STATE OF HAWAIʻI

HAWAIʻI LABOR RELATIONS BOARD

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In the Matter of

BRAN KEOPUHIWA,

Complainant(s),

and

HAWAIʻI FIRE DEPARTMENT, County of Hawaiʻi; and HAWAII FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 1463, AFL-CIO,

Respondent(s).
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CASE NO(S). 19-CE-11-930
19-CU-11-373

DECISION NO. 515

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER; DISSENTING OPINION OF BOARD MEMBER J N. MUSTO, Ph.D.
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FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

This prohibited practice case filed with the Hawaiʻi Labor Relations Board (Board) arises from Respondent HAWAIʻI FIRE DEPARTMENT, County of Hawaiʻi's (HFD-COH, Employer, or Respondent) placement (Kailua Placement) of Complainant BRAN KEOPUHIWA (Complainant or Mr. Keopuhiwa), self-represented litigant (SRL), at the Kailua Fire Station (Kailua) and its refusal to transfer him back from Kailua to Waiakea Fire Station (Waiakea) or other fire station closer to Hilo (Waiakea Transfer Denial).

Mr. Keopuhiwa pursued grievances over both the Kailua Placement and Waiakea Transfer Denial (Placement Grievance and Waiakea Transfer Denial Grievance, respectively, and collectively Grievances). After HFD-COH denied the Grievances, Respondent HAWAII FIRE FIGHTERS ASSOCIATION (HFFA or Union and collectively Respondents with HFD-COH) sent a notice of intent to arbitrate both Grievances. While the Grievances were pending arbitrator selection, Mr. Keopuhiwa requested a voluntary demotion and transfer to Central Fire Station (Central) that HFD-COH approved. HFFA withdrew both Grievances from arbitration based on, among other things, mootness.

In his Second Amended Complaint, Mr. Keopuhiwa argues that HFD-COH wilfully violated the relevant bargaining unit 11 (BU 11) collective bargaining agreement (CBA), committing prohibited practices under Hawaiʻi Revised Statutes (HRS) § 89-13(a)(1), (4), (7),

and (8)[1] and that HFFA violated its duty of fair representation and the terms of the CBA, committing prohibited practices under HRS § 89-13(b)(1), (4), and (5)[2] by the handling of his grievances and failing to arbitrate.

1.1. Statement of the Case

On June 19, 2019, Complainant filed his original prohibited practice complaint (Complaint) against Respondents, and a First Amended Complaint against Respondents on August 1, 2019.

On October 19, 2019, Complainant filed the Second Amended Complaint.

HFFA filed a motion to dismiss the Second Amended Complaint (HFFA MTD), which HFD-COH joined.

HFD-COH filed a motion to dismiss the Second Amended Complaint or in the alternative for summary judgment (HFD-COH MTD/MSJ and Motions to Dismiss collectively with the HFFA MTD), which HFFA joined.

Mr. Keopuhiwa opposed both Motions to Dismiss that the Board heard and later orally denied.

The Board held hearings on the merits (HOM) on December 9-10, 2019 and February 24-27, 2020. Complainant called himself as a witness; HFD-COH called Darren Rosario (Rosario) and Lance Uchida (Uchida); and HFFA called Robert Lee (Lee). Some of the exhibits were admitted and some excluded from evidence. Board Exhibit 1 was admitted in evidence. Complainant's Exhibits B-1 through B-20 and B-23 to B-40 were admitted into evidence. All of Respondents' exhibits were admitted into evidence.

At the December 10, 2019 HOM, Respondents moved for a directed verdict that the Board heard and took under advisement.

At the December 10, 2019 HOM, a Board member was absent for the afternoon session. The parties waived the HRS § 91-11[3] requirement that a proposed decision be issued.

At the February 24, 2020 HOM, HFD-COH again moved for a directed verdict that the Union joined, and the Complainant opposed. The Board heard and denied the directed verdict motions (collectively Directed Verdict Motions).

The parties filed simultaneous post-hearing briefs.

1.2. Issues:

1. Whether HFD-COH committed a prohibited practice by Mr. Keopuhiwa's Kailua Placement for disciplinary reasons and the denial of his Waiakea Transfer Denial in violation of the BU 11 CBA?

