EFiled: Jun 14 2021 02:56PM HAST
Transaction ID 66686978
Case No. CU-04-291

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

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| In the Matter of<br><br>SUSAN SIU,<br><br>Complainant(s),<br><br>and<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Respondent(s). | CASE NO(S). CU-04-291<br><br>DECISION NO. 505<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER |

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

The Hawai‘i Labor Relations Board (Board) issued Proposed Findings of Fact, Conclusions of Law, Decision and Order (Proposed Order) in this case on May 28, 2021. The Proposed Order, among other things, found that Complainant SUSAN SIU (Ms. Siu) did not meet her burden of proof to prove her case, and, accordingly, dismissed the case. The Proposed Order further provided, in relevant part:

> **5. Filing of Exceptions and Motion to Set Aside**
>
> Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, Decision and Order may file exceptions with the Board, as laid out in HRS §91-11, within ten days after service of a certified copy of this document. The exceptions must specify which findings or conclusions are being excepted to with citations to the factual and legal authorities for such exceptions. A hearing for the presentation of oral arguments will be scheduled if such exceptions are filed, and the parties will be notified of such hearing.

Ms. Siu did not file Exceptions to the Proposed Order within the provided ten-day period.

Accordingly, the Board hereby adopts the Proposed Order, including the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, filed on May 28, 2021 and

attached to this Decision as the final Decision and Order in this case, and dismisses Ms. Siu's complaint. This case is closed.

DATED: Honolulu, Hawai'i, June 14, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:

Susan Siu, Self-Represented Litigant
Peter Trask, Esq.

EFiled: May 28 2021 03:58PM HAST
Transaction ID 66644246
Case No. CU-04-291

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

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| In the Matter of<br><br>SUSAN SIU,<br><br>Complainant(s),<br><br>and<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Respondent(s). | CASE NO(S). CU-04-291<br><br>PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER |

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

## 1. Proposed Introduction, Issues, and Statement of the Case

Complainant SUSAN SIU (Complainant or Ms. Siu) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) committed prohibited practices based on HGEA's failure to fully process grievances regarding "stand-by pay" and "unpaid overtime" (Complaint).

HGEA filed a Motion to Join the City and County of Honolulu as a Respondent (Joinder Motion), which the Board denied after a hearing on the motion. The Board held hearings on the merits (HOMs) in this case on July 21, September 29, and September 30, 2010. Both parties rested their cases, and the Board ordered closing briefs, which the parties submitted.

The current Board Chair Marcus R. Oshiro, and Members Sesnita A.D. Moepono and J N. Musto did not participate in any proceedings in this matter, but they have thoroughly reviewed the record, including the files, pleadings, transcripts, and exhibits. After such review, the Board issued a Minute Order, Order No. 3726, which, among other things, states that the Board finds that HGEA is the prevailing party in this case and orders HGEA to submit proposed findings of fact and conclusions of law to the Board.

After receipt of HGEA's proposed findings of fact and conclusions of law, and in accordance with Hawai'i Revised Statutes (HRS) § 91-11[i], the Board issues this Proposed Findings of Fact, Conclusions of Law, Decision and Order (Proposed D & O).

Any finding of fact or conclusion of law submitted by HGEA but not adopted in this decision is deemed rejected. 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.

### 1.1. Proposed Issues

Based on the former Board Chair's statement at the beginning of the HOMs and the dismissal of certain Complaint allegations for reasons set forth below, the issues in this case regarding HGEA's conduct with respect to the Overtime (OT) and Standby Pay grievances are as follows.

1. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(4)[ii] by wilfully violating its duty of fair representation to Ms. Siu by acting arbitrarily, discriminatorily, or in bad faith through its conduct regarding the OT and Standby Pay grievances?

2. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(5)[iii] by wilfully violating the terms of the CBA by its handling the OT and Standby Pay grievances?

### 1.2. Proposed Statement of the Case

On February 19, 2010, Complainant filed her Complaint alleging that HGEA violated HRS §§ 89-13(a)(1), (5), (7), and (8) and 89-13(b)(2), (4), and (5) conduct in handling her OT and Standby Pay grievances, including a breach of the duty of fair representation.

HGEA filed a motion to join the City and County of Honolulu (City) as a party, which was opposed by the City. After a hearing, the Board orally denied the motion for joinder.

At the HOMs, Complainant called only herself as a witness. HGEA called Lissa Lau (Lau), who was the City's Branch Chief for Labor Relations, and Brandon Lee (Lee), an HGEA Business Agent. The following exhibits were entered into evidence: Board Exhibits 1-11; Complainant's Exhibits 1-55; and Respondent's Exhibits A and 1- 12.

Based on this record, the Board renders the Proposed D & O.

