STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant(s), and GOVERNING BOARD OF KANUIKAPONO CHARTER SCHOOL; and JADE DANNER JONES, Chairperson, Board of Directors, Kanuikapono Charter School, Respondent(s).	CASE NO(S). 19-CE-03-928 DECISION NO. 513 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

1.1. Hawai‘i Charter School Law

Hawai‘i’s charter schools are a creation of the Hawai‘i State Legislature. *See* 1999 Haw. Sess. Laws Act 62, § 1 (Act 62 or the Act), which is currently recodified as Hawai‘i Revised Statutes (HRS) Chapter 302D. In Act 62, the Hawai‘i charter schools were called “new century charter schools” and defined as schools that utilize an alternate educational framework and are governed by a governing board that is independent from those provided by the Hawai‘i public school system. The Act was intended to be a comprehensive charter school law, which not only provided for the formation but also accountability of that charter school for the academic performance of their students.

The Act established two basic types of charter schools, conversion (existing public schools that converted to independent charter schools) and start-ups (newly created schools). While the Act specifically made new century charter schools subject to collective bargaining under HRS Chapter 89, disputes and misunderstandings remained as to the coverage of specific charter schools and employees and the application of collective bargaining agreements.

The current recodification of Act 62 clearly provides that HRS Chapter 89 applies to all charter schools. HRS § 302D-25(a).[1] Despite this clarity of coverage, the independent character of charter schools continues to raise controversies under HRS Chapter 89 like this one regarding the relationships of the charter school, their employees, and the exclusive representative.

1.2. Prohibited Practice Complaint

On May 7, 2019, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, LOCAL 152, AFL-CIO (Complainant, HGEA, or Union) filed this prohibited practice complaint (Complaint) with the Hawai‘i Labor Relations Board (Board) against Respondents KANUIKAPONO CHARTER SCHOOL[2] (School) and Governing Board Chair JADE DANNER JONES (Danner Jones, Chair, or Respondent) claiming, among other things, that Respondents prohibited and discouraged bargaining unit 3 (BU 3) members from communicating with the Union about working conditions at the School and from inquiring about their collective bargaining agreement rights.

Further, HGEA asserted that Respondents retaliated and harassed these members by unduly restricting and punishing them for exercising their HRS Chapter 89 and collective bargaining agreement (CBA) rights for communicating with the Union and exposing deficiencies and possible criminal conduct. HGEA argued that Respondents' alleged discrimination, harassment, and punishment included locking email accounts, changing of duties, and directives from the Governing Board Chair in wilfull violation of HRS §§ 89-3, 89-8, and 89-13(a)(1), (2), (3), (4), (7), and (8).[3]

Respondents filed a motion to dismiss the Complaint (MTD) arguing that the HRS § 89-13(a)(8) claim should be dismissed for failure to exhaust contractual remedies and for the Board's lack of jurisdiction over the Respondents. HGEA opposed the Motion to Dismiss.

The Board held a hearing on the Motion to Dismiss. HGEA orally moved to amend the Complaint to substitute the Governing Board for the School as a Respondent, which Respondents did not oppose. The Board orally granted substitution of the Governing Board for the School without requiring the filing of an amended complaint[4] and denied the MTD. The parties filed a stipulation substituting the GOVERNING BOARD OF KANUIKAPONO SCHOOL (Governing Board or Respondent, and collectively with Danner Jones as Respondents) for the School as a named Respondent.

1.3. Issues

Based on the Complaint, the issues in this case are:

1. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(1) by their conduct discouraging School BU 3 members from raising

issues and filing grievances, directing and making statements not to communicate with the Union, and direct dealing in interference with the rights of School BU 3 employees protected by HRS § 89-3;

2. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(1) by their conduct and statements discouraging BU 3 members from communicating with the HGEA and refusing to respond to HGEA's request for Danner Jones to cease and desist from sending emails directing and admonishing School BU 3 members unless HGEA produced the emails, in interference with HGEA's right to act for and negotiate agreements and to fairly represent School BU 3 as the exclusive representative and the School BU 3 members' rights to fair representation protected by HRS § 89-8(a);

3. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(2) by dominating, interfering, or assisting in the formation, existence, or administration of an employee organization in interference of their HRS Chapter 89 rights;

4. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(3) by discriminating with respect to any term and condition of employment to encourage or discourage membership in the HGEA based on any of this alleged misconduct;

5. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(4) by any of this alleged misconduct discriminating against a BU 3 employee(s) because the employee(s) informed, joined, or chose to be represented by the HGEA based on any of this alleged misconduct; and

6. Whether Respondents committed a prohibited practice under HRS § 89-13(a)(7) by violating HRS §§ 89-3 and 89-8(a) for any of this alleged misconduct.

1.4. Statement of the Case

The Board held hearings on the merits (HOMs) on the Complaint on November 14-15, 2019, and on January 7-9, 2020. The parties agreed that the audio recording was the official record of the proceedings.

On November 21, 2019, the Board informed the parties that the audio recording inadvertently malfunctioned, so there was no official record of the November 14, 2019 proceedings, which included the testimony of Danner-Jones and Desiree Peterson (Peterson). At

the January 7, 2020 HOM, the parties agreed that the HGEA would proceed with its case and decide whether to recall Danner Jones.

During the HOMs, the HGEA called Peterson, Kanoe Ahuna (Ahuna), Denby Dawson (Dawson), Lainie Kainoa Wojak (Wojak), Lavaia Naihe (Naihe), Susan Chandler (Chandler), and Kaulana Finn (Finn). Respondents called Danner Jones and Shane Cobb-Adams (Cobb-Adams).

After the HGEA rested its case, Respondents made an oral motion to dismiss without argument. HGEA opposed the oral motion based on the evidence. After a hearing, the Board took the oral motion to dismiss under advisement.

After a full and complete review of the record, the Board issues the following findings of fact and conclusions of law. Any finding of fact improperly designated as a conclusion of law is deemed or construed as finding of fact; and any conclusion of law improperly designated as a finding of fact is deemed or construed as a conclusion of law.

2. Background and Findings of Fact

2.1. Parties

2.1.1. Exclusive Representative

For the relevant time, HGEA was an employee organization[5] and the exclusive representative[6] for BU 3 (nonsupervisory employees in white collar positions) under HRS § 89-2. In that capacity, HGEA represented the School employees, who were members of BU 3.

For the relevant time, Finn and Dale Shimomura (Shimomura) were HGEA business agents on Kauaʻi, and Gerald Ako (Ako) was the HGEA Kauaʻi Division Chief.

2.1.2. Employer

For the relevant time, Kanuikapono was a new century charter school under HRS Chapter 302D, located on the island of Kauaʻi. As a charter school, Kanuikapono is subject to HRS Chapter 89. *See* HRS § 302D-25(a)(1).[7]

Under HRS § 89-10.55(b),[8] the Governor of the State of Hawaiʻi is the public employer for BU 3 for the purpose of negotiating a collective bargaining agreement (CBA). *See* HRS § 89-6(d)(1).[9] Under HRS § 89-2, the employer is the Governor and any individual who represents an employer or acts in their interest.

The Governing Board is independently authorized to manage and determine the organization of the School, negotiate supplemental collective bargaining agreements with the exclusive representative of their employees, and is considered the employer of the School employees for purposes of HRS Chapter 89. *See* HRS §§ 89-10.55(c),[10] 302D-1,[11] 302D-12(f)[12]and 302D-25(a)(1)(A).[13]

Since October 2018 and for the relevant time, Ahuna was the Executive Director (ED) of the School responsible for collective bargaining. Lawaia Naihe was an interim and full-time Deputy Director of the School since April 2019.

For the relevant time, School Administrative Services Assistant (SASA) Dawson, School Office Assistant Peterson, and School Health Aid Wojak, were School employees and members of BU 3.[14]

When the Complaint was filed, Danner-Jones was the Chair of the Governing Board of Kanuikapono.

2.2. Agreements Affecting the School

Although charter schools do not vote on the BU 3 Master Agreement (BU 3 CBA), the BU 3 CBA is applicable to BU 3 School employees based on the Hawai‘i State Public Charter School Commission (Commission) contract requiring the School to abide by applicable collective bargaining agreements.

2.3. Commission Action and Federal Bureau of Investigation (FBI) Subpoenas

Before March 2018, the Commission removed the School governing board and placed the executive director at the time on administrative leave pending investigation for allegations of nepotism, infighting and factions, and unresolved Commission notices of concern.

In August 2018, the Commission put in place a three-member transition board (Transition Board) until December 2018 and gave the Transition Board a list of things to address unresolved notices of concern. The Transition Board meetings were heated and attended by community, staff, and parents.

The Transition Board Treasurer Becky Santos (Santos) handled compliance with School staff members Peterson and Dawson working overtime.

During the Summer of 2018, the FBI issued subpoenas to the School (FBI Subpoenas) for ten years of records as part of an investigation into the nonprofit.

The Transition Board hired Ahuna as ED during this difficult and challenging time for the School. After taking over, Ahuna had no control over the financial situation, the records, and information required for the FBI Subpoenas and the notices of concern because of issues with Santos.

Ahuna sought help from the Commission with her problems with the Transition Board and from the HGEA. HGEA representatives came to the campus twice to address their members' concerns.

After their appointment, the Governing Board began to address the notices of concern, staff confusion and turnovers, accounting systems, and general dysfunction. At the December 2018 Governing Board meeting, Ahuna requested more control, oversight, and assistance with handling the financials for the FBI Subpoenas and notices of concern.

Between December 2018 and January 2019, Chair Danner Jones took over the financials and compliance with the FBI Subpoenas and told Peterson and Dawson to stop work on the FBI Subpoenas.

In February 2019, Treasurer Cobb-Adams began assisting with the financials, Vice-Chair Derek Green (Green) began assisting with human resources (HR), and John Kaohelaulii began assisting with facilities.

DOE withheld the March through May 2019 School funding because of Commission concerns and Title I funding because of paperwork.

2.4. Danner Jones' and Ahuna's Issues with HGEA Members

2.4.1. Wojak

Wojak was the HGEA Shop Steward at the School.

In January 2019, Danner Jones and Ahuna began having problems with Wojak acting without authorization and appropriate approval, which included requesting attendance at a training class directly from the Attorney General's Office, testifying before the Commission, and implementing a food practice.

Wojak referenced a confidential Governing Board document in a harassment claim against another employee and copied, among others, the HGEA, School employees, the Commission Executive Director, and a community member. Ahuna notified Wojak that this disclosure violated both confidentiality and Ahuna's previous directive to report staff complaints only to her, that continued disregard of her directives could constitute insubordination subject to discipline, that a formal investigation into her possession and distribution of the confidential

document would be done, and that Wojak had a right to have Union representation for the investigation.

Wojak forwarded Danner Jones' and Ahuna's communications about these incidents to HGEA and complained that these communications were reprimands, attacks, and examples of a hostile environment.

Wojak interpreted Ahuna's direction to address staff concerns to her as being told not to go to the Union. Wojak felt intimidated from exercising her union rights, that her work environment was hostile, and that employees were discouraged from raising employment concerns and being involved in grievances because of retaliation.

2.4.2. Dawson and Peterson

At Ahuna's request, Danner Jones began assigning, directing, and monitoring Dawson's and Peterson's progress on various administrative and financial tasks and projects.

2.4.2.1. Work on FBI Subpoenas

After joining the Governing Board, Danner Jones negotiated a more limited scope for the FBI information and directed that Peterson and Dawson work on the FBI Subpoenas only during work hours and not on overtime. Danner Jones made Peterson's primary assignment the FBI Subpoenas and instructed Peterson and Dawson in the financial documentation.

Danner Jones, Ahuna, Dawson, and Peterson met to review and set deadlines for the tasks necessary for compliance with the FBI Subpoenas. During these periodic checks, Danner Jones and Ahuna mentioned the HGEA disrespectfully to Dawson and Peterson.

2.4.2.2. Work on School Enrollment Process

In March 2019, the School began working on the enrollment process and the lottery system. Ahuna asked Dawson to work on making the enrollment process comply with School policies.

Danner Jones, Peterson, Dawson, Ahuna, Audry Kuhaula, and Cobb-Adams met to discuss the alignment of enrollment procedures and policies. Dawson and Peterson disagreed with Danner Jones over the process for adopting new policies and the admissions policy and process.

Dawson contacted Sylvia Silva (Silva) from the Commission for clarification on the School's approved admissions policy. Silva notified Danner Jones that another notice of concern would be sent if the School was not following the policies.

Danner Jones emailed Dawson that she should raise the issue internally with Danner Jones before going outside the School, that she was displeased with Dawson contacting the Commission, and that Ahuna was the School's authorized representative to communicate with outside organizations. Dawson viewed the emails as belittling.

On March 21, 2019, Shimomura informed Ahuna that Danner Jones should cease and desist from emailing directives and admonitions to Dawson and other staff. Ahuna responded by requesting copies of the referenced emails. Shimomura responded by threatening to file a complaint with the Board if Danner Jones failed to cease and desist. Danner Jones emailed Shimomura informing him that they were unable to respond because he failed to produce the emails, and the Governing Board is responsible for policy and administrative functions.

2.4.2.3. Meetings on the FBI Subpoenas and Other Work Assignments

In April 2019, Danner Jones assigned Peterson to Dawson's SASA duties. Dawson felt that Danner Jones was operating without consulting the Governing Board in changing Dawson's daily job duties and assignments, monitoring her emails, and in replacing Ahuna as ED during Ahuna's vacations.

On April 17, 2019, Danner Jones, Ahuna, Peterson, Dawson, and Cobb-Adams met to discuss tasks and deadlines, including the FBI Subpoenas. Danner Jones told Dawson and Peterson to communicate with her or Ahuna and not the Union about any School issues, including union or collective bargaining issues. Danner Jones told them that Union involvement was only for unresolved issues. Cobb-Adams stated that it was easier to clean the slate of all employees, who go to the union for everything. Dawson was frustrated by being given tasks not within her job duties and walked out of the meeting.

After the meeting, Peterson consulted with Finn about what Danner Jones was permitted to do about her job duties and assignments and reported the Governing Board's lack of respect for the HGEA. She forwarded Danner Jones' emails regarding work assignments and instructions to Finn. She also informed Stacy Moniz (Moniz) of Danner Jones' statements not to go to the Union for any reason, and her feelings of retaliation. Ako requested Ahuna to address Dawson's concern regarding Governing Board policies.

At a meeting two weeks later with Ahuna, Dawson, Danner Jones, and Peterson, Cobb-Adams with Danner Jones' agreement repeated that there should be compliance with the School chain of command before going to the HGEA.

At an April 23, 2019 meeting, Danner Jones was dissatisfied with Dawson's failure to complete assigned tasks. Dawson got upset with Danner Jones for yelling, giving her directions, assigning tasks outside of her job responsibilities, and failing to keep her informed about the notices of concern.

Later, Dawson overheard Ahuna state that the School did not need to hire people who keep going to the Union.

On April 25, 2019, Moniz informed Danner Jones that he was troubled by the emails between the School and the HGEA members because of misunderstandings and contradictions of the communication protocols. Danner Jones' response invited HGEA to provide training or professional development opportunities, input, and consulting on the School's reorganization.

At an April 26, 2019 meeting, the Governing Board acknowledged that the School is bound by the HGEA CBAs.

On April 26, 2019, Danner Jones accessed the School's Hawaiian Airlines account on Dawson's School email account by resetting the password and temporarily locking Dawson out of her School email account. Danner Jones restored Dawson's access on the following day.

Dawson informed Ahuna that she would seek Union assistance because Danner Jones was creating a hostile work environment.

On April 30, 2019, Peterson complained to Finn about retaliation based on Danner Jones' changing Peterson's job duties and her anger and verbal abuse.

In May 2019, Dawson notified Ahuna that she perceived Danner Jones' conduct as personal attacks and began calling in sick. Dawson was put on paid temporary leave pending investigation.

Moniz contacted Ahuna and demanded Dawson's immediate reinstatement. He notified her that Finn would be attending a meeting on the issue, and that in the future, HGEA should be given written notice of an action or interview. Ahuna responded that Dawson was placed on temporary leave with pay based on Dawson's wish to not show up for work because of the hostility.

On May 2, 2019, Ahuna, Green, Dawson, Cobb-Adams, Finn, and Ako met to address Dawson's concerns of hostile work environment and the changes to her job description and duties. Ahuna characterized the interactions between Dawson and Danner Jones as disagreements. At the meeting, Finn took the position that changes in job description or condition of work were subject to consultation with the Union. Cobb-Adams stated that the School did not have to follow the HGEA CBA because the Governing Board was the employer.

Following the May 2, 2019 meeting, Green responded to Dawson's concerns from the meeting. He found no hostile environment existed, the Chair or her designee was able to direct staff on behalf of the Governing Board to support the ED and achieve School goals, and that Dawson had been unwilling to perform certain duties claimed to be outside of her job description and be directed by anyone other than the ED. Green decided that Dawson be placed on paid

leave until her return to work on May 8, 2019, when Ahuna and Dawson would review Dawson's job description and assignments with a Union representative present. Finally, Green informed HGEA that any further objections to the Governing Board's authority regarding the School's daily operations and direction of personnel should be raised with the School's Deputy Attorney General.

Finn responded that she would be present at this meeting and demanded that Dawson's paid administrative leave be rescinded and she be placed on fulltime status under the ED's direction and supervision.

On May 3, 2019, Peterson contacted Moniz to complain and inquire about how to handle Danner Jones telling her not to go to the Union and her feelings of retaliation.

On July 10, 2019, Dawson resigned from School employment and filed a grievance based on a hostile work environment.

2.4.3. Statements Made to Naihe About the HGEA Situation at the School

During the Summer of 2019, Naihe had discussions at least twice a week with HGEA bargaining unit members about wanting to quit their School employment because of feelings of retaliation and intimidation by the Governing Board.

During this time, Danner Jones stated twice to Naihe that she would fight the union on all School issues and that unions should be out of the charter schools.

3. Analysis and Conclusions of Law

3.1. Witness Credibility

In assessing witnesses' credibility, the Board primarily relied on witness demeanor, the context and consistency of the testimony, and the quality of the individual witness' recollections. The Board also considered whether any evidence corroborated or refuted the testimony and the weight of such evidence. The Board further looked at established or admitted facts, inherent probabilities, and reasonable inferences that can be drawn from the entire record. In making these assessments, the Board noted that it believed some, but not all, of a witness' testimony. Most of the credibility determinations regarding the witnesses' testimony are incorporated into the findings of fact above.

The Board generally found most witnesses to be straightforward and credible and accepted their testimony to the extent their testimony is consistent with the findings of fact.

Peterson was a partially credible and partially not credible witness. While Peterson had a general recollection of the events that she was involved in, her recollection was confusing regarding the timeline and the specific statements made. However, she did have a clear recollection regarding the meetings that she attended with Danner Jones and Ahuna. She was less credible in her testimony that she was only a witness to Danner Jones' targeting of Dawson for reprimands and disagreements and not a target because this position is inconsistent with her resignation from her School employment. In addition, her response to the HGEA's representative's question regarding Cobb-Adams statement that they should clean the slate of employees going to the Union was not as convincing as other witnesses. On direct examination of Peterson, the HGEA representative, at times, suggested answers by using leading rather than open-ended questions, such as asking whether she contacted the Union and feared retaliation, and whether she felt that the HGEA was disrespected after Danner Jones became Governing Board Chair. Finally, Peterson's testimony regarding when Cobb Adams made the statement that the School does not have to comply with the HGEA CBAs and could create their own contracts was simply confusing.

Both Naihe and Ahuna were credible and honest witnesses, and their testimony is largely credited. Ahuna tended to focus her testimony on the challenges and difficulties that she encountered when she assumed the School ED position.

Dawson's testimony was partially credible and partially not credible. Her testimony was often vague and confusing, and statements were made in generalities. To add to the confusion, Dawson had poor recall of specific details on events. For example, she could not recall the length of time that she was locked out of her computer and the length of her leave. Her testimony regarding Danner Jones' retaliation and harassment were also lacking in detail and at times exaggerated. This testimony regarding Danner Jones' retaliation and harassment was based more on her feelings about Danner Jones' manner and tone, which albeit was relevant, and less on specific actions. Finally, Dawson's testimony was also not always consistent with the testimony of Ahuna and Peterson, who seemed to have better recall of the details and events. Therefore, the HGEA representative at times used leading questions to elicit and flesh out her confusing testimony.

Wojak's testimony was partially credible and partially not credible. Wojak had a clear and detailed recollection of her School employment and the internal complaints that she was involved with. However, she demonstrated bias towards the Union and anger towards Ahuna and the School for the investigation regarding the publication of the Governing Board confidential document.

Finn was also a partially credible and partially not credible witness, and her testimony is credited to the extent that it is consistent with the findings of fact. The major weakness of her testimony was her confusion regarding specific meeting dates.

Danner Jones was a partially credible and partially not credible witness. Although credible in her explanations for her conduct, her testimony also presented a subjective view of the facts. Danner Jones was willing to acknowledge that she was wrong on the admissions policy, which supported her credibility. However, her absolute denials of ever telling the employees not to contact the Union and reprimanding Dawson or giving her assignments outside her job description, and her statement that she absolutely told the employees to contact their Union at any time were directly contradicted by other witness testimony. Further, her response about whether she assigned Dawson tasks outside her job description was evasive and misleading. In short, this part of her testimony was self-serving and unconvincing diminishing her credibility. Finally, while attempting to temper and restrain her confrontational and authoritative demeanor, Danner Jones' demeanor was consistent with other witness testimony and other evidence in the record that her tone and manner in her interactions with the School BU 3 members, particularly with Dawson, Peterson, and Wojak, were intimidating, authoritarian, and condescending.

Cobb-Adams was a partially credible witness and partially not credible witness. He admitted that he wanted a fresh start from the School's nepotistic organization involving the former governing board chair and executive director. He was honest about the School's struggles to comply with the requirements of the applicable collective bargaining agreements, most particularly the salaries and overtime, and that he had never seen the HGEA CBAs. However, his denials of making statements about not going to the Union and that the School did not have to abide by the union contract were not believable because of the overwhelming contradictory testimony from other witnesses. However, the Board notes that his testimony regarding the collective bargaining agreements applicable to the School was not specific as to which contracts that he referred to (HSTA CBA, HGEA CBA, and/or supplemental agreements).

3.2. Dispositive Motions

3.2.1. Standard of Review

3.2.1.1. Motion to Dismiss

Regarding a motion to dismiss for lack of subject matter jurisdiction, the Board must accept the allegations of the complaint as true and viewed in the light most favorable to the complainant. Caspillo v. Dep't of Transportation, Board Case No. 17-CE-01-988, Decision No. 509, at *6 (Nov. 22, 2021) (Caspillo) (https://labor.hawaii.gov/hlrb/files/2021/11/Decision-No.-509.pdf). The Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint. *Id.* at *7 (*citing* Tupola v. Univ. of Haw. Prof'l Assembly, Board Case No. CU-07-330, Order No. 3054, at *17 (Feb. 25, 2015) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf). However, where the complainant can prove no set of facts in support of the claim which would entitle relief,

dismissal is proper. Haw. State Tchrs. Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (Haw. Ct. App. 2011).

The party seeking to invoke the Board's jurisdiction has the burden of establishing that jurisdiction exists. Caspillo, at *7. The Board may review any evidence, such as affidavits and testimony to resolve factual disputes regarding the existence of jurisdiction in considering a motion to dismiss for lack of subject matter jurisdiction. *Id.* (*citing* Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000).)

3.2.1.2. Motion for Directed Verdict

While considering a motion for directed verdict, the Board must consider the evidence and inferences in the case in the light most favorable to the non-moving party. Further, the Board may only grant a motion for directed verdict when there is only one reasonable conclusion as to the proper judgment. Hsiao v. Hawai'i Gov't Emp. Ass'n, Board Case No. 20-CU-08-383, Decision No. 498, at *11 (Oct. 14, 2020) (https://labor.hawaii.gov/hlrb/files/2020/10/Decision-No.-498.pdf) (*citing* Richardson v. Sport Shinko, 76 Hawai'i 494, 502, 880 P.2d 169, 177 (1994)).

3.2.1.3. Motion for Partial Findings

Where a party has been fully heard and the Board finds against the party on that issue, the Board may either enter judgment as a matter of law or decline to render any judgment until the close of all the evidence on a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. The judgment is required to be supported by findings of fact and conclusions of law. Parker v. Dep't of Pub. Safety, State of Hawai'i, Board Case No. 19-CE-10-923, Decision No. 502, at *42 (March 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-502.pdf) (Parker).

Unlike a motion for directed verdict, with a motion for partial findings, the Board is authorized to resolve disputed issues of fact and is not required to draw any inferences in favor of the non-moving party but may make findings in accordance with its own view of the evidence. Paio v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case Nos. 16-CU-10-344; 16-CU-10-345, Decision No. 497, at *22-23 (Feb. 21, 2020) (https://labor.hawaii.gov/hlrb/files/2020/03/Decision-No.-497.pdf) *citing* Richie v. United States, 451 F.3d 1019, 1023 (9th Cir. 2006)).

3.3. Burden of Proof

Under HRS § 91-10(5) and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16), the Complainant has the burden of proving alleged violations of HRS Chapter 89 by a preponderance of the evidence.

Under HAR § 12-42-8(g)(16), any party raising any other issue has the burden of proving that issue by a preponderance of the evidence.

The preponderance of the evidence is proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence. Minnich v. Admin. Dir. of the Courts, 109 Hawai‘i 220, 229, 124 P.3d 965, 974 (1989) (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 535, 574 (1989)).

Further, the Board has interpreted HAR § 12-42-8(g)(16) to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. If any party fails to present sufficient legal arguments with respect to any issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. State of Haw. Org. of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161 at *32-33 (June 7, 1982) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-161.pdf).

3.4. Motion to Dismiss

Respondents filed the Motion to Dismiss the Complaint asserting, among other things, that the Board lacked jurisdiction over the HRS § 89-13(a)(8) claim for a failure to exhaust contractual remedies, that the named Respondents School and Danner Jones were not public employers, Danner Jones was not liable in her individual capacity, and that Danner-Jones, as an individual Governing Board member, was entitled to protection and immunities afforded to public board members under HRS § 26-26.

HGEA opposed the Motion to Dismiss (Memorandum in Opposition) arguing, among other things, that HGEA did not have to exhaust because the allegations of the Complaint were not the same as the basis for the Dawson grievance, and that if the Governing Board was the proper Respondent, HGEA requested leave to amend the Complaint. Regarding Danner Jones, HGEA asserted that she went rogue and was not protected by HRS § 26-[2]6, the Governing Board Chair cannot interfere in the daily School operations, and there were genuine issues of whether Respondents violated the HRS Chapter 89 provisions alleged in the Complaint.

The Board denied the Motion to Dismiss for the following reasons.

3.4.2. Lack of Jurisdiction Over Respondents

Respondents made several arguments for the Board's lack of jurisdiction over the Respondents named in the Complaint. The Board denied the Motion to Dismiss for both Respondents.

Given the stipulation by the parties that the Governing Board should be substituted for the School as a Respondent because it is the employer of the School employees under HRS Chapter 302D, the Board need not address the argument for dismissal of the School.

The definition of "employer" or "public employer" includes "any individual who represents one of these employers or acts in their interest in dealing with public employees[,]". HRS § 89-2.[15] In its Memorandum in Opposition, HGEA took the position that Danner Jones was a designated representative of the Governing Board, the public employer in this case. Under HRS § 89-2, as a representative of the Governing Board, Danner Jones is included with the definition of public employer or employer under HRS Chapter 89. Therefore, Danner Jones is not dismissed from his case.

However, the Board has no jurisdiction and will not interpret the application of HRS § 26-26 in this case and clarifies that as a statutory public employer under HRS § 89-2, Danner Jones is being named in her official capacity as Chair of the Governing Board and not in a personal capacity. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. 16-CE-01-882, Order No. 3190, at *16 (September 22, 2016) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3190.pdf).

3.4.3. Dismissal of HRS § 89-13(a)(8) and Failure to Exhaust

Prior to addressing the failure to exhaust, the Board notes that while asserting a violation of HRS § 89-13(a)(8) for violation of the BU 3 CBA, the Complaint completely fails to specify which CBA provisions were violated. Therefore, the Board dismisses the HRS § 89-13(a)(8) allegation for this reason. The Board has jurisdiction over the remaining allegations in the Complaint.

Regarding dismissal of the HRS § 89-13(a)(8) for failure to exhaust, however, the Board disagrees with Respondents for the following reasons.

When considering an allegation that an employer has committed a prohibited practice by violating the relevant collective bargaining agreement under HRS § 89-13(a)(8), the Board has consistently held that 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 I) and Poe v. Haw. Lab. Rels. Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (Poe II). Kapesi v. Dep't of Pub. Safety, State of Hawai'i,

Board Case No. 17-CE-10-908, Decision No. 510, at *9 (March 2, 2022) (https://labor.hawaii.gov/hlrb/files/2022/03/Decision-No.-510.pdf).

The Hawai'i Supreme Court has concluded that a public employee pursuing a grievance exhausts their 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 I, 97 Hawai'i at 531, 40 P.3d at 933.

In this case, Respondents argued that the HRS § 89-13(a)(8) claim should be dismissed for failure to exhaust because Dawson filed a pending grievance (Dawson grievance) with similar allegations to those in the Complaint.

HGEA argued in opposition that exhaustion was not required because the pending Dawson grievance was based only on hostile work environment and not the issues raised in the Complaint.

While the Board acknowledges that the Dawson grievance arose out of the same factual circumstances, the Board agrees with HGEA that the Dawson grievance is irrelevant to the exhaustion issue because it was not based on the same allegations as the Complaint. As opposed to the Dawson grievance based on BU 3 CBA violations for hostile environment, the Complaint is based on discrimination, harassment, and retaliation in violation of HRS Chapter 89 and not specific HGEA CBA provisions. Therefore, dismissal is not warranted for failure to exhaust.

3.5. Oral Motion to Dismiss (Motion for Directed Verdict or for Partial Findings)

After HGEA completed its case-in-chief, Respondents made an oral motion to dismiss, which HGEA opposed. Neither supported their position with arguments.

As the motion was made after Complainant HGEA completed its case-in-chief, the Board construes the motion as one for directed verdict or for partial findings (MDV/MPF).

Although its administrative rules do not specifically provide for motions for directed verdict or partial findings, the Board may hear motions akin to these types of motions if the party opposing the motion is given a full and fair opportunity to be heard on the motion after reasonable notice, and the applicable Board rules are not otherwise violated. Los Banos v. Haw. Lab. Rels. Bd., 145 Hawai'i 297, ___, 452 P.3d 765, ___ (Haw. Ct. App. 2019).

Whether considered as a motion for directed verdict or for partial findings, Respondents failed to carry their burden regarding the MDV/MPF. The Board determines for the reasons discussed fully below that HGEA presented sufficient evidence that Respondents violated HRS §§ 89-3, 89-8(a), and 89-13(a)(1). Therefore, the Board denied the MDV/MPF.

3.6. Merits of the Complaint

3.6.1. Respondents Violated HRS §§ 89-3, 89-8(a), and 89-13(a)(1)

For the reasons set forth below, the Board finds that Respondents violated HRS §§ 89-3, 89-8(a), and 89-13(a)(1).

3.6.1.1. HRS § 89-13(a)(1)

Based on the Complaint, HGEA argues that, among other things, Respondents committed prohibited practices in violation of HRS §§ 89-3, 89-8, and 89-13(a)(1) by intentionally and knowingly discouraging and prohibiting BU 3 members from exercising their rights under HRS Chapter 89 and the BU 3 CBA, which included communicating with the HGEA about School working conditions and inquiring into their BU 3 CBA rights.

The Board's test to find a prohibited practice for employer interference under the statute is well-established. Parker, at *58. Whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Takushi, Board Case Nos. CE-01-374a and b, Decision No. 404, at * 9 (March 3, 2000) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-404.pdf) (Decision 404) (*citing* Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984)). The interference must be with a lawful employee activity, or discrimination affecting the employee exercise of a protected right. Haw. State Tchr. Ass'n v. Haw. Pub. Emp. Rels. Bd., 60 Haw. 361, 362-64, 590 P.2d 993, 995-96 (1979).

3.6.1.1.1. HRS §§ 89-13(a)(1) and 89-3.

HRS § 89-3 guarantees employees the right to self-organize, to form, join or assist labor organizations, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Decision No. 404, at *8-9.

The Board has previously recognized that an employer commits a prohibited practice in violation of HRS § 89-13(a)(1)[16] by interfering with the employee's right to participate in the collective bargaining process without employer interference, restraint, or coercion under HRS § 89-3.[17] Parker, at *58. The right of an employee to communicate with the employee's exclusive representative is a fundamental corollary of the rights of employees identified in HRS § 89-3. Haw. Gov't Emp. Ass'n. AFSCME, Local 152, AFL-CIO v. Lingle, Board Case No. CE-03-574, Order No. 2321, at *3-4 (April 6, 2005) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2321.pdf).

Based on the Complaint allegations and the evidence presented during the HOM, HGEA asserts that Respondents violated 89-13(a)(1) by interfering with HRS § 89-3 protected rights by the following alleged misconduct. First, Ahuna's reprimands of the HGEA Shop Steward Wojak for unapproved communications with others outside the School and circulation of her harassment claim with a confidential document. Second, Danner Jones' and Ahuna's directives and Cobb-Adams' statement to Dawson and Peterson to raise School issues only with the School hierarchy and not with the Union. Third, Cobb-Adams' statements that it was easier to clean the slate of all employees who seek Union assistance and that the School did not have to follow the HGEA CBA, and Ahuna's statement that the School did not need people, who kept going to the Union. Fourth, Danner Jones' statements that she would fight the Union, and that the unions did not belong in the charter schools.

In interpreting HRS § 89-13(a)(1), the Board has used federal labor law principles interpreting the similar provision in the National Labor Relations Act[18] to determine whether employer statements constitute prohibited practices under this section. Hawai'i Gov't Emp. Ass'n, AFSCME, Local.152, AFL-CIO v. Cayetano, Board Case No. CE-03-427, Decision No. 407, at *9 (May 3, 2000) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-407.pdf) (Decision No. 407); Hawai'i Fed. of College Tchr., Local 2003 v. Univ. of Hawai'i Prof'l Assembly, Board Case No. CU-07-11, Decision No. 50, at *9-10 (August 12, 1974) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-50.pdf).

Those principles include that an employer may express to its employees its general view about unionism or any of its specific views about a particular union, if these expressions do not contain a "threat of reprisal or force or promise of benefit." Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Keller, Board Case No. CE-13-597, Decision No. 456 at *15-16 (Nov. 8, 2005) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-456.pdf) (*citing* Decision No. 404, at *74-75); Cadillac of Naperville, Inc. v. NLRB, 14 F.4th 703, 714 (D.C. Cir. 2021). The test for determining whether an employer has violated HRS § 89-13(a)(1) is whether based on the totality of the circumstances surrounding the occurrence, the employer's threats or statements tend to be coercive, not whether the employees are in fact coerced. *See* Brown & Root, Inc. v, NLRB, 333 F.3d 628, 634 (5th Cir. 2003). An employer violates HRS § 89-13(a)(1) by making statements, which considered from the employees' point of view have a reasonable tendency to coerce. *See* DynCorp. Inc. v. NLRB, 233 Fed. Appx. 419, 426-27 (6th Cir. 2007) (*citing* Dayton Newspapers, Inc. v. NLRB, 402 Fed.Appx. 651, 659 (6th Cir. 2005)) (DynCorp).

When a close question exists, "the presence of contemporaneous threats or prohibited practices is often a critical factor in determining whether there is a threatening color to the employer's remarks." *See* Exxon Research & Eng'g Co. v. NLRB, 89 F.3d 228, 233 (5th Cir. 1996) (*citing* TRW-United Greenfield Civ. v. NLRB, 637 F.2d 410, 420 (5th Cir. 1981)). Examination of the context of statements and the atmosphere in which they are made can be used to make this determination. The inquiry should examine the atmosphere of the workplace and

how specific comments fit into that atmosphere to determine whether there was a "threatening color" to specific remarks. "[C]onsiderable deference [is paid] to the conclusion of the Board as to whether a comment constituted an impermissible threat[;]" and "if the inference or conclusion found by the Board that the statements constitute a threat is a reasonable one, its findings will not be set aside on review even though a different inference or conclusion may seem more plausible." DynCorp., 233 Fed. Appx. at 426-27 (*citing* Henry J. Siegel Co. v. NLRB, 417 F.2d 1206, 1214 (6th Cir. 1969)); *see also* NLRB v. Mike Yurosek & Sons, Inc. 597 F.2d 661, 663 (9th Cir. 1979). The number and the tone of comments and statements are substantial evidence for a finding of HRS § 89-13(a)(1). Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251, 1258 (1st Cir. 1978).

The Board is unable to find that Ahuna's warnings to HGEA Shop Steward Wojak to approve training requests and testimony before the Commission interfered with her HRS § 89-3 rights because they had nothing to do with her right to union representation. Further, Wojak's actions regarding her harassment claim and the confidential document were only protected to the extent of her right to consult or communicate with the HGEA on the matter. More specifically, her actions in distributing that document to other recipients both in and out of the School were not protected by HRS § 89-3.

Wojak's feelings of intimidation from exercising her union rights and the hostile atmosphere discouraging members from raising issues and filing grievances with the Union are, however, relevant to the context and determination whether there was a "threatening color" or an opposition to the Union by Respondents in this case.

To determine whether Respondents' orders and statements that these employees should not go to the Union about School issues, that they do not need employees who go to the Union, and that the HGEA CBA does not apply to the School were coercive and threatening, consideration must be given to the context in which these orders and statements were given. There is no dispute that the Governing Board and the School were facing significant challenges and problems. While these challenges and pressure can be viewed as mitigating factors for Respondents' conduct, they also support HGEA's position that Respondents' tone and attitude and the School atmosphere were hostile and antagonistic towards the BU 3 members. Although Danner Jones made efforts to control her tone and demeanor in her interactions with the BU 3 members, her directives and statements were delivered in a "belittling" manner. In this School atmosphere, Danner Jones' orders and statements had a definitively threatening color in violation of the HRS § 89-3 rights of the School BU 3 employees in violation of HRS § 89-13(a)(1). Finally, from the employees' point of view, Respondents' statements undeniably had a reasonable tendency to coerce. Therefore, Respondents violated HRS § 89-13(a)(1). DynCorp, 233 Fed.Appx. at 426-27.

The Board has further recognized that improper direct dealing by an employer with employees also violates HRS § 89-13(a)(1). Lingle v. United Pub. Workers., AFSCME, Local 646, Board Case No. CU-01-121, Decision No. 382, at *31 (August 30, 1996) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-382.pdf) (Decision No. 382). "Improper direct dealing is characterized by actions that persuade employees to believe that they can achieve their objectives directly through the employer and thus erode the union's position as the exclusive bargaining representative. Another way to frame the question of direct dealing is 'whether the employer has chosen 'to deal within the Union through the employees, rather than with the employees through the Union.'" Americare Pine Lodge Nursing and Rehab. Ctr. V. NLRB, 164 F.3d 867, 874-75 (4th Cir. 1999) (Americare).

The criteria for determining whether a particular communication is unlawful "direct dealing" is whether: 1) the employer was communicating directly with union represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in the bargaining; and 3) this communication was made to the exclusion of the union. El Paso Elec. Co. and Int'l Brotherhood of Elec. Workers, Local 960, 355 NLRB 544, 545 (2010).

The Board finds all three requirements for direct dealing statements were met in this case. The first and third criteria were met when Danner Jones, Cobb-Adams, and Ahuna[19] held meetings and communicated directly with BU 3 members Dawson and Peterson on changes to their job duties and responsibilities and performing tasks outside their job description, without HGEA's presence. The second criteria was met because during these meetings, these School leaders directed and stated that School issues, including collective bargaining, were to go through the School hierarchy and not to the Union. These statements interfered with and undermined the Union's role in representing these employees. Decision No. 382, at *31. The Board finds that Respondents' intention was to convince Dawson and Peterson that going through the designated School chain of command would address their concerns without Union involvement eroding the HGEA's position as the exclusive bargaining representative. *See, e.g.*, Americare, 164 F.3d at 875. For this reason, the Board further holds that Respondents violated HRS §§ 89-3 and 89-13(a)(1) for direct dealing.

3.6.1.1.2. HRS §§ 89-13(a)(1) and 89-8(a)

HGEA further asserted that Respondents' misconduct and statements interfered with their rights protected under HRS § 89-8(a).[20] In addition to the Respondents' statements and directives noted above, Danner Jones and Ahuna also refused to respond to Shimomura's demand, and the HGEA Shop Steward felt intimidated and that employees were discouraged from raising concerns and being involved with grievances because of the hostile environment and fears of retaliation.

The HGEA's duty of fair representation, as the exclusive representative for BU 3, under HRS § 89-8(a) is two-fold. First, HGEA is mandated "to act for and negotiate agreements covering all employees in the unit[.]" Second, HGEA "shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." HRS § 89-8(a); *see also* Langtad v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-175, Decision No. 423, at *5 (April 16, 2001) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-423.pdf).

Claims under HRS §§ 89-8(a), and 89-13(a)(1) have been brought implicating the first fold of HRS § 89-8(a). *See, e.g.*, United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Hamamoto, Board Case No. CE-01-539, Order No. 3005, at *2 (July 9, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3005.pdf); Univ. of Haw. Prof'l Assembly v. Bd. of Regents, Board Case No. CE-07-124, Decision No. 303, at *28 (June 4, 1990) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-303.pdf). The Board finds that Respondents' directives and statements not to involve the Union made at meetings with Dawson and Peterson regarding changes in job duties and assignments not within their job descriptions obviously interfered with HGEA's required duty to act for and negotiate agreements covering all BU 3 employees in violation of HRS § 89-13(a)(1).

HGEA further proved that Respondents discouraged BU 3 members from communicating and raising issues with HGEA and being involved in grievances but also refused to respond to HGEA's request for Danner Jones to stop emailing directives and admonitions to Dawson and other BU 3 members without HGEA providing the emails. This employer interference also extended to the second fold of HRS § 89-8(a), the duty and right to fair representation. The Board recognizes that in a case like this involving an HRS § 89-8(a) claim of employer interference with and obstruction of the Union and the bargaining unit members' relationship, communications, and ability to assert rights, there are dual protected rights implicated by this second fold—the Union's ability to fairly represent its members and the members' right to be fairly represented by the union.[21]

Under these circumstances, the Board broadens HRS §§ 89-8(a) and 89-13(a)(1) to protect from employer interference the fair representation rights of both the union and the bargaining unit members. Therefore, the Board concludes that Respondents violated HRS § 89-13(a)(1) by interfering with HGEA's right to act for and negotiate agreements for and fairly represent the School BU 3 members protected by HRS § 89-8(a) and with the School BU 3 bargaining unit 3 members' right to be fairly represented by their Union.

3.6.1.2. Wilfullness

For Respondents' conduct to constitute a prohibited practice under HRS § 89-13(a)(8), however, the violation must be wilfull. Therefore, the Board is required to determine whether

Respondents acted with the conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89. Haw. Gov't Emp. Ass'n. v. Casupang, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007).

The Board finds the required wilfullness of Respondents' violations of 89-13(a)(1) from Danner Jones' conduct and statements and Cobb-Adams' statements. As previously discussed, Danner Jones and Cobb-Adams were both well-aware that HGEA represented these employees. Despite this awareness, Danner Jones and Cobb-Adams warned Dawson and Peterson on several occasions to raise School concerns only through the School hierarchy and not with the Union. Moreover, despite both she and Ahuna having access to emails referenced by Shimomura, they refused to respond to his demand to cease and desist from the email exchanges with Dawson without HGEA providing the emails. The Board finds that their demand for the emails unreasonable and an obvious attempt to obstruct the Union's representation of Dawson. Finally, despite the Governing Board's acknowledgment that the School was subject to the HGEA CBA, and his own discussions with HGEA, Cobb-Adams made the veiled threat to clean the slate of employees who went to the union and the statement that the School was the employer and did not have to comply with the HGEA CBA.

Based on the record, there is sufficient evidence that Respondents knew that these BU 3 employees were represented by the HGEA and still chose to commit the violations of HRS §§ 89-3, 89-8(a), and 89-13(a)(1).

3.7. The Board Does Not Find Violations of HRS §§ 89-13(a)(2), (3), (4), (7) or (8)

3.7.1. HRS § 89-13(a)(2)

Based on the Complaint, the Board is compelled to address the claim that Respondents violated HRS § 89-13(a)(2). This provision makes it a prohibited practice for an employer to "dominate, interfere, or assist in the formation, existence, or administration of any employee organization[.]"

Although the Board has previously found an HRS § 89-13(a)(2) violation as a derivative of an HRS § 89-13(a)(1) violation by reasoning that an employer by interfering and coercing employees in the exercise of their HRS Chapter 89 rights undermines the employees' confidence in the union in violation of HRS § 89-13(a)(2),[22] upon review of case law, the Board must reject this proposition.

In United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *30-31 (August 4, 2003) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-443.pdf) (Okimoto), the Board adopted

the Electromation, Inc. v. N.L.R.B., 35 F.3d 1148 (7th Cir. 1994) (Electromation) test to determine whether an HRS § 89-13(a)(2) violation exists.

Under the Electromation test, there are two distinct issues when addressing an HRS § 89-13(a)(2) violation: first, whether an employee organization other than the exclusive representative was involved in the alleged violative acts, and second, whether the employer dominated, interfered, or assisted in the formation, administration, or organization of that employee organization that was not the exclusive representative.

In Okimoto, the Board noted that, in defining "employee organization," HRS Chapter 89 substantively adopted the definition of "labor organization" from the National Labor Relations Act Section 2(a). Okimoto, Decision No. 443A, at *31. Using this definition, the Board found that an advisory committee whose duties encompassed, among other things, grievances, compensation, and conditions of work met the requirements of an employee organization under HRS Chapter 89.

Here, there are no allegations that an employee organization other than the HGEA was involved in the violative acts. Therefore, the Board cannot find an HRS § 89-13(a)(2) violation.

For this reason, the Board dismisses the claim for a violation of HRS § 89-13(a)(2).

3.7.2. HRS § 89-13(a)(7)

While the Complaint alleges these independent violations of HRS §§ 89-3 and 89-8 upon which an HRS § 89-13(a)(7) may be based, the Board rejects this allegation.

The Board has recognized that, where the HRS § 89-3 is based solely on an allegation of HRS § 89-13(a)(1), HRS § 89-13(a)(7) is not applicable to the extent that this allegation is specifically governed by HRS § 89-13(a)(1) due to redundancy between the claims. United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Char, Board Case No. CE-10-744, Order No. 2697, at *15 (April 12, 2010) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2697.pdf); Haw. Fire Fighters Ass'n, IAFF, Local 1463 v. Caldwell, Board Case No.14-CE-11-835, Order No. 3368, at *13 (June 8, 2018) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3368.pdf).

Therefore, likewise in this case, the HRS § 89-13(a)(7) is not applicable to the HRS § 89-8(a) claim to the extent that it is specifically governed by HRS § 89-13(a)(1).

For this reason, the Board dismisses the claims for a violation of HRS § 89-13(a)(7) based on redundancy.

3.7.4. HRS § 89-13(a)(3)

HRS § 89-13(a)(3) makes it a prohibited practice for an employer to "discriminate in regard to…any term and condition of employment to encourage or discourage membership in any employee organization[.]"

In State of Haw. Org. of Police Officers v. Ballard, Board Case No. 18-CE-12-910, Order No. 3442, at *12 (January 7, 2019) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3442.pdf), this Board set out the appropriate standards to determine whether an employer has committed a prohibited practice under HRS § 89-13(a)(3).

First, only discrimination affecting the employee's exercise of a protected right, may be the subject of a prohibited practice charge under this provision. *Id.* (*citing* Haw. State Teacher's Ass'n v. Haw. Pub. Emp. Rels. Bd., 60 Haw. 361, 364, 590 P.2d 993, 996 (1979)).

The Board further recognized that there are two types of discriminatory employer conduct that adversely affect employee's rights, namely "inherently destructive" or "comparatively slight". *Id.* (*citing* NLRB v. Great Danes Trailers, Inc., 388 U.S, 26, 33-34 (1967) (Great Danes Trailers)). "Inherently destructive" conduct "carries with it 'unavoidable consequences which the employer not only foresaw but which [the employer] must have intended' and thus bears 'its own indicia of intent.'" *Id.* (*citing* Great Danes Trailers at 33). Regarding the "comparatively slight", if the harm to employee rights is comparatively slight and a substantial and legitimate business end is served, the Complainant must affirmatively show improper motivation. *Id.* (*citing* Great Danes Trailers at 34).

Finally, a finding of "inherently destructive", the inference of the conduct's unlawful intention must be so compelling that the employer's protestations are justifiably disbelieved. *Id.* (*citing* Fresh Fruit & Vegetable Workers, Local 1996 v. NLRB, 539 F.3d 1096-97 (9th Cir. 2008)). This conduct must have far-reaching effects that would hinder future bargaining and create continuing obstacles to the future exercise of employee rights. *Id.* (*citing* Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976)).

According to the Complaint, the Governing Board's discriminatory actions taken against BU 3 members for communicating with HGEA were locking their email accounts and changing their duties. The Board disagrees. Dawson was the only employee shown to have been locked out of her School email account, and Danner Jones took the action for the substantial and legitimate business reason of accessing the School's Hawaiian Airlines account on her email account and restored her password the following day. Therefore, any potential harm to Dawson from being locked out of her email account was comparatively slight. Further, the record is clear that Danner Jones' changes to Dawson's and Peterson's job duties occurred prior to their complaints and communications with the Union. In fact, the complaints and communications were about Danner Jones' directives changing their job duties. Based on the timing, Danner

Jones' changing of Dawson's and Peterson's job duties was not due to their communicating with the Union. For these reasons, the Board cannot find that Danner Jones' and the Governing Board's actions constituted "inherently destructive" conduct in violation of HRS § 89-13(a)(3).

3.7.5. HRS § 89-13(a)(4)

Finally, HGEA has contended that the Danner Jones conduct in locking of email accounts, changing duties, and giving harassing and discriminatory directives without Governing Board or statutory authority under HRS Chapter 302D, were in retaliation and harassment for communicating with HGEA and for exposing deficiencies and possible criminal conduct deserving of protections under HRS §§ 378-61 and 378-62 violated HRS § 89-13(a)(4).

The Board has no jurisdiction over HRS Chapter 302D and HRS §§ 378-61 and 62, and therefore, will not consider whether there was authority or protections under those provisions.

HRS § 89-13(a)(4) makes it a prohibited practice for an employer to "discharge or otherwise discriminate against an employee because…the employee has informed, joined, or chosen to be represented by any employee organization."

To prevail on a violation of HRS § 89-13(a)(4), HGEA has the burden of showing by a preponderance of evidence that: 1) there was an improper motive; (2) there was a causal connection between the improper motive and for engaging in protected activity before this Board; and (3) the improper motive was motivating factor for taking action adverse to the Complainant. Weiss v. Bratt, Board Case No. CE-05-452, Decision No. 425, at *8-9 (August 1, 2001) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-425.pdf) (*citing* Lepere v. Waihee, Board Case No. CE-10-153, Decision No. 349, at *10 (February 8, 1994) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-349.pdf) (Lepere). Further, to prove discrimination, the HGEA must show that anti-union animus contributed to the decision to discipline the employee. If the burden is satisfied, the employer must then show by a preponderance of the evidence that the employee would have been disciplined even if the employee had not engaged in the protected activity. *Id.* (*citing* Lepere, Decision No. 349, at *10).

In this case, HGEA failed to show that there was an adverse action taken by Respondents against any BU 3 member. Specifically, there was no showing that either Peterson or Wojak was disciplined. While Dawson's placement on paid administrative leave may be viewed as disciplinary, Respondents explained that the reason for the placement on leave was her failure to show up at work. Dawson left her School employment because she quit and not because of discipline. Regarding Dawson being locked out of her email account, HGEA did not show nor argue that this was disciplinary or related to her communications with HGEA. In fact, Danner Jones explained that the lockout was due to her need for access to the School's Hawaiian Miles account on Dawson's email account. Finally, HGEA failed to show that the alleged change in job duties and the alleged giving of harassing and discriminatory directives were improperly

motivated or causally connected to the BU 3 employees' communications with the HGEA. In fact, these alleged actions appeared to have been taken prior to and were the subject of Dawson's and Peterson's communications with the HGEA. Therefore, due to HGEA's failure to show the improper motive and the causal connection, the Board finds no violation of HRS § 89-13(a)(4).

For these reasons, the Board holds that HGEA has failed to carry the burden of showing that Respondents violated HRS § 89-13(a)(4).

4. Civil Penalty

HRS § 377-9(d)[23] provides that, "[a]n employer…who wilfully…commits prohibited practices that interfere with the statutory rights of …employees…for the exercise of protected conduct shall be subject to a civil penalty not to exceed $10,000 for each violation. In determining the amount of any penalty under this section, the board shall consider the gravity of…the prohibited practice and the impact of the practice on the charging party, or other persons seeking to exercise rights guaranteed by this section[.]"

As fully discussed above, the Board held that Respondents wilfully committed prohibited practices that interfered with the statutory rights of employees for the exercise of protected conduct. Therefore, the Board is required to assess a civil penalty against Respondents for this interference as ordered below. The Board found two violations of HRS § 89-13(a)(1) for violations of HRS § 89-3 and 89-8, involving the statutory rights of employees for the exercise of protected conduct.

Respondents shall be assessed $100.00 for violating HRS § 89-13(a)(1) by interfering with the HRS § 89-3 protected rights of BU 3 bargaining unit employees and $100.00 for violating HRS § 89-13(a)(1) by interfering with the HRS § 89-8 protected rights of BU 3 bargaining unit employees.

In assessing the gravity, the Board, in its discretion, considers that these prohibited practices for interference were Respondents' first violations and committed during a challenging time for Respondents in administering the School. However, Respondents' future prohibited practices for interference may be considered repeat violations and weighed accordingly in determining the civil penalties under this provision.

5. Order

For the reasons set forth above, the Board finds and holds that Respondents violated HRS §§ 89-3, 89-8(a), and 89-13(a)(1) and dismissing the remaining prohibited practice violations.

The Board, therefore, orders Respondents to:

1. Cease and desist from interfering with the BU 3 members communications with the HGEA and refusing to provide information requested regarding these communications;

2. Immediately post copies of this Decision and Order for 60 consecutive days in places where notices to School employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by posting on an intranet or an internet site, and/or other electronic means where Respondents customarily communicate with these employees;

3. Respondents shall pay $100.00 for each of the violations of HRS § 89-13(a)(1) for interfering with the HRS § 89-3 protected rights of BU 3 bargaining unit employee and for interfering with the HRS § 89-8 protected rights of BU 3 bargaining unit employees, for a total of $200.00 payable to the State of Hawai‘i general fund as a civil penalty; and

4. Respondents shall notify the Board of the steps taken to comply with this Order within 30 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai‘i, October 19, 2022.

HAWAI‘I LABOR RELATIONS BOARD
(dlir.laborboard@hawaii.gov)

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
Richard Thomason, Deputy Attorney General

[1] HRS § 302D-25(a) provides:

> (a) Charter schools shall be exempt from chapter 91 and 92 and all other state laws in conflict with this chapter, except those regarding:
>
> (1) The collective bargaining under chapter 89; provided that:
>
> (A) The exclusive representatives as defined in chapter 89 and the governing board of the charter school may enter into supplemental agreements that contain cost and noncost items to facilitate decentralized decision-making;
>
> ***
>
> (C) These supplemental agreements may differ from the master contracts negotiated with the department[.]

[2] The prohibited practice complaint named Kanuikapono Charter School as the public employer. However, on October 21, 2019, the parties filed a stipulation to substitute the Governing Board of Kanuikapono Charter School as the Respondent in place of Kanuikapono Charter School.

[3] The Complaint alleged violations of HRS §§ 89-13(1), (2), (3), (4), (7), and (8). The Board finds that there are no such statutory provisions. Since the Complaint is being brought against Respondents as the public employer, the Board construes the alleged violations to be of HRS §§ 89-13(a)(1), (2), (3), (4), (7), and (8).

[4] As no amended complaint was required to be filed, the Board will continue to reference the Complaint with the substitution of the GOVERNING BOARD OF KANUIKAPONO SCHOOL (Governing Board) for the School as the "Complaint." Further, as the substitution was made without HGEA being required to file an amended complaint, the Governing Board was not required to file an answer to the amended complaint and the MTD and the HGEA's opposition to the MTD were not required to be refiled either.

[5] HRS § 89-2 defines "employee organization" as "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, amount of contribution by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees."

[6] HRS § 89-2 defines "exclusive representative" as "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."

[7] *See* endnote 1, *supra.*

[8] HRS § 89.55(b) provides:

> (b) For the purpose of negotiating a collective bargaining agreement for charter school employees who are assigned to an appropriate bargaining unit, the employer shall be determined as provided in section 89-6(d).

[9] HRS § 89-6(d)(1) provides:

> (d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:
>
> (1) For bargaining units…(3),... the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit.

[10] HRS § 89-10.55(c) provides:

> (c) For the purpose of negotiating a memorandum of agreement or a supplemental agreement that only applies to employees of a charter school, the employer shall mean the governing board, subject to the conditions and requirements contained in the applicable sections of this chapter governing any memorandum of agreement or supplemental agreement.

[11] HRS § 302D-1 defines "[G]overning board" to mean "the independent board of a public charter school that is party to the charter contract with the authorizer that:

> (1) Is responsible for the financial, organizational, and academic viability of the charter school and implementation of the charter;
>
> (2) Possess the independent authority to determine the organization and management of the school, the curriculum, and virtual education;
>
> (3) Has the power to negotiate supplemental collective bargaining agreements with exclusive representatives of their employees and is considered the employer of charter school employees for purposes of chapters 76, 78, and 89; and
>
> (4) Ensures compliance with applicable state and federal laws."

[12]HRS § 302D-12(f) provides in relevant part:

> (f) The governing board shall be the independent governing body of its charter school and shall have oversight over and be responsible for the financial, organizational, and academic viability of the charter school, implementation of the charter, and the independent authority to determine the organization, and management of the school, the curriculum, virtual education, and compliance with applicable federal and state laws. The governing board shall ensure its school complies with the terms of the charter contract between the authorizer and the school. The governing board shall have the power to negotiate supplemental collective bargaining agreements with the exclusive representatives of their employees.

[13] *See* endnote 1, *supra.*

[14] HRS § 89-10.55(a) provides in relevant part:

(a) Employees of charter schools shall be assigned to an appropriate bargaining unit as specified in section 89-6[.]

[15] HRS § 89-2 defines "employer" or "public employer" as "the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawai'i health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees...."

[16] HRS § 89-13(a)(1) and (7) provide:

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

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

***

(7) Refuse or fail to comply with any provision of this chapter[.]

[17] HRS § 89-3 provides that, "[e]mployees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion…"

[18] It must be acknowledged that the National Labor Relations Act § 158(a)(1) is distinguishable from HRS § 89-13(a)(1) because § 158(a)(1) is cabined by § 158(c), which provides that expressing any views, argument, or opinion is neither an unfair labor practice not evidence of an unfair labor practice, as long as the views contain no threat of reprisal or force or promise of benefit. Cadillac of Naperville, Inc. v. NLRB, 14 F.4th 703, 714 (D.C. Cir. 2020). HRS § 89-13(a) contains no similar provision to § 158(c). Nonetheless, the Board has relied on federal case law holding that based on § 158(a)(1) and (c), that coercive statements that threaten retaliation against employees for protected activity are forbidden.

[19] Ahuna's conduct is attributable to the Respondent Governing Board because under the Kanuikapono School Bylaws, Article V, the ED is appointed by and delegated with authority by the Governing Board to act.

[20] HRS § 89-8(a) provides in relevant part:

(a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership….

[21] This case is distinguishable from the Parker situation, which was a classic hybrid case recognized in Poe II, in which a bargaining unit employee brings an HRS § 89-8(a) claim for breach of duty of fair representation against the union along with an HRS § 89-13(a)(8) claim for breach of the collective bargaining agreement against the employer. 105 Hawai'i at 104, 94 P.3d at 659. In Parker, the Board held that the union did not breach its duty of fair

representation under HRS § 89-8(a), however, the employer violated HRS § 89-13(a)(1) by interfering with the bargaining unit member's right to consult with his union under HRS § 89-3. Parker, at *49-53, 58-63. Unlike this case, the union in Parker made no HRS § 89-13(a)(1) claim against the employer for interference with its protected right to fairly represent its members under HRS § 89-8(a). Accordingly, the union's protected right under HRS § 89-8(a) was not addressed.

[22] *See, e.g.*, United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Kaua'i Veterans Memorial Hospital, Board Case No. CE-10-239, Decision No. 411, at *12 (June 9, 2000) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-411.pdf).

[23] HRS § 377-9(d) is made applicable to HRS Chapter 89 cases based on HRS § 89-14, which provides, in relevant part:

> Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]