2. Whether the Union breached its duty of fair representation to Mr. Keopuhiwa by allowing a Union official involved in the incidents underlying the Kailua Placement and Waiakea Transfer Denial Grievances to serve as the Union representative during all phases of the processing of the Grievances, including settlement, the Steps 1 and 2 of the Kailua Placement Grievance, the Step 1 of the Waiakea Transfer Denial Grievance, Division Chair review and recommendation whether to proceed to arbitration, and as Chair and member of the HFFA Division Grievance Committee making the decision to withdraw Mr. Keopuhiwa's Grievances from arbitration sent to the HFFA Executive Board?

2. Background and Findings of Fact

2.1.1. Parties

2.1.1.1. Complainant

For the relevant time, Mr. Keopuhiwa was employed by HFD-COH, an "employee" or "public employee" under HRS § 89-2,[4] and a member of BU 11.[5]

Until December 1, 2018, Mr. Keopuhiwa was a Fire Rescue Specialist (FRS) assigned to Waiakea. An FRS performs searches and rescues in water and mountains and extrications.

Mr. Keopuhiwa was also a qualified Hazardous Materials Specialist (HAZMAT). A HAZMAT is on the same pay grade as the FRS and handles mitigation of hazardous material spills.

2.1.1.2. The Employer

For the relevant time, HFD-COH was a "public employer" under HRS § 89-2.[6]

Rosario was the HFD-COH Fire Chief.

Gantry Andrade (Andrade) was an HFD-COH Deputy Fire Chief.

Uchida was an HFD-COH Deputy Fire Chief responsible for recruitments, promotions, and transfers.

Matthias Kusch (Kusch) was an HFD-COH Battalion Chief.

Todd Vincent (Vincent), Charles Spain (Spain), and Brent Matsuda (Vincent, Spain, and Matsuda, respectively, and collectively Captains) were HFD-COH Captains assigned to Waiakea.

Glen Honda (Honda) was a retired HFD-COH Assistant Chief, who investigated at Spain's request, a September 7, 2017 incident involving Complainant. (Spain Investigation).

William Brilhante, Jr. (Brilhante) was the County of Hawaiʻi (COH) Director of Human Resources.

The COH has had a Violence in the Workplace Policy (VIWP) since January 1995.

2.1.1.3. The Exclusive Representative

For the relevant time, HFFA was the "exclusive representative" under HRS § 89-2[7] for BU 11.

Lee was the HFFA President.

Spain was the HFFA County of Hawaiʻi Division Chair, the Chair and a member of the Division Grievance Committee, and an HFFA Executive Board member.

Aaron Lenchanko (Lenchanko) was the HFFA Secretary-Treasurer.

2.1.2. Collective Bargaining Relationship

The COH and the HFFA are parties to the applicable BU 11 CBA.

The CBA contains various provisions, including:

- Section 10.A.[8] provides that the Fire Chief or designee has the responsibility for placement of employees. However, the placement of employees cannot be utilized as a disciplinary measure, must be for legitimate operational reasons, and due consideration is required for cases involving personal hardship.

- Section 10.B[9] provides that employees may submit written requests to the Fire Chief or designee to be considered for transfer to another station, which shall be acknowledged in writing from the Fire Chief or designee. The Fire Chief or designee is required to fully consider an employee's transfer request.

- Section 16.[10] provides that employees cannot be disciplined without just and proper cause.

- Section 18.[11] provides for a grievance procedure.

- Paragraph 18.A.[12] provides that any complaint by an employee or the Union concerning the application and interpretation of the CBA is subject to the grievance procedure.

- Paragraph 18.B.[13] provides that any individual employee may present a grievance to their immediate supervisor without intervention of the Union provided that the Union has been afforded an opportunity to be present at the conference(s) on the grievance. By mutual consent of the Employer and the Union, any time limits within each step may be extended.

- Paragraph 18.C. and D. [14] provide for an individual employee to pursue a grievance through an informal step and Steps 1 and 2.

- Paragraph 18.E.[15] provides for either the individual employee or the Union to appeal the grievance in writing to the Employer or its designee.

- Paragraph 18.G.[16] provides for arbitration if the grievance is not resolved at Step 2 and the Union desires to proceed to arbitration. The Union is required to serve written notice on the employer or designee of its desire to arbitrate within 10 working days after the employer's Step 2 decision. The parties are required to attempt to select an arbitrator "immediately thereafter." "If agreement on an arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawai'i Labor Relations Board to submit a list of five (5) arbitrators."

2.1.3. Disciplinary Actions Under the CBA

Under the CBA, disciplinary actions begin with a verbal reprimand followed by a written reprimand, suspension, and termination. Progressive discipline is applied when corrective action does not change the behavior.

2.1.4. HFFA Process for Handling Grievances Under the CBA

While the HFFA Executive Board is responsible for managing the grievances and the step process, the HFFA Division Chair and Board members on every island are primarily responsible for handling the grievance.

The HFFA Division Chair handles grievance settlements that Lee signs.

Under the CBA, a bargaining unit member may process their own grievance through Steps 1 and 2 with a Union representative monitoring and observing the process. However, only the HFFA can advance to arbitration. In most cases, the HFFA gives notice of an intent to arbitrate to preserve the timeliness and the ability to arbitrate.

HFD-COH and HFFA have no agreement to waive deadlines in the grievance process.

After the arbitration request is filed, HFFA asks the grievant to provide all documents for assessment of the grievance.

Before the HFFA Executive Board makes a final decision on arbitrating a grievance, there is a review process at several levels to consider whether the grievance should proceed to arbitration.

The HFFA Division Chair makes a review and recommendation. The HFFA counsel also performs a legal assessment and recommendation.

The HFFA Division Grievance Committee made up of the HFFA President, Secretary-Treasurer, and Division Chair makes the final Division Committee decision on whether to arbitrate that is sent to the HFFA Executive Board.

The HFFA Executive Board makes the final decision on whether to proceed to arbitration after the grievant is given an opportunity to provide additional information or a presentation.

2.1.5. HFD-COH Actions on Incidents Leading to the Grievances

2.1.5.1. Complainant's Workplace Violence Complaints

Complainant filed VIWP Complaints against Vincent (Vincent VIWP Complaint) and Spain (Spain VIWP Complaint and collectively VIWP Complaints with the Vincent Complaint) that were investigated and found to lack sufficient evidence.

After the filing of these VIWP Complaints, Mr. Keopuhiwa's problems with the Captains and HFD-COH escalated by the following incidents.

2.1.5.2. Spain Investigation

In September 2017, Spain requested HFD-COH open an investigation (Spain Investigation) into whether Mr. Keopuhiwa violated HFD Rules and Regulations by filing the VIWP Complaints.

In February 2018, Complainant was transferred to Central Fire Station (Central) and told not to return to Waiakea until the investigation was completed.

Mr. Keopuhiwa requested HFFA assistance with his transfer to Central and his perceived HFD-COH retaliation, harassment, and intimidation. Lee declined.

The HFD-COH investigator Honda found that Mr. Keopuhiwa violated, in part, the HFD Rules[17] (Spain Investigation Report).

Mr. Keopuhiwa was notified of the finding and the corrective action—mediation.

2.1.5.3. Mediation Between Mr. Keopuhiwa and the Captains

In April 2018, Matsuda notified Rosario (Matsuda Memorandum) of his inability to supervise Mr. Keopuhiwa based on numerous incidents occurring between January 2017 and January 2018 that showed Mr. Keopuhiwa's disrespect and disregard for Matsuda's authority.

In April 2018, Vincent requested that Mr. Keopuhiwa not work on his shift because of Mr. Keopuhiwa's lack of respect for higher ranking officers and the VIWP complaint (Vincent Request).

In April 2018, Spain notified Rosario that Mr. Keopuhiwa was unable to work on "C" shift because of alleged threats and harassing behavior (Spain Notice).

None of Complainant's misconduct referenced in the Vincent Request and the Spain Notice were investigated.

Rosario temporarily assigned Mr. Keopuhiwa from Waiakea during the mediation because of the Captains' claims of inability to work with him.

Between August and November 2018, Mr. Keopuhiwa and the Captains went through mediation. In November 2018, the Captains notified Rosario that the mediation showed their inability to work with Complainant.

Rosario trusted the judgment of the three Captains "without question" and discussed the available options for Mr. Keopuhiwa's placement with the Union, including Spain.

After considering the various options, Rosario decided that moving Mr. Keopuhiwa had the least impact. Rosario decided not to offer Mr. Keopuhiwa a transfer to a HAZMAT position.

2.1.5.4. Kailua Placement

Rosario notified Complainant of his Kailua Placement (Placement Notice). Despite no accusations or investigations of any wrongdoing and good performance reviews, Rosario specifically noted "several incidents [beginning in September 2017] involving [Mr. Keopuhiwa] and Fire Captains Matsuda, Spain, and Vincent" that were investigated, and corrective action was taken. Rosario further informed Mr. Keopuhiwa that "all of these measures have not resulted in a change nor…any indication that [Mr. Keopuhiwa] would be able to work effectively and efficiently" with the Waiakea Captains and that his presence at the Waiakea was not in the best interest of efficient operations. Therefore, Mr. Keopuhiwa was permanently assigned to Kailua, effective December 1, 2018.

Mr. Keopuhiwa was required to drive two and a half hours with no paid travel time to work because of the Kailua Placement.

2.1.6. Mr. Keopuhiwa's Grievances

2.1.6.1. Mr. Keopuhiwa's Placement Grievance

2.1.6.1.1. The Incidents Cited in the Notice of Placement Were Not Subject to Discipline

Mr. Keopuhiwa requested all information regarding the Kailua Placement, including the incidents relied on in the Placement Notice and all investigations into the several incidents involving Mr. Keopuhiwa and the Captains.

In its response, HFD-COH listed the Matsuda Memorandum incidents, a December 13, 2017 oral reprimand by Spain for failure to follow workplace directives (Spain Oral Reprimand), December 13 and 22, 2017 failures to follow directives by Kusch (Kusch Directives), a December 28, 2017 inappropriate texting of Matsuda (Matsuda Texting), the Vincent Request and Spain Notice, the VIWP Complaints, and the Spain Investigation and Report.

The Matsuda Memorandum lists an additional dozen incidents showing Matsuda's inability to effectively supervise, manage or trust Mr. Keopuhiwa (January 16, 2017, October 12, 2017, November 26, 2017, December 6, 21, 24, 25, and 29, 2017, and January 7, 2018) that were not investigated or substantiated.

The Spain Oral Reprimand and Kusch's December 22, 2017 Directive were successfully grieved by Mr. Keopuhiwa for lack of union representation during questioning. HFD had notified HFFA that Spain should not be the Union representative during the Spain Oral Reprimand.

The Matsuda Texting and Kusch's January 11, 2018 Directive were investigated and found unsupported.

The Spain Investigation for Complainant's filing of the VIWP Complaints was the only matter for which Complainant was found, in part, to have violated HFD-COH Rules and Regulations. Mediation was imposed as the corrective measure.

2.1.6.1.2. Placement Grievance Process

Mr. Keopuhiwa filed and requested Union representation for the Placement Grievance, but he ended up pursuing it on his own.

Complainant filed the Step 1 grievance, claiming, in part, that the placement was disciplinary.

Rosario recommended to Lee that the HFFA Representative in the Step 1 meeting be other than Spain because of his involvement in Complainant's counseling and mediation.

As Lee's reaction was that "the employer does not tell him how to operate the union[,]" and that "[Spain] is the elected official that the members chose", Spain and Ivan Higashi (Higashi) represented HFFA at the Step 1 Placement Grievance.

After the Step 1 meeting, Rosario denied Mr. Keopuhiwa's Placement Grievance for lack of evidence. Rosario further asserted that there were no CBA violations because, among other things, the placement was not disciplinary.

Mr. Keopuhiwa filed a Step 2 grievance with Brilhante. Spain and Higashi again represented HFFA at the Step 2 meeting. Brilhante dismissed the Step 2.

2.1.6.2. Mr. Keopuhiwa's Request for the Waiakea Transfer Denial and Grievance

In January 2019, Mr. Keopuhiwa requested a transfer from Kailua to either Waiakea, Kailua B, Central, Haihai, Laupahoehoe, or Volcano. Uchida denied the transfer.

Complainant requested an informal grievance meeting with Rosario. Uchida met with him and gave Rosario's reason for the Waiakea Transfer Denial — being what was best for HFD's operational efficiencies and personnel involved.

