

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

STEPHANIE C. STUCKY,

Complainant(s),

and

WILFRED OKABE, President, Hawaii State Teachers Association; WILBERT HOLCK, UniServ, Hawaii State Teachers Association; ERIN NAGAMINE, Maui UniServ, Hawaii State Teachers Association; DAVID FORREST, O‘ahu UniServ, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION,

Respondent(s).

CASE NO(S). CU-05-303

DECISION NO. 508

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 June 2, 2021. The Proposed Order, among other things, found that Complainant STEPHANIE C. STUCKY (Stucky) did not meet her burden of proof to prove the sole remaining claim in this 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.

The deadline to file exceptions was June 14, 2021 at 4:30 p.m. because the Board “actually receives” documents only within its normal business hours; accordingly, documents filed after the close of the Board’s business day are actually received by the Board the following business day. *See*, Hawai‘i Administrative Rules (HAR) § 12-42-5(c) (setting the times the Board is open) and HAR § 12-42-8(a)(3) (stating that the date on which papers are actually received by the Board is the date of filing). Although Stucky’s written exceptions were untimely, the Board considered them and held oral argument on the exceptions on June 23, 2021.

The Board makes the following notes.

HAR § 12-42-8(g)(3)(C)(iii) sets the default timeframe for written responses to any motions filed by the Board, stating:

Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

Accordingly, if the Board sets no alternative schedule for written responses to motions, the administrative rules apply, and responses are due within five days after service of the motion. Therefore, Stucky had five business days after the service of Respondents’ Motion for Decision and Order to respond to such motion. Stucky failed to do so.

The question before the Board when considering Respondents’ Motion for Decision and Order is whether Stucky met her burden of proof in presenting her case. In the alternative to making such a motion, Respondents could have chosen to rest without putting on a case-in-chief. Accordingly, Stucky has no right to Respondents putting on a case-in-chief if she fails to meet her burden of proof in her case-in-chief¹.

Based on the foregoing, the Board, after thorough review and consideration, hereby adopts the Proposed Order, including the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, filed on June 2, 2021 and attached to this Decision as the final Decision and Order in this case, and dismisses Ms. Stucky’s complaint. This case is closed.

DATED: Honolulu, Hawai‘i, June 30, 2021.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Shawn Luiz, Esq.
Keani Alapa, Esq.

¹ The relevant burden of proof is described more fully below.

STATE OF HAWAII

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STEPHANIE C. STUCKY,

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Respondent(s).

CASE NO(S). CU-05-303

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

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

1. Proposed Introduction and Statement of the Case

Complainant STEPHANIE C. STUCKY (Complainant or Stucky) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging that Respondents WILFRED OKABE, President, Hawaii State Teachers Association (Okabe); WILBERT HOLCK, UniServ, Hawaii State Teachers Association (Holck); ERIN NAGAMINE, Maui UniServ, Hawaii State Teachers Association (Nagamine); DAVID FORREST, O'ahu UniServ, Hawaii State Teachers Association (Forrest); and HAWAII STATE TEACHERS ASSOCIATION (HSTA, and collectively with Okabe, Holck, Nagamine, and Forrest, Respondents) committed prohibited practices by breaching the duty of fair representation and acting in bad faith in the implementation of Article V of the bargaining unit 5 (BU 5) collective bargaining agreement (CBA) and internal process guidelines for the submission of grievances to arbitration and by refusing to file a motion to vacate the Arbitrator's Decision and Award dated January 12, 2011. Stucky alleged that HSTA's actions constituted prohibited practices as described in Hawai'i Revised Statutes (HRS) § 89-13(b)(3), (4), and (5).

After several dispositive motions, the Board dismissed Stucky's claim that Respondents violated HRS § 89-13(b)(3) in Order No. 2807 and her claim that Respondent violated HRS § 89-13(b)(5) in Order No. 2835.

The Board began the hearings on the merits (HOM) on September 19, 2016 with the Board specifically clarifying that the issue before the Board was whether HSTA breached the duty of fair representation it owed to Stucky as to the decision not to move to vacate an arbitration awardⁱ, thus committing a prohibited practice under HRS § 89-13(b)(4)ⁱⁱ.

After Stucky closed her case-in-chief, Respondents alleged that Stucky had not met her burden of proof and, accordingly, moved for a decision making this finding.

The Board issued Order No. 3727, a minute order that, among other things, found that Stucky did not carry her burden of proof as to this claim. Based on that finding, Order No. 3727 ordered Respondents to submit proposed findings of fact and conclusions of law as permitted by Hawai'i Administrative Rules (HAR) § 12-42-8(g)(17)(C).

The current Board Chair, Marcus R. Oshiro, did not participate in any proceeding in this matter, but has thoroughly reviewed the record, including the files, pleadings, transcripts, and exhibits. After such review, and after receipt of HGEA's proposed findings of fact and conclusions of law, and in accordance with HRS § 91-11ⁱⁱⁱ, the Board issues this Proposed Findings of Fact, Conclusions of Law, Decision and Order.

Any finding of fact or conclusion of law submitted by HSTA 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.

2. Proposed Background and Findings of Fact

2.1. Parties and Background

During the relevant period, Stucky worked for the Department of Education, State of Hawai'i (DOE) as a teacher. In that position, Stucky was a public employee^{iv} and a member of BU 5^v.

HSTA is and, during the relevant period, was the employee organization^{vi} and exclusive representative^{vii} for BU 5. During the relevant period, Okabe was the President of HSTA, Holck was the Deputy Executive Director of HSTA; Nagamine was the Maui UniServ Director of HSTA; and Forrest was the O'ahu UniServ Director of HSTA.

HSTA and DOE were parties to CBAs for BU 5 effective from July 1, 2007 to June 30, 2009 (2007-2009 CBA) and from July 1, 2009 to June 30, 2011 (2009-2011 CBA).

After the arbitration of HSTA’s grievance on Stucky’s behalf regarding her termination from employment with the DOE, Arbitrator Frank Yap, Jr. (Arbitrator Yap) issued his Decision and Award, dated January 12, 2011 (Yap Award).

Stucky requested that HSTA contest the Yap Award. HSTA’s UniServ Directors reviewed both her request and the Yap Award. After review, HSTA’s UniServ Directors recommended against filing a circuit court motion to vacate the Yap Award.

HSTA further retained legal counsel to assess the probability of prevailing on a motion to vacate the Yap Award. HSTA’s legal counsel expressed their opinion that there may be insufficient grounds for vacating the award.

Based on the recommendation and the opinion from legal counsel, HSTA informed Stucky that it would not file a motion to vacate the Yap Award. Stucky expressed her disappointment and requested information as to her legal options, including information regarding her right to “any legal services Appeals procedures available.”

Stucky submitted her “Application for Legal Services Program for the HSTA/DUSHANE Legal Appeal Services Program,” (Application) which is designed specifically for HSTA members who feel they have been denied or curtailed legal support by HSTA.

HSTA received and acknowledged the Application and convened a three-member panel to hear Stucky’s request. After the panel heard Stucky’s arguments, it issued a decision denying Stucky’s appeal, finding that “there is no basis upon which to grant your appeal for legal services. No reasons were presented refuting the statutory requirements...for vacating an arbitration award[.]” The decision further informed Stucky that she could appeal the panel’s decision to the NEA Office of Legal Services Programs.

3. Proposed Analysis and Conclusions of Law

3.1. Jurisdiction and Burden of Proof

The Board has original jurisdiction over prohibited practice controversies, and thus over this case. Hawaii Government Employees Association v. Casupang, 116 Hawai‘i 73, 97, 170 P.3d 324, 348 (2007) (Casupang).

The Board does not have jurisdiction over a union’s internal procedures. *See, e.g., State of Hawaii Organization of Police Officers v. Ballard, et al.*, Board Case No. 18-CE-12-910, Order No. 3442, at *8 (January 17, 2019) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3442.pdf>).

The Board further does not have jurisdiction over HRS Chapter 658A^{viii}. *See*, HRS § 658A-1, Definitions (“...In cases subject to chapter 89... ‘court’ means the circuit court of the

appropriate judicial circuit.”) and HRS [§ 658A-26], Jurisdiction. Therefore, the Board cannot confirm, HRS [§ 658A-22], vacate, HRS [§ 658A-23], or modify or correct, HRS [§ 658A-24], an arbitration award, as only the relevant court may do so.

Under both HRS § 91-10(5)^{ix} and HAR § 12-42-8(g)(16)^x, Stucky bears the burden of proof in this case. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be met by a preponderance of the evidence. HRS § 91-10(5).

Accordingly, in the instant case, Stucky must present both evidence and argument that show that it is more probable than not that the Respondents violated HRS Chapter 89. *See Minnich v. Admin. Dir. of the Courts*, 109 Hawai‘i 220, 229 (Minnich) (*citing Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 14 (1989)). To put it another way, Stucky must produce sufficient evidence and support the evidence with arguments that apply the relevant legal principles. *United Pub. Workers, AFSCME, Local 646 v. Waihee*, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-309.pdf>).

As the Board has previously said, if the party who carries the burden of proof does not present sufficient evidence and legal arguments with respect to an issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. *Mamuad v. Nakanelua*, Board Case No. CU-10-331, Order No. 3337F, *25 (May 7, 2018) (<https://labor.hawaii.gov/hlr/files/2019/01/HLRB-Order-3337F.pdf>) (*Mamuad*). *See also: State of Hawaii Org. of Police Officers v. Fasi*, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-161.pdf>).

3.2. Motion for Decision and Order

3.2.1. Authority for Motion

Respondents styled their Motion for Decision and Order as a judgment for partial findings under Hawai‘i Rules of Civil Procedure (HRCPP) Rule 52(c), claiming that Stucky failed to meet her burden of proof as to the remaining issue in this case at the close of her case-in-chief, namely whether HSTA followed its practice and procedures post-decision on whether to move to vacate the arbitration award because failing to do so could constitute a breach of the duty of fair representation.

Although the Board has not adopted the HRCPP, the Board is permitted to hear motions such as a motion for a directed verdict if the party opposing the motion has a full and fair opportunity to be heard on the motion after reasonable notice and the rules applicable to the Board are not otherwise violated. *Parker v. PSD and UPW*, Board Case Nos. 18-CU-10-370; 19-CE-10-923, Decision No. 502, at *42 (March 23, 2021) (<https://labor.hawaii.gov/hlr/files/2021/03/Decision-No.-502.pdf>) (*Parker*).

Stucky did not file a response to HSTA’s Motion for Decision and Order within the five days permitted by HAR § 12-42-8(g)(3)(C)(iii)^{xi}.

The Board did not immediately rule on Respondents’ Motion for Decision and Order after the five days expired. HSTA filed the Motion for Decision and Order on September 20, 2016, and the Board did not issue Order No. 3727 until March 25, 2021. During that time, Stucky filed no response or opposition.

Accordingly, Stucky had more than reasonable notice of the Motion for Decision and Order and did not respond.

3.2.2. Legal Standards

When considering a motion such as the Motion for Decision and Order, the Board must consider the evidence and inferences in the case in the light most favorable to the non-moving party. Makino v. County of Hawaii and UPW, Board Case Nos. CE-01-856, CU-01-332, Decision No. 492, *19 (2017) (<https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-492.pdf>). Further, the Board may only grant a motion for directed verdict when there is only one reasonable conclusion as to the proper judgment. Id.

3.3. Stucky Did Not Prove that Respondents Violated the Duty of Fair Representation

3.3.1. Standards for the Breach of the Duty of Fair Representation

HSTA has a duty to fairly represent all employees in BU 5, both in collective bargaining and in the enforcement of the resulting CBA. Poe v. Hawaii Labor Relations Board, 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004) (Poe). However, HSTA must retain the discretion to act in what it believes to be the best interest of the bargaining unit; therefore, the duty of fair representation must be narrowly construed. Tupola v. University of Hawaii Professional Assembly et al., Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *27 (2015) (<https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf>) (Tupola). Accordingly, any substantive examination of HSTA’s performance must be deferential. Id., at *27.

Accordingly, the Board can find a breach of the duty of fair representation only if HSTA’s conduct towards Stucky was arbitrary, discriminatory, or in bad faith. Poe, 105 Hawai‘i at 104, 94 P.3d at 659. In this case, Stucky has alleged only that HSTA acted in bad faith. Accordingly, the Board will examine her claim in that light.

3.3.2. Traditional Hybrid Case

The Board typically looks at the breach of the duty of fair representation based on the “hybrid case” found in Poe. The Hawai‘i Supreme Court found in Poe that the claims of an

employer breaching the collective bargaining agreement and a union breaching the duty of fair representation are “inextricably interdependent.” Poe, 105 Hawai‘i at 102, 94 P.3d at 657. Under Poe, therefore, Stucky must carry the burden of showing both the breach of the CBA by DOE and the breach of the duty of fair representation by HSTA.

If the Board takes Stucky’s claims as a hybrid case, Stucky cannot prevail based on the case against the DOE for the breach of the CBA. The Board is bound by the arbitrator’s decision finding that DOE did not breach the CBA because of its inability to overturn an arbitration award. The Board has noted that, if the Board were to overturn an arbitration award, it would be “acting in a manner completely contrary to the spirit, intent and basic purpose of Chapter 89, HRS, and the mission of this Board.” Fasi and HGEA et al, Board Case No. DR-02-30, Decision No. 107, *6 (April 19, 1979) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-107.pdf>) (citations omitted). Further, as noted in Section 3.1 above, the Board lacks jurisdiction over the arbitration awards rendered under HRS Chapter 658A.

Under the Poe hybrid analysis, the failure to prove a violation of the CBA by the Employer deprives Stucky of standing to pursue a hybrid claim of the breach of the duty of fair representation by HSTA. Poe, 105 Hawai‘i at 104, 94 P.3d at 659.

Accordingly, to the extent that the duty of fair representation is tied to a hybrid case, Stucky cannot prevail.

3.3.3. Other Breaches of the Duty of Fair Representation

Even assuming that the duty of fair representation is not tied to a hybrid case, the Board still is compelled to find that HSTA did not breach the duty of fair representation to Stucky.

HSTA would have the Board rely on federal court precedent under the National Labor Relations Act (NLRA) in resolving the issue. The federal courts have found that a union is never required to contest an award in court to discharge the duty of fair representation. Bonds v. Coca-Cola Co., 806 F.2d 1324, 1325 (7th Cir. 1986) (Bonds). When an employee has extra-contractual remedies that allow them to seek judicial review of an arbitration decision, the union is under no duty to provide the employee with more legal assistance than bargained for in the contract or required by law. Freeman v. Teamsters Local 135, 746 F.2d 1316, 1319-22 (7th Cir. 1984). Therefore, under the NLRA, a union’s acceptance of an award finding against the union is not a violation of the duty of fair representation. Osborne, Labor Union Law and Regulation 374 (2003).

While considering federal precedent, the Board noted that unlike the NLRA, HRS § 658A-23 allows only a party to the arbitration to apply to vacate an arbitration award. While the relevant CBA provision, Article V.G.2.b. and HRS § 89-10.8(a) refer to final and binding arbitration, only the parties to the arbitration (namely the employer and the union) have the right

to move to vacate the award on limited grounds under HRS § 658A-23. Accordingly, the Board found in Order No. 2807 that “the Union’s duty of fair representation extends to the decision to seek judicial review” to the extent that alleging a breach of that duty states a claim for relief.

However, the Board’s consideration of HSTA’s breach of duty of fair representation in this case is limited by its lack of jurisdiction in two key respects. First, as explained above, the breach of duty of fair representation issue cannot be resolved under the traditional hybrid case when the issue involves an arbitration award that has already resolved that the employer has not breached the CBA. Further, as further discussed above, the Board has no jurisdiction over the HSTA’s internal procedures. Accordingly, the Board’s determination of whether HSTA breached the duty of fair representation may not include consideration of the issue of whether HSTA complied with its internal procedures. With these limitations, the Board turns to the alleged breach of the duty of fair representation.

Stucky alleges that HSTA’s breach of duty of fair representation is rooted in its bad faith conduct. The Board disagrees.

To prove that HSTA breached the duty of fair representation due to bad faith, Stucky needs to provide proof that HSTA acted, or failed to act, due to an improper motive. Tupola, at *34. To prove such an improper motive, Stucky must corroborate her allegations with subsidiary facts and show substantial evidence of fraud, deceit, or dishonest conduct. Id.

When considering the issue of bad faith, the Board is not concerned with whether HSTA made the right decision; rather, the Board asks whether HSTA made the decision rationally and in good faith. Emura v. Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, Board Case No. CU-03-328, Order No. 3028, at *15-16 (2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3028.pdf>). Accordingly, the Board will not examine and takes no position on whether a motion to vacate the Yap Award may have succeeded or not, or which of the six grounds found in HRS [§ 658A-23] are or may be present in the current case.

HSTA’s UniServ Directors examined the Yap Award, the case before them, and voted not to pursue a motion to vacate the award. HSTA’s legal counsel advised that HSTA may not have the requisite legal grounds to succeed on a motion to vacate the award. Even after making the decision not to move to vacate the award, HSTA granted Stucky’s request for additional consideration. HSTA convened a panel to listen to her arguments. After hearing those arguments, the panel decided that a motion to vacate the Yap Award would not be successful. Accordingly, HSTA declined to file a motion to vacate the Yap Award.

Stucky has presented no evidence of fraud, deceit, or dishonest conduct. Based on the record, even considering the evidence in the light most favorable to Stucky, the Board cannot make a finding that HSTA acted in bad faith.

Therefore, Stucky has failed to meet her burden of proof in her case-in-chief, and the Board must grant Respondents' Motion for Decision and Order.

4. Proposed Order

Based on the above, the Board grants Respondents' Motion for Decision and Order and dismisses the Complaint in its entirety. 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, June 2, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Shawn Luiz, Esq.
Keani Alapa, Esq.

ⁱ In Order No. 2835, at *8-9, the Board noted that:

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- (b) The facts presented are in dispute as to whether HSTA followed its practice and procedure to review the arbitrator's award and whether HSTA breached its duty of fair representation regarding its decision not to seek judicial review of said award...
 - (c) It is not clear from the evidence presented when or how HSTA informed Complainant of HSTA's established practice and procedure to review and arbitrator's award, and when or whether HSTA complied with its practice and procedure to review Arbitrator Yap's Decision and Award, or whether the review of Arbitrator Yap's Decision and Award was generated by Complainant's Application for Legal Services Program.

Therefore, there is a genuine issue of material fact in dispute as to whether HSTA adhered to its practice and procedure of reviewing the arbitrator's award to determine whether to file a motion to vacate the award. Moreover, material issues of fact remain as to whether Respondents breached their duty of fair representation by failing to follow HSTA's internal procedures that constitute an HRS § 89-13(b)(4) violation.

ⁱⁱ HRS § 89-13 states in relevant part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent willfully to:

(4) Refuse or fail to comply with any provision of this chapter;

The Board has permitted an allegation of a breach of the duty of fair representation, whether under an independent HRS Chapter 89 provision or not, to serve as an alleged willful violation of HRS § 89-13(b)(4). LePere v. Waihee, Case No. CE-10-132, Decision No. 348, at *14 (1994) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-348.pdf>).

ⁱⁱⁱ 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.

^{iv} HRS § 89-2 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)].

^v HRS § 89-6 defines bargaining unit 5 as:

Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent;

^{vi} HRS § 89-2 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.

^{vii} 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.

^{viii} Although Stucky references HRS Chapter 658 in her filings, the Board notes that the Hawai‘i State Legislature repealed HRS Chapter 658 in 2001, at the same time as it created HRS Chapter 658A, which deals with arbitrations such as the grievance arbitration at issue in this case.

^{ix} HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

^x HAR § 12-42-8(g)(16) of the Board’s rules states:

(16) 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. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

^{xi} HAR § 12-42-8(g)(3)(C)(iii) provides:

Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.