) claim;

2. Grants Respondent UHPA's Motion to Dismiss in part, regarding dismissal of the HRS § 89-13(a)(7) claim;

3. Grants Respondent UHPA's Motion for Summary Judgment in part, regarding the breach of the duty of fair representation;

4. Holds the HRS § 89-13(a)(1) and (4) claims against UH in abeyance pending the exhaustion of the grievance process; and

4. Denies or does not reach a conclusion on the remaining issues in the dispositive motions and claims.

Accordingly, as all claims against Respondent UHPA have been dismissed, Board Case No. 18-CU-07-362 is hereby closed, and Respondent UHPA is dismissed from any future proceedings in this case.

DATED: Honolulu, Hawai'i, April 24, 2019.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

CAMPOS v. UNIVERSITY OF HAWAIʻI AT MĀNOA and UHPA
CASE NOS. 18-CE-07-917, 18-CU-07-362
AMENDED ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAIʻI'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT UNIVERSITY OF HAWAIʻI PROFESSIONAL ASSEMBLY'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
ORDER NO. 3455A

Copies sent to:

Joseph H. Campos II, Ph.D., Self-Represented Litigant
Elisabeth A.K. Contrades, Esq.
David Sgan, Esq.

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[i] Although the named Respondent is listed as the "University of Hawaiʻi at Manoa", for the purposes of consistency with the statute, the Board will interpret the "University of Hawaiʻi at Manoa" to mean "the board of regents…of the University of Hawaii." *See* Endnote vi.

[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 § 89-2 Definitions defines "employee organization" as:

> "Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

[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] *See* Endnote i.

[vi] 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…

[vii] When the Board rules are silent or ambiguous on procedural matters, the Board then may look for guidance to similar provisions of court rules. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1 (CE), Order No. 1978 at *5 (January 11, 2001).

[viii] *See* Endnote vii.