The Board finds and holds that, Ms. Siu did not meet her burden of proof regarding the City's violation of the CBA. Because Ms. Siu's former employer's violation of the CBA is

essential to proving her hybrid case under Poe, the Board does not need to address and makes no findings and conclusions regarding Ms. Siu's allegation of HGEA's breach of the duty of fair representation and HRS § 89-13(b)(4) regarding the OT and Standby Pay issues contained in the Complaint. Finally, the Board finds that Ms. Siu failed to establish that HGEA committed a prohibited practice under HRS § 89-13(b)(5) by wilfully violating the collective bargaining agreement regarding the OT and Standby Pay grievances. Therefore, the Board dismisses the Complaint against HGEA in its entirety.

## 2. Proposed Background and Findings of Fact

Ms. Siu was employed by the Department of the Medical Examiner (ME Office), City and County of Honolulu (City), as an Investigative Supervisor. In that position, Ms. Siu was a member of BU 4,[iv] for which HGEA is and was the exclusive representative.[v]

HGEA and the City were parties to collective bargaining agreement (CBA), effective July 1, 1999-June 30, 2003[vi] (CBA).

### 2.1. Ms. Siu's Grievances and Other Disputes with the City

#### 2.1.1. OT Grievance

When Ms. Siu was hired as the Chief Investigator for the ME Office, she was told that there would be a great deal of OT, for which she would receive compensatory time off. However, there no written agreement for the OT, and Ms. Siu's only documentation for the OT was notations on her work calendar.

During 2001-04, Ms. Siu claimed and was paid OT for 500 hours of OT incurred because of short staffing. However, during this period, Ms. Siu was not compensated for an additional 335 hours because the amount was unbudgeted and undocumented. When these additional hours were not credited to her compensatory time off bank, Ms. Siu sought compensation for the compensatory time.

Sometime between October 21-24, 2004, Complainant submitted OT requests for the 335 hours to her supervisor, the Chief Medical Examiner von Guenther (Chief ME) on a form entitled "Medical Examiner Combination Time Sheet and Overtime Meals Statement" (ME OT Form). While Ms. Siu signed the ME OT forms, the signature line for her supervisor to sign that the requested OT is "certified correct and overtime is authorized" and the signature line for her department head to certify that the "overtime work for the above mentioned employee is in accordance with the applicable provisions of the current collective bargaining agreements" are unsigned..

By a Memorandum, dated October 27, 2004, the Chief ME denied these OT requests because proper authority was not given for the OT hours under CBA Article 23B.

On November 4, 2004, HGEA Union Agent Robert Doi (Doi) filed a Step 3 grievance regarding the OT with City Department Human Resources Director Cheryl Okuma-Sepe (Okuma-Sepe) based on CBA Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), and 23 (Overtime) (OT grievance).

Doi obtained an agreement with the City to place the OT grievance on hold until further moved on. No hearing was held on the OT grievance, and the grievance was not closed. However, Doi indicated to Lau that he had no intention of pursuing the grievance for lack of merit.

CBA Article 23B provides, among other things, that "Overtime work occurs when an Employee renders service at the direction of proper authority[.]" CBA Article 23D Conversion to Compensatory Time Credit provides that "the number of actual hours of overtime worked shall be converted to compensatory time credit at the rate of one and one-half (1 1/2) hours of compensatory time credit for each hour of overtime worked or fraction thereof computed to the nearest fifteen (15) minutes…" CBA Article 23E Compensatory Time Off provides that, "An Employee who has compensatory time credit shall be scheduled for compensatory time off as mutually agreed to with the Employee's appointing authority."

Sometime during the 2004-08 period, Doi told Ms. Siu that the OT grievance was still alive. In 2009, Lee told Ms. Siu that he would resurrect the grievance.

**2.1.2.** OT/Standby Pay Grievance

In February 2001, Ms. Siu requested, and the Chief ME issued to her, an office pager for the purpose of answering investigator questions.

There was no written agreement for Standby Pay, official placement of Ms. Siu on call, or documentation or calculation for the Standby Pay claim. Ms. Siu received no compensation for Standby Pay while allowed to have the pager. However, Ms. Siu claims that she was on call 24 hours 7 days a week, based on a verbal agreement with the Chief ME for Standby Pay.

At a 2004 training, Ms. Siu learned about Standby Pay.

The Chief ME denied that Ms. Siu was assigned to be on call. The Chief ME issued the office pager to Ms. Siu because she did not have a pager.

The Chief ME sent a Memorandum, dated August 24, 2004, stating that all calls regarding investigations, medical examiner jurisdiction, or inability to work a scheduled shift should be referred to her or the on-call doctor. The Memorandum specifically warned, "Do not contact Susan Siu, since she is no longer available on pager."

