

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

In the Matter of

JOSEPH H. CAMPOS II, Ph.D.,

Complainant(s),

and

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY,

Respondent(s).

CASE NO(S). 19-CU-07-374

DECISION NO. 511

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 a Proposed Findings of Fact, Conclusions of Law, Decision and Order (Proposed Decision) in this case on June 17, 2022. The Proposed Order, among other things, found that Complainant JOSEPH CAMPOS II, Ph.D. (Complainant or Dr. Campos) did not meet his burden of proof at the hearing on the merits. The Proposed Decision further provides, 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.

No party filed Exceptions to the Proposed Order within the provided ten-day period.

Accordingly, the Board hereby adopts the Proposed Decision, filed on June 17, 2022 and attached to this Order as the Final Order in this case and dismisses Dr. Campos' complaint. This case is closed.

DATED: Honolulu, Hawai'i, June 28, 2022.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEONO, Member

J N. MUSTO, Member

Copies sent to:

Joseph Campos II, Ph.D.
David Sgan, Esq.

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

1. Proposed Introduction and Statement of the Case

Complainant JOSEPH CAMPOS II, Ph.D. (Complainant or Dr. Campos) filed this prohibited practice complaint (Complaint) with the Hawai‘i Labor Relations Board (Board) against Respondent UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union). In the Complaint, Dr. Campos alleges that UHPA breached the duty of fair representation owed to him, thus committing a prohibited practice under Hawai‘i Revised Statutes (HRS) § 89-13(b)(4) by violating HRS § 89-8 and that UHPA committed a prohibited practice under HRS § 89-13(b)(5) by wilfully violating the terms of the bargaining unit 7 (BU 7) collective bargaining agreement (CBA).

The Board heard UHPA’s Motion to Dismiss/Motion for Summary Judgment (MTD/MSJ) and took it under advisement before proceeding to the hearing on the merits (HOM).

At the HOM, Dr. Campos presented his case. After Dr. Campos rested his case, UHPA stated that it did not have any witnesses and rested their case.

Dr. Campos filed Supplemental Information approximately four months after the Board ended the HOM. UHPA filed a Motion to Strike, which Dr. Campos opposed.

After consideration of the entire record, including testimony, exhibits, pleadings, and argument, the Board issued Order No. 3729, a Minute Order that, among other things, found that Dr. Campos failed to carry his burden of proof and directing UHPA to file proposed findings of fact and conclusions of law. UHPA did so, and the Board now, in accordance with Order No. 3729, issues this proposed decision and order in this case.

However, the Board grants UHPA's Motion to Strike to the extent that the Board does not consider evidence that is not properly submitted at the HOM. However, the Board further notes that, even if the Supplemental Information was considered at an HOM, this would not have impacted the Board's decision as the Supplemental Information clearly indicates that Dr. Campos had an additional opportunity to contest UHPA's decision not to take his grievance to arbitration, which Dr. Campos utilized.

As its final decision, the Board denies UHPA's MTD/MSJ on all counts related to the alleged breach of the duty of fair representation. The Board grants summary judgment to UHPA as to the HRS § 89-13(b)(5) claim, finding that the material facts are in not in dispute regarding UHPA's alleged violation of the BU 7 CBA and that UHPA is entitled to summary judgment. Therefore, the Board finds that UHPA did not commit prohibited practices under HRS § 89-13(b)(5).

The Board further finds that Dr. Campos failed to carry his burden of proof as to the alleged breach of the duty of fair representation at the HOM, and, accordingly, finds that UHPA did not commit prohibited practices under HRS § 89-13(b)(4).

Any finding of fact or conclusion of law submitted by UHPA but not 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. Background and Findings of Fact

Until his termination on July 1, 2018, Dr. Campos was an employee¹ of the University of Hawai'i (UH or Employer)² and a member of bargaining unit 7³ (BU 7). UHPA is the exclusive representative⁴ for BU 7. UHPA and the relevant employer group⁵ for BU 7 are parties to a collective bargaining agreement (CBA) for BU 7.

On or about April 30, 2018, Dr. Campos filed a grievance alleging that UH violated several articles of the BU 7 CBA. UHPA declined to represent Dr. Campos for this grievance.

By a letter dated January 8, 2019, UHPA notified Dr. Campos that it would not send his grievance to arbitration.

After Dr. Campos appealed UHPA’s decision at a hearing on March 30, 2019, the UHPA Executive Board denied the appeal. UHPA notified Dr. Campos of this denial by a letter dated April 1, 2019.

3. Proposed Analysis and Conclusions of Law

3.1. Dispositive Motion

UHPA submitted the MTD/MSJ, which Dr. Campos opposed. Effectively, in the MTD/MSJ, UHPA argues that Dr. Campos lacks standing to bring this Complaint and that the Complaint fails to properly plead certain legal technicalities. The Board rejects both arguments.

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 Kapesi v. Dep’t of Pub. Safety*, Board Case Nos. 17-CE-10-908, 17-CU-10-359, Decision No. 510 at *6 (March 2, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/03/Decision-No.-510.pdf>) (*Kapesi*).

The Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint, but 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. *Id.* at *6-7.

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 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).

3.1.1. Failure to Properly Plead Arguments

First, the Board finds that UHPA’s arguments that Dr. Campos failed to properly plead a hybrid case—both in pleading the Employer’s alleged violation of the CBA and in pleading UHPA’s breach of the duty of fair representation—are wrong.

Initially, the Board notes that it is not bound by the Hawai‘i Rules of Civil Procedure (HRCP), and therefore, HRCP Rule 8(a) does not apply to this case. However, even under the standard set by HRCP Rule 8(a), the Hawai‘i Supreme Court (HSC) has explicitly rejected the pleading standard that UHPA advocates for. *Bank of Am., N.A. v. Reyes-Toledo*, 143 Hawai‘i 249, 252, 428 P.3d 761, 764 (2018) (“...this court has never adopted the *Twombly/Iqbal* ‘plausibility’ pleading standard, and we now expressly reject it.” (emphasis added)). In Hawai‘i

state courts, and before this Board, the traditional “notice pleading” standard governs to “provide[] citizen access to the courts and to justice.” Id.

Following the HSC’s lead, the Board also expressly rejects the plausibility pleading standard and reiterates that the notice pleading standard governs proceedings before the Board.

To comply with the notice pleading standard, the Board construes 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. *See 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) (Parker), *citing 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).

Under Hawai‘i law, a complainant only must give fair notice to the respondent of what the complainant’s claim is and what grounds support this claim. Kapesi, Decision No. 510, at *7. 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. Parker, Decision No. 502, at *54 (*citing Paio*, Decision No. 497 at *26-27).

The Board finds that Dr. Campos’ Complaint contains enough of a short and plain statement of his claims to provide UHPA with notice of his claim and the facts surrounding her claim. Therefore, the Board denies the MTD/MSJ on this claim.

3.1.2. Standing

The Board next rejects UHPA’s argument that Dr. Campos does not have standing to bring this case because his status as a public employee under HRS Chapter 89 ended on June 30, 2018.

Standing looks at whether parties have the right to bring a particular complaint or claim. Kapesi, Decision No. 510, at *8. In other words, without standing, a party cannot bring a valid complaint.

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). To that end, UHPA argues that Dr. Campos was no longer an employee under HRS Chapter 89 both when he filed this Complaint and when UHPA declined to take Dr. Campos’ grievance to arbitration. The Board rejects this proposition as plainly wrong.

By the time a grievance has worked its way through the process and a union has issued a notice that they do not intend to arbitrate the grievance, a significant amount of time may pass. In

this case, Dr. Campos initiated his grievance on April 30, 2018 and was terminated on July 1, 2018, and UHPA did not issue its final notice to him that it would not take his grievance to arbitration until April 1, 2019.

A hybrid case consists of two parts—an employer’s alleged breach of the CBA and a union’s alleged breach of the duty of fair representation in processing the grievance arising from the employer’s alleged breach. Poe v. Hawaii Labor Relations Board, 105 Hawai‘i 96, 101-02, 94 P.3d 652, 656-57 (2004) (Poe II). Under the principle of exhaustion, the employee cannot file a valid prohibited practice complaint alleging a hybrid case until all administrative remedies are exhausted. Poe v. Haw. Lab. Rels. Bd., 97 Hawai‘i 528, 531, 40 P.3d 930, 933 (2002) (Poe); Poe II, 105 Hawai‘i at 101, 94 P.3d at 656.

Taking these facts together, when considering the issue of standing, the Board must look at whether the complainant was a public employee on the relevant date when the injury began. In this case, Dr. Campos’ grievance alleges violations of the CBA, with “the most recent incident occurring on April 13, 2018.”

UHPA does not dispute that Dr. Campos was a public employee on April 13, 2018, when this alleged injury occurred, and when he filed his grievance on April 30, 2018. These dates serve as the relevant dates for the Board to consider regarding standing to bring a hybrid case or for claims related to a hybrid case.

Dr. Campos was a public employee on the “trigger date” for this claim. The fact that Dr. Campos’ status as a public employee changed while the events in this case continued is irrelevant.

The Board has consistently decided cases where the complainant was no longer a public employee when the complaint was filed. *See, e.g., Kapesi*, Decision No. 510, at *5-6 (where the Employer terminated the Complainant and the grievance process continued for over ten months after the Complainant’s termination before the Union notified the Complainant that it would not take the grievance to arbitration; and *Caspillo*, Decision No. 509, at *3-5 (where the Employer terminated the Complainant and the grievance process continued for over a year after the Complainant’s termination before the Union notified the Complainant that it would not take the grievance to arbitration).

The Board, accordingly, refuses to adopt a position that a Union bears no duty of fair representation to a former member when a grievance—filed while that individual was still a bargaining unit member—is still pending. To find otherwise could lead to a situation where a Union summarily refuses to take any discharge case to arbitration once the discharge becomes final. The Board denies the MTD/MSJ on this claim.

3.1.1. Failure to Name Indispensable Party

UHPA further argues that Dr. Campos failed to name an indispensable party because he failed to name UH, the Employer. The Board disagrees.

No one disputes that UH is the relevant Employer for this matter or that arbitration would require the assent of both UH and UHPA. However, this case is based on Dr. Campos' allegation that UHPA breached its duty of fair representation and that UHPA violated the BU 7 CBA—neither of which require the Employer's presence.

While the alleged breach of the duty of fair representation implicates the Employer due to the “hybrid case” established by the HSC, the law is clear that an employee may, if they choose, bring a claim against only the Union and not the Employer. Poe v. Hawaii Labor Relations Board, 105 Hawai'i 96, 102, 94 P.3d 652, 657 (2004) (Poe II). While choosing to pursue a claim against one, rather than both, actors does not change the two-pronged case that the employee must prove, the law permits the employee to make that decision. Id.

Further, while the Board acknowledges that UH would need to consent to any arbitration if the notice of intent to arbitrate was withdrawn, this does not make UH an indispensable party in this case. While it may not be successful, UHPA can pursue arbitration through a request to UH to reopen the arbitration process.

UH has the right to claim an interest in this case, and it has not done so. Dr. Campos has the right to bring a claim against UH in this matter, and he has not done so. Accordingly, the Board finds that UH is not an indispensable party and denies the MTD/MSJ on this claim.

3.1.2. Timeliness

HRS § 377-9 sets forth a requirement that 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 v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio). The administrative rules governing the Board proceedings further include this ninety-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Haw. State Teachers Ass'n v. Hayashi, Board Case No. CE-05-661, Order No. 3855, at *3, (June 7, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/06/Order-No.-3855.pdf>) (Hayashi). This jurisdictional ninety-day limit begins when the complainant knew or should have known that his rights were being violated and is set by statute; neither the Board nor the parties may waive this requirement. Caspillo v. Dep't of Transp., Board Case Nos. 17-CE-01-899, 17-CU-01-355, Decision No. 509, at *6 (November 22, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/11/Decision-No.-509.pdf>) (Caspillo).

The Board rejects UHPA's argument regarding the timeliness of the Complaint and UHPA's attempt to utilize the Board's order in a separate case to adjudicate this case.

In Campos v. Univ. of Haw. at Mānoa, Board Case Nos. 18-CE-07-917, 18-CU-07-362, Order No. 3455A, at *8-9 (April 24, 2019) (<http://labor.hawaii.gov/hlrp/files/2022/06/Order-No.-3455A.pdf>) (Campos I), the Board, among other things, found that Campos' demand for UHPA to represent him in his grievance and UHPA's denial of such representation constituted discrete, qualifying events for the purpose of considering a prohibited practice complaint for a breach of the duty of fair representation.

Effectively, the question before the Board in Campos I regarding UHPA was whether UHPA was required to help Dr. Campos and help him during the grievance process. Id., at *12-13. The Board concluded that UHPA had no duty to participate in the grievance process until they made the determination of whether to take the grievance to arbitration. Id., at *13.

The instant Complaint is a separate case dealing with a separate issue and claim. This case has nothing to do with the question of whether UHPA was required to participate in Dr. Campos' grievance prior to deciding whether to take the grievance to arbitration. Rather, this case deals with UHPA's decision to refuse to take the grievance to arbitration.

The discrete "trigger" event in this case was UHPA's denial of arbitration on April 1, 2019. The ninetieth day from this event was June 30, 2019, which is a Sunday. Under HAR § 12-42-8(c)⁶, Dr. Campos had until July 1, 2019 to file his Complaint. The instant Complaint was filed on July 1, 2019. Therefore, the Complaint is timely, and the Board denies the MTD/MSJ on this claim.

3.1.3. Summary Judgment

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. Caspillo v. Dep't of Transp., Board Case Nos. 17-CE-01-899, 17-CU-01-355, Decision No. 509, at *6 (November 22, 2021) (Caspillo).

UHPA effectively asks for summary judgment on the HRS § 89-13(b)(5) issue in this case. Upon review of the Complaint, the Board must concur.

The material facts are not in dispute in that the BU 7 CBA and the Complaint states what they state. Dr. Campos has not specifically identified any section of the BU 7 CBA that UHPA allegedly violated. Rather, the Complaint speaks to interference with Dr. Campos' rights under the CBA, which are properly considered as an alleged breach of the duty of fair representation.

Accordingly, the Board grants summary judgment to UHPA as to the HRS § 89-13(b)(5) issue.

3.2. Motion to Strike

The Board generally does not strike relevant information from the record, and the Board is not bound by the HRCP, as explained above. Therefore, UHPA's HRCP Rule 12(f) motion is improper.

However, the Board has determined that it does not consider evidence in a closing memorandum that was not properly submitted at the HOM. *See Varney v. Univ. of Haw. Prof'l Assembly*, Board Case No. CU-07-106, Decision No. 369, at *3-4 (September 21, 1995) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-369.pdf>). Thus, the Board disregards evidence not properly introduced into the record during the hearing and does not consider the Supplemental Information in its final deliberations.

The Board further notes that, even if the Supplemental Information was considered at an HOM, it provides no substantial new evidence. This Complaint arises from UHPA's final decision not to take Dr. Campos' grievance to arbitration, which occurred after Dr. Campos appealed the preliminary decision. The Supplemental Information references Dr. Campos' right to appeal the decision, "with dates being considered in March and early April 2019." Therefore, the Supplemental Information, even if considered, would not make a material impact on the Board's decision.

3.3. Burden of Proof

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 his case-in-chief, Dr. Campos must produce evidence and persuade the Board that it is more likely than not that UHPA breached its duty of fair representation.

Thus, if Dr. Campos has not provided enough evidence and legal argument to succeed on a claim after he finishes presenting his case, the Board must find that he failed to carry his 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>).

3.4. Breach of the Duty of Fair Representation

The Board can find a breach of the duty of fair representation only if UPW's conduct towards Dr. Campos was arbitrary, discriminatory, or in bad faith. *Poe II*, 105 Hawai'i at 104, 94 P.3d at 659. To determine which of these three elements apply, the Board has adopted a two-step

analysis, first looking at whether the alleged union misconduct involved the union's judgment or whether it was 'procedural or ministerial.' Mamuad, Order No. 3337F, at *31.

3.4.1. Procedural or Ministerial Acts – Arbitrariness

The "arbitrary" prong of a breach of the duty of fair representation controls only when looking at procedural or ministerial union conduct. Caspillo, Decision No. 509, at *12. For consideration under this prong, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the conduct; the act must have been in reckless disregard of the employee's rights; and it must prejudice a strong interest of the employee. Id. Mere negligence does not rise to the requisite level of arbitrariness. Id.

Dr. Campos alleges that UHPA merely provided the pretense of due process and, thus, acted arbitrarily. The Board must disagree.

As noted in Campos I, Order No. 3455A, at *12-13, UHPA had no obligation to participate in the grievance process until UHPA needed to decide whether to arbitrate the grievance. Therefore, in this case, the Board considers whether UHPA provided sufficient due process when considering Dr. Campos' request to arbitrate.

Unions' actions are not considered perfunctory unless those actions treat the union member's claim so lightly as to suggest an "egregious disregard" of their rights. Mamuad, Order No. 3337F, at *32. An employee has no absolute right to have a grievance taken to arbitration, and the fact that an underlying grievance was meritorious is not sufficient to establish a breach of the duty of fair representation. Id., at *31.

If the union undertakes at least some "minimal investigation" of a grievance before making its decision as to whether to arbitrate the grievance, the union has not acted perfunctorily. Caspillo, Decision No. 509, at *12 (*citing* Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at *13 (October 27, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3028.pdf>) (Emura). The particular facts of the case define the requisite thoroughness of the investigation. Id.

UHPA determined that, in his grievance, Dr. Campos was seeking a remedy that UHPA was outside the BU 7 CBA's scope. Prior to the filing of his grievance, UHPA's outside counsel provided a position statement as to the subject of Dr. Campos' grievance. The Board finds that this determination was not one made perfunctorily or without judgment. UHPA researched the issue even before Dr. Campos filed his grievance.

After Dr. Campos' grievance proceeded through Step 1 and Step 2, UHPA determined that, in addition to the issues raised prior to Dr. Campos filing the grievance, there were concerns about the timeliness of Dr. Campos' complaint. UHPA did not solely rely on the concerns that

they raised about the subject of Dr. Campos' grievance; it conducted an additional review of the grievance itself. By doing so, UHPA did not perfunctorily process the grievance and did not breach the duty of fair representation in an arbitrary manner.

3.4.2. Acts of Judgment – Discrimination and/or Bad Faith

Decisions about how to pursue a particular grievance, including whether to arbitrate a grievance, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Tupola, Order No. 3054, at *28; *see also* Mamuad, Order No. 3337F, at *31.

The union must retain discretion to act in what it believes to be their members' best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation is narrowly construed, and the Board must be deferential in substantively examining UHPA's performance. Caspillo, Decision No. 509, at *14. The Board is not considering whether UHPA made the right decision; rather, the Board is only asking whether UHPA made its decision rationally and in good faith. Emura, Order No. 3028, at *15-16.

3.4.2.1. Discrimination

The Board has not adopted a strict standard for discrimination in the context of a breach of the duty of fair representation, but the Board has noted that discrimination is not restricted by impermissible or immutable classifications like race or other constitutionally protected categories. Caspillo, Decision No. 509, at *14. In addition to constitutionally protected categories, a union cannot discriminate against an employee based on union membership or if discrimination comes from prejudice or animus. Id.

To prove discriminatory conduct, the complainant must show substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad, Order No. 3337F, at *37.

The Complaint does not specifically lay out a reason for any discrimination. To the extent that Dr. Campos raises the issue of UHPA asserting that it did not owe Dr. Campos a duty of fair representation, the Board finds that Dr. Campos has not provided substantial evidence of discrimination based on this position.

While the Board has concerns about UHPA's position, as addressed above, the evidence before the Board does not show that this position impacted UHPA's decision not to take Dr. Campos' grievance to arbitration. Therefore, the Board finds that UHPA did not breach its duty of fair representation owed to Dr. Campos in a discriminatory manner.

3.4.2.2. Bad Faith

The bad faith element requires the Board to subjectively determine if the union acted (or failed to act) due to an improper motive. Tupola, Order No. 3054, at *34. The complainant must corroborate any assertions of the requisite state of mind with subsidiary facts and must show substantial evidence of fraud, deceit, or dishonest conduct. Id. If a complainant fails to present subjective evidence of an improper motive and merely suggests that an improper motive is the only “reasonable explanation” for the conduct, the complainant fails to prove their case. Emura, Order No. 3028, at *15.

Dr. Campos argues, among other things, that UHPA’s position that it did not owe Dr. Campos a duty of fair representation, is proof of an improper motive and bad faith. However, as discussed above, the evidence before the Board does not show that this position impacted UHPA’s decision about Dr. Campos’ grievance. Therefore, the Board finds that UHPA did not breach its duty of fair representation owed to Dr. Campos in bad faith.

Accordingly, the Board must find that Dr. Campos failed to carry his burden of proof to show a breach of the duty of fair representation.

4. Proposed Order

Based on the above, the Board denies UHPA’s MTD/MSJ on all counts related to the alleged breach of the duty of fair representation; grants summary judgment to UHPA on the HRS § 89-13(b)(5) claim; and finds that Dr. Campos failed to carry his burden of proof to show that UHPA breached its duty of fair representation owed to Dr. Campos. 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 17, 2022 _____.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Joseph Campos II, Ph.D.

David Sgan, Esq.

¹ 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)].

² In this capacity, UH 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...

³ HRS § 89-6(a)(7) defines BU 7 as, “Faculty of the University of Hawaii and the community college system.”

⁴ 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.

⁵ HRS § 89-6(d)(4) sets out the employer group for BU 7 as:

(4) For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote.

⁶ HAR § 12-42-8(c) reads:

In computing any period of time prescribed or allowed by these rules or order of the board, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday...