

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

In the Matter of

JONATHAN TAUM,

Complainant(s),

and

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

Respondent(s).

CASE NO(S). ~~17-CU-10-357~~
17-CE-10-906

DECISION NO. 514

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

The Hawai'i collective bargaining law, Hawai'i Revised Statutes (HRS) Chapter 89, recognizes the right of public employees to organize for the purpose of collective bargaining guaranteed under the Hawai'i State Constitution Article XIII, § 2. Each prohibited practice case brought under HRS Chapter 89 is an evolving journey before the case is resolved.

This case, however, is unprecedented. It began as a classic hybrid complaint brought by a bargaining unit member against his employer and his exclusive representative. It became a case implicating the fundamental right of an individual bargaining unit member to challenge his discharge by his employer free from interference under HRS Chapter 89.

1.1. Statement of the Case

Complainant JONATHAN TAUM (Taum or Complainant) initially filed his prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) to challenge his discharge from employment with Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (PSD or Employer). Taum's hybrid complaint alleged that PSD and Respondent ~~UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO~~ (UPW or Union and collectively with PSD, Respondents) committed various prohibited practices.

After completing 16 days of the hearings on the merits (HOMs), questions arose about the qualifications of PSD's expert witness and a key actor in the disciplinary and grievance proceedings surrounding Taum's discharge: J. Marte Martinez (Martinez).

These questions fundamentally altered the case. Martinez was PSD's expert witness on use of force matters at the Board's HOM. She was also the use of force expert and author of the use of force report (Martinez Report) that PSD relied on throughout Taum's discipline and discharge process. Further, other PSD employees sought out Martinez's counsel to help them understand the significant issues.

This integral position in PSD's investigation, disciplinary, and grievance proceedings, as well as Martinez's appearance as PSD's expert witness before the Board, means that the issue of her qualifications was vital for the Board to settle. If Martinez was not qualified to hold her position and make the determinations that PSD relied on for the discipline and discharge, and if PSD knew or should have known about her lack of qualifications and failed to disclose that knowledge, then Taum could not have properly challenged his discipline and discharge.

As a result of the major shift in this case, there are effectively two parts to this case—those related to the hybrid case under Poe v. Haw. Lab. Rels. Bd., 105 Hawai'i 97, 101-02, 94 P.3d 652, 656-57 (2004) (Poe II) and those related to Taum's HRS Chapter 89 right to challenge his discharge without Employer interference. The Board settles both in this Decision and Order.

In the first part, the Board holds that Taum failed to carry the burden of proving the Poe II hybrid case. The Board holds that Taum failed to carry the burden of showing that UPW breached its duty of fair representation. Based on this failure to prove the first prong of the hybrid case, the Board holds that he cannot carry the burden of proving that the employer PSD committed a prohibited practice under HRS § 89-13(a)(8) for violation of the bargaining unit 10 (BU 10) collective bargaining agreement (CBA). Therefore, the Board dismisses the prohibited practice case against UPW for Taum's failure to carry his burden of proof to show a breach of the duty of fair representation and the prohibited practice claim against PSD for a violation of HRS § 89-13(a)(8) for lack of standing.

In the second part, the Board holds that PSD wilfully violated HRS § 89-13(a)(1) by relying on Martinez as its use of force expert and relying on Martinez's use of force review and assessment and the Martinez Report without disclosing her lack of minimum qualifications (MQs) for her PSD Firearms Training Specialist position (FTSP) during the disciplinary, grievance, and prohibited practice proceedings. More specifically, the Board holds that PSD committed a prohibited practice under HRS § 89-13(a)(1) by interfering with Taum's HRS § 89-3 rights during the disciplinary and grievance processes by interfering with Taum's right to a meaningful, full, and effective representation by his Union under HRS § 89-8(a).

The Board further holds that PSD committed a prohibited practice under HRS § 89-13(a)(1) by interfering with Taum's right under HRS § 89-3 to a full and fair process in challenging his discharge by relying on Martinez, her use of force review and assessment, and the Martinez Report while refusing, failing, and inhibiting the disclosure that Martinez was unqualified for her PSD FTSP.

Any findings of fact improperly designated as conclusions of law are findings of fact. Any conclusions of law improperly designated as findings of fact are conclusions of law.

1.2. Issues

The issues in this case based on the UPW's Motion to Dismiss Amended Complaint and for Summary Judgment are as follows:

1. Whether the Board lacked subject matter jurisdiction over the Amended Complaint based on untimely filing?
2. Whether the Amended Complaint failed to state a claim for violations of HRS § 89-13(b)(1), (4), and (5)?
3. Whether Complainant carried the burden of establishing the hybrid case that: a) UPW breached its duty of fair representation in the handling of his grievance over his discharge by, among other things, failing to inform him of his rights or provide him with legal advice and counsel and by withdrawing his grievance from arbitration; and b) PSD committed a prohibited practice by violating the BU 10 CBA in violation of HRS § 89-13(a)(8)?

The remaining issues based on the Amended Complaint are whether PSD violated HRS § 89-13(a)(1) by interfering and restraining Taum in the exercise of his protected rights:

1. Under HRS §§ 89-3 and 89-8(a), when it relied on Martinez, who was unqualified for her PSD FTSP, her use of force review and assessment, and the Martinez Report during the disciplinary and grievance procedures for Taum's discharge, given that PSD failed to disclose Martinez's lack of qualifications to Taum and his Union, and whether these actions denied Taum a meaningful, full, and effective representation by his Union during the disciplinary and grievance procedure; and
2. Under HRS § 89-3, when it relied on Martinez, who was unqualified for her PSD FTSP, her use of force review and assessment, and the Martinez Report during the process of Taum's challenges of his discharge, given that PSD failed to disclose and inhibited the disclosure of this information about Martinez to Taum, his Union, and his attorney, and whether these actions denied Taum a full and fair process in challenging his discharge?

1.3. Procedural History

1.3.1. Preliminary Case

As discussed above, Taum filed his Complaint claiming a hybrid case against UPW for breach of the duty of fair representation in violation of HRS §§ 89-13(b)(1), (4), and (5) and against PSD for breach of the CBA in violation of HRS § 89-13(a)(1).

The Board held HOMs on the Complaint on April 11-12, 2018; July 18-20, 2018; August 27-30, 2018; September 27, 2018; January 8-10, 2019; February 26-28, 2019; May 7-9, 2019; July 1-2, 2019; September 25, 2019; and October 3, 2019.

At the HOMs on the Complaint, Complainant presented witness testimony from himself, Peter Cabrerros (Cabrerros), Stafford Uemura (Uemura), Randall Waltjen, Cramer Mahoe, Andy Ahuna-Alofaituli, Craig Pinkney, Bronson Malani, Anthony Ho (Ho), Daniel Paleka (Paleka), and Alton Nosaka (Nosaka).

PSD called Martinez, Penney Young (Young), Laurie Nadamoto (Nadamoto), and Nolan Espinda (Espinda).

UPW called Lela Taamilo (Taamilo), Dayton Nakanelua (Nakanelua), Samuel J. Kaeo (Kaeo), and Michael Carvalho (Carvalho).

The Board called Taamilo, Nakanelua, Colleen Miyasato (Miyasato), and State Senator Clarence Nishihara (Nishihara), Chair of the Senate Public Safety Committee, as witnesses.

At the HOMs on the Complaint, some of the exhibits were admitted into evidence and others were excluded. The Board entered the following into evidence: Board Exhibits 1-2 and 4-7; Complainant's Exhibits 1-9, 11, 12, 14, 18, and 20; Union Exhibits A-O, R-HH, and JJ (p. 1-8, 11-22 only); and PSD Exhibits A-H.

Various other motions and stipulations were filed during the proceedings, which were orally ruled on and fully addressed to the extent necessary in this Decision and Order.

1.3.2. Martinez Issue

PSD called Martinez as their use of force specialist for her review and assessment and as the author of the report that was heavily relied on in Taum's disciplinary proceedings: the Martinez Report. In support of her qualifications as PSD's use of force specialist, Martinez represented that she graduated in 1992 from Southern Oregon University (Southern Oregon) with a Bachelor of Arts (B.A.) degree in criminal justice and criminology.

However, while the preliminary case was proceeding, a Hawaii News Now (HNN) report raised the issue of whether Martinez had been dishonest about her qualifications for her job. This issue was further raised by Nishihara at the hearings to confirm Espinda as the PSD Director (Espinda Confirmation Hearings).

Based on these concerns, beginning on April 18, 2019, Taum requested and the Board issued subpoenas duces tecum to obtain information about Martinez's educational qualifications.

1.3.2.1. First PSD Subpoena

PSD filed a Motion to Revoke (Motion to Revoke) regarding a subpoena for documents related to PSD investigations concerning Martinez's resume, qualifications, and credentials submitted to the Legislature in 2019 (First PSD Subpoena). The Board denied this Motion to Revoke reasoning, in part, that PSD raised Martinez's credentials, experience, qualifications, education, and training when PSD called Martinez as their use of force expert witness.

At the May 7, 2019 HOM, the PSD Custodian of Records Miyasato appeared and produced a black binder (PSD Black Binder) consisting of the results of a 2016-17 investigation into Martinez's credentials (2016-17 Investigation). The PSD Black Binder contains only Martinez's training and certifications and part of Martinez's personnel records and attachments.

PSD moved for a protective order of the PSD Black Binder based on confidentiality because of a 2019 ongoing investigation without citing any legal authority.

On July 2, 2018, the Board held an in-camera review of the PSD Black Binder. The review showed that the PSD Black Binder produced no information regarding Martinez's educational background and personnel information. At the review, PSD maintained that the PSD Custodian of Records made a good faith effort to comply with the request.

Taum withdrew the First PSD Subpoena with Board approval.

1.3.2.2. Martinez Subpoenas

PSD also moved to revoke a subpoena for Martinez to appear (First Martinez Subpoena). The First Martinez Subpoena was not successfully served, and Martinez did not appear.

Taum applied for and the Board issued another subpoena for Martinez to appear and testify before the Board, which PSD objected to.

1.3.2.3. Southern Oregon Subpoenas

Taum applied for a subpoena duces tecum to the Office of Alumni Relations at Southern Oregon for Martinez's educational records which was issued by the Board and served.

Taum further applied for a subpoena duces tecum to Southern Oregon (Second Southern Oregon Subpoena) to mail certified copies of records pertaining to Martinez's graduation from Southern Oregon's Criminal Justice/Criminology Program in 1992 to Taum's counsel, which was issued and served.

Martinez filed a motion to quash and/or for protective order for the Second Southern Oregon Subpoena with the Circuit Court in Oregon to stop "this unwarranted attempt to gain access to my education records which I have already provided at my expense in sealed envelope to my employer (State of Hawaii)."

1.3.2.4. Board Hearings and Orders Regarding Martinez's Qualifications

After the subpoenas were unsuccessful in obtaining information verifying Martinez's educational qualifications for the FTSP through the subpoenas, the Board issued several orders.

The Board issued Order No. 3557 ordering PSD to produce Martinez and UPW to produce UPW State Director Nakanelua at an HOM to answer the Board's questions regarding Martinez's qualifications. The Board further ordered Martinez to bring certified copies of records of her qualifications, including transcripts, diplomas, certificates, and degrees pertaining to her Southern Oregon graduation.

The Board also issued Order No. 3561 ordering PSD to produce documents in its possession or formerly within its possession that had been transmitted to any other governmental agency regarding Martinez's employment applications for PSD positions.

At the September 25, 2019 HOM, PSD responded to Order Nos. 3557 and 3561 by producing the same PSD Black Binder with a request for sealing and a protective order based on confidentiality of employment records. PSD represented that the Order No. 3561 was forwarded to PSD and that "these documents are all the documents in the custody of [PSD] that the Board has requested." The PSD Black Binder was filed under seal.

Martinez did not appear due to a family emergency, and PSD orally requested a 60-day continuance for her appearance.

PSD called Taamilo. Taamilo forwarded Order No. 3561, but not Order No. 3557, to Miyasato, who gathered the produced documents.

Miyasato appeared under Order Nos. 3557 and 3561. Despite having access to Martinez's personnel file, she failed to review or produce any documents from that file to comply with Order No. 3561 because she and PSD Deputy Director Maria Cook (Cook) agreed to copy only the PSD Black Binder. Cook did not direct Miyasato to check any other sources for documents.

Over PSD's objections, the presiding Board member determined that PSD failed to comply with Order No. 3561 and gave specific directions to Miyasato to copy and produce Martinez's personnel file with applications, a job description, an MQ listing for every position that Martinez held, and to check the file for confirmation of Martinez's graduation and Southern Oregon degree (transcript or diploma) by October 3, 2019.

Based on PSD's failure to provide the documents ordered in Order No. 3561, despite having the documents in its possession, the Board issued Order No. 3563 requiring that PSD and its Custodian of Records comply with Order No. 3561 by producing all of Martinez's employment documents (personnel files and records and training certification records) at the next HOM.

PSD filed objections to Order No. 3563 and moved to continue the HOM until PSD completed its interlocutory appeal of the Board's orders.¹

Taum filed a motion for order to show cause (Motion for OSC) as to why PSD should not be held in contempt of Order Nos. 3557 and 3561, which PSD opposed.

The Board held another HOM where PSD again did not comply with Order Nos. 3557, 3561, and 3563. The Board took judicial notice of the HNN videos records and the Hawai'i Senate public record regarding the issue of Martinez's educational and training background as information in the public at that time. Before the hearing was concluded, the Board issued an oral ruling reduced to writing by Order No. 3566A.

Finally, on October 7, 2019, the Board issued Order No. 3566A. This Order ruled that PSD failed to act in good faith to comply with Order Nos. 3561 and 3563 based on, among other things, the conduct of PSD and its counsel regarding review of PSD files and documents for compliance with Order No. 3561; their failure to raise any specific HRS §§ 92F-13 and 92F-14 issues at the HOM; and Martinez's failure to appear and produce the documents required by Order No. 3557 at the September 25, 2019 HOM.

As remedies, the Board denied the 60-day continuance for Martinez to appear, no longer required her appearance, and disqualified her as an expert witness. The Board then drew an adverse inference from PSD's refusal to produce documents qualifying Martinez as an expert witness and Martinez's failure to appear and produce requested documents. Therefore, the Board gave Martinez's testimony, opinions, and analysis and PSD's actions relying on such testimony, opinions, and analysis the weight that they deserve based on these reasons and the Board's credibility determination. The Board further orally denied Complainant's Motion for an OSC. Finally, the Board settled the issue of PSD's production of documents by determining that PSD was no longer required to produce documents regarding Martinez's credentials under Order Nos. 3557, 3561, and 3563.

1.3.3. Amended Complaint

After the issues surrounding Martinez's qualifications arose, the Board issued a notice that it would entertain a motion for leave to amend the Complaint to conform to the evidence to add additional allegations.

Complainant subsequently filed a motion to amend the Complaint to conform to the evidence to include additional allegations of prohibited practice violations against the Respondents (Motion to Amend), which the Respondents opposed. After a hearing, the Board granted the Motion.

On October 24, 2019, Taum filed his amended prohibited practice complaint (Amended Complaint) asserting, among other things, claims that, because Martinez was unqualified for the PSD position that she held when she rendered her use of force review and assessment and the Martinez Report; because PSD refused to disclose and substantiate Martinez's qualifications to the Complainant and UPW during the disciplinary, grievance, and prohibited practice proceedings; and because the investigation was incomplete when he was discharged, PSD violated HRS §§ 89-10.8 and 89-13(a)(1), (6), (7), and (8). Taum further argued that UPW violated HRS §§ 89-13(b)(1), (3), (4), and (5) by breaching its duty of fair representation and having actual knowledge that Martinez was unqualified for her PSD position and doing nothing.

At the status conference on the Amended Complaint, the Board ordered that Complainant would first proceed on his rebuttal case regarding the hybrid case. Then, the Board would hear the merits of the Amended Complaint by Complainant presenting his case-in-chief, followed by PSD's case-in-chief, and Complainant's rebuttal.

UPW filed a dispositive motion on the Amended Complaint (UPW MTD/MSJ), which PSD joined. After a hearing, the Board granted, in part, and denied in part, the UPW MTD/MSJ. Specifically, the Board dismissed the HRS § 89-13(a)(8) allegation against PSD and all allegations against UPW.

The Board held HOMs on the Amended Complaint on November 7, 2019; December 11, 18, and 19, 2019; and on March 3, 2020. Taum called Department of Human Resource Development (DHRD) Director Ryker Wada as a witness, and PSD called Cook. The Board recalled Nishihara and ordered the appearances of Nakanelua and Martinez. PSD Exhibits I-M were admitted into evidence.

At the December 11, 2019 HOM, Martinez appeared under subpoena and admitted that she did not have a B.A. degree from Southern Oregon but claimed—without documentation—degrees from two unaccredited colleges or universities that no longer exist. She refused to provide the Board with copies of her applications and educational records in her possession.

1.3.4. Second PSD Subpoena

On December 12, 2019, Taum filed an amended application for issuance of subpoena duces tecum, which was issued by the Board to the PSD Custodian of Records to appear before the Board on December 18, 2019 (Second PSD Subpoena). This subpoena ordered that PSD produce certified copies of Martinez's job application for the FTSP and reports of employment and education verification.

PSD filed a motion to revoke the Second PSD Subpoena, and PSD's Custodian of Records did not appear under the Board subpoena. The Board ruled that the Custodian of Records should have appeared, regardless of PSD's intention to file a motion to revoke.

At the March 3, 2020 HOM, Miyasato appeared in response to the Second PSD Subpoena as PSD's Custodian of Records and brought a redacted copy of the FTSP application contained in Martinez's personnel file, with the second page missing.

After the Board ordered the original of this application produced for in-camera comparison with the redacted document, Miyasato again provided a copy of the FTSP application used to complete the 2019 review ordered by Cook into whether Martinez qualified for the FTSP based on substitute excess work experience (2019 Cook Review). This copy also had the same page missing and showed Southern Oregon was listed with a major of Criminology, 51 credits completed, and achievement of a B.A. degree.

Miyasato also brought a copy of the blank FTSP application form, with page 2 showing questions regarding dismissal from employment or dishonorable separation from military service, criminal convictions, suspensions or revocations of licenses, and settlements or agreements limiting or precluding the applicant from State of Hawai'i employment.

The HOM was closed, and Taum and PSD filed simultaneous Post-hearing Briefs.

2. Background and Findings of Fact

2.1. Parties and Agents

2.1.1. PSD

Respondent Employer² PSD operates the correctional system of jails and prisons for the State of Hawai'i which includes Hawai'i Community Correctional Center (HCCC).

2.1.1.1. HCCC

During the relevant period, Cabrerros was the HCCC warden. Carvalho was an ACO V (lieutenant) and an experienced investigator for use of force cases at HCCC, including the incident for which Taum was discharged.

Leading up to this case, HCCC had a long-standing problem of drugs coming into the facility. The drug problem was a major safety issue for staff and inmates because inmates high on drugs engaged in fights and were unpredictable.

2.1.1.2. PSD Administration

During all relevant periods, Espinda was the PSD Director. Cathy Ross (Ross) served as PSD Deputy Director until Cook took that position.

Miyasato served as PSD's Custodian of Records during the pendency of this case.

Shelley Nobriga (Nobriga) supervised PSD Hearings Officers Nadamoto and Young.

Taamilo served as the PSD Human Resources Specialist.

2.1.1.3. Martinez

Martinez was PSD's use of force specialist who rendered a use of force review and assessment and was the author of the report most heavily relied on in Taum's disciplinary proceedings: the Martinez Report. Every significant decision maker in Taum's disciplinary and grievance procedure relied heavily on Martinez's use of force review and assessment and the Martinez Report.

However, Martinez did not meet the MQs for the FTSP that she held when she was the use of force specialist who performed a use of force review and assessment and authored the Martinez Report for Taum's disciplinary case.

The FTSP job duties included monitoring compliance with firearms training and safety standards, policies, and procedures.

In 2015, Martinez applied for the FTSP, which required graduation and a B.A. from a four-year accredited college or university or substituted excess work experience. Martinez applied for that position asserting that she obtained credits and a B.A. in criminology from Southern Oregon.

However, Martinez did not have a B.A. from Southern Oregon but may have obtained between 51 and 70 credits from that college or some other accredited college or university.

Before hiring Martinez, PSD failed to verify that Martinez had obtained a B.A. with such a limited number of credits and failed to obtain proper documentation regarding her educational background, as would normally be required by the DHRD.

Before hiring Martinez, PSD further failed to analyze Martinez's excess work experience to determine if substitution would allow Martinez to qualify for the position.

Despite Martinez's failure to meet the MQs for the position, PSD hired Martinez as a FTSP sometime after September 2015.

In 2016, during the pendency of Taum challenging his discharge in the Pre-Disciplinary phase of the PSD process, issues regarding Martinez's lack of qualifications were raised to both PSD through Espinda and the State Senate by a PSD employee requesting Whistleblower Act protections (Whistleblower Complaint). After the issues were raised, PSD opened the 2016-17 Investigation to determine whether the FTSP, which Martinez held at the time, was an open or closed recruitment. DHRD handles open recruitments under their process, which includes verification of whether the applicant satisfies the MQs for the position, including educational background. PSD handles closed (internal) recruitments, including the verification process.

The FTSP was a closed recruitment handled by PSD.

The PSD Black Binder, which contained the results of the 2016-17 Investigation, included only Martinez's training and certifications and part of Martinez's personnel records and attachments. Espinda gave a copy of the PSD Black Binder to the State Senate with the statement that PSD was confident of Martinez's qualifications.

Martinez continued her PSD employment and, on April 14, 2018, became the public safety training officer.

In April 2019, issues regarding Martinez's lack of qualifications resurfaced during the pendency of this case, both through the media (HNN Article) and with the State Senate during the Espinda Confirmation Hearings for PSD Director during the 2019 legislative session.

Nakanelua was not aware of the questions regarding Martinez's qualifications until the Espinda Confirmation Hearings. After Nakanelua learned of the questions, Espinda assured him that an internal investigation would be initiated into Martinez's educational background.

PSD opened an investigation (2019 Investigation) to review, among other things, whether Martinez lied in her statement that she had a B.A. degree from Southern Oregon. The investigation concluded that PSD could not prove that Martinez falsified her FTSP application. This conclusion was because, among other things PSD was unable to locate the original FTSP application and had multiple documents purporting to be copies of the FTSP application. The

2019 Investigation specifically did not conclude whether Martinez had a B.A. degree from Southern Oregon.

Although Cook and Espinda reviewed educational transcripts with discrepancies regarding whether Martinez earned a B.A. obtained during the investigation, Cook did not consider or verify Martinez's educational background credentials.

2.1.1.4. Cook

As noted above, Cook served as the Deputy Director of PSD during a portion of the proceedings.

Cook recommended and directed the 2019 Investigation with the approval of Espinda.

Cook also directed and supervised the 2019 Cook Review. This review was to determine whether Martinez had substitute excess work experience for the FTSP. Cook concluded in her review that PSD could have qualified Martinez for the FTSP based on substitute excess work experience. However, Cook did not review any documents from the FTSP recruitment file, which was destroyed.

Cook directed PSD's compliance with the Board orders to produce Martinez and documents regarding Martinez's qualifications including the following.

Cook told Martinez to have PSD continue Martinez's testimony.

Knowing that the PSD Black Binder was not relevant to Martinez's educational qualifications and that the Board's orders extended to curriculum vitae, resumes, and transcripts, Cook agreed with Miyasato to produce only the PSD Black Binder to comply with Order Nos. 3557 and 3561.

Cook decided not to comply with Order Nos. 3561 and 3563 and produce Martinez's personnel file because of a pending investigation, legal objections, and Martinez's refusal to consent, notwithstanding Cook's knowledge that: the Office of Information Practices is the agency charged with enforcement and interpretation of HRS Chapter 92F; PSD was allowed to produce information regarding Martinez's education, training, and previous experience under HRS § 92F-12(a)(14); and PSD had produced redacted applications for Martinez and information regarding her education to the media in 2016. While Cook asserted that she deferred to legal counsel for what to produce, she admitted that the Board had the authority to determine what should be produced by weighing the considerations of the privacy interests against the public interests in disclosure.

Cook did not share the Southern Oregon information or the Internal Affairs (IA) investigative file with PSD's counsel to produce, even though the IA file had information on Martinez's educational qualifications.

2.1.2. UPW

Respondent UPW is and was the exclusive representative³ for BU 10⁴ and with the relevant employer group for BU 10,⁵ a party to the BU 10 CBA.

During the relevant period, Nakanelua was the UPW State Director, and Clifford Uwaine (Uwaine) served as his Executive Assistant.

During the relevant period, Loyna Kamakeeaina (Kamakeeaina) served as the UPW Hawai'i Division Director.

During the relevant period, Jonathan Sloan (Sloan) was a UPW business agent.

Wendy Campaniano (Campaniano) was the attorney retained by UPW to handle and represent the Union in the Taum arbitration.

2.1.3. Taum

Until his discharge, Complainant Taum was a 19-year veteran employee⁶ of PSD.⁷ At the time of his discharge, Taum had been an adult corrections officer (ACO) IV, a BU 10 position, for 13 years.

Taum became the UPW Chief Shop Steward for HCCC in 2005-06. After becoming the Union Treasurer and a member of the State and Executive Board and the negotiating team, Taum began to have conflicts with and felt that Nakanelua had a personal grudge against him for wanting to make changes at the facilities through the CBA. Paleka and Nosaka confirmed that Nakanelua disliked Taum.

Taum's major conflict with Nakanelua happened when he and other complainants filed charges and testified against Nakanelua for failing to ratify a sick leave pattern program agreement in violation of the AFSCME Constitution and for alleged collusion with the employer.

After being threatened with retaliation against the employees that he represented, Taum accepted a proposal to drop his charge and issue an apology to Nakanelua. A UPW Executive Board decision (2008 Decision) ordered Taum to permanently resign as Shop Steward, not to seek any UPW office, to issue a written apology to Nakanelua, and to suffer severe monetary penalties for any failure to comply.

On November 30, 2016, UPW filed a Step 1 grievance on behalf of Taum based on his failure to receive a promotion to lieutenant.

At a December 18, 2010 public Executive Board meeting, Taum again raised the sick leave ratification issue with then-UPW President James Wataru. Nakanelua argued that the interpretation was settled in 2008 and that Taum breached the 2008 Decision.

In a 2012 meeting with Taum, Nakanelua, Uwaine, and other ACOs, Ho requested that Nakanelua settle with Taum. Nakanelua said that he had nothing to say to Taum.

While Nosaka told Taum that Nakanelua's body language showed that he was out to get Taum and that Nakanelua disliked him, Nosaka was not aware of Nakanelua targeting or making specific statements about Taum..

At a September 25, 2018 union meeting, Taum yelled to vote no on Nakanelua. Nakanelua responded that he would see him at the convention, which Taum interpreted as mocking him because he could not attend the convention.

2.2. CBAs; Policies and Procedures

2.2.1. BU 10 CBA

UPW and the relevant employer group⁸ for BU 10 are parties to a CBA.

The BU 10 CBA provides for, among other things, the following rights:

- § 11.01a provides that an employee shall be subject to discipline by the Employer for just and proper cause.
- § 15 provides a procedure for the grievance processing.
- § 15.02 defines a grievance as a complaint filed by either the bargaining unit employee or the Union over a violation, misinterpretation, or misapplication of a specific CBA section.⁹
- § 15.03.a provides that an employee may process a grievance through Steps 1 and 2,¹⁰ but under § 15.16, only the Union has the right to submit a grievance to arbitration.¹¹
- § 15.09¹² requires the employer to provide all information in its possession needed by the grievant and the Union to investigate and/or process a grievance within seven calendar days of the request.

Under a supplemental agreement, PSD and the Union waive Step 2 and proceed to arbitration after a Step 1 denial under CBA § 15.05b.¹³

To preserve arbitrability, the Union is required to file a timely notice of intent to arbitrate within 30 days of the Step 1 decision under CBA § 15.16.

Under the CBA, the Union, through the UPW State Director, determines whether the grievance proceeds to arbitration.

DHRD handles Step 3, the arbitration step, for all State of Hawai‘i departments, including PSD.

2.2.2. PSD Standards of Conduct (SOC)

An ACO’s primary responsibilities include ensuring the health, safety, and security of the inmates. An ACO IV is a supervisor who is held to a higher standard than ACO IIIs and is responsible for ensuring compliance with HCCC policies and procedures and for providing direction and instructions to subordinates.

All ACO Vs and below in all facilities and correctional centers are subject to, expected to know, and be familiar with the PSD Standards of Conduct (SOCs) negotiated with the Union and the PSD use of force policy consulted upon with the Union.

Taum was familiar with the SOC, which contains various provisions.

2.2.3. Use of Force Policy and Training

Since 2010, PSD has had a use of force policy applicable to all ACOs at all PSD facilities. This policy prohibits unreasonable use of force by the ACOs to minimize injuries. A supervisor is subject to and has specific responsibilities under the Policy.

Taum received use of force training, which included the use of strikes and pressure and compliance (PPCT) during his six-month Basic Correctional Training (BCT) in 1998, an eight-hour training in March 1999, and in his supervisor training for his ACO IV position.

2.2.4. Standard PSD Disciplinary Procedures

The PSD Director makes all disciplinary decisions.

PSD’s review process for an incident begins at the facility with the chief of security and the warden. After facility review, the review proceeds to the PSD institutional division officer and deputy director to ensure that the evidence is sufficient to proceed with discipline.

PSD’s standard operating procedure for a discharge is due process proceedings on two levels—the Pre-Disciplinary and the Pre-Discharge—both of which require notice of the alleged violations.

At the first level, the Pre-Disciplinary hearings officer conducts a due process hearing, which may trigger further reviews, factfinding investigation, and expert opinions.

