

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

JASMINE L. KAPESI,

Complainant(s),

and

DEPARTMENT OF PUBLIC SAFETY,  
State of Hawai'i; and UNITED PUBLIC  
WORKERS, AFSCME, LOCAL 646, AFL-  
CIO,

Respondent(s).

CASE NO(S). 17-CE-10-908  
17-CU-10-359

DECISION NO. 510

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 February 2, 2022. The Proposed Order, among other things, found that Complainant JASMINE L. KAPESI (Ms. Kapesi) 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. Kapesi 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 February 2, 2022 and attached to this Decision as the final Decision and Order in this case, and dismisses Ms. Kapesi's complaint. This case is closed.

DATED: Honolulu, Hawai'i, March 2, 2022.

HAWAI'I LABOR RELATIONS BOARD

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MARCUS R. OSHIRO, Chair

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SESNITA A.D. MOEPONO, Member

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J N. MUSTO, Member

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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**

After Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (PSD) terminated Complainant JASMINE L. KAPESI (Ms. Kapesi) from her position as an adult correctional officer (ACO) III, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a grievance on Ms. Kapesi's behalf. After receiving the Step 1 Decision from PSD, UPW decided not to pursue the grievance, and told Ms. Kapesi the same.

In her prohibited practice complaint (Complaint), Ms. Kapesi alleges, among other things, that PSD committed prohibited practices under Hawai'i Revised Statutes (HRS) § 89-13(a)(1), (5), (6), (7), and (8) when it discharged her, and that UPW committed prohibited practices under HRS § 89-13(b)(1), (2), (3), (4), and (5) for failing to represent her as a collective bargaining member.

Before the hearing on the merits (HOM), UPW and PSD each filed a dispositive motion (UPW MTD and PSD MSD respectively), which Ms. Kapesi opposed. The HOM began on February 2, 2018. After the first day of the HOM, UPW filed a second motion to dismiss (UPW Second MTD), which Ms. Kapesi opposed. The HOM resumed on April 16, 2018, and Ms. Kapesi finished presenting her case and rested.

UPW filed a Motion for Directed Verdict, which PSD joined, and Ms. Kapesi opposed. PSD also filed a Motion for Directed Verdict, which Ms. Kapesi opposed. In her opposition to both Motions for Directed Verdict, Ms. Kapesi moved, among other things, for the HOM to continue further.

After hearing oral arguments on the Motions for Directed Verdict, the Board considered the record and issued an oral ruling.

The Board issued a minute order, reducing the oral ruling to writing and directing PSD to submit proposed findings of fact and conclusions of law. The minute order further informed the parties that that, after considering PSD's proposed findings of fact and conclusions of law, the Board would issue its own proposed decision.

Having considered the proposed findings of fact and conclusions of law, and upon further review of the record, the Board issues this final order. This final order amends the prior oral ruling and minute order. The Board:

- Grants, in part, and denies, in part, UPW's MTD—more specifically, finds that Ms. Kapesi does not have standing to raise claims under HRS §§ 89-13(a)(5), (6), and 89-13(b)(2), and (3), and denies UPW's MTD on all other counts;
- Denies PSD's MSD;
- Denies UPW's Second MTD;
- Grants the Motions for Directed Verdict to the extent that Ms. Kapesi failed to meet her burden to prove that PSD violated the collective bargaining agreement (CBA) when it discharged her; and
- Dismisses the alleged breach of the duty of fair representation based on Ms. Kapesi's failure to meet her burden to prove that PSD violated the CBA. *See Poe v. Haw. Labor Rels. Bd.*, 105 Hawai'i 97, 101-02, 94 P.3d 652, 656-57 (2004) (*Poe II*) (citations omitted).

Any finding of fact or conclusion of law submitted by PSD but not specifically adopted in this decision is 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**

During all relevant times, Ms. Kapesi was an employee<sup>1</sup> of PSD<sup>2</sup> and worked as an ACO III at the Women's Community Correctional Center (WCCC), a position that is included in

bargaining unit 10<sup>3</sup> (BU 10). UPW is the exclusive representative<sup>4</sup> for BU 1. UPW and the relevant employer group for BU 10 are parties to a CBA for BU 10. The BU 10 CBA includes Section 11, Discipline; Section 14, Prior Rights, Benefits, and [Prerequisites]; and Section 15, Grievance Procedure.

Section 11 lays out that “A regular Employee shall be subject to discipline by the Employer for just and proper cause.” The term “just and proper cause” is not defined in the CBA.

PSD maintains Standards of Conduct for the Department of Corrections (SOC). All employees are issued copies of the SOC and acknowledge receipt in writing. The SOC, among other things, includes Article III, Conduct, which includes a Guide for Disciplinary Action and a list of the Professional Conduct and Responsibilities that apply to ACOs.

On or about October 22, 2014, the Honolulu Police Department (HPD) received a criminal complaint alleging that, on September 3, 2014, Ms. Kapesi was in a car with a person who had a relationship with an inmate at WCCC. That person alleged, among other things, that Ms. Kapesi held a knife to them and threatened to put them in the trunk of a car.

Based on the criminal complaint about the events of September 3, 2014, the O‘ahu grand jury indicted Ms. Kapesi for terroristic threatening in the first degree, a felony, on September 9, 2015. Judge Richard Perkins (Judge Perkins) issued a no-contact order that, among other things, prohibited Ms. Kapesi from possessing or controlling any firearm, ammunition, firearm permit, or license and required Ms. Kapesi to have no contact with the person who made the criminal complaint.

Ms. Kapesi did not inform PSD about the pending court case for the felony.

As of December 8, 2015, by order of the circuit court, Ms. Kapesi was allowed and permitted to possess a firearm or ammunition for work-related purposes and training associated with work.

In late March to early April 2016, PSD’s computer systems conducted its annual Lautenberg Amendment check. The system flagged Ms. Kapesi’s name due to her September 9, 2015 arrest.

On May 23, 2016, Ms. Kapesi pleaded no-contest to the charge of terroristic threatening in the first degree. Ms. Kapesi filed a motion for Deferred Acceptance of Guilty or No Contest (DANC); and on August 10, 2016, the Judge granted the motion, placing Ms. Kapesi on deferral for a period of four years.

Ms. Kapesi did not inform PSD that she had entered a no-contest plea to terroristic threatening in the first degree.

By letter, dated August 12, 2016, Eric G. Tanaka, Warden for WCCC, (Warden Tanaka) requested information and documents from the Department of the Prosecuting Attorney regarding Ms. Kapesi's DANC.

By letter, dated September 9, 2016, Warden Tanaka placed Ms. Kapesi on leave without pay from September 9, 2016 through October 7, 2016 while PSD conducted its investigation into Ms. Kapesi's failure to notify PSD or WCCC of her arrest and subsequent DANC.

WCCC's Investigator, Sergeant Charles Owens (Sgt. Owens) informed Ms. Kapesi of WCCC's investigation into her DANC plea by a letter, dated September 9, 2016. Among other things, the letter informed Ms. Kapesi that the investigation was based on PSD's discovery that she:

1. Did not report to the Department of Public Safety that [she] was arrested on October 12, 2015 for Terroristic Threatening in the first degree (e) with the use of a dangerous instrument.
2. Did not report to the Department of Public Safety that [she] was convicted of a Class C felony (HRS 707-716 (1,E))
3. Violated the Department of Public Safety Standards of Conduct for an officer and disregarded the [Policies and Procedures].

Ms. Kapesi completed the questionnaire provided to her for the investigation. Ms. Kapesi stated in her responses, among other things that she was not aware that she was required to notify PSD that she was arrested after she turned herself in; and that she entered a DANC plea to the charge of Terroristic Threatening in the First Degree.

Warden Tanaka placed Ms. Kapesi on leave with pay from October 10, 2016 through December 30, 2016.

On October 20, 2016, Warden Tanaka recommended pre-disciplinary action against Ms. Kapesi.

By letter, dated November 16, 2016, Ms. Kapesi received notice of her pre-disciplinary due process hearing. Among other things, the notice informed Ms. Kapesi that PSD alleged that she violated the following sections of the SOC:

- 1) Article III; Section II, Professional Conduct and Responsibilities; Subsection C, Cooperation;
- 2) Article III; Section II, Professional Conduct and Responsibilities; Subsection G, Knowledge of Laws and Regulations;

- 3) Article III; Section II, Professional Conduct and Responsibilities; Subsection H, Performance of Duty;
- 4) Article III; Section II, Professional Conduct and Responsibilities; Subsection I, Obedience to Laws and Regulations;
- 5) Article III; Section III, Rules; Class B Rules; B9, Criminal Acts;
- 6) Article III; Section III, Rules; Class C Rules; C6, Reports; and
- 7) Article III; Section III, Rules; Class D Rules; D12, Truthfulness

PSD held the pre-disciplinary hearing for Ms. Kapesi on December 5, 2016.

On December 12, 2016, Ms. Kapesi received a pre-discharge letter, informing her that the effective date of her discharge would be December 30, 2016. PSD found that Ms. Kapesi violated all seven of the above-listed sections of the SOC. Among other things, the pre-discharge letter concluded that:

19. The department has a reasonable and legitimate concern regarding the continued employment of a person, who plead[ed] to Terroristic Threatening in the First Degree, which is a C felony, as the facts involved threats with a knife to a member of the public with ties to a WCCC inmate.
20. The department has a legitimate concern[] with limiting the abuse of inmates and with not maintaining the employment of someone, who plea[ded] to Terroristic Threatening in the First Degree based on having another person threaten harm and then personally threatened harm to an individual. The retention of this type of employee creates significant liability for the department.

On December 27, 2016, PSD held the pre-discharge hearing for Ms. Kapesi. On December 29, 2016, PSD sent Ms. Kapesi notice that it found that the evidence presented at the pre-discharge hearing, “was insufficient to overturn the sanction imposed by the discharge letter dated December 12, 2016.”

Ms. Kapesi’s discharge became effective on December 30, 2016.

UPW filed a grievance on Ms. Kapesi’s behalf on January 10, 2017. PSD and UPW held the Step 1 meeting on September 12, 2017, and by letter, dated November 2, 2017, PSD denied the Step 1 grievance.

By letter, dated November 27, 2017, UPW informed Ms. Kapesi that it processed her grievance through the grievance procedure and that it would not pursue her grievance further because, “there is insufficient proof that there is a violation of the CBA.”

### **3. Proposed Analysis and Conclusions of Law**

#### **3.1. Motions to Dismiss and for Summary Judgment or Disposition**

##### **3.1.1. Motion for Summary Judgment or Summary Disposition**

The UPW MTD and PSD MSD both argue that the Respondents were entitled to summary judgment or disposition prior to the HOM.

The Board has adopted the standards for motions for summary judgment set forth by the Hawai‘i Supreme Court (HSC) in Thomas v. Kidani, 126 Hawai‘i 125, 267 P.3d 1230 (2011), and French v. Haw. Pizza Hut, Inc., 105 Hawai‘i 462, 99 P.3d 1046 (2004). *See, e.g., Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO v. Kawakami*, Board Case Nos. 20-CE-03-946a; 20-CE-04-946b; 20-CE-13-946c, Decision No. 506 at \*22 (June 23, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No-506.pdf>) (Kawakami); *see also Tupola v. Univ. of Haw. Prof’l Assembly*, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at \*18 (February 25, 2015) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3054.pdf>) (Tupola).

Summary judgment is appropriate only when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the Board must review the evidence in the light most favorable to the party opposing the motion for summary judgment; and the Board must resolve any doubt about whether or not such a motion should be granted in favor of the non-moving party. Kawakami, Decision No. 506, at \*22.

At the time Respondents filed the UPW MTD and the PSD MSD, the Board considered the facts on the record and determined that genuine disputes regarding material facts existed, including but not limited to issues about the motives of the parties. Thus, the Board did not grant summary judgment.

##### **3.1.2. Motions to Dismiss Generally**

The contents of the complaint serve as the basis for motions to dismiss for lack of subject matter jurisdiction, and when considering a motion to dismiss, the Board must accept the allegations of the complaint as true and view those allegations in the light most favorable to the complainant. *See Jones v. Lee*, Board Case No. 21-CE-06-960, Order No. 3781, at \*2 (July 16, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/07/Order-No-3781.pdf>) (Jones). The Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint. Tupola, Order No. 3054, at \*17. However, the Board may dismiss a claim if it



appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Haw. State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

The party seeking to invoke the Board's jurisdiction must establish that jurisdiction exists. Jones, Order No. 3781, at \*2. The Board may review any evidence, such as affidavits and testimony, to resolve factual disputes about the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Comm. v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

### **3.1.3. Failure to State a Claim**

UPW argues, among other things, that Ms. Kapesi's Complaint fails to provide enough factual allegations to state claims for relief for certain alleged violations of HRS § 89-13.

The Board only dismisses a complaint for failure to state a claim if the claim is "clearly without any merit" and if, based on that lack of merit, the Board concludes that no law supports the claim. Parker v. Dep't of Pub. Safety, State of Hawai'i, Board Case No. 19-CE-10-923, Decision No. 502, at \*54 (March 23, 2021) (<https://labor.hawaii.gov/hlr/files/2021/03/Decision-No.-502.pdf>) (Parker). Further, the Board only dismisses a complaint for failure to state a claim if it appears beyond doubt that the complainant cannot prove any set of facts that would entitle them to relief. Tupola, at \*17. The Board must view Ms. Kapesi's complaint in the light most favorable to her to determine if the allegations in the complaint could permit relief under any alternative theory. Id.

The Board follows the pleading standards set by the Hawai'i appellate courts. Paio v. UPW, Board Case Nos. 16-CU-10-344, 16-CU-10-345, Decision No. 497, at \*26 (February 21, 2020) (<https://labor.hawaii.gov/hlr/files/2020/03/Decision-No.-497.pdf>) (Paio). The Board must construe the pleadings liberally and requires only that the complaint contain a short and plain statement of the claim to provide the respondent with fair notice of the complaint and the relevant grounds. Parker, at \*54 (*citing Paio*, at \*26).

Hawai'i law requires only that a complainant give fair notice to the respondent of what the complainant's claim is and what grounds support this claim. Id. The law does not require that a complainant plead legal theories with precision, and the pleading of evidence, facts, conclusions, or law is not dispositive. Id. (*citing Paio*, at \*26-27).

The Board finds that Ms. Kapesi's Complaint contains enough of a short and plain statement of her claims to provide Respondents with notice of her claim and the facts surrounding her claim. The Board denies the UPW MTD on this point.

### 3.1.4. Standing

UPW further argues that Ms. Kapesi lacks standing to bring certain claims, specifically her allegations of violations of HRS §§ 89-13(a)(5) and (6) and HRS §§ 89-13(b)(2) and (3).

Standing refers to the question of whether parties have the right to bring a particular complaint or claim. Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai‘i 64, 67, 881 P.2d 1210, 1213 (1994). To determine legislative standing, the HSC has noted that standing requirements may be created or directed by legislative declarations of policy. Tax Foundation of Hawaii vs. State, 144 Hawai‘i 175, 188, 439 P.3d 127, 140 (2019) (Tax Foundation). Thus, legislative standing requirements may differ based on statutory language. Id.

Under HRS §§ 89-13(a)(5) and (6) and HRS §§ 89-13(b)(2) and (3):

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

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(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

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

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(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

\*\*\*

As discussed above, Ms. Kapesi was a public employee within the definition of HRS § 89-2 until her termination, generally giving her the legislative standing to file a prohibited practice complaint. *See* HRS §§ 89-14, 377-9.

However, the plain language of HRS §§ 89-13(a)(5) and (b)(2) lays out which parties are attached to these claims. HRS §§ 89-13(a)(5) and (b)(2) are concerned with the rights of employers and exclusive representatives under HRS § 89-9, which lays out the “Scope of negotiations; consultation” between employers and exclusive representatives.

Ms. Kapesi is a public employee, not an employer or an exclusive representative. Thus, she has no legislative standing to bring prohibited practice complaints under HRS §§ 89-13(a)(5) or (b)(2), and the Board must dismiss those claims. *See, e.g., LePere v. United Pub. Wrkrs., AFSCME, Local 646*, Board Case No. CU-10-94, Order No. 976, at \*4-5 (October 15, 1993) (*LePere*) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-976.pdf>); *Kwock v. Dep’t of Ed., State of Hawai’i*, CE-05-554, Order No. 2262, at \*6 (June 8, 2004) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2262.pdf>).

Similarly, HRS §§ 89-13(a)(6) and (b)(3) relate to the mediation and arbitration procedures in HRS § 89-11, “Resolution of disputes; impasses.” This section sets out the rights and responsibilities of public employers and exclusive representatives during impasse proceedings. It does not give rights or responsibilities to individual employees such as Ms. Kapesi. Thus, Ms. Kapesi has no legislative standing to bring prohibited practice complaints under HRS §§ 89-13(a)(6) and (b)(3), and the Board must dismiss those claims. *See, e.g., LePere*, Order No. 976, at \*5; *Fong v. Sakai*, Board Case No. CE-10-503, Order No. 2113, at \*8-9 (September 12, 2002) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2113.pdf>).

### 3.1.5. Exhaustion

When considering an allegation that an employer has committed a prohibited practice by violating the relevant collective bargaining agreement, the Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile, based on the Court’s reasoning in *Poe v. Haw. Lab. Rels. Bd.*, 97 Hawai’i 528, 531, 40 P.3d 930, 933 (2002) (*Poe*) and *Poe II*, 105 Hawai’i at 101, 94 P.3d at 656. *See, e.g., Univ. of Haw. Prof’l Assembly v. Bd. of Regents*, Board Case No. CE-07-804, Order No. 2939 (August 22, 2013) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2939.pdf>).

The HSC has found that:

...a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee’s exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile.

*Poe*, 97 Hawai’i at 531, 40 P.3d at 933.

UPW argues that Ms. Kapesi did not exhaust her administrative remedies because she did not request for her grievance to be pursued further until after UPW notified her of its refusal to pursue her grievance.

Exhaustion occurs when an employee reaches the point in the grievance process where they can no longer progress. Poe, 97 Hawai‘i at 538, 40 P.3d at 940. No one disputes that Ms. Kapesi’s grievance went through the Step 1 process and that UPW told Ms. Kapesi, after the Step 1 Decision, that it would not take her grievance further. At that point, it would have been futile for Ms. Kapesi to continue her grievance because UPW already decided that it would not take her grievance to arbitration. If exhaustion of administrative remedies is futile, it is not required. Poe, 97 Hawai‘i at 536, 40 P.3d at 938; *see also* Poe II, 105 Hawai‘i at 102, 94 P.3d at 657.

Based on the above, the Board rejects UPW’s argument that Ms. Kapesi’s complaint must fail due to the exhaustion doctrine.

### **3.2. Motions for Directed Verdict**

#### **3.2.1. Legal Standards**

The Board can hear motions for directed verdict if the party opposing the motion has a full and fair opportunity to be heard on the motion, and the Board’s rules are not otherwise violated. Parker, Decision No. 502, \*42. Here, Ms. Kapesi had a full and fair opportunity to be heard through filing a written opposition to the motion and through presenting oral argument to the Board.

In prohibited practice cases, the complainant “bears the burden of proof” to a degree of a “preponderance of the evidence.” HRS § 91-10(5); HAR § 12-42-8(g)(16). This means that, in her case-in-chief, Ms. Kapesi must produce evidence and persuade the Board that it is more likely than not that Respondents committed prohibited practices.

Ms. Kapesi has finished presenting her case, and both Respondents argue that she failed to meet her burden of proof. For Ms. Kapesi’s claims to survive these Motions for Directed Verdict, Ms. Kapesi must have proven in her case-in-chief that Respondents committed these prohibited practices. *See* 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>).

When considering these motions, the Board must view the evidence and inferences in the light most favorable to Ms. Kapesi. Makino v. Cnty of Hawaii and United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case Nos. CE-01-856, CU-01-332, Decision No. 492, \*19 (2017) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-492.pdf>). The Board can

only grant these motions if the only reasonable conclusion is that Ms. Kapesi has failed to meet her burden of proof. Id.

Thus, if Ms. Kapesi has not provided enough evidence and legal argument to succeed on a claim after she finishes presenting her case, the Board must find that she failed to carry her burden of proof and dispose of the issue. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, \*25 (2018) (Mamuad) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3337F.pdf>).

### **3.2.2. HRS §§ 89-13(a)(7)**

HRS § 89-13(a)(7) specifies that it shall be a prohibited practice for a public employer or its designated representative wilfully to refuse or fail to comply with any section of HRS Chapter 89. The Board has consistently held that an HRS § 89-13(a)(7) allegation requires that the complainant specify the HRS Chapter 89 provision allegedly violated by the employer so that the employer has notice of what statutory violations they allegedly committed. *See* Siu v. Haw. Gov't Emples. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-04-291, Decision No. 505, at \*10 (June 14, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-505.pdf>) (Siu).

Here, Ms. Kapesi failed to specify the HRS Chapter 89 provision alleged as the basis for the HRS § 89-13(a)(7) violation, and the Board must dismiss the allegation.

HRS § 89-13(b)(4) similarly refers to a wilfull refusal or failure to comply with a section of HRS Chapter 89, this time by a public employee or an employee organization or its designated agent. However, the Board has found that an allegation of a prohibited practice under HRS § 89-13(b)(4) does not require a separate, independent HRS Chapter 89 allegation if the complainant is alleging a breach of the duty of fair representation. *See* Siu, Decision No. 505, at \*10. Thus, the Board deals with this allegation below.

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

Ms. Kapesi further alleges that UPW violated the terms of the CBA, committing a prohibited practice under HRS § 89-13(b)(5) by refusing to pursue her grievance to arbitration. However, the remainder of the record does not further this argument.

The CBA does not require UPW to take every grievance to arbitration. Consideration of UPW's decision not to pursue Ms. Kapesi's grievance through the entirety of the grievance process and to arbitration falls under an alleged breach of UPW's duty of fair representation—not an alleged CBA violation.

Based on the above, the Board dismisses the HRS § 89-13(b)(5) claim against UPW and will address the alleged breach of UPW's duty of fair representation below.

### **3.2.4. Hybrid Case; HRS §§ 89-13(a)(8) and (b)(4)**

The remaining issues in this case make up the “hybrid case”. The HSC has found that the claims of an employer breaching the collective bargaining agreement and a union breaching the duty of fair representation are “inextricably interdependent.” Poe II, 105 Hawai‘i at 102, 94 P.3d at 657. This means that Ms. Kapesi must prove both parts to succeed in a hybrid case. Id.; *see also* Tupola, Order No. 3054 at \*39.

#### **3.2.4.1. HRS § 89-13(a)(8)**

To establish her case against the State Respondents, Ms. Kapesi must prove that they did not have just and proper cause to discharge her. In support of her position, among other things, Ms. Kapesi argues that the State Respondents did not have just cause because they did not conduct a fair investigation; they set up a “double standard” by discharging employees for certain types of “criminal act[s]” and not for others; the investigation was untimely; and Ms. Kapesi’s name should not have been flagged during the Lautenberg process.

The CBA does not include a definition of just and proper cause, and the Board has not adopted any test for such. However, as discussed above, Ms. Kapesi’s arguments center around whether the State Respondents’ investigation was timely; whether it was fair; and whether she received equal treatment. The Board addresses each of these arguments in turn.

##### **3.2.4.1.1. Investigation**

Ms. Kapesi argues that the State Respondents’ investigation was untimely because she was not placed on leave without pay until October 2016, six months after her name was flagged by the Lautenberg process as having been arrested for a criminal complaint.

However, as discussed above, Ms. Kapesi’s entered her “No-contest” plea on or about August 10, 2016. Until she entered this plea, the State Respondents could not have started an investigation because Ms. Kapesi was presumed not guilty.

Two days after Ms. Kapesi entered her plea, Warden Tanaka sent a letter to the Department of the Prosecuting Attorney requesting more information on Ms. Kapesi’s case because of her position as an ACO. This letter effectively began the investigation.

Therefore, the investigation was timely.

##### **3.2.4.1.2. Fair Investigation**

Ms. Kapesi next argues that she did not have the opportunity to address all allegations against her during the investigation; therefore, Ms. Kapesi believes the investigation was unfair.

According to the Inter-Office Memorandum sent to Ms. Kapesi on September 9, 2016, the investigation centered around an alleged failure to report her arrest; an alleged failure to report a conviction; and an alleged violation of the SOC and Policies and Procedures. Thus, Ms. Kapesi was aware that all these issues were included in the investigation.

Ms. Kapesi believes that the focus of the investigation was the issue of her possession of firearms. This issue is one of those issues raised in the conclusions of the Discharge Letter and is included in the investigative report, but it was not the only issue raised in the investigation.

Based on a review of the investigative questionnaire Ms. Kapesi completed and the Discharge Letter, the Board finds that Ms. Kapesi was aware of the relevant issues and allegations during the investigation and had an opportunity to address all relevant allegations. Therefore, the investigation was fair.

#### **3.2.4.1.3. Equal Treatment**

Ms. Kapesi's next argument is that she received unequal treatment compared to similarly situated employees. Ms. Kapesi presents the cases of two other ACOs who pleaded No-contest to felony charges. According to Ms. Kapesi, these two ACOs were not terminated.

However, the felony charges that those two ACOs pleaded No-contest to were related to felonies of driving under the influence and a violation of a place to keep firearms. These are not felonies related to injuring or threatening to injure another person. Therefore, the Board finds that these are not similar felonies.

The State Respondents put forth the case of another ACO who was arrested for Assault II and who was discharged. This felony is more like terroristic threatening because it involves injuring or threatening to injure another person.

Ms. Kapesi argues that the State Respondents should not be allowed to base discipline on the degree or type of criminal act committed and that "There should be a list of the different crimes that would constitute an automatic dismissal" so that the standard would "be black and white."

The Board finds that nothing in law requires the State Respondents to lay out a list of crimes that lead to an automatic dismissal or a black and white standard. The SOC lays out that, "the severity of a single violation may warrant immediate discharge." Based on the record, the Board finds that the severity of Ms. Kapesi's violation is similar to the severity of the violation of the ACO who was arrested for Assault II, and more dissimilar than the violations of the other two ACOs.

Thus, the Board finds that Ms. Kapesi was treated equally.

**3.2.4.1.4. Ms. Kapesi Has Not Proven a Prohibited Practice Under HRS § 89-13(a)(8)**

Based on the above, the Board must find that Ms. Kapesi has not proven that PSD wilfully violated the CBA when it terminated her. Thus, Ms. Kapesi's claim of an HRS § 89-13(a)(8) violation fails and must be dismissed.

**3.2.4.2. Breach of the Duty of Fair Representation; HRS § 89-13(b)(4)**

As noted above, the hybrid claim requires that the complainant succeed on both issues; if the complainant fails to prove one, the other cannot succeed. Given that the Board finds that PSD did not wilfully violate the CBA, the Board cannot find that UPW committed a prohibited practice by breaching its duty of fair representation owed to Ms. Kapesi.

Therefore, the Board dismisses the HRS § 89-13(b)(4) claim of a prohibited practice due to a breach of the duty of fair representation for lack of standing and makes no other findings as to this claim.

**3.2.5. HRS §§ 89-13(a)(1) and (b)(1); Derivative Violations**

Ms. Kapesi does not explicitly lay out how the Respondents violated HRS §§ 89-13(a)(1) or (b)(1). Therefore, the Board views these claims as "derivative" violations. Because Ms. Kapesi failed to prove that the Respondents committed any other prohibited practices, the Board must dismiss these derivative allegations.

**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, \_\_\_\_\_ February 2, 2022 \_\_\_\_\_.

HAWAI‘I LABOR RELATIONS BOARD

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MARCUS R. OSHIRO, Chair

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SESNITA A.D. MOEPONO, Member

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J N. MUSTO, Member

Copies sent to:

Jasmine L. Kapesi, Pro Se  
Miriam P. Loui, Deputy Attorney General  
Koshiba, Price & Gruebner

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<sup>1</sup> 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)].

<sup>2</sup> In this capacity, PSD is an Employer within the meaning of HRS § 89-2, which defines “employer” or “public employer” as:

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

<sup>3</sup> HRS § 89-6(a)(10) defines BU 10 as “Institutional, health, and correctional workers.”

<sup>4</sup> 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.