

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

FRANCINE K. GUZMAN,

Complainant,

and

HONOLULU POLICE DEPARTMENT, City  
and County of Honolulu; and HAWAII  
GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Respondents.

CASE NOS. 19-CE-03-925  
19-CU-03-371

ORDER NO. 3804

ORDER DENYING MOTIONS TO  
DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT

**ORDER DENYING MOTIONS TO DISMISS  
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

**1. Introduction**

Complainant FRANCINE K. GUZMAN (Ms. Guzman) filed her prohibited practice complaint (Complaint) alleging, among other things, that Respondent HONOLULU POLICE DEPARTMENT, City and County of Honolulu (HPD), committed a prohibited practice in the interview/selection process for the Secretary II position of the Communications Division, and that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA, and collectively with HPD, Respondents) declined to take her grievance regarding this process to arbitration. Each of the Respondents filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (Motions to Dismiss), based on various grounds and joined in the other's Motion to Dismiss.

After consideration of the Motions to Dismiss, the Hawai'i Labor Relations Board (Board) denies both Motions to Dismiss for the reasons explained below.

## 2. Background and Findings of Fact

Ms. Guzman, a member of bargaining unit 3<sup>i</sup> (BU 3), is an employee<sup>ii</sup> of HPD.<sup>iii</sup> HGEA is the exclusive representative<sup>iv</sup> for BU 3.

In 2018, Ms. Guzman applied for the Secretary II Position in the Communications Division of HPD, and she was not selected for the position. Based on this non-selection, HGEA filed a grievance on Ms. Guzman's behalf, which proceeded through the grievance process in the BU 3 collective bargaining agreement (CBA).

After HPD denied Ms. Guzman's grievance at Step 1 and Step 2, HGEA decided not to take the grievance to arbitration. HGEA informed Ms. Guzman of this decision by letter dated April 4, 2019.

Ms. Guzman filed her Complaint on April 16, 2019. In the Allegations section of her Complaint, Ms. Guzman alleges:

I have received a certified letter from HGEA on 4/8/19 declining the Arbitration against the Honolulu Police Department, due to insufficient evidence. We went through Step 1 and Step 2 of the Grievance Process and now HGEA has declined the Arbitration process of an Interview/Selection process for the Secretary II position of the Communications Division.

The Complaint includes, among other things, the following in the section for other relevant facts:

I have been denied 12 positions within the HPD for either a lateral or promotion for an internal application since 2011. In 2017 the Civil Service Commission granted my appeal for an unfair Interview/Selection process. In 2018, the HLRB granted my appeal and both the CSC and HLRB request a reinterview for the D8 PT&A position. On November 30, 2018 I attended a settlement hearing for a Federal lawsuit against the HPD for a Whistleblower and Retaliation case and I reinterviewed for D8 PT&A position. Again I received another regret to inform you letter for both and the Secretary II position for the Communications Division that HGEA declined to pursue the arbitration, due to insufficient evidence. I believe that this is continued retaliation by the HPD, which is against the settlement agreement and for HGEA for not supporting me as a union member.

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### 3. Discussion

Preliminarily, the Board notes that HPD's Motion to Dismiss shows some confusion as to the relevant issue in this case. HPD's Motion to Dismiss references, on multiple occasions, Ms. Guzman's non-selection to a District 8 Senior Clerk Typist position. While the Complaint references this non-selection in its "other relevant facts" section, it is not referenced in the "Allegations" section of the Complaint. Therefore, this non-selection to this position is not before the Board. Accordingly, any arguments raised in HPD's Motion to Dismiss that pertain only to the District 8 Senior Clerk Typist position are denied as irrelevant to this case.

#### 3.1. Genuine Issues of Material Fact

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. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 99 P.3d 1046 (2004). *See, e.g.*, Hawaii 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. University of Hawaii Professional Assembly et al., Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at \*18 (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, at \*22.

Respondents each moved for summary judgment in their pleadings. However, the Board finds that while the chronology of events is not in question, genuine issues of material fact exist due to questions about the motives behind the parties' actions. Ms. Guzman alleges in her Complaint that HPD is retaliating against her due to, among other things, prior proceedings before the Board. Therefore, the Board must examine HPD's motives in denying Ms. Guzman the Secretary II position.

Further, HPD has asserted that a settlement agreement bars Ms. Guzman from proceeding in this case. The relevance of such settlement agreement and the question of whether it may categorically and completely bar Ms. Guzman from exercising her Hawai'i Revised Statutes (HRS) Chapter 89 rights is another issue of material fact that the Board will need to determine after a hearing on the merits.

Accordingly, as there are genuine issues of material fact, summary judgment is not appropriate, and the Board denies both motions.

### 3.2. Motions to Dismiss Generally

The contents of the complaint serve as the basis for motions to dismiss for lack of subject matter jurisdiction, and, accordingly, 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 (<https://labor.hawaii.gov/hlrp/files/2021/07/Order-No-3781.pdf>) (*Jones*). The Board may dismiss a claim only 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. *Hawaii 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 has the burden of establishing that jurisdiction exists. *Jones*, at \*2. The Board may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. *Casumpang v. ILWU, Local 142*, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); *Right to Know Committee v. City Council, City and County of Honolulu*, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

### 3.3. Timeliness

The Board may only hear cases that it has jurisdiction over, and the Board's jurisdiction has been defined by both statute and the courts. See, HRS §§ 89-14, 377-9; *Aio v. Hamada*, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (*Aio*).

Under HRS § 377-9, the Board can only hear complaints filed within ninety days of the action that the alleged prohibited practice is based on. HRS § 377-9(1); *Aio*, 66 Haw. at 505 n. 3, 729 n. 3. The administrative rules governing the Board further include this ninety-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board has construed the limitations period strictly and cannot waive this limitations period, even by a single day. *Fitzgerald v. Ariyoshi, et al.*, Board Case Nos. CE-10-175; CU-10-43, Decision No. 175, at \*21-22 (July 29, 1983) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-175.pdf>). The ninety-day limit is jurisdictional and provided by statute, and neither the Board nor the parties may waive this requirement. *Hikalea v. Dep't of Env' Serv, City and County of Honolulu*, Case No. CE-01-808, Order No. 3023, at \*6 (October 3, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3023.pdf>). The ninety-day period starts when the complainant knew or should have known that their rights were being violated. *United Pub. Workers, AFSCME, Local 646 v. Okimoto*, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-443.pdf>).

Both Respondents have argued that the Complaint is untimely. The Board rejects these arguments as clear misstatements of law.

Ms. Guzman received notice of her non-selection to the Secretary II position in 2018. HGEA, on Ms. Guzman's behalf, filed a timely grievance alleging that this non-selection violated the CBA. The grievance process continued until HGEA determined that it would not take Ms. Guzman's grievance to arbitration, which it did by letter dated April 4, 2019. Ms. Guzman filed her Complaint on April 16, 2019, less than two weeks after the conclusion of the grievance process.

As the Respondents are well aware, because of the well accepted principle of exhaustion, Ms. Guzman would have been unable to file a valid prohibited practice complaint with the Board that alleged that HPD violated the CBA until after the parties completed the grievance process. *See, e.g., Hsiao v. Hawaii Government Employees Association*, Board Case No. 20-CU-08-383, Decision No. 498, at \*12 (October 14, 2020) (<https://labor.hawaii.gov/hlrp/files/2020/10/Decision-No.-498.pdf>); *see also Poe v. Hawaii Labor Relations Board*, 105 Hawai'i 97, 101-02, 94 P.3d 652, 656-57 (2004).

Therefore, under the relevant law, Ms. Guzman had ninety days from when she exhausted the grievance process for the non-selection to the Secretary II Position to file her Complaint. She did so.

Accordingly, the Board finds that the Complaint is timely.

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

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/hlrp/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. Therefore, the Board must view Ms. Guzman's complaint in the light most favorable to her to determine if the allegations in the complaint could warrant relief under any alternative theory. *Id.*

The Board follows the pleading standards established 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/hlrp/files/2020/03/Decision-No.-497.pdf>) (*Paio*). Therefore, 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.

All that is required for notice pleading under Hawai'i law is fair notice to the respondent of what the complainant's claim is and upon what grounds the claim rests. *Id.* Complainants are

not required to 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. Guzman’s Complaint contains such a short and plain statement of her claims. Indeed, the Allegations section of the Complaint plainly sets out her claim:

- Ms. Guzman was not selected for the Secretary II position of the Communications Division of the HPD;
- Ms. Guzman and HGEA grieved this non-selection;
- After HPD denied the grievance at Step 1 and Step 2, HGEA declined to take the grievance to arbitration.

Among the other relevant facts Ms. Guzman presents, she claims that HPD discriminated against her based, in part, on prior proceedings before HLRB.

Ms. Guzman is not required to plead alleged violations of specific sections of HRS § 89-13 for her Complaint to meet the notice pleading standard. Both of the Respondents acknowledge that Ms. Guzman’s allegations most closely mirror a “hybrid claim,” which consists of two parts: an alleged breach of the CBA by HPD (a prohibited practice under HRS § 89-13(a)(8)) and an alleged breach of the duty of fair representation by HGEA (a prohibited practice under HRS § 89-13(b)(4); *see* *Siu v. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO*, Board Case No. CU-04-291, Decision No. 505, at \*11 (June 14, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-505.pdf>)).

Further, Ms. Guzman’s allegations of discrimination by HPD in regard to the non-selection are clearly stated (*see* HRS § 89-13(a)(3) and (4)).

Accordingly, the Board denies both Motions to Dismiss for failure to state a claim.

#### **4. Order**

Based on the above, the Board denies both Motions to Dismiss, or in the Alternative for Summary Judgment. The Board will proceed to a hearing on the merits in this case and will amend its pretrial order to reflect future dates and deadlines.

DATED: Honolulu, Hawai‘i, \_\_\_\_\_ October 25, 2021 \_\_\_\_\_.

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:

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<sup>i</sup> HRS § 89-6(a)(3) defines bargaining unit 3 as, “Nonsupervisory employees in white collar positions.”

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

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

<sup>iv</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.