2.2.5. Standard UPW Grievance Procedures

When several individual ACOs are involved in an incident, the UPW State Director decides whether to assign a single or independent business agents for each ACO.

The Union's internal process is that the Union Division Director and Executive Assistant review the grievance file and the business agent report recommending whether to proceed to arbitration, indicate their concurrence or not with the report, and forward the report to the State Director.

2.3. HCCC Incident

On June 15, 2015, Taum was the supervising ACO during an inmate rehousing. An incident occurred that led to the four ACOs involved using force against the inmate being rehoused (Incident).

2.4. HCCC Investigation of the Incident and Carvalho Report

Following the Incident, Cabrerros assigned Carvalho to investigate the alleged SOC violation counts against Taum for the Incident. These alleged SOC violations included, among other things, issues of unnecessary and excessive use of force and supervision of employees.

During the investigation, Carvalho reviewed videos of the Incident (PSD video), reports from the ACOs involved and other HCCC staff, investigative questionnaires from the ACOs involved and training instructors Kaeo and Uemura, medical records with photographs, the investigators' review of the video, the use of force policy, and the inmate's statement.

Carvalho submitted his investigation report (Carvalho Report) with findings and conclusions based on all the evidence. The Carvalho Report found evidence of excessive use of force based on the PSD video.

Carvalho determined that Taum was ultimately responsible for the use of force employed during the Incident because he was the supervisor of the escort and subsequent takedown of the inmate, and he was responsible for instructions to and controlling the actions of his subordinates. Therefore, Carvalho concluded that Taum violated all SOC violation counts contained in the investigation.

PSD gave Taum a copy of the completed Carvalho Report.

2.5. PSD Administrative Disciplinary Proceedings for Taum

Espinda reviewed the completed Carvalho Report, including the PSD video. Based on his review of the Carvalho Report, Espinda found sufficient evidence of just and proper cause to proceed to a disciplinary hearing process and approved Cabrerros' request to process the Taum investigation to a Pre-Disciplinary due process hearing.

2.5.1. Pre-Disciplinary Hearings

The case was forwarded to the PSD Hearings Office supervisor, who assigned the first level Pre-Disciplinary Hearing to Young.

2.5.1.1. March 21, 2016 Pre-Disciplinary Hearing

Young notified Taum of a Pre-Disciplinary Hearing by memorandum (Pre-Disciplinary Notice). Prior to the Pre-Disciplinary Hearing, Young reviewed the Carvalho Report.

Young conducted the Pre-Disciplinary Hearing by recorded videoconference from O'ahu. Taum and Sloan were present at the hearing from the Intake Service Center on Hawai'i Island (Intake Center).

At the hearing, Sloan requested additional information on certain allegations and made arguments against the allegations that Taum violated the SOCs. Sloan, among other things, asserted that Young should consider a report in another ACO's investigation; however, Young found that ACO not credible. Taum also provided arguments against the allegations and denied wrongdoing.

Based on questions about whether Taum was misidentified on the PSD video, Young was concerned that the hearing was for the wrong person. She continued the hearing to allow her to further review the PSD video.

Following the hearing, Young consulted Martinez, the PSD subject matter specialist in the use of force, for a better understanding of the correctional staff statements.

2.5.1.2. July 12, 2016 Pre-Disciplinary Hearing

Young notified Taum of a second Pre-Disciplinary Hearing. The notice amended the charges against Taum from those in the prior Pre-Disciplinary Notice.

The July 12, 2016 Pre-Disciplinary Hearing was also supposed to be a recorded videoconference conducted by Young in Honolulu with Taum and Sloan present at the Intake Center; however, after twenty minutes, the Pre-Disciplinary Hearing was continued due to technical issues.

2.5.1.3. Martinez Report

Young's supervisor Nobriga suggested an independent review of the Incident to determine whether to proceed with the investigation. Young requested that Martinez perform the review, assessment, and expert opinion based on the PSD video to determine whether the force used in the Incident was appropriate under PPCT training. Young provided Martinez with the PSD video and specific questions.

Martinez submitted the Martinez Report, which included responses to the specific questions and a timeline based on the video time stamps to identify specific strikes. To produce the report, Martinez played, observed, and replayed at a slower speed the PSD video to review the strikes, the target areas, and the techniques applied. Her responses to the specific questions posed by Young included an assessment of whether the initial takedown and strikes used complied with BCT and PPCT training.

2.5.1.4. July 20, 2016 Pre-Disciplinary Hearing

Young notified Taum and the Union of a follow up Pre-Disciplinary hearing on July 20, 2016.

Young went to Hilo for the July 20, 2016 Pre-Disciplinary Hearing to avoid technical difficulties. The Pre-Disciplinary Hearing was conducted by videoconference and recorded.

Taum and Sloan attended the Pre-Disciplinary Hearing. Prior to the hearing, they were able to review the Carvalho Report. At the hearing, they were able to review the Martinez Report.

Prior to proceeding with the hearing, Young set out the charges against Taum. She gave Taum an opportunity to provide testimony and his recollection of the Incident. Taum provided documents but no witnesses.

Sloan presented arguments against the charges. However, due to technical difficulties, Taum not able to provide his real-time review and explanation of what occurred based on the PSD video. Sloan informed Young of the existence of other videos of the Incident, which Young did not obtain or review.

After the hearing, Young concluded that Taum committed SOC violations. She based her conclusions on, among other things, the Martinez Report, the hearing, Taum's testimony, witness and supervisor statements, the hearings held for the other ACOs involved, documents provided by Taum, a follow up questionnaire with an HCCC Lieutenant, and the Carvalho Report.

For the use of force issue, Young relied solely on Martinez's review and assessment of the PSD video and the Martinez Report.

Young drafted and incorporated her findings and conclusions from the Pre-Disciplinary Hearing into a Discharge Letter (Young Discharge Letter) reviewed by Nobriga for Espinda's signature.

2.5.2. November 29, 2016 Young Discharge Letter

Espinda received the draft letter from Young with her findings and conclusions, and the administrative file with all the evidence gathered by the investigator and the Pre-Discharge Hearings officer.

In addition to two videos of the Incident, Espinda reviewed the Martinez Report and Martinez's statements made during the Taum Investigation and follow-up. He found the Martinez Report consistent with his observation and an accurate depiction of the conduct shown on the PSD video.

After making his own review and assessment of the findings and investigation, Espinda signed the Young Discharge Letter notifying Taum of his discharge from his ACO IV position, effective December 23, 2016.

For Espinda, the PSD video was a factor, the investigation was a significant factor, and the Martinez Report strengthened and gave contextual support for the investigative process, including the interviews, reports, and PSD video, for the discharge decision.

The Factual Findings in the Young Discharge Letter included Martinez's review and assessment of the PSD video.

The Young Discharge Letter notified Taum of his right to contest his discharge before Nadamoto and his right to grieve the just and proper cause.

2.5.3. Pre-Discharge Hearing on December 20, 2016

After a Pre-Disciplinary Hearing and a discharge determination, a PSD employee has a right to a Pre-Discharge Hearing before another hearings officer to provide additional information or issues not previously raised to argue that the discharge should not be sustained.

In Taum's case, prior to the Pre-Discharge Hearing, Nadamoto reviewed the Carvalho Report, the PSD video, the information gathered by Young, the case folder, and the Young Discharge Letter, which included the Martinez Report as a basis.

Nadamoto conducted the Pre-Discharge Hearing for Taum by videoconference. Nadamoto did not inquire into the investigation or the Pre-Disciplinary phase determinations but focused on arguments raised by the employee at the hearing.

Sloan attended and represented Taum at the Pre-Discharge Hearing.

The Union submitted the testimony of multiple witnesses and argued that Taum was prevented from calling three additional witnesses who had to leave because of a six-hour delay in the hearing. The Union also submitted Taum's oral and written response to the supporting facts and conclusions, which asserted that his due process rights were violated from the Incident to the final discharge and disputed Martinez's assessment.

Once again, the PSD video was not shown for Taum to provide a breakdown of the video.

After the hearing, Nadamoto consulted Martinez by email and telephone calls to clarify the evidence presented at the hearing. Nadamoto further considered the Union's hearing presentation, including the witness testimony, Taum's statement, and video provided by Sloan; the Carvalho Report; and the reports and documents collected by Young.

Relying heavily on Martinez, her use of force review and assessment, the Martinez Report, and consultations and communications with her, Nadamoto discounted or failed to consider any of the asserted mitigation factors. In finding the evidence insufficient to overturn the discharge decision, Nadamoto found Martinez's analysis of the Incident most significant.

Nadamoto drafted the Final Discharge Letter (Nadamoto Discharge Letter and collectively with the Young Discharge Letter referred to as Discharge Letters) upholding the discharge for Espinda's signature.

2.5.4. January 4, 2017 Nadamoto Discharge Letter

Prior to signing the Nadamoto Discharge Letter, Espinda received the administrative file, which contained information that Nadamoto gathered by email or at the hearing, including the Carvalho Report, the Pre-Disciplinary and Pre-Discharge proceedings information, and the letters and emails with Martinez.

After reviewing the administrative file and performing his independent assessment, Espinda signed the Nadamoto Discharge Letter notifying Taum that the discharge was sustained and advising him to consult with the Union if he felt there was no just and proper cause for the action.

In sustaining the discharge, Espinda relied on the Martinez Report and agreed with her analysis.

2.6. UPW Grievance Filed Regarding Taum's Discharge

Immediately after PSD sustained the discharge decisions for the ACOs involved in the Incident, Nakanelua consulted Uwaine and Kamakeeaina. Nakanelua assigned separate business agents for each of the ACOs involved in the incident. Sloan was assigned to Taum's grievance.

2.6.1. UPW Request for Grievance Information

Under CBA § 15.09,¹⁴ the employer must provide all information in its possession needed by the grievant and the Union to investigate and/or process a grievance within seven calendar days of the request.

UPW requested information regarding the Taum grievance, and Taamilo responded to the request for information (RFI). Taamilo scheduled a Step 1 meeting and provided information to UPW, including the Carvalho Report and documents, the Martinez Report, an administrative folder that identified the individuals involved with the investigation and report, the PSD video, Taum's personnel records, PSD policies and procedures, and information on similar disciplinary cases.

2.6.2. Taum's Conversation with Kamakeeaina

After speaking with Sloan, Taum spoke with Kamakeeaina to express his concern that the grievance did not go far enough and should list additional facts. Kamakeeaina told Taum that she had asked Nadamoto whether the termination was going to be effective on December 23, 2016 before the investigation was completed. When Nadamoto responded that Espinda told her that the termination was still effective December 23, 2016, Kamakeeaina told PSD that the matter would be grieved.

Taum spoke with Kamakeeaina and Sloan regarding the termination being upheld, the receipt of the Nadamoto Discharge Letter from Espinda, the grievance steps, and his concern that not everything was heard at the Pre-Discharge Hearing. Kamakeeaina indicated that the involved ACOs were discharged without due process based on the incomplete investigation.

2.6.3. Step 1 Grievance

On January 5, 2017, Sloan filed a grievance on Taum's behalf for the discharge (Taum grievance) based on lack of due process and just cause, and failure to consider all the evidence presented at the Pre-Discharge Hearing and at the Pre-Disciplinary hearing based on the incomplete investigation.

Sloan notified Taum of the Step 1 meeting.

Prior to the Step 1 meeting, Taamilo consulted with Young, Nadamoto, and her supervisor Renee Laulusa, who consulted with Espinda.

Taamilo represented PSD at the Step 1 meeting. Taum attended with Sloan, who presented the case on behalf of the Union, which included Taum speaking on his own behalf.

At Step 1, Taamilo's role was to allow UPW and Taum to raise issues, including mitigating factors, to change the disciplinary decision and conduct an independent assessment of the evidence in the investigative file. However, at the meeting, mitigating factors were not addressed.

There was no audio of the Step 1 meeting.

Taamilo reviewed the full grievance and administrative files, including but not limited to the findings and conclusions made and evidence gathered by Young in the Pre-Disciplinary phase, which included the Martinez Report, the Pre-Disciplinary Hearing audiotapes, the PSD videos, and the Discharge Letters.

After the review, Taamilo drafted a letter that Espinda signed and sent on January 31, 2017, notifying UPW that the Step 1 grievance was denied.

2.6.4. UPW's Notice of Intent to Arbitrate

UPW obtained extensions of time to submit its notice of intent to arbitrate Taum's grievance from March to June 2017.

Under the Union's standard process, Sloan recommended to Nakanelua that the notice of arbitration be filed in the Taum grievance.

Kamakeeaina informed Taum of her concurrence with proceeding to arbitration and her opinion that Taum was terminated despite doing everything required of him as a supervisor. When Taum expressed concern that his history with Nakanelua may affect the decision to go to arbitration, Kamakeeaina reassured him that Nakanelua was professional.

Nakanelua received the Taum grievance and investigative files, which included Sloan's notes and recommendations and Uemura's review. In deciding whether to proceed to arbitration, Nakanelua reviewed the RFI letter and the information provided in response to determine whether there has been a complete investigation conducted by the employer, and whether the grievance was properly processed. The UPW ensures that a grievance is properly investigated by the business agent and Union by making sure that the information required by CBA § 15.09 has been provided.

Despite some doubts and concerns about the Nadamoto Discharge Letter's allegations and without a review of the PSD video, Nakanelua approved the assigning of an attorney to the case and preparation of the grievance file for transmittal and requested that the notice of arbitration letter be prepared to inform PSD of the Union's intention to proceed to arbitration.

Nakanelua selected Campaniano to represent the Union in the Taum arbitration because of her previous representation of UPW in ten arbitration cases over terminations (none for use of force). UPW hand-delivered the full grievance file to Campaniano.

2.6.5. Step 3 Arbitration

Taamilo provided the documents in the grievance file to DHRD.

On May 5, 2017, UPW sent a letter to then-DHRD Director James Nishimoto notifying him of its intention to submit the Taum grievance to arbitration.

Taum received a copy of the Notice of Intent to Arbitrate and of Campaniano's representation of the Union. Taum also received another letter, dated May 15, 2017, from Nakanelua notifying him of the submission of his grievance to arbitration. The letter further informed Taum that "the decision to arbitrate is subject to further review that may result in the grievance being withdrawn from arbitration."

2.6.6. Taum's Interactions with Campaniano During Her Representation of UPW

Nosaka and Paleka warned Taum that Nakanelua was setting him up by Campaniano's representation because of her lack of experience with handling termination cases. Taum became concerned about his representation and began to record and collect information.

Taum contacted Campaniano several times. Campaniano promised to meet with him, and among other things, they discussed the arbitrator selection process.

Campaniano sent a letter notifying Taum of the selection of Arbitrator Maura Okamoto and the relevant hearing dates. The letter requested that Taum and Sloan appear at the hearing in Honolulu and directed Taum to contact Sloan regarding travel arrangements.

Throughout this process, Taum was informing Campaniano of his concerns.

However, Taum became frustrated with Campaniano during one phone call when he was trying to communicate the facts of his case. He raised issues regarding various pieces of evidence and his feeling that he was being retaliated against because of his witnessing and reporting issues at HCCC. Campaniano did not allow Taum to review the PSD video frame-by-frame.

Towards the end of the conversation, Campaniano raised the issue of resignation and advised Taum to move on with his life. Taum responded that it was hard to walk away and did not authorize any discussion of resignation with PSD.

Taum and Campaniano continued to communicate about the arbitration. Campaniano clarified that the filing of the decision to proceed to arbitration was to preserve the timeliness, which the Union had discretion to review, cancel, settle, and reconsider based on all the facts and circumstances received during the process.

On October 2, 2017, Campaniano notified Taum that she received a copy of a letter from Nakanelua, dated September 25, 2017 letter (Nakanelua Letter), informing Taum of the withdrawal of his grievance from arbitration, the cancellation of the hearing dates, and the termination of her representation.

2.6.7. Nakanelua Withdrawal of Arbitration

Nakanelua initially reviewed the PSD video in July 2017 with Uwayne and Kamakeeaina. Nakanelua reviewed the PSD video a total of seven times and additional evidence with Uwayne prior to sending the Nakanelua Letter.

In deciding whether to proceed to arbitration, Nakanelua found deficiencies in the Martinez Report. Nakanelua performed an independent observation. He reviewed the PSD video with the Martinez Report and found the Martinez Report accurate. Therefore, Nakanelua relied on the Martinez Report to determine that Taum's reporting of the Incident was not consistent.

After reviewing the PSD video, Nakanelua instructed Campaniano to do an analysis and evaluation of the grievance file.

Campaniano's assessment was that the case should not proceed to arbitration. However, her assessment failed to include questioning of any witnesses or discussion with Taum regarding the merits of the arbitration.

Based on Campaniano's assessment, Nakanelua conducted another review with Uwayne and Kamakeeaina. He also requested a second written assessment of the Incident from another attorney Lowell Chun-Hoon (Chun Hoon), who concurred with Campaniano.

On September 25, 2017, Nakanelua sent the Nakanelua Letter notifying Taum that UPW decided not to pursue the grievance to arbitration. The Nakanelua Letter states, "Based on a review of the entire matter, including but not limited to the applicable provisions of the Collective Bargaining Agreement (CBA) and the evidence presented, the Union has decided not to pursue the grievance because there is insufficient proof that there is a violation of the CBA."

Nakanelua withdrew the Taum grievance based on the entire grievance file; the recommendations of Sloan, Kamakeeaina, Uwaine, Campaniano, and Chun-Hoon; and his own experience with the disciplinary process in use of force cases.

Nakanelua denied that a grudge against Taum influenced his decision not to arbitrate the grievance over Taum's discharge.

Nakanelua notified the other three ACOs involved in the Incident that their grievances on their discharges were also withdrawn from arbitration.

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's testimony. Most of the credibility determinations regarding the witnesses' testimony are incorporated into the findings of fact above.

Witness credibility mattered in this case on several significant issues. The most critical of those were about whether Martinez was qualified for the FTSP that she held at the time she rendered the Martinez Report, acted as PSD's use of force expert, and rendered her use of force review and assessment upon which Taum's discharge was based; and the extent to which PSD relied on Martinez's use of force expertise, review, and assessment, and the Martinez Report during the proceedings challenging his discharge without disclosing Martinez's lack of qualifications to Taum, his Union, and his attorney.

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.

While at times Mr. Taum's testimony was self-serving and contentious, his testimony was largely straightforward, consistent, plausible, and honest. Taum admitted when he lacked knowledge or was unable to recall. On direct examination, his recollection was fairly clear and detailed. On cross examination, however, he tended to be cautious, evasive, and unresponsive in his recall, and at times, admitting only a general recollection and a necessity to check his records for specifics. In assessing his credibility, while the Board relied on all the factors set forth above, Taum's demeanor, the context of his testimony, the quality of his recollections, the consistency

of his testimony, and the presence or absence of corroboration were most significant. Most of the credibility findings regarding Mr. Taum's testimony are incorporated into the findings of fact.

Nosaka was truthful, credible, and specific in his perception that UPW unfairly treated Taum based on Nakanelua's body language and his conflicts with and dislike of Taum. He was also honest about the conflict between Nakanelua and Taum being mutual, that he had no recall of negative statements by Nakanelua about Taum, and that he felt that Nakanelua's retaliation against him (Nosaka) was because of his role in the UPW constitutional amendment dispute and affiliation with Taum. The Union's attempt to undermine Nosaka's credibility by portraying him as a disgruntled former employee and unsuccessful challenger in a UPW State Director election was mostly unproductive because Nosaka provided credible reasons for his actions taken against UPW.

The Board faced an unprecedented situation in determining regarding Martinez's credibility.

In her first appearance before the Board in January 2019, Martinez was a convincing witness regarding her use of force credentials and her FTSP qualifications based on, among other things, her B.A. degree from Southern Oregon. She was also credible and convincing with a clear recollection of the process and circumstances surrounding the making of the Martinez Report. She was candid about the flaws in the Martinez Report, which supported her veracity. Martinez was somewhat disingenuous in her responses deflecting blame from herself for the lack of current PPCT training for the ACOs involved in the Incident and her lack of knowledge of HCCC standard operating procedures for escorting of inmates for rehousing. Nevertheless, her real-time review of the PSD video and assessment of the use of force shown was believable.

However, at the December 2019 HOM on the Amended Complaint, Martinez made the stunning admission that she did not graduate from Southern Oregon but from an unaccredited school no longer in existence. Martinez's credibility was eviscerated by her denial that she misrepresented her B.A. degree from Southern Oregon in her January 2019 testimony. Her explanation was neither credible nor supported by her prior testimony. Therefore, this was another misrepresentation.

Finally, the Board finds Martinez's failure and refusal to comply with the subpoenas and orders to produce documents to substantiate and clarify her educational credentials confirm her lack of truthfulness and credibility. Therefore, for the purpose of the ultimate issues in this case regarding PSD's interference with Taum's right to adequate representation by his Union during the disciplinary and grievance processes and his right to a full and fair process of challenging his discharge, Martinez demonstrated that she was not credible.

The Board found Young's testimony confusing and characterized by a poor recall of Taum's Pre-Disciplinary Hearing process. Young was unable to keep track of the specific details

of each of the Pre-Disciplinary Hearings, such as the documents and witnesses presented by Taum, whether the hearing was held, or whether Taum was able to identify himself on the PSD video. Her testimony also showed bias because she resolved credibility issues in favor of PSD rather than Taum and the other ACOs involved without reasons. Young admitted that her determination regarding Taum's discharge was based not on an independent review of the evidence but on the Martinez Report and Martinez's opinion. Therefore, the Board does not credit Young's testimony that Taum's Pre-Disciplinary process was done thoroughly and fairly.

Nadamoto, on the other hand, had a clear recollection regarding the standard operating procedures for the disciplinary hearings. However, her testimony was confusing and conflicting on the issue of whether she gathered new evidence at the Pre-Discharge phase of Taum's disciplinary process. On one hand, she testified that she was unable to recall whether she tried to find additional new evidence. She justified her lack of recall by a general assertion that her role as the Pre-Discharge Hearings Officer was limited to a review of evidence gathered in the investigation and the Pre-Disciplinary hearing phase, and that any additional new evidence should have been gathered and raised by Taum and the Union. The Board credits Nadamoto's testimony to the extent that she reviewed evidence gathered by Carvalho and Young in recommending that the discharge be sustained.

The Board found Espinda's testimony, part credible, and part not credible. His recollection of PSD's established procedures for processing an employee's alleged misconduct through the investigation, the disciplinary process, and the imposition and review of the disciplinary decision was clear. However, his recall regarding the specific procedure and his role in Taum's case was not as detailed. Further, the Board did not find Espinda credible regarding his knowledge of the facts regarding Martinez, her applications, and qualifications. On these issues, which included the Whistleblower Complaint, the various inquiries and investigations into Martinez's educational qualifications and her FTSP application, and his communications regarding Nishihara's concerns and requests, his testimony was characterized by poor recall, confusion, and contradictions. Espinda's testimony that he had no concerns regarding her job applications nor awareness of any questions about her credentials until the HNN Article in 2019 was contradicted by other evidence in the record, such as the Whistleblower Complaint and Nishihara's questions about Martinez's qualifications in 2016. Finally, some of Espinda's responses were exaggerated and self-serving to PSD and himself, such as the lack of weight he gave to the Martinez Report.

In his testimony, Nakanelua demonstrated knowledge of the UPW Constitution and election process, his job responsibilities, and the PSD disciplinary process. Some of his testimony was obviously self-serving personally or for the Union. For example, his denials of making derogatory remarks about and having a grudge against Taum, and that Taum's filing of charges and a grudge affected or interfered with UPW's representation of Taum. Another was his characterization of Taum as an impressive and great representative. However, Nakanelua had a

clear recall of the Trial Body proceedings and of the procedure that he followed and the reasons for his decisions for referring and withdrawing the Taum grievance from arbitration. His statement that he had no knowledge that Martinez was unqualified until the 2019 Espinda Confirmation Hearing was credible.

Carvalho had a clear and detailed recollection of the procedures followed and the reasons for his findings and conclusions regarding the Taum investigation. At the time of the Taum investigation, he was a PSD employee. By the time of his testimony, he was retired from his PSD position. After having the opportunity to review and rely on the Carvalho Report, Carvalho provided credible testimony without much equivocation on the steps that he took in performing the investigation and the reasons for his decisions during the process.

The Board found Cook's testimony, in part credible and in part not credible. Her recall of her role, meetings, interactions, and review of the 2016-17 and 2019 Investigations and the 2019 Cook Review was clear and detailed. However, it was apparent that her involvement was limited to directing, delegating, and reviewing, rather than performing these investigations. Her testimony regarding the procedures followed was often confusing, misleading, and a parsing of words. Cook was particularly vague, evasive, and confusing in her responses about her reasons for PSD not complying with the Board orders and any investigation or review involving Martinez's educational credentials, including whether she reviewed Martinez's testimony that she graduated from college and her attempt to explain why Martinez's FTSP application showing attesting to a B.A. from Southern Oregon with 51 credits was not a sworn false statement.

Specifically, the Board did not find her testimony credible on the 2019 Cook Review, the PSD records on Martinez's FTSP recruitment, and the number of Martinez's educational transcripts. The Board found the 2019 Cook Review conclusion that PSD qualified Martinez for the FTSP educational MQs based on substituted excess work experience flawed in several respects: the timing of the review four years after PSD hired Martinez; its sole focus on a speculative question of whether Martinez might have been (not was) qualified by PSD based on substitute excess work experience; the lack of inquiry or verification of Martinez's educational credentials; and Cook's admission that there was no actual proof that PSD qualified Martinez for the FTSP. Her testimony that PSD had no records for Martinez's FTSP recruitment because of the destruction of the FTSP recruitment file was contradicted by PSD's production of some incomplete copies of Martinez's FTSP applications. Cook's testimony that she reviewed eight transcripts for Martinez was inconsistent with her other testimony that she only reviewed two transcripts provided by DHRD.

3.2. Burden of Proof

Under both HRS § 91-10(5)¹⁵ and Hawai'i Administrative Rules (HAR)¹⁶ § 12-42-8(g)(16),¹⁷ the complainant, as the charging party, bears the burden of proof. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be

met by a preponderance of the evidence. However, if another party raises any subsequent issue, that party has the burden of proving that issue by a preponderance of the evidence. HRS § 91-10(5); HAR § 12-42-8(g)(16); *see also*: Haw. Gov't Emps. Ass'n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, at *16 (November 8, 2005) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-456.pdf>).

Accordingly, Taum must present both evidence and argument that show that it is more probable than not that Respondents violated HRS Chapter 89. *See Minnich v. Admin. Dir. of the Courts*, 109 Hawai'i 220, 229, 124 P.3d 965, 974 (2005) (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)). In other words, Taum must produce sufficient evidence and support the evidence with arguments that apply the relevant legal principles. United Pub. Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, at *12 (September 6, 1990) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-309.pdf>) (citing State of Haw. Org. of Police Officers v. Fasi, Board Case No. CE-12-161, Decision No. 161, at *32-33 (June 7, 1982) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-161.pdf>) (Fasi)).

If the party with the burden of proof does not present sufficient evidence and legal arguments regarding an issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *25 (May 7, 2018) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3337F.pdf>) (Mamuad). *See also*: Fasi, Decision No. 161, at *33.

3.3. Preliminary Issues and Rulings

During the proceedings, the Board rendered certain rulings that are addressed to the extent necessary in this Decision and Order.

3.3.1. Motion for OSC, Motion for Continuance, and Order No. 3566A

In his Motion for OSC, Complainant primarily requests, among other things, that PSD, Martinez, and their legal counsel be ordered to appear before the Board, be held in contempt of Order Nos. 3557[A] and 3561 under HAR § 12-42-8(g)(9)(A) and be barred from appearing and testifying before the Board for a three-year period.

HAR § 12-42-8(g)(9) provides for a finding of contemptuous conduct¹⁸ under two limited situations. HAR § 12-42-8(g)(9)(A) is primarily intended as a mechanism for the Board to maintain civility and propriety in its proceedings by controlling the conduct and behavior of persons appearing before the Board. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. DR-01-100a, Order No. 2723, at *7 (July 13, 2010) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2723.pdf>). HAR § 12-42-8(g)(9)(B) applies to the limited situation of a witness refusing to answer any question ruled to be proper at a hearing. Neither of these situations is presented in this Motion for OSC.

PSD presented Martinez as their use of force expert regarding Taum's conduct in the Incident, and she falsely testified regarding her FTSP qualifications. Taum's frustration with the failure of PSD and Martinez to comply with Board orders and subpoenas to obtain documents regarding her qualifications is understandable. In fact, the Board finds that PSD's misconduct alleged in this case was more egregious than either of the situations under HAR § 12-42-8(g)(9).¹⁹ Nevertheless, because the Board's contempt rules do not address this type of conduct, the Board cannot grant the Motion for OSC.

However, the Board also cannot ignore PSD's failure to comply with its orders to produce Martinez because this failure frustrated and delayed the processing of this case.

While the Board could have enforced its subpoenas and orders under HRS § 377-9,²⁰ the Board was unwilling to further delay the prohibited practice proceedings that had been in process for almost two years. Therefore, the Board issued Order No. 3566A to address PSD's lack of compliance. PSD and Martinez knew that the PSD Black Binder did not contain any documents relevant to Martinez's educational background. Because of PSD's and Martinez's refusal to produce anything other than the PSD Black Binder, it was unclear what other relevant documents and information they had. Taum was prejudiced by their failure to produce the information ordered. Accordingly, the Board analogized the situation to one in which a party is prejudiced by another party's loss or destruction of evidence.

In Order No. 3566A, the Board determined that PSD failed to act in good faith and set forth specific reasons for that finding. Based on this finding, the Board disqualified Martinez as an expert witness; drew an adverse inference from PSD's refusal to produce documents to qualify Martinez as an expert; and gave the weight deserved to Martinez's testimony and opinions. After so doing, the Board ruled that PSD was no longer required to produce documents regarding Martinez's credentials under these Orders.

The adverse inference rule adopted by the Board under its broad authority under HRS § 89-5²¹ is well-accepted by the Hawai'i courts. *See, e.g., Stender v. Vincent*, 92 Hawai'i 355, 365, 992 P.2d 50, 60 (2000) (Stender). This rule is commonly applied where a remedy must be fashioned to cure prejudice suffered by one party because another party loses or destroys evidence. *Id.* at 362, 992 P.2d at 57. Where evidence is lost or destroyed, the trier of fact may draw an adverse inference that the lost evidence was unfavorable to the party, who destroyed or lost the evidence. *Id.* at 364-65, 992 P.2d at 59-60.

In administrative agency proceedings the inference of unfavorability is required to be drawn when a party has relevant evidence in their control and fails to produce the evidence. Int'l Union, United Auto., Aerospace and Agric. Workers of America v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972). While bad faith may compel an adverse inference, the absence of bad faith may not necessarily preclude one. Within the bounds of its discretion, the trier of fact has the

flexibility to fashion an appropriate sanction based on the facts of the case. Stender, at 364-65, 992 P.2d at 59-60.

The Board, in its discretion, further denied PSD's request for a continuance until the circuit court ruled on an appeal from Order No. 3566A. *See, e.g., Alt v. Krueger*, 4 Haw. App. 203, 209, 663 P.2d 1078, 1083 (App. 1983) (citing Sanders v. Point After, Inc., 2 Haw. App. 65, 626 P.2d 193 (1981)).

In short, the Board addressed Taum's complaints against PSD made in the Motion for OSC in a manner allowed by its discretionary authority under HRS Chapter 89.

3.3.2. Motion to File Amended Complaint

The Board's administrative rules provide for a liberal construction to effectuate the purpose of HRS Chapter 89 and to secure the just and speedy determination of every proceeding. HAR § 12-42-2. These rules layout the procedures for written motions and allow the Board, in its discretion, to allow any document to be amended before a final order is issued. HAR §§ 12-42-8(g)(3)(C) and (10).

At the hearing on the Motion to Amend, UPW agreed that the Board's administrative rules permit a prohibited practice complaint to be amended without limitation in the discretion of the Board at any time prior to the issuance of a final order. HAR §§ 12-42-8(g)(10) and 12-42-43. UPW's principal objection was that the requirements of HRCF Rule 15(b)²² that provide for amendment of complaints to conform to the evidence were not met in this case.

The Board's administrative rules do not specifically provide for amendment of pleadings to conform to the evidence like HRCF Rule 15(b), and the Board is not governed by the HRCF or the cases decided under these Rules. *See: Los Banos v. Haw. Lab. Rel. Bd.*, No. CAAP-17-0000476 (App. Nov. 22, 2019) (mem.) (Los Banos).

The Board has broad discretionary authority to "resolve controversies" and to take "necessary and proper" actions to "conduct proceedings on complaints of prohibited practices[.]" HRS §§ 89-5(i)(3) and (4). Under these administrative rules, the Board has ruled that this authority includes amending charges to conform to the evidence as required to conduct a full, fair, and impartial hearing. Parker v. Dep't of Pub. Safety, Board Case No. 19-CE-10-923, Decision No. 502, at *39 (March 23, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/03/Decision-No.-502.pdf>) (Parker) (citing Taylor v. City of Los Angeles, 60 Cal. App. 4th 611, 618 (Cal. Ct. App. 1997)). This rule reflects the liberal policy favoring amendments of pleadings at any time.

Because there was no showing that the amendments granted caused undue delay or prejudice, the Board rejects PSD's contention that there is manifest prejudice. While the parties had rested their case-in-chief on the hybrid case claims, the proposed Amended Complaint adds

prohibited practice allegations against PSD for using Martinez as its use of force expert without disclosing that she was unqualified. This amendment was based on evidence already presented during the cases-in-chief. Further, the Board specifically provided Respondents with a full opportunity to reopen their case to address the additional violations alleged in the Amended Complaint. Therefore, there was no manifest prejudice to any of the parties caused by the proposed amendment.

On the other hand, manifest prejudice would have occurred if the Board did not allow the amendments because that would have resulted in interference with Taum's rights to a full and fair processing of his challenges to his discharge.

Regarding the issue of consent raised by UPW, the Board finds implied consent based on UPW's failure to object when PSD put Martinez's qualifications into issue.

The proposed Amended Complaint did not raise impermissible new claims against UPW. The Complaint contains allegations that Nakanelua's discriminated against Taum based on a vendetta and their past conflicts. These are not new allegations. The allegations regarding Nakanelua's actual knowledge of and failure to question Martinez's qualifications were raised when PSD qualified her as its use of force specialist.

Finally, the Board rejects UPW's untimeliness objections to the proposed Amended Complaint because any document amended "shall be effective as of the date of the original filing, if it relates to the same proceeding." HAR § 12-42-8(g)(10)(C). As the Amended Complaint relates to the same proceeding, it is timely. The issue of the untimeliness of the claims regarding Nakanelua's discrimination based on the vendetta and his past conflicts with Taum will be addressed fully below.

UPW is well-aware that the 90-day period begins when the complainant knew or should have known that his rights were being violated. United Pub. Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 30, 2006) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-443.pdf>) (Okimoto). Complainant did not know of the issue of Nakanelua's knowledge of the questions regarding Martinez's qualifications until September 25, 2019. Therefore, the claim is within the 90-day period of the filing of the Amended Complaint on October 24, 2019.

For these reasons, the Board granted the Motion to Amend.

3.3.3. Stipulated Protective Order

The Board orally did not accept PSD's request for a stipulated protective order for a sealing of the PSD Black Binder.

The Board, in its discretion, rejects PSD's requests for sealing or a protective order for the PSD Black Binder on several other grounds.

Neither HRS Chapter 89 nor the Board's administrative rules provide authority for a stipulated protective order or blanket sealing of the entire document.

The Hawai'i Supreme Court (HSC) has ruled that, when a party or court seeks to prevent public access to records, both procedural and substantive requirements must be satisfied to overcome the right of public access. Grube v. Trader, 142 Hawai'i 412, 423, 420 P.3d at 343, 354 (2018) (Grube); *see also*: Oahu Publ'n, Inc. v. Ahn, 133 Hawai'i 482, 497-98, 331 P.3d 460, 475-76 (2014) (Ahn). Those substantive requirements include that the court must make a record of "specific findings." The court may not rely on generalized concerns but must indicate facts demonstrating a compelling interest that justify the continued sealing of the documents and how unsealing the information will lead to the infliction of irreparable damage to the compelling interest. Grube, 142 Hawai'i at 424-25, 420 P.3d at 355-56 (citing Ahn, 133 Hawai'i at 507, 331 P.3d at 485).

PSD provided no facts other than a vague reference to a PSD investigation and HRS Chapter 92F as grounds for the requested confidentiality. The only pending investigation brought to the Board's attention was regarding Martinez's educational background and the FTSP application, neither of which is contained in the PSD Black Binder. Therefore, the Board could not make the required record of specific findings to meet the substantive requirements for sealing of the PSD Black Binder and refused to accept the stipulated protective order or to grant the request for sealing.

3.4. UPW's Motion to Dismiss and/or For Summary Judgment

UPW's Motion to Dismiss and/or For Summary Judgment (UPW MTD/MSJ) and Complainant's opposition reference various types of dispositive motions. The Board has adopted relevant standards. Based on those standards, the Board orally dismissed the hybrid case allegations against both Respondents and closed Board Case No. 17-CU-10-357 against UPW. The Board further ordered HOMs to proceed on the Amended Complaint over the remaining violations against PSD of HRS §§ 89-13(a)(1) and (7) and 89-10.8. The Board sets forth the reasons for its oral rulings as follows.

3.4.1. Lack of Subject Matter Jurisdiction for Untimeliness

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

A motion to dismiss for lack of subject jurisdiction may be raised at any time. Rodrigues v. Perry, Board Case No. CE-12-822, Order No. 2942, at *8 (August 27, 2013) (<https://labor.hawaii.gov/hlrh/files/2019/01/HLRB-Order-2942.pdf>) (citing Chun v. Emp. Retirement Sys., 73 Haw. 9, 13, 828 P.2d 260, 263 (1992)). The Board's standards for a motion to dismiss for subject matter jurisdiction are well-established.

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 Caspillo v. Dep't of Transp., Board Case No. 17-CE-01-899; 17-CU-01-355, Decision No. 509, at *6 (November 22, 2021) (Caspillo) (<https://labor.hawaii.gov/hlrh/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. Tupola v. Univ. of Haw. Prof'l Assembly, Board Case No. CU-07-330, Order No. 3054, at *17 (February 25, 2015) (<https://labor.hawaii.gov/hlrh/files/2019/01/HLRB-Order-3054.pdf>) (Tupola) (citing Pavsek v. Sandvold, 127 Hawai'i 390, 402-03, 279 P.3d 55, 67-68 (App. 2021) (Pavsek)). However, the Board may dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Haw. State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

The party seeking to invoke the Board's jurisdiction has the burden of establishing that jurisdiction exists. Caspillo, Decision No. 509, at *6. 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 Cnty. of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

As to untimeliness, HRS § 377-9(l) sets forth a requirement applicable to prohibited practice cases under HRS § 89-13 that the Board can only hear complaints filed within 90-days of the action that the alleged prohibited practices are based on. Aio at 404 n.3, 664 P.2d at 729 n.3. The administrative rules governing the Board proceedings further include this 90-day limitation. HAR § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case Nos. CE-10-75; CU-10-43, Decision No. 175, at *21-22 (1983) (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-175.pdf>). The 90-day limit is jurisdictional and provided by statute; therefore, neither the Board nor the parties may waive this requirement. Hikalea v. Dep't of Env. Serv., City and Cnty. of Honolulu, Board Case No. CE-01-808, Order No. 3023 at *6 (October 3, 2014) (<https://labor.hawaii.gov/hlrh/files/2019/01/HLRB-Order-3023.pdf>). Further, the 90-day period

begins when the complainant knew or should have known that his rights were being violated. Okimoto, Decision No. 443A, at *4.

Respondents do not dispute the Board’s well-recognized rule that with breach of the duty of fair representation allegations, the 90-day limitations period set forth in HRS § 377-9(l) begins when the employee receives notice that the union will not represent the employee. DePonte, Jr. v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-01-100, Order No. 1105, at *7 (September 15, 1994) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1105.pdf>). Rather, their arguments are focused on the untimeliness of the allegations pertaining to the 2007 charges filed by Taum against Nakanelua and those against UPW for the conduct of Campaniano.

These assertions ignore the Board’s finding in prior cases that evidence of antecedent events may be used as background or to shed light on the true character of events occurring within the limitation period. Caldeira v. Kunimura, Board Case No. CE-03-97, Order No. 714, at *10 (November 1, 1988) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-714.pdf>) (citing NLRB v. Ryder Tank Lines, Inc., 310 F.2d 233, 234 (4th Cir. 1962)). This approach is consistent with the rule applied in breach of duty of fair representation cases under federal law where the limitations period has been held not to bar an employee from using prior acts as background evidence in support of a timely claim. *See*: Saunders v. NY Convention Ctr. Operating Corp., No. 1:20-cv-5805-GHW, 2021 U.S. Dist. LEXIS 182247, at *22-23 (S.D.N.Y. Sep. 23, 2021) (citing Davis-Garrett v. Urban Outfitters, 921 F.3d 30, 42 (2d Cir. 2019).

Accordingly, the Board finds that these allegations constitute background evidence, shedding light on the timely breach of the duty of fair representation allegations against UPW for withdrawal of the request for arbitration. The Board rejects Respondents’ arguments that these allegations should be dismissed based on untimeliness.

The Board concurs with UPW’s position that internal union matters are not within its subject matter jurisdiction. *See*: Bunch v. Haw. Gov’t Emp. Ass’n, Local 152, AFL-CIO, Board Case No. CU-03-99, Order No. 1350, at *9-10 (July 30, 1996) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1350.pdf>). However, as noted in Pe’a v. State of Haw. Org. of Police Officers, Board Case No. CU-12-59, Order No 713, at *5 (October 28, 1988) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-713.pdf>), the line between “matters that are internal union affairs and those that are external may not always be clear.”

Nonetheless, the Board further determines that Taum is not seeking to relitigate the internal 2007 charges, proceedings, and conclusions. These allegations are background evidence to shed light on the true character of events occurring during the limitations period—namely Nakanelua’s alleged breach of duty of fair representation based on discrimination against Taum. The Board, therefore, has jurisdiction to consider these allegations for this limited purpose.

3.4.2. Failure to State a Claim

Regarding dismissal for the failure to state a claim, the United States Supreme Court (U.S. Supreme Court) has held that an objection that a complaint fails to state a claim upon which relief can be granted endures up to but not beyond trial on the merits. Arbaugh v. Y & H Corp., 546 U.S. 500, 507 (2006) (Arbaugh).

The Board's standards for dismissal for failure to state a claim are well-established. Dismissal is appropriate only if the complaint is clearly without merit and its lack of merit leads to a finding that no law supports the claims in the complaint." Justice v. Fuddy, 125 Hawai'i 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy). Complaints should not be dismissed for failure to state a claim unless there is no doubt the complainant cannot prove any set of facts in support of his claim that would entitle him to relief. *Id.* at 107-108, 253 P.3d at 668-669. Accordingly, the Board must consider the complaint in the light most favorable to the complainant to determine whether the allegations in the complaint could warrant relief under any alternate theory. *Id.* at 108, 253 P.3d at 669. Further, the Board is strictly limited to the allegations of the complaint and must deem those allegations to be true. However, the Board is not required to accept legal conclusions made in the complaint. Paysek, 127 Hawai'i at 403, 279 P.3d at 68.

UPW argues that the alleged violations of HRS §§ 89-13(b)(1), (4), and (5) fail to state a claim because there is an absence of law and facts to support the claims that: 1) UPW had a duty to inform the Complainant of his right to file and/or pursue arbitration on his own; 2) UPW should have afforded Complainant with legal advice and counsel; 3) Nakanelua had a personal grudge or vendetta against Complainant based on the 2007 internal complaint filed against him; and 4) the Union did not know about Martinez's qualifications and did not rely on her for its decisions in this case.

Although not in the original Complaint, the issue of the Union's knowledge of and reliance on Martinez was also an issue raised during the HOMs on the original Complaint and will be addressed on the merits of the hybrid case below.

As the other allegations were contained in the original Complaint for which HOMs were already held, under Arbaugh, these objections for failure to state a claim cannot endure as to these allegations that were tried. Therefore, the Board will not dismiss any of these allegations for a failure to state a claim and will address them as part of the hybrid case below.

3.4.3. Failure to Carry the Burden of Establishing the Hybrid Case

The Hawai'i Intermediate Court of Appeals (ICA) has held that a harmonious reading of the Board's rules permits the Board to hear motions akin to a motion for a directed verdict if the party opposing the motion is given a full and fair opportunity to be heard on the motion after reasonable notice, and the rules applicable to the Board are not otherwise violated. Further, the

reference to established court rules and cases interpreting such rules as guidance in applying the Board's own rules of practice and procedure is generally permissible. Los Banos, at *42-43.

Therefore, based on Los Banos and the Board's administrative rules, Board construes the portion of the UPW MTD/MSJ regarding the hybrid case allegations as a motion for decision that the Complainant failed to carry his burden of establishing that UPW breached its duty of fair representation and that PSD breached the CBA in violation of HRS § 89-13(a)(8), HRS § 91-10(5) and HAR § 12-42-8(g)(16).

An allegation that the employer committed a prohibited practice by violating the relevant CBA requires that a complainant first exhaust contractual remedies unless the attempt to exhaust would be futile. However, an employee who is prevented from exhausting the contractual remedies provided by their collective bargaining agreement due to their union's wrongful failure to process the grievance may nevertheless bring an action against the employer provided that the employee can prove that the union breached its duty of fair representation in the handling of the employee's grievance. Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57.

Hence, for a "hybrid case" where the prohibited practices consist of allegations of a breach of the duty of fair representation by the union and breach of the CBA by the employer, both claims are "inextricably interdependent," and both must be proven in the proceedings. Even if an employee brings a claim against only one of these parties, the employee must prove both sides of the "hybrid case." *Id.* at 102, 94 P.3d at 657. If the employee is unable to prove that the employee's union breached its duty of fair representation, the employee lacks standing to pursue his claim before the Board. *Id.* at 104, 94 P.3d at 659.

3.4.3.1. Breach of the Duty of Fair Representation

In the Amended Complaint, Taum made numerous complaints against UPW for breach of the duty of fair representations based on Nakanelua's conduct regarding the handling of Taum's grievance over his discharge. In addition, Taum alleged that UPW breached the duty of fair representation during the arbitration step by the withdrawal of Taum's grievance.

Poe II recognizes that a union's interests are broader than those of any one of its members because of its obligation to protect the interests of its members as a group. *Id.* at 101, 94 P.3d at 656. Thus, an employee does not have an absolute right to have the union pursue the employee's claims in the grievance process regardless of the collective bargaining agreement. *Id.*, 94 P.3d at 656. The union breaches its duty of fair representation only if its conduct towards the bargaining unit member was arbitrary, discriminatory, or in bad faith. *Id.* at 104, 94 P.3d at 659.

Based on the Poe II standards and other relevant cases, the issue is whether Taum carried his burden of proving that any of Nakanelua's alleged conduct was arbitrary, discriminatory, or in bad faith.

3.4.3.1.1. Procedural or Ministerial Acts –Arbitrariness

For alleged misconduct to be arbitrary, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the union’s conduct; the act must have been in reckless disregard of the employee’s rights; and it must prejudice a strong interest of the employee. Asato v. Haw. Gov’t Emp. Ass’n and Dep’t. of Ed., Board Case No. 19-CU-03-375; Decision No. 504, at *5-6 (2021) (<https://labor.hawaii.gov/hlrp/files/2021/05/Decision-No.-504.pdf>). Mere negligence does not rise to the level of arbitrariness that constitutes a breach of the duty of fair representation. *Id.* Therefore, the Board has generally recognized arbitrariness in situations where the union has failed to perform a procedural or ministerial act. Tupola, Order No. 3054, at *28.

Regarding the handling of a grievance, an individual employee lacks direct control over a union’s action taken on his behalf, and the union typically has broad discretion in its decision whether and how to pursue an employee grievance against the employer. Parker, Decision No. 502, at *50 (citing Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-58 (1990)). Thus, although an employee has no absolute right to have his grievance taken to arbitration, a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. *Id.* at *49 (citing Poe II, 105 Hawai‘i at 101-02, 94 P.3d at 656-57).

A union acts perfunctorily when it treats the union member’s claim so lightly as to suggest an “egregious disregard” of their rights. Mamuad, Order No. 3337F, at *32. Therefore, if the union undertakes a “minimal investigation” of the grievance, it does not act perfunctorily. 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 required thoroughness of the investigation depends on the particular facts of the case. *Id.*

UPW argues that Nakanelua’s decision to withdraw the arbitration was a properly exercised matter of judgment based on his review and his findings and conclusions of the salient factors and evidence.

Complainant does not adequately dispute the lack of arbitrariness of Nakanelua’s decision. Taum does not argue that UPW’s representation was perfunctory. In fact, he admitted UPW represented him fully during the disciplinary and grievance steps up to the arbitration step.

Rather, Taum’s complaints surround UPW’s handling of the arbitration by failing to inform him of his rights to file or pursue arbitration on his own and provide him with legal advice and counsel. The evidence and the law do not support Taum’s position.

Significant to these issues is that under CBA § 15.16, the Union is the party to the arbitration.²³ Where a collective bargaining agreement provides that only a union may exercise

the ultimate grievance step of requesting arbitration, the employee is bound by the union's decision. Poe v. Hawai'i Lab. Rels. Bd., 97 Hawai'i 528, 537, 40 P.3d 930, 939 (2002). As the party to the arbitration, UPW owns and controls the arbitration process, including the decisions of whether to be represented by an attorney, the selection of the attorney, and whether to proceed or withdraw the arbitration. *See, e.g., Mamuad*, Order No. 3070, at *12.

Therefore, contrary to Taum's contention, the duty of fair representation does not require the Union to provide him with legal counsel or advice in the grievance process. UPW's only duty was not to act arbitrarily or discriminatorily with regard to union membership in providing legal counsel in an arbitration. The union has the right to decide the circumstances under which an attorney will be provided to an employee in arbitration proceedings. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985).

Taum obviously was dissatisfied and disagreed with Nakanelua's selection of Campaniano and her communications, preparation, handling, views, and decisions during the arbitration step. However, Campaniano did proceed with and keep Taum informed of the processing of the arbitration. She also was direct about her representation of the UPW, and that the notice of intent to arbitrate was to preserve the timeliness and give the Union time to review and reconsider the decision.

Taum presented no evidence that Nakanelua's selection of Campaniano was arbitrary or discriminatory based on his union membership. Rather, Nakanelua's selection of Campaniano to represent the Union was consistent with its right under CBA § 15.16.

Also, because the Union owns the arbitration process, Taum had no right to file or pursue arbitration on his own. Therefore, Nakanelua had no duty to inform him of this right.

For the reasons set forth above, the Board concludes that Taum failed to meet his burden of showing that UPW's conduct in the handling of his grievance and arbitration step, including the decision to withdraw his discharge from arbitration was arbitrary.

3.4.3.1.2. Subjective Motive – Discrimination and Bad Faith

While the arbitrary factor looks to the objectivity of the union's conduct, the discrimination and bad faith factors look to the subjective motivation of the union officials. Mamuad, Order No. 3337F, at *37. To prove discriminatory conduct, the complainant must show substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. *Id.*

The bad faith element requires that the Board make a subjective inquiry to determine whether the union acted (or failed to act) due to an improper motive. Tupola, Order No. 3054, at *34. Assertions of the state of mind required for this claim must be corroborated by 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.

The Board acknowledges Taum’s perspective that Nakanelua’s refusal to proceed with the arbitration was discriminatory based on their past antagonistic relationship. However, Complainant has the heavy burden of proving that UPW’s conduct was intentional and unrelated to legitimate union objectives.

The record supports that Nakanelua had reasons to dislike Taum and that their relationship had a troubled history. However, there was a lack of proof showing that Nakanelua decided, either in whole or in part, to withdraw Taum’s grievance from arbitration based on their history or other subjective factors rather than the salient factors he provided.²⁴ In short, the evidence did not rise to a showing that Nakanelua’s decision was motivated by hatred, malice, a personal grudge, or vendetta.

Further, there was no evidence of a conspiratorial agreement, let alone intent, between UPW and PSD to suppress Taum’s rights under the CBA or HRS Chapter 89 during the disciplinary and grievance process or to have him resign or be discharged and lose his union membership.

There was also no evidence that UPW was guilty of fraud, deceit, or dishonesty for lying to Taum because of Nakanelua’s failure to act after having direct knowledge of Martinez’s lack of qualifications. Nakanelua’s categorical denial of any awareness of the controversy regarding Martinez’s educational qualifications until the Espinda Confirmation Hearings during the 2019 legislative session was un rebutted. Therefore, because Nakanelua was not aware that Martinez was unqualified for her FTSP until over a year and a half after his decision to withdraw Taum’s grievance from arbitration, the Board finds no evidence that UPW acted in bad faith based on Nakanelua’s knowledge at the time UPW withdrew Taum’s grievance from arbitration.

Nor has Taum shown that at the time that Nakanelua did become aware of Martinez’s lack of qualifications that UPW had any remedy or mechanism under the CBA grievance procedure to reinstate Taum’s grievance into the arbitral process. At this point in time, the challenge to Taum’s discharge was already before the Board and not within the arbitral forum

The Board finds and holds that UPW’s withdrawal of the Taum grievance from arbitration was not discriminatory or in bad faith.

Based on his failure to prove that UPW’s conduct was arbitrary, discriminatory, or in bad faith, Complainant has failed to carry the burden of showing that UPW breached its duty of fair representation. Therefore, the Board dismissed and closed Board Case No. 17-CU-10-906.

3.4.4. HRS § 89-13(a)(8) Claim

Given that the Board finds and holds that Taum failed to prove UPW breached the duty of fair representation, the Board is unable to find that Complainant can carry the burden of proving PSD committed a prohibited practice under HRS § 89-13(a)(8) by violating the CBA.

As discussed above, under Poe II, to prevail on the hybrid claim requires that the Complainant succeed on both the case for breach of the duty of fair representation against the Union and the case for breach of the CBA against PSD. If the Complainant fails to prove one, the other cannot succeed.

Therefore, the Board dismisses the HRS § 89-13(a)(8) claim against PSD for lack of standing and makes no other findings on this allegation. The hybrid case involving the breach of duty of fair representation claim against UPW and the breach of the CBA by PSD is dismissed.

3.5. UPW's Motion for Reimbursement of Expenses

After being dismissed from the case, UPW requested an order under HRCF Rule 56(g) for reimbursement of expenses and other appropriate relief (Motion for Reimbursement) incurred for opposing a January 16, 2018 motion for summary judgment and filing the MTD/MSJ based on Taum's filing of a declaration containing false statements about Nakanelua. Taum opposed the Motion for Reimbursement on the grounds, among other things, that the Board's rules do not provide for an award of attorney's fees and costs, and UPW may not rely on HRCF.

In arguing that the Board cannot impose sanctions, attorney's fees, and costs under HRCF Rule 56(g), Taum asserts that Los Banos broadly held that the Board may not apply HRCF in the Board's proceedings. The Board finds this interpretation overly broad and simplistic. In upholding the circuit court decision that the Board should not have applied HRCF Rule 52(c) without proper notice in that case, the ICA did not wholesale preclude the Board from applying HRCF to Board proceedings. Rather, the ICA agreed with the circuit court that the Board was incorrect in finding that HRCF Rule 81(b)(12)²⁵ "specifically extends the application of the HRCF to proceedings before the Board provided that there are no statutes or rules that contradict the HRCF provision that is being applied by the Board." Los Banos, at *32-33. Therefore, as discussed above, the ICA held that the Board is permitted to hear motions akin to a motion for a directed verdict based on "a harmonious reading of the Board's own rules," so long as the party opposing the motion is given a full and fair opportunity to be heard on the motion after reasonable notice, and the rules applicable to the Board are not otherwise violated. *Id.* at *42-43. (Emphasis added)

Nonetheless, the Board concurs with Taum that Los Banos precludes the affirmative relief requested by UPW under HRCF 56(g) based on this rule's conflict with HRS § 377-9(d)²⁶ and HAR § 12-42-50.²⁷ These provisions allow the Board to award attorney's fees and costs "in

favor of employees making them whole.” There is nothing in these provisions that appear to apply to the Union. State v. Nakanelua, 134 Hawai‘i 489, 502, 345 P.3d 155, 168 (2015). Therefore, as UPW fails to assert any other Board rule or statutory provision that specifically requires or even allows the Board to order affirmative action in their favor from the Complainant, the Board denies the Motion for Reimbursement.

3.6. Merits of the Amended Complaint Against PSD

The Board turns to the remaining issues raised by the Amended Complaint, specifically whether PSD violated HRS §§ 89-13(a)(1) and (7) (by violating HRS § 89-10.8) when it relied on Martinez as its use of force specialist, her use of force review and assessment, and the Martinez Report for the use of force employed during the Incident for which Taum was disciplined without disclosing that she was unqualified for the PSD FTSP.

3.6.1. The Board Has Jurisdiction to Determine Whether PSD’s Conduct In this Case Constitutes a Prohibited Practice for Interference

HRS § 89-1(b) sets forth the legislature’s declaration that the public policy of the State is “to promote harmonious and cooperative relations between government and its public employees to protect the public by assuring effective and orderly operations of government by,” among other things, recognizing the right of public employees to organize for the purpose of collective bargaining, and creating the Hawai‘i Labor Relations Board to administer the provisions of HRS Chapter 89.

To implement this statement of public policy, HRS § 89-5(i) statutorily requires the Board to “[re]solve controversies under this chapter,” “conduct proceedings on complaints of prohibited practice by...employees...and take such actions with respect thereto as it deems necessary and proper,” and “hold such hearings and make such inquiries, as it deems necessary to carry out properly its functions and powers, and for the purpose of such hearings...examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by issuance of subpoenas[.]”

Therefore, the Board’s authority clearly extends to determining whether in a particular instance, employer conduct constitutes a “prohibited practice” under HRS § 89-13. See United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Haw. Lab. Rels. Bd., 131 Hawai‘i 142, 151, 315 P.3d 768, 777 (App. 2013).

Taum’s claims for violations of HRS § 89-13(a)(1) are two-fold: the right to a meaningful, full, and effective representation by the Union and the right to a full and fair process in challenging his discharge.

While both allegations raise issues of first impression, the Board, under its prohibited practice authority, agrees with Taum that PSD violated HRS § 89-13(a)(1) by interfering with both rights for the following reasons.

3.6.2. HRS §§ 89-13(a)(1) Guarantees an Employee’s Right To Be Free From Interference In The Exercise of Any Right Under Chapter 89

Under HRS § 89-13(a)(1), an employer commits a prohibited practice by wilfully “interfering, restraining, or coercing any employee in the exercise of any right guaranteed under [HRS Chapter 89].” An Employer commits a prohibited practice in violation of HRS §§ 89-3 and 89-13(a)(1) and (7)²⁸ by interfering with the employee’s right to participate in the collective bargaining process without employer interference, restraint, or coercion. Parker, Decision No. 502 at *58.

The test is 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 CE-10-374b, Decision No. 404, at *49 (2000) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-404.pdf>) (citing Ralph’s Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164, 117 LRRM 1260 (1984)). However, only interference with a lawful employee activity, or discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under the statute. Haw. State Tchr. Ass’n v. Haw. Pub. Emp. Rels. Bd., 60 Haw. 361, 364, 590 P.2d 993, 996 (1979).

Protected rights are recognized and established in other HRS Chapter 89 provisions. Those rights include HRS § 89-3, the employee’s right to pursue “lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion[,]” and HRS § 89-8(a), which provides for the right of “[t]he employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit [to] be the exclusive representative of all employees in the unit.”

3.6.2.1. PSD’s Interference with Taum’s Right to A Meaningful and Effective Union Representation under HRS §§ 89-3 and 89-8(a)

Essentially, Taum’s claim is that PSD violated HRS § 89-13(a)(1) by interfering with his HRS§ 89-3 right to fair representation by his Union during the disciplinary and grievance procedure by relying on Martinez, the Martinez Report, and her use of force review and assessment for his discharge without disclosing her lack of qualifications for the FTSP to him or his Union.

A bargaining unit member’s right to union representation during an employer meeting or interview that the member reasonably believes could result in disciplinary action is well-

established based on HRS §§ 89-3, 89-8(a), and 89-13(a)(1) and Hawai‘i court and Board decisions.

HRS § 89-8(a) places on the Union the duty of protecting the interests of its members as a group, and a union’s interests are therefore broader than those of any one member. Poe II, 105 Hawai‘i at 101, 94 P.3d at 656. As the Board has recognized, under HRS § 89-8(a), the exclusive representative has the right to act for the employees in its unit. As such, it is long recognized that each member of the bargaining unit has a right to fair representation by the exclusive representative under this provision.²⁹ *See: Id.*, 94 P.3d at 656; Brown v. State of Haw. Org. of Police Officers, Board Case No. CU-12-41, Decision No. 170, at *14 (1983) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-170.pdf>); Yamaguchi v. Malapit, Board Case No. CE-01-52, Decision No. 145, at *23-26 (1981) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-145.pdf>).

In addition, the Hawai‘i courts have held that the rights under HRS §§ 89-3 and 89-13(a)(1) extend to the right afforded under federal law by NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260-62 (1975)) (Weingarten) to union representation at an employer meeting or interview that an employee reasonably believes could result in disciplinary action. Parker, Decision No. 502, at *59 (citing Haw. State Tchrs. Ass’n. v. Bd. of Educ, 144 Hawai‘i 57, 434 P.3d 1252 (App. 2019)).

In Weingarten, the U.S. Supreme Court held that a denial of an employee’s right to union representation upon request during an interview which the employee reasonably believes could result in disciplinary action has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1)³⁰ of the National Labor Relations Act. The Court based its ruling on the reasoning that participation by the union representative at this stage might reasonably be designed to clarify the issues, bring out the facts and policies concerned, and give assistance to the employee, who may lack the ability to express themselves when their livelihood is at stake, “might in fact need the more experienced kind of counsel which their union steward might represent.” Weingarten, 420 U.S. at 262-63 n.7.

Weingarten specifically provides that it is the Board and not the courts which determine whether the need exists for union representation considering changing industrial practices and its cumulative experience in dealing with labor-management relations based on the application of the evolutionary approach. Parker, Decision No. 502, at *62 (citing Weingarten, 420 U.S. at 266).

In Parker, the Board held that this need of a bargaining unit member to union representation under Weingarten requires that the employer allow for the member to have a meaningful and adequate opportunity to consult with his union based on the circumstances. *Id.*

Taum was allowed to have and consult with his Union representative during his disciplinary and grievance proceedings. The issue is whether the Union representative was given

the opportunity to participate in the disciplinary and grievance process as designed by Weingarten. The Board concludes that it was not for the following reasons.

3.6.2.2. PSD's Interference During The Disciplinary Proceedings

The Board finds that for a union's right to represent its bargaining unit employees under HRS § 89-8(a) and Weingarten to have meaning, the union must be given the opportunity to meaningfully, fully, and effectively represent the bargaining unit employee at a disciplinary meeting. *See, e.g., NLRB v. Texaco, Inc.*, 659 F.2d 124, 126-27 (9th Cir. 1981).

In September 2016 when the questions about Martinez arose, Taum's Pre-Disciplinary Hearings were still in process. Despite Espinda's knowledge of the questions, PSD failed to disclose to Taum, the Union, Young, and Nadamoto or to suspend the Pre-Disciplinary proceedings during the investigation of her qualifications. Further, the 2016-17 Investigation ordered by Espinda in response to the questions was not a full review and assessment of her qualifications and credentials, including whether she met the educational MQs for the FTSP.

These failures were significant because the Pre-Disciplinary Hearings and the Union's defense of Taum focused on the finding that Taum used excessive use of force during the Incident. This is not a case where PSD did not rely on the information. *See, e.g., Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Dep't of Pub. Safety*, Board Case No. CE-03-162, Order No. 922, at *6 (January 27, 1993) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-922.pdf>).

Because of her lack of use of force training, Young relied heavily on Martinez, as the use of force specialist, and her review and assessment of the use of force in determining that Taum was guilty of the excessive use of force for which he was discharged. Young met and consulted with Martinez who demonstrated the force used during Incident. Young further requested that Martinez perform an independent review, assessment, and the Martinez Report on the use of force based on the PSD video.

At the same time, Taum was not given the chance to provide his own real-time review of the PSD video during the Pre-Disciplinary Hearings. Without knowledge of Martinez's lack of qualifications for her position, Taum and UPW had no opportunity or grounds to question PSD's use and reliance on Martinez as the use of force specialist, her use of force review and assessment, and the Martinez Report. Therefore, Young's findings and conclusions that Taum failed to supervise and exercised an excessive use of force during the Incident were not subject to a full challenge at the Pre-Disciplinary phase.

During the Pre-Discharge Hearing step, Nadamoto reviewed the information gathered by Young and the Young Discharge letter based on the Martinez Report prior to the hearing. During the Pre-Discharge phase, Nadamoto similarly employed Martinez as her use of force expert in

considering the evidence both before and after the hearings. Martinez's qualifications and her FTSP were significant to the weight given to her use of force review and assessment and the Martinez Report because another trainer, Uemura, appeared and presented a different opinion from Martinez. However, Nadamoto relied heavily on Martinez's assessment for her finding in the Nadamoto Discharge Letter that the Union's evidence was insufficient to overturn the discharge decision. Again, Taum was denied any opportunity to provide his own countervailing review of the PSD video and a full opportunity to challenge Martinez as the use of force specialist, her use of force review and assessment, and the Martinez Report relied on by Nadamoto because of PSD's nondisclosure.

Prior to signing Discharge Letters, Espinda also reviewed statements made during the investigation and the follow up, the emails and consultations of Young and Nadamoto, and the administrative file with the evidence gathered, all of which included Martinez's expertise, the Martinez Report, and her use of force review and assessment. Despite knowing of the questions regarding Martinez's qualifications, the Martinez Report was an important factor in Espinda's decision.

While the Board acknowledges that the effect of this disclosure on the ultimate outcome of Taum's disciplinary proceeding is uncertain, what is certain is that Taum was denied the opportunity for his Union to consider and use this information during the disciplinary phase. Under the rights protected under HRS § 89-8(a), both the Union and Taum had the right to know and decide whether and to what extent Martinez's lack of qualifications was an issue in relying on her use of force review and report in challenging his disciplinary action.

Therefore, the Board finds and concludes that PSD's reliance on Martinez, her review and assessment, and the Martinez Report without disclosing Martinez's lack of qualifications for her PSD position during his disciplinary proceedings interfered with Taum's right to a meaningful, full, and effective representation by the UPW guaranteed by HRS §§ 89-3 and 89-8(a) and Weingarten to clarify the issues, bring out the facts and policies concerned, and provide assistance in violation of HRS § 89-13(a)(1).

3.6.2.3. Interference During The Grievance Proceedings

PSD's interference with Taum's right to an effective and meaningful Union representation under HRS § 89-8(a) continued through the grievance process.

The challenge of Taum's discharge was specifically based on a lack of due process and just cause and failure to consider all the evidence presented during the disciplinary proceedings. PSD's reliance on an unqualified expert witness, her use of force review and assessment, and the Martinez Report during the disciplinary step without the disclosure was directly relevant to the due process and just cause grounds raised in Step 1. Without the disclosure of Martinez's lack of qualifications during the grievance process, UPW was deprived of a potentially critical argument

in support of its position resulting in a lack of due process and failure to consider all the evidence during this process.

Further, PSD's continuing failure to disclose Martinez's lack of FTSP qualifications denied Taum a meaningful and full consideration by Nakanelua and his advisors regarding the effect of her lack of qualifications on the finding that Taum supervised and participated in an excessive use of force incident. Taum was deprived of his right to his Union's full and thorough deliberation regarding whether to proceed to arbitration.

The grievance arose out of PSD's tainted disciplinary decision. Therefore, the Board holds that PSD interfered with Taum's right to a meaningful and effective representation by his Union during the grievance process protected by HRS §§ 89-3 and 89-8 (a) in violation of HRS § 89-13(a)(1).

3.6.2.4. PSD Interfered with Taum's Right Under HRS § 89-3 to a Full and Fair Process in the Challenges of His Discharge in Violation of HRS § 89-13(a)(1)

PSD's conduct further interfered with Taum's right to fully and fairly challenge his disciplinary action through the various legal forums not only by the nondisclosure but by inhibiting the use and disclosure of Martinez's lack of qualifications during the process.

The Board has previously recognized that the right to file a grievance is a protected right under HRS § 89-3 and that an employee's right to pursue a grievance without interference or harassment is fundamental to HRS Chapter 89. Accordingly, an employer's interference with an employee's right to pursue a grievance violates HRS § 89-13(a)(1). State of Haw. Org. of Police Officers v. Lingle, Board Case No. CE-12-238, Decision No, 377, at *17 (1996) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-377.pdf>) (Lingle); United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Kunimura, Board Case No. CE-01-83, Decision No. 194, at *15 (1984) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-194.pdf>) (Kunimura).

Based on Lingle and Kunimura and the reasons fully discussed above and incorporated here, the Board also finds that PSD's reliance on Martinez as its use of force expert, her review and assessment, and the Martinez Report without disclosing her lack of FTSP qualifications further interfered with Taum's right to pursue his challenges of his discharge through the disciplinary and grievance procedures in violation of HRS § 89-13(a)(1).

The right of an employee to pursue a prohibited practice charge without employer interference or harassment is as fundamental to HRS Chapter 89 and deserving of protection under HRS § 89-3 as the right to pursue a grievance. Indeed, HRS § 89-13(a)(4) recognizes an employee's unfettered right to file a prohibited practice charge. Further, an interference with the

right to file unfair labor practice charges has also been found to constitute substantial evidence of a violation of the analogous National Labor Relations Act Section 8(a)(1). NLRB v. East Texas Pulp & Paper Co., 346 F.2d 686, 690 (5th Cir. 1965).

In this case, PSD put Martinez's FTSP educational qualifications in issue by her January 2019 testimony that she graduated from Southern Oregon with a B.A. degree in criminal justice and criminology.

From April to December 2019, the prohibited practice proceedings focused on resolving the issue of Martinez's qualifications and Taum's efforts to obtain verification of her educational credentials and her PSD FTSP employment information from PSD and Martinez.

In April 2019, after the HNN Report raised questions about Martinez's qualifications and credentials, Taum appropriately sought through the prohibited practice process to obtain through subpoenas duces tecum to PSD, Martinez, and Southern Oregon the information to clarify and establish her represented qualifications.

After almost five months of unsuccessful attempts by Taum to obtain the information regarding Martinez's qualifications by subpoenas, the Board issued Order Nos. 3557, 3561, and 3563 to PSD to compel production of Martinez and documents relevant to her qualifications and PSD employment.

In response to the subpoenas and orders, PSD produced the PSD Black Binder, which PSD admitted was incomplete and unresponsive. The PSD Custodian of Records admitted that Cook did not direct her to review Martinez's personnel file for additional subpoenaed or ordered documents, and they agreed to only copy the PSD Black Binder.

Finally, after over five months of PSD's continuing refusal to comply with the subpoenas and orders for information to clarify and resolve the issue, the Board issued Order No. 3566A. The Board drew an adverse inference from PSD's failure to act in good faith to produce the documents ordered and from Martinez's failure to appear and produce ordered documents. Only after the adverse inference was drawn and the Amended Complaint filed, did PSD produce Martinez at a December 2019 HOM. At that HOM, Martinez did not produce any documents but conceded in her testimony that she did not have the required B.A. degree from an accredited four-year college or university. During the HOM on the Amended Complaint, PSD continued its refusal to comply with another Taum subpoena for information regarding Martinez's FTSP application until the Board ordered compliance.

The Board recognizes PSD's legal right to defend itself against prohibited practice allegations using the Board provided mechanisms, including motions to revoke and objections to subpoenas. However, after the Board heard, considered, and ruled on PSD's objections and defenses to the subpoenas,³¹ PSD was obligated to make a good faith effort to comply. The

record shows that PSD failed to meet this obligation, which constitutes an interference with Taum's rights to a fair and full process.

Further, while the adverse inference in Order No. 3566A is an appropriate remedy for a party's refusal to produce unfavorable evidence, the Board finds that the circumstances of this case compel an additional finding that PSD interfered with Taum's right to a full and fair processing of his challenge of his discharge in the prohibited practice venue. As stated before, PSD put Martinez's qualifications in issue during these prohibited practice proceedings to establish her FTSP and use of force qualifications. After the HNN Article raised questions about her qualifications, PSD had an affirmative duty to come forward with information to clarify and address those questions. PSD failed to do its duty.

The Board simply cannot ignore that Taum, his Union, and his attorney were deprived of significant information proving that this critical witness lacked the required qualifications for the PSD position that she held when she acted as PSD's use of force specialist and author of the Martinez Report upon which Taum's discharge was rendered. For over three and a half years in three different legal venues, PSD not only failed to disclose but inhibited the disclosure that its use of force specialist was unqualified for the FTSP. By this continuing misconduct, the Board finds and holds that PSD has interfered with Taum's right to a full and fair processing of his challenges to his disciplinary consequence under HRS § 89-3 in violation of HRS § 89-13(a)(1).

3.6.2.5. Wilfullness of PSD's Conduct

For PSD's conduct to constitute a prohibited practice under HRS §89-13(a)(1), the violation must be wilfull. Therefore, the Board must determine whether PSD 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). A respondent's omission or failure to act may support a conclusion that there was some wilfull misconduct. Aio, 66 Hawai'i at 409 n.8, 664 P.2d at 732 n.8.

The Board finds the requisite wilfullness for PSD's violations of HRS § 89-13(a)(1) based on the conduct of Espinda, Cook, and Martinez, all of whom had knowledge of the questions regarding Martinez's lack of qualifications for the FTSP and continued to both remain silent and inhibit the disclosure of the truth by subterfuge.

Martinez's wilfull conduct is obvious. Despite knowing that she was unqualified for the FTSP, she remained silent and acted as PSD's use of force specialist during Taum's disciplinary and grievance procedures over the discharge. During her initial testimony before the Board in this case, Martinez went further by misrepresenting her educational background and claiming she met her FTSP MQs. After the HNN Report, she avoided service and failed to appear under Board orders until December 2019 when she denied testifying that she had a B.A. degree from Southern

Oregon. She further refused to produce her FTSP application and documents clarifying her qualifications as required by subpoenas and Board orders.

The wilfulness of Espinda's conduct is proven by his misrepresentations and failures to disclose the questions regarding Martinez's qualifications to the PSD hearings officers and the Union and to require a thorough investigation into her FTSP qualifications.

Espinda's misrepresentations, including his denial of awareness of Martinez's lack of qualifications until the HNN Article on April 11, 2019, were contradicted by the Whistleblower Complaint and Nishihara's inquiries. Espinda knew in September 2016 of questions surrounding Martinez's qualifications. While Espinda may plausibly deny specifically knowing in September 2016 about her lack of educational qualifications, including the lack of a Southern Oregon B.A. degree, there is no question that he knew of the questions about her FTSP qualifications.

Espinda ordered the 2016-17 Investigation into the matter, which was limited to a review of Martinez's certifications and training qualifications. Although knowing of the limited review, Espinda represented to the State Senate that PSD was confident of Martinez's qualifications. Further, Espinda failed to disclose the questions regarding Martinez's qualifications and truthfulness to the PSD hearings officers and attorneys, Taum's Union and attorney, and the Board allowing PSD to continue to rely on Martinez for her use of force expertise, her review and assessment, and the Martinez Report depriving Taum of and PSD from conducting a full and fair process to challenge his discharge.

Finally, after the HNN Report, Espinda ordered Cook to conduct the 2019 Investigation into whether Martinez falsified her FTSP application. Although the investigation was flawed because Martinez's original FTSP application and certain pages from purported copies of the application were missing from PSD records, Espinda did nothing but accept the conclusion that there was no proof that Martinez falsified her FTSP application. These acts of omission with knowledge by Espinda constitute substantial evidence of wilfulness.

Cook's actions also substantiate the finding of wilfulness by PSD. She was aware of the questions regarding Martinez's qualifications by April 2019 based on the State Senate's inquiries and the HNN Article. She was also aware that PSD was relying on Martinez as its use of force expert in this case. She was tasked with directing the 2019 Investigation into whether Martinez falsified her FTSP application. Cook knew that Taum was seeking information to verify Martinez's educational credentials. From her involvement, she also knew that PSD's records for Martinez's FTSP hiring were incomplete and that her FTSP application showed discrepancies for her educational credentials. Yet, Cook failed to disclose PSD's lack of verifying information and the irregularities in Martinez's educational MQs to Taum, the Union, or the Board.

Instead, Cook continued the subterfuge by directing PSD's failure to comply with the Board Orders to produce Martinez and the documents regarding her FTSP application and her

educational qualifications. She agreed with Miyasato to produce the PSD Black Binder, which she not only knew but admitted did not have the educational information sought. Her admissions that she was responsible, at least in part, for PSD's responses to the Board Order Nos. 3557, 3561, and 3563 that she knew that HRS Chapter 92F did not prevent PSD from producing Martinez's educational, training, and prior experience proves the wilfulness of PSD's conduct.

Based on this conduct, the Board finds that PSD consciously, knowingly, and deliberately failed to disclose and withheld information showing that Martinez was unqualified for the FTSP.

3.6.3. Violation of HRS § 89-13(a)(7) by Violating HRS § 89-10.8

Although Complainant alleged violations of HRS § 89-13(a)(7) by violating HRS 89-10.8 in the Amended Complaint, he failed to present any evidence and argument proving these allegations. Therefore, the Board holds that Taum failed to carry his burden of proving these claims and dismisses these claims.

4. Remedies

4.1. Civil Penalty

HRS § 377-9(d) 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 PSD wilfully committed prohibited practices that interfered with Taum's statutory rights for the exercise of protected conduct. Therefore, based on the plain language of this provision, the Board is required to assess a civil penalty against PSD for the interference with these protected rights as ordered below. The Board found two violations of HRS § 89-13(a)(1) for interference with Taum's right to a meaningful, full, and effective representation from his Union under HRS §§ 89-3 and 89-8(a) and with Taum's right to a full and fair challenge of his discharge under HRS § 89-3.

PSD shall be assessed \$5,000 for each violation of HRS § 89-13(a)(1), for a total of \$10,000 in civil penalties. In assessing the penalty, the Board, in its discretion, considers that PSD has prior prohibited practices for interference in violation of HRS § 89-13(a)(1). *See, e.g., Parker*, Decision No. 502, at *64. Further, as the Board has already made very clear, PSD's misconduct in interfering with Taum's challenges to his discipline was serious and egregious and should not be repeated.

4.2. Make Whole Remedies

HRS § 377-9(d) further requires the Board to order the Respondent PSD to take affirmative action, including reinstatement of Taum and orders making him whole, including back pay with interest, costs, and attorneys' fees. The Order below provides for Taum's reinstatement to his ACO IV position without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed. Further, if reinstatement is not feasible, PSD is required to provide compensation in lieu of reinstatement.

The Board finds that Taum is entitled to reinstatement and make whole relief as further provided below.

5. Order

For the reasons set forth above, the Board finds and holds that PSD violated HRS § 89-13(a)(1). Therefore, the Board orders that PSD:

1. Cease and desist from using and relying on Martinez as a use of force specialist and any of her use of force reviews, assessments, or reports for purposes of determining whether an employee should be disciplined for a failure to use appropriate use of force under the PSD policies;
2. Refrain from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to a union member under HRS §§ 89-3 and 89-8(a) to a meaningful, full, and fair representation by their union and by interfering and obstructing with their right to a full and fair process in challenging their discipline through the disciplinary, grievance, and prohibited practice proceedings protected by HRS § 89-3 in violation of HRS § 89-13(a)(1);
3. Within 30 days of this Order, reinstate Jonathan Taum to his former position as an ACO IV at HCCC without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed. Or, if Taum does not choose to or is unable to be reinstated, PSD shall provide him compensation him in lieu of reinstatement, including front pay to compensate for future lost earnings, which shall consist of wages and benefits that he would have earned for the length of time the employment with PSD was reasonably certain to continue;
4. Make Jonathan Taum whole, including back pay with interest and other benefits suffered from PSD's misconduct taken against him;
5. Within 30 days from the date of his Order, remove from its files any reference to the unlawful discharge of Jonathan Taum, and within three days after the removal,

notify him in writing that this has been done and that the discharge will not be used against him in any way;

6. Preserve and within 14 days of a request from Taum or his attorney, or such additional time as the Board may allow for good cause shown, provide at a reasonable place designated by the Board, all payroll records, social security payment records, timecards, personnel records and reports, and any other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay and front pay and other benefits due to make Complainant whole under the terms of this Order for Complainant and his attorney;
7. Complainant shall submit any request for attorney's fees and costs by motion filed no later than 30 days after the date of this Decision and Order, which motion shall include sufficient details to enable the Board to determine the reasonableness of the items requested. Any opposition to such motion shall be filed no later than five (5) days after the filing of the motion;
8. PSD shall pay \$5,000.00 for each violation of HRS § 89-13(a)(1) for interfering with Taum's HRS §§ 89-3 and 89-8(a) right to meaningful, full, and effective Union representation during his disciplinary and grievance process and for interfering with his HRS § 89-3 right to a full and fair challenge to his discharge, for a total of \$10,000 payable to the State of Hawai'i general fund as a civil penalty; and
9. Post at HCCC, copies of this Decision and Order for sixty (60) consecutive days in places where notices to 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 other electronic means where PSD customarily communicates with its employees.
10. PSD shall notify the Board of the steps taken to comply with this Order within 45 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai'i, _____ February 21, 2023 _____.

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:

Ted Hong, Esq.

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Jonathan Spiker, Esq.

¹ PSD filed an amended notice of appeal of appeal from Order No. 3566A with the First Circuit Court on the grounds that the Board's actions were clearly erroneous and capricious. PSD requested that the court strike, reverse, amend, and/or vacate certain portions of Order No. 3566A.

The First Circuit Court granted the Board's motion to dismiss the appeal.

² In this capacity, PSD is an Employer within the meaning of HRS § 89-2, which defines "Employer" or "public employer" as:

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

³ 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.

⁴ HRS 89-6(a) provides:

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

(10) Institutional, health, and correctional workers[.]

⁵ HRS § 89-6(d) 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 unit[...]10, the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation shall each have one vote if they have employees in the particular bargaining unit[.]

⁶ 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)].

⁷ See endnote 2, *supra*.

⁸ See endnote 4, *supra*.

⁹ BU 10 CBA § 15.02 defines “grievance” as, “The term grievance shall mean a complaint filed by a bargaining unit Employee, or by the Union, alleging a violation, misinterpretation, or misapplication of a specific section of this Agreement occurring after its effective date.”

¹⁰ BU 10 CBA § 15.03a. provides that, “An Employee may process a grievance and have the grievance heard without representation by the Union except as provided in Section 15.18.”

¹¹ CBA § 15.16 provides:

STEP 3. ARBITRATION

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

¹² CBA § 15.09 provides, in relevant part:

15.09 INFORMATION.

The Employer shall provide all information in the possession of the Employer, which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:

15.09a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request, or

15.09b. Make the material requested available to the grieving party and/or the Union within seven (7) calendar days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that the grieving party and/or the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

¹³ CBA § 15.05b. provides, “By mutual agreement between the Union and the Employer any requirement of Section 15 may be waived.

¹⁴ See endnote 11, *supra*.

¹⁵ HRS § 91-10(5) provides:

§ 91-10 Rules of evidence; official notice. In contested cases:

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

¹⁶ The Board notes that under Board Order No. 3915 because this case was initiated prior to the October 21, 2022, the effective date of the Board's current administrative rules HAR Chapter 12-43, the Board's former administrative rules HAR Chapter 12-42 are applicable.

¹⁷ HAR § 12-42-8(g)(16) provides:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issues shall have the burden of proving that issue by a preponderance of the evidence.

¹⁸ HAR § 12-42-8(g)(9) provides:

(9) Contemptuous conduct:

(A) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party; shall be grounds for suspension or disbarment from further practice before the board after due notice and hearing.

(B) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper may, in the discretion of the board, be grounds for striking all testimony previously given by such witness on related matters.

¹⁹ See endnote 17, *supra*.

²⁰ HRS § 377-9(b) and (e) provides in relevant part:

In all proceedings under this chapter before the board, each member of the board may issue subpoenas and administer oaths....

Any person who wilfully and unlawfully fails or neglects to appear or to testify or to produce books, papers and records as required, shall, upon application to a circuit judge, be ordered to appear before the board, and failure to obey the order may be punished as a contempt of court.

(e) If any person fails or neglects to obey an order of the board while the same is in effect [,] the board may petition the circuit court judge of the judicial circuit wherein the person resides or usually transacts business for the enforcement of the order and for appropriate temporary relief or restraining order, and shall certify and file in the court the record in the proceedings, including all documents and papers on file in the matter, the pleadings

and testimony upon which the order was entered, and the decision and order of the board. Upon such filing the board shall cause notice thereof to be served upon the person by mailing a copy to the person's last known post office address, and thereupon the judge shall have jurisdiction in the premises.

²¹ Under HRS § 89-5, the Board has broad authority to “resolve controversies under [HRS Chapter 89]”; “conduct proceedings on complaints of prohibited practices by...employees...and take such actions with respect thereto as it deems necessary and proper”; and “hold such hearings and make such inquiries, as it deems necessary, to carry out properly its function and powers, and for the purpose of such hearings and inquiries,...examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas[.]”

²² HRCP Rule 15 (b)(1) provides:

FOR ISSUES TRIED BY CONSENT. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

²³ The Board has long held that arbitration clauses like CBA § 15.16 have been interpreted to permit only the union to request arbitration. Ching v. State of Haw. Org. of Police Officers, Board Case No. CU-12-15, Decision No. 89, at *14-16 (1978) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-89.pdf>); Poe v. Univ. of Haw. Prof'l Assembly, Board Case No. DR-03-64, Order No. 1728, at *10-14 (June 4, 1999) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1728.pdf>).

²⁴ The Board also notes that although Taum's situation based on his ACO IV supervisory position is different from the other ACOs discharged for the Incident, the Union withdrew requests for arbitration over the discharges of all of the ACOs involved.

²⁵ HRCP Rule 81(b)(12) provides:

(b) Other proceedings. These rules shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:

(12) Proceedings under...chapter 89 and 380, relating to collective bargaining and labor disputes[.]

²⁶ HRS § 89-14 provides that any prohibited practice controversy is submitted to the Board in the same manner and with the same effect as provided in section 377-9. HRS § 377-9(d) provides in relevant part:

(d) After the final hearing, the board shall promptly make and file an order or decision, incorporation findings of fact upon issues involved in the controversy and the determination of the rights of the parties...Final orders may ... make orders in favor of employees making them whole, including back pay with interest, costs, and attorneys' fees. Emphasis added)

²⁷ HAR § 12-42-50 provides, in relevant part:

The board may require the respondent to do any or all of the following: to cease and desist from the prohibited practice found to have been committed; to suspend the respondent's rights, immunities, privileges, or remedies granted or afforded by chapter 89, HRS, for not more than one year; or to require the respondent to take such affirmative action as will effectuate the purpose of chapter 89, HRS, including reinstatement of an employee with or without pay as may be deemed proper....

²⁸ 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[.]

A violation of HRS § 89-3 can also lead to a prohibited practice claim under HRS § 89-13(a)(7). However, the Amended Complaint in this case relies on HRS § 89-10.8 for the HRS §89-13(a)(7) violation. As discussed more fully below, the HRS § 89-13(a)(7) allegation is dismissed for lack of evidence.

²⁹ Along with HRS § 89-13(b)(4) and (5), prohibited practice charges have been brought against the union for a failure to assist and properly contest disciplinary actions. *See, e.g., Caldeira v. Malapit*, Board Case No. CE-03-80, Decision No. 196, at *24-33 (1984) (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-196.pdf>). Accordingly, HRS § 89-8(a) also creates an employee's right to fair representation by the Union.

³⁰ Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7 of the Act provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"

³¹ PSD made objections to producing Martinez's personnel files based on HRS §§ 92F-13 and 92F-14 and confidentiality. PSD failed to provide any legal authority for the confidentiality argument. Regarding argument regarding HRS Chapter 92F protections, the Board acknowledges that it is not the appropriate administrative agency to interpret HRS Chapter 92F. However, the Board is compelled to point out that under HRS § 92F-28(1), an agency is not permitted to withhold or deny access to a personal record or any information in a personal record, "[when] the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record of information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding[" Further, under HRS § 92F-12(a)(14), the education and training background of present employees of an agency are subject to public inspection.