In a Memorandum, dated August 26, 2004, to Acting Police Chief Glen Kajiyama, the Chief ME superseded an August 25, 2004 Memorandum by changing the contact person to the Chief ME and alternate contacts of Dr. William Goodhue, Jr. (Goodhue) and Dr. Gayle F. Suzuki.

The Chief ME sent a Memorandum, dated August 30, 2004, to Ms. Siu, requesting, "Due to the misunderstanding regarding your status as being on call, please return pager 287-5063 at your earliest convenience."

On September 3, 2004, Doi filed a grievance on behalf of Ms. Siu with the Chief ME with notice to Okuma-Sepe, regarding, among other things, Standby Pay and OT. The grievance cited CBA Articles 3 (Maintenance of Rights and Benefits), 15 (Training and Development), 19 (Safety and Health), 23 (Overtime), and 26 (Standby Pay) (Standby Pay/OT grievance). The Standby/OT grievance requested payment for Standby Pay for the period Ms. Siu had the pager ending August 29, 2004, and OT payment for the period worked.

The City denied the Standby Pay/OT grievance.

**2.1.3.** Filing of a Stand-Alone Standby Pay Grievance

On September 7, 2004, Doi also pursued the Standby Pay issue by filing a stand-alone grievance with Okuma-Sepe (Standby Pay grievance). The Standby Pay grievance claimed that the pager was issued for Ms. Siu to respond to pages during and after her normal work hours.

On October 26, 2004, Okuma-Sepe sent a Step 3 Decision disputing the arbitrability of the Standby Pay grievance based on untimeliness. Further, Okuma-Sepe denied the grievance based on a lack of a CBA violation.

On October 29, 2004, Doi filed a notice of arbitration with Okuma-Sepe regarding the Standby Pay grievance.

On November 12, 2004, Lau sent a letter proposing a list of arbitrators.

Despite Doi telling Ms. Siu in a June 7, 2007 telephone call that the Standby Pay grievance was over, and he was told not to pursue in because of untimeliness, the Standby Pay grievance is still pending.

CBA Article 26 Standby Pay A provides, in relevant part, that, "An Employee shall be deemed to be on standby duty when assigned by the head of the department or superior to remain at home or any other designated place for a specific period for the purpose of responding to calls for immediate service after the Employee's normal hours of work, on the Employee's scheduled day off or on holidays. CBA Article 26 Standby Pay provision provides that an employee shall be paid an additional amount equal to 25% of the employee's daily rate.

On November 24, 2004, Doi notified Okuma-Sepe by a letter, dated November 24, 2004, that the grievances were being referred to the HGEA attorneys.

**2.1.4.** Lee's Handling of Ms. Siu's Grievances

On July 22, 2009, Ms. Siu emailed Lee to ask about the status of the 2004 grievances.

On July 29, 2009, Ms. Siu requested a status of the two grievances because "Bob said they were still alive." Lee responded that he was still trying to track down the grievances, but his supervisor could not locate the files. Lee promised to contact other staff members and the labor relations person at the ME Office to find the documents.

On August 20, 2009, Ms. Siu emailed Lee again asking about the status of her grievances. Lee responded and asked Ms. Siu to stand by while he investigated her various issues.

On September 14, 2009, Lee emailed Ms. Siu that he would continue to try to get an update on her grievances but had not found anything yet.

On November 3, 2009, Ms. Siu again requested answers from Lee regarding her 2004 grievances because she was contemplating retirement. Lee responded twice to this request. In the first, Lee indicated that he had not located a formal filing of the grievances and was waiting for a response to his general inquiry made to the ME Office. In the second, Lee promised to call Ms. Siu.

On November 9, 2009, Lee reiterated that his checks with HGEA staff had not turned up any formally filed pending grievances, but he was still awaiting a response from the ME's Office. Ms. Siu provided the appropriate ME Office contact and noted the urgency of the matter because of her retirement.

By a November 10, 2009 email, Lee promised to follow up with Goodhue within the week. Lee emailed Ms. Siu that Goodhue was unaware of any outstanding grievances.

On November 23, 2009, Siu emailed Lee that she was planning to retire on December 31, 2009 and wanted to know if that would affect her grievance. Lee promised to call her.

On November 25, 2009, Ms. Siu asked Lee again about how her retirement would impact her grievances. She further informed Lee that she had found several letters from HGEA, a September 3, 2004 letter informing the Chief ME that the union was filing a grievance and September 7, 2004 and September 24, 2004 letters to Okuma-Sepe regarding two cases pending at the arbitration level. Lee responded that he had received some correspondence with the City Human Resources Department regarding these issues.

On December 3, 2009, Lee emailed Ms. Siu requesting a meeting to listen to the cellphone tapes and copy documents.

After finding two empty files with Ms. Siu's name, Lee obtained the official City files, including the OT requests.

On December 9 and 11, 2009, Ms. Siu and Lee exchanged emails regarding the OT and Standby grievances. Ms. Siu informed Lee that she was disappointed in HGEA's representation. Regarding the OT issue, Lee informed her that her OT requests were denied by the Chief ME, and there was no preauthorization as required by CBA Article 23. Therefore, unless Ms. Siu has other evidence showing that the Chief ME or other supervisor directed her to perform the OT, there was no CBA violation. Regarding the Standby Pay issue, Lee informed Ms. Siu that the claims can be pursued if she has any evidence of calls taken or actual work because of the pager as required by CBA Article 26. Lee informed Ms. Siu that the issuance of a pager does not substantiate the Standby Pay claim.

On December 11, 2009, Ms. Siu responded to Lee that her OT submission was based on her calendar documentation and a verbal agreement with the Chief ME. Ms. Siu informed Lee that Doi told her that the grievance was still viable.

On December 16, 2009, Ms. Siu and Lee exchanged emails. Lee informed Ms. Siu that the Standby Pay grievance is the only case that may be viable if Ms. Siu provides him with the evidence. Lee further informed her that the grievance will be viable after her retirement without her paying union dues. Lee suggested that Ms. Siu search for documentation of the pages and calls received beyond the regular workday, and that they meet to review the documents. However, Ms. Siu never provided Lee with the requested evidence.

In another November 2006 telephone call, Doi represented that both the OT and Standby Pay grievances are still alive and being considered as part of a total settlement of all her legal cases against the ME Office.

Ms. Siu and Doi had several other telephone calls on uncertain dates. She recorded and transcribed those calls without Doi's knowledge because Doi had been giving her different stories without documentation. Two of those telephone calls took place in 2007-08 and discussed her grievances and other legal cases. Doi told Ms. Siu that the OT grievance was on hold at Step 3 because the employer could be waiting for all the cases[vii] to be over to close everything, including the grievances, and that he had talked to Lau about a settlement of all the cases. Ms. Siu also stated that she has OT sheets, which she submitted and had returned with the Chief ME's handwriting and her personal tracking of her pager calls.

### 2.2. Dispute Over Collecting Ms. Siu's Personal Belongings from the ME Office

On December 28, 2009, Lee and Ms. Siu exchanged emails regarding terms and coordination of a visit to the ME Office to collect her personal items.

By a January 8, 2010 email regarding "potential visit for visit to ME", Ms. Siu's private attorney Mark Beatty (Beatty) informs Lee that, "Your services are no longer required."

In a February 12, 2010 letter to Beatty, Lee acknowledged Beatty's email and Ms. Siu's right to private counsel. Lee further stated, "it is indeed the Union's policy and practice to respect the choice for private counsel and to remove ourselves from involvement with the cases. Per your email and by your receipt of this letter, this is what we have now officially done with Ms. Siu's cases."

### 2.3. Ms. Siu's Letter to HGEA Executive Director Randy Perreira

Ms. Siu sent a letter to HGEA Executive Director Randy Perreira (Perreira), dated March 2, 2010, requesting the Union continue with her grievances. In this letter, she provided Perreira with a history of her disputes with the ME Office, her grievances, and other legal cases. She reiterated three times that her attorney represents her only in a civil matter. Ms. Siu further informed Perreira that the "union has neglected to fulfill their services on matters they found to be valid[,]" and that she expected the Union to continue to represent her on these issues, specifically the unpaid Standby pay and OT pay.

## 3. Proposed Analysis and Conclusions of Law

### 3.1. Preliminary Matters

Prior to addressing the significant issues in this case, the Board is compelled to dispose of the Joinder Motion and various prohibited practice allegations of the Complaint.

#### 3.1.1. Joinder Motion

HGEA sought to join the City as Ms. Siu's employer and because the grievances at issue were based on the City ME Office's denial of her request for Standby Pay and the alleged OT agreement between the City and Ms. Siu. Despite conceding that the Board has no administrative rules permitting a joinder, HGEA argued that resolution of these accusations requires the involvement and participation of the City as an indispensable party. Accordingly, HGEA argued that Hawai'i Administrative Rules (HAR) § 12-42-8(g)(14) providing for intervention should be applied to determine the joinder of the City and County.

The City opposed the joinder asserting that none of the allegations under HRS § 89-13(a) and (b) allegations apply to the City, and the City is not an indispensable party under HAR § 12-42-8(b)(14).

The Board's denial of the joinder was warranted for two reasons.

HGEA's reliance on HAR § 12-42-8(g)(14) for the joinder of the City is misplaced. As conceded by HGEA, the Board has no administrative rules permitting joinder of a party. HAR § 12-42-8(g)(14) provides for intervention not joinder in the proceedings. The Hawai'i appellate courts, in interpreting the Hawai'i Rules of Civil Procedure (HRCP) Rule 24(a) (intervention) and Rule 19(a) (joinder), have recognized intervention and joinder as two different procedures.[viii] W.H. Shipman v. Hawaiian Holiday Macadamia Nut Co., 8 Haw. App. 354, 370, 802 P.2d 1203, 1211 (1990).

HAR § 12-42-8(g)(14) providing for intervention requires that "a petition to intervene and become a party thereto shall submitted in writing to the board." Obviously, the City did not file a petition for intervention triggering the intervention procedure.

However, while the Board's administrative rules do not provide for a party to the proceeding to join an indispensable party, HAR § 12-42-42(d) provides that a person, such as a public employer claiming interest in the dispute or controversy, may be made a party upon proof of interest. While the Board has discretion under HAR § 12-42-42(e) to bring in additional party by serving a copy of the complaint upon the City, the Board chose not to do so.

For these reasons, the Board's refusal, in its discretion, to grant HGEA's request for joinder of the City was appropriate. Based on the lack of the City as a party in this case, the HRS § 89-13(a) allegations must be dismissed for the following reasons.

#### **3.1.2.** Dismissal of Certain Complaint Allegations

In the Complaint, Ms. Siu alleges that HGEA violated HRS § 89-13(a)(5), (7), and (8) and 89-13(b)(2) by its conduct in the handling of her OT and Standby Pay grievances.

##### **3.1.2.1.** HRS § 89-13(a)(5), (7), and (8) Allegations

HRS § 89-13(a) makes it a prohibited practice "for a public employer or its designated representative wilfully" to engage in any of the acts enumerated in that section. (Emphasis added)

Based on the plain language of this provision, because HGEA was not Ms. Siu's public employer, HGEA is unable to wilfully commit any prohibited practice in violation of HRS § 89-13(a)(5), (7), or (8). Accordingly, the Board dismisses all the HRS § 89-13(a)(5), (7), and (8) allegations against HGEA regarding both the OT and the Standby Pay grievances.

#### 3.1.2.2. HRS § 89-13(b)(2) and HRS § 89-13(a)(5)

HRS § 89-13(b)(2) makes it a prohibited practice for a public employee or an employee organization or its designated agent wilfully to "refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9[.]" HRS § 89-13(a)(5) provides for the reciprocal duty of the public employer making it a prohibited practice for a public employer or its designated representative wilfully "to refuse to bargain in good faith with the exclusive representative as required in section 89-9[.]"

The refusal to bargain charge is properly raised by a public employer, who has the reciprocal duty to bargain in good faith. As an individual employee and not a public employer, Ms. Siu, lacks standing to raise a refusal to bargain charge against the union, and an HRS§ 89-13(b)(2) charge must be dismissed. Lepere v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-10-66, Order No. 1076, at * 4-5 (June 13, 1994).

In general, standing is a prudential concern regarding whether the party seeking a forum, has alleged a sufficient personal stake in the outcome of a controversy as to justify the exercise of the court's remedial powers on the party's behalf. In Hawai'i state courts, standing is an issue arising out of justiciability concerns based on prudential concerns of judicial self-governance and is based on concern regarding the properly limited role of courts in a democratic society. Although Hawai'i state courts may consider standing even when not raised by the parties, they are not required to do so *sua sponte*, as they would be required to do if they perceive issues of subject matter jurisdiction. Tax Found. of Hawaii v. State, 144 Hawai'i 175, 192, 439 P.3d 127 (2019).

In its discretion, the Board considers, *sua sponte*, Ms. Siu's standing to raise the HRS § 89-13(a)(5) and 89-13(b)(2) allegations against HGEA regarding the OT and the Standby Pay grievances. The Board dismisses the HRS § 89-13(b)(2) allegation based on Ms. Siu's lack of standing. Although the Board already has dismissed the HRS § 89-13(a)(5) allegation as set forth above, the Board alternatively dismisses the HRS § 89-13(a)(5) allegation for Ms. Siu's lack of standing.

#### 3.1.2.3. HRS § 89-13(a)(7) and 89-13(b)(4) Allegations

In addition, HRS § 89-13(a)(7) makes it a prohibited practice for a public employer or its designated representative wilfully to refuse or fail to comply with HRS Chapter 89. For an HRS § 89-13(a)(7) allegation to be sufficient requires a specification of the HRS Chapter 89 provision that are alleged violated to provide notice to the employer as to the statutory violations of HRS Chapter 89 being charged. Poe v. Tsuda, Board Case No. CE-03-225, Order No. 1178, at *6-7 (April 19, 1995).

In this case, because the Complaint fails to specify the HRS Chapter 89 provision alleged as the basis for the HRS § 89-13(a)(7) violation, this allegation regarding the OT and Standby

Pay grievances are dismissed for this reason, in addition to the reasons articulated in Section 3.1.2.1. above.

HRS § 89-13(b)(4) creates an analogous prohibited practice for a public employee or an employee organization or its designated agent. However, unlike HRS § 89-13(a)(7), an allegation of a breach of the duty of fair representation whether under an independent HRS Chapter 89 provision or not has been permitted to allege a wilfull violation of HRS § 89-13(b)(4). LePere v. Waihee, Case No. CE-10-132, Decision No. 348, at *14 (1994). The Board has further held that a complaint alleging that a union breached its duty of fair representation alleges a colorable claim of an HRS § 89-13(b)(4) violation. Poe v. Hawaii Gov't Emp. Ass'n, Board Case No. CU-03-208, Order No. 2144, at *8 (January 7, 2003). Therefore, the HRS § 89-13(b)(4) claim will not be dismissed. The Board will address this HRS § 89-13 (b)(4) allegation in conjunction with the non-statutory breach of the duty of fair representation allegation regarding the OT Standby Pay grievances.

#### 3.1.2.4. HRS § 89-13(b)(5) Allegation

In addition to the breach of the duty of fair representation allegations, Ms. Siu also alleges that HGEA's handling of her OT and Standby Pay grievances violate HRS § 89-13(b)(5), which makes it a prohibited practice for a public employee or an employee organization or its designated agent to wilfully violate the terms of a collective bargaining agreement. As CBA Articles 23 Overtime and 26 Standby Pay are the only CBA provisions in the record, the HRS § 89-13(b)(5) allegations must rest on these provisions. Because the issue of HGEA's violation of the CBA is critical to the analysis of the Poe hybrid case as well, the merits of the HRS § 89-13(b)(5) allegation are addressed as follows.

### 3.2. Hybrid Case Under Poe

The Hawai'i Supreme Court (Court) has held that based on federal precedent, it is well settled that an employee must exhaust any grievance procedures provided under a collective bargaining agreement before bringing a court action pursuant to the CBA. Poe v. Hawai'i Labor Relations Board, 105 Hawai'i 97, 101, 94 P.3d 642, 656 (2004) (Poe). A review of the facts in this case shows that the OT and Standby Pay grievances were still pending when the Complaint was filed. Therefore, because the CBA grievance procedure for each of these grievances has not technically been exhausted, Ms. Siu would have no standing to bring this prohibited practice case based on a failure to exhaust contractual remedies.

However, Ms. Siu claims that HGEA has breached its duty of fair representation in the pursuit of her OT and Standby Pay grievances implicating the "hybrid case" established in Poe, Id. at 101-02, 94 P.3d at 656-57. In that case, the Court further noted that an employee who is prevented from exhausting the remedies provided by a collective bargaining agreement may, nevertheless, bring an action against her employer. This action consists of two separate claims, a

claim against the employer for a breach of the collective bargaining agreement and a claim against the union for a breach of the duty of fair representation. The two claims are "inextricably interdependent." To prevail against either the employer or the union, the employee must not only show that the employer's action was contrary to the collective bargaining agreement but must also carry the burden of demonstrating the breach of the duty by the union. Id., at 102, 94 P.3d at 657. Therefore, an employee may, if she chooses, 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.

Ms. Siu did not bring a prohibited practice allegation against her former employer the City. Nevertheless, under Poe, to establish her standing, Ms. Siu must carry the dual burden of the hybrid case showing not only that HGEA breached its duty of fair representation but also that the City breached the CBA, by a preponderance of the evidence.[ix]

**3.2.1.** The City and HGEA's Breach of the CBA

To establish the case against the City, Ms. Siu must prove that the City's denials of her requests for OT and Standby Pay violated the applicable CBA provisions.

**3.2.1.1.** Ms. Siu's OT Claims

Based on the record regarding the OT requests, Ms. Siu represented that there were 335 hours of OT for which she was promised and owed compensatory time off. When she did not receive compensatory time credit for these hours, Ms. Siu submitted written requests for OT pay to the Chief ME. The Chief ME denied Ms. Siu's OT requests based on a lack of proper authority under CBA Article 23.

There is no dispute that the CBA provision applicable to Ms. Siu's OT claim is CBA Article 23. This provision Article 23B requires that overtime work occurs when an employee renders service at the direction of proper authority[.]" CBA Article 23E further requires that an employee with compensatory time credit shall be scheduled for compensatory time off as mutually agreed to with the Employee's appointing authority. CBA Article 23H provides that "The provisions of this Article in regard to payment in cash shall be applicable in all cases except where the Employee who has performed the overtime work elects, in writing to take compensatory time off in lieu of case."

Ms. Siu substantiated her entitlement to her OT claims by her testimony that: she was verbally promised that she would receive compensatory time off; she documented her OT hours on her work calendar; and the work calendar entries showed that she worked 335 OT hours for which she was not given compensatory time credit or pay. In addition, Ms. Siu submitted copies of the ME OT forms submitted as written requests for the OT hours to the Chief ME signed by her but not by her supervisor and the department head.

While this evidence may support a finding that Ms. Siu worked 335 hours of OT service, CBA Article 23 requires more, that the service be directed by the proper authority. The record supports that contrary to Ms. Siu's allegation, the OT service was not directed by the proper authority. Significant to that finding is that the ME OT Forms submitted into the record show that her supervisor did not sign certifying that the requested OT was correct and authorized and the department head did not sign certifying that the OT work requested was in accordance with the applicable CBA provisions.

Further, despite Ms. Siu's assertion of a verbal agreement with the Chief ME for her to receive compensatory time for her OT hours, there is no dispute that there was no written agreement showing that her supervisor or department head directed her to render OT service. There is also no evidence of any mutual agreement between Ms. Siu and her supervisor or department head to schedule any compensatory time off, nor an election in writing by Ms. Siu to take compensatory time off in lieu of cash under CBA Article 23E and H, respectively.

In short, Ms. Siu does not show that her alleged OT, whether compensated by compensatory time off or in cash, complied with the requirements of CBA Article 23. Accordingly, Ms. Siu fails to prove that the City's denial of her OT requests violated the CBA Article 23.

Ms. Siu, therefore, is unable to establish one of the two critical elements of the Poe hybrid case that her former employer the City violated the CBA regarding her OT claim.

Because the City did not violate CBA Article 23, the Board is also compelled to find that insofar as the HRS § 89-13(b)(5) claim against HGEA relies on a violation of CBA Article 23, HGEA did not commit a prohibited practice.

**3.2.1.1.1.** Ms. Siu's Claims for Standby Pay

To prove her Standby Pay claims, the Board heard Ms. Siu's testimony that she had a verbal but not a written agreement for Standby Pay, and evidence that she was issued an office pager. Ms. Siu submits that the issuance of the office pager entitled her to receive Standby Pay because she was on standby duty.

Ms. Siu's testimony that there was a verbal agreement for her to receive Standby Pay when she was given the pager must be initially questioned based on its credibility. This testimony is contradicted by Ms. Siu's other testimony that she learned about Standby Pay at a training in 2004, three years after she received the pager.

Moreover, there is no dispute that CBA Article 26 Standby Pay is the relevant CBA provision to the Standby Pay claim. Even if there was a verbal agreement, this would be

insufficient to modify the requirements of CBA Article 26. Accordingly, for her Standby Pay claim to stand, Ms. Siu must demonstrate that the requirements of CBA Article 26 are met.

CBA Article 26 requires that for an employee, including Ms. Siu, to be deemed to be on Standby duty, her supervisor or department head must assign her to remain at home or other designated place, for a specific period, for the purpose of responding to calls for immediate service after her normal hours of work, on her scheduled day off, or on holidays.

Based on the evidence presented in this case, Ms. Siu is unable to show that she was on Standby duty. At best, Ms. Siu proved that she was instructed to answer work calls when she was at home. This showing is inadequate to prove that she was entitled to receive Standby Pay under Article 26 for answering work calls at home.

Specifically, there is no evidence that Ms. Siu's supervisor or department head assigned her to remain at home or other designated place, that this assignment was for a specific period of that assignment, and that the purpose of the assignment was to respond to calls for immediate service. Even if these requirements of Article 23 were met, Ms. Siu admitted that she had no documentation or calculation for the time spent answering work calls at home. Therefore, regarding her Standby Pay claim, the Board finds that Ms. Siu failed to establish a critical element of the Poe hybrid case that the City violated the CBA Article 26.

Because the City did not violate CBA Article 26, the Board further rules that insofar as the HRS § 89-13(a)(5) claim against HGEA relies on a violation of CBA Article 26, HGEA did not commit a prohibited practice.

### **3.2.2.** HGEA's Breach of the Duty of Fair Representation

This prohibited practice case was brought only against HGEA based on allegations of a breach of its duty of fair representation regarding her OT and Standby Pay grievances by failing to follow up or respond to her in a timely manner, losing files and evidence, failing to perform a procedural or ministerial act, and trying to give up representing her.

Based on Poe, these claims against the union for a breach of the duty of fair representation are "inextricably interdependent" with the claims against the employer for a breach of the collective bargaining agreement. Therefore, Ms. Siu's inability to carry the burden of showing that her former employer the City violated the CBA by its denial of her OT and Standby Pay claims means that she is unable to satisfy the requirements of the hybrid case regardless of whether she proves her case against HGEA.

Accordingly, the Board is not compelled to and does not resolve the issue of whether HGEA violated its duty of fair representation to Ms. Siu in the handling of her OT and Standby Pay grievances. Specifically, the Board makes no finding or conclusion on the merits of this

issue and is unable to find or conclude that HGEA violated HRS § 89-13(b)(4) for this reason. Applying the Poe reasoning, the Board finds that Ms. Siu lacked standing to pursue these prohibited practice allegations before the Board because she is unable to prove one of the required claims: namely, that the City violated the CBA.

### 3.3. Remedies Are Not Warranted

Ms. Siu asserts that HGEA's attorney represented that if Ms. Siu did not prevail in this case that the Board would order Ms. Siu to pay HGEA's legal costs.

Despite being unable to rule in Ms. Siu's favor on this Complaint, the Board finds that Ms. Siu was sincere in her belief in her prohibited practice claims, including that the City breached the CBA by denying her OT and Standby compensation and that HGEA did not fairly represent her regarding her grievances.

More significantly, HRS § 377-9(d) provides, in relevant part:

> Final orders may dismiss the complaint or…require the person to take affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including…costs, and attorney's fees…

Based on the plain language of this provision, attorney's fees and costs are only to be ordered in favor of "employees making them whole[.]" The Board interprets this provision as providing make-whole remedies, including attorney's fees and costs to "employees". As HGEA is a Respondent and is not an "employee"[x] nor a representative of an employee in this case, the Board will not order Ms. Siu to pay HGEA's attorney's fees and costs.

For these reasons, the Board will not order Ms. Siu to pay any attorney's fees costs or other remedies against her.

## 4. Proposed Order

For the reasons discussed above, the Board dismisses the Complaint. The Board further orders that no remedies will be awarded under HRS § 377-9(d). This case will be closed upon entry of the final decision and order.

## 5. Filing of Exceptions and Motion to Set Aside

Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, Decision and Order may file exceptions with the Board, as laid out in HRS §91-11, within ten days after service of a certified copy of this document. The exceptions must specify which findings or conclusions are being excepted to with citations to the factual and legal authorities for

such exceptions. A hearing for the presentation of oral arguments will be scheduled if such exceptions are filed, and the parties will be notified of such hearing.

DATED: Honolulu, Hawai'i, May 28, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:

Susan Siu, Self-Represented Litigant
Peter Trask, Esq.

[i] HRS § 91-11, Examination of evidence by agency states,

> Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

[ii] HRS § 89-13(b)(4) provides:

> (b) It shall be a prohibited practice for a public employee or for a employee organization or its designated agent wilfully to:
>
> ***
>
> (4) Refuse or fail to comply with any provision of this chapter[.]
>
> ***

[iii] HRS § 89-13(b)(5) provides:

> (b) It shall be a prohibited practice for a public employee or for a employee organization or its designated agent wilfully to:
>
> ***
>
> (5) Violate the terms of a collective bargaining agreement[.]

[iv] HRS § 89-6(a) provides in relevant part:

> (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> ***
>
> (4) Supervisory employees in white collar positions[.]

[v] HRS § 89-2 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.

[vi] Although the alleged claims against the City and HGEA extend beyond June 30, 2003, the only CBA in the record was effective from July 1, 1999 through June 30, 2003 and introduced by HGEA. Since Ms. Siu has the burden of establishing the alleged breach of the CBA, the onus of introducing the relevant collective bargaining agreements would be hers. However, because there was no evidence that the applicable collective bargaining provisions regarding OT and Standby Pay were modified in subsequent collective bargaining agreements, the Board will, for the purposes of this case, presume that CBA Articles 23 and 26 remained in effect for the period relevant to the Complaint.

[vii] Ms. Siu had various other unrelated cases involving the City, including a worker's compensation claim, a workplace violence investigation and grievance, a federal civil rights case, and an ethics charge.

[viii] Although the Board has found that it is not bound by the HRCP, where the Board's administrative rules are silent on procedural matters, the Board generally looks to analogous provisions of court rules and decisions interpreting such rules for guidance in applying the Board's own rules. Parker v. Dept' of Pub. Safety, State of Hawai'i, Board Case No. 19-CE-10-923, Decision No, 502, at *39 (2021).

[ix] HAR § 12-42-8(g)(16) provides, in relevant part, that, "The charging party, in asserting a violation of Chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence."

[x] HRS § 89-2 defines an "employee" or "public employee" as "any person employed by a public employer, except elected and appointed officials and other employees who are excluded from covered in section [89-6(f)]."