Mr. Keopuhiwa filed a Step 1 Waiakea Transfer Denial Grievance for lack of good reason and refusal to honor his Waiakea Transfer Denial. Spain represented the Union at the Step 1 meeting.

The COH Department of Human Resources had a policy and procedure for red circling discussed as an option during the grievance process. Red circling is where a firefighter is kept at a certain rank and pay grade while being given a different assignment. This enables a firefighter to be transferred with the same pay grade and title to another station.

After the Step 1 meeting, Rosario denied the Step 1 grievance.

At the Step 2 meeting, Mr. Keopuhiwa met with Lee Botelho, and Higashi, the Union representative. On April 22, 2019, the COH-HR Director denied both the Step 2 Placement and the Waiakea Transfer Denial Grievance.

HFFA made no attempt to settle the Kailua Placement and Waiakea Transfer Denial Grievances..

2.1.6.3. Step 3 Arbitration of the Placement and Waiakea Transfer Denial Grievances

HFFA submitted the Placement and Waiakea Transfer Denial Grievances to Step 3 arbitration. HFFA informed Mr. Keopuhiwa of the submissions and, among other things, that the Division Chair and legal counsel would review and submit recommendations to the Division Grievance Committee whether to pursue arbitration; that the three-member Division Grievance Committee decides whether to proceed to arbitration; and this Division Committee decision may be appealed by the grievant to the HFFA Executive Board.

Former HFFA Kauaʻi Division Chair Colin Wilson was the contact person for Mr. Keopuhiwa's arbitration because of his grievance experience and HFFA Hawaiʻi Division Chair Spain's direct involvement in the conflicts with Complainant.

Deputy Corporation Counsel John Mukai contacted HFFA to initiate the arbitrator selection process for both Grievances.

At his wife's suggestion, Mr. Keopuhiwa contacted Uchida and Rosario to request a voluntary demotion and transfer to Hilo that COH-HFD granted.

Uchida informally met with Mr. Keopuhiwa and informed him that a voluntary demotion could jeopardize his grievances. Mr. Keopuhiwa took the voluntary demotion because of his wife's medical issues.

Mr. Keopuhiwa's voluntary demotion and transfer became effective, July 1, 2019.

Spain, Lee, and Lenchanko were the Division Grievance Committee members that decided not to proceed to arbitration on the Grievances (Division Committee Decision).

On August 20, 2019, HFFA notified Mr. Keopuhiwa of the Division Grievance Committee Decision that recommended to the HFFA Executive Board not to arbitrate the Grievances for significant absence of proof or evidence and that his voluntary demotion rendered his Grievances moot. Complainant did not appeal this decision to the HFFA Executive Board because he felt that an appeal was futile.

Based on this decision, HFFA and HFD-COH did not select an arbitrator or extend the CBA deadlines.

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 testimony, and the quality of the individual witness' recollections. The Board also considered if the evidence corroborated or refuted the testimony and the weight of this 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 believed some, but not all witness testimony. Most of the credibility determinations regarding the witnesses' testimony are incorporated into the findings of fact above.

While the witnesses' testimonies were obviously more favorable to their positions on the issues, 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 above.

3.2. Dispositive Motions

3.2.1. Motions to Dismiss or in the Alternative for Summary Judgment

In the HFFA MTD on the Second Amended Complaint, HFFA argued, among other things, that the Union did not violate the CBA grievance procedure; mootness of the two underlying grievances based on Mr. Keopuhiwa's transfer, and voluntary demotion; mootness of the Second Amended Complaint based on HFFA's decision not to arbitrate; no breach of the duty of fair representation; untimeliness of the retaliation, intimidation, coercion, interference, and discrimination claims; and failure to state a claim.

In the HFD-COH MTD/MSJ on the Second Amended Complaint, the Employer asserted failure to exhaust contractual remedies, untimeliness of the retaliation claims, mootness based on Mr. Keopuhiwa's voluntary demotion and transfer, and Board deferral to arbitration.

After applying the appropriate legal standards to the facts in the record, the Board denied both Motions.

3.2.1.1. Standards for Motion for Summary Judgment

The Board has adopted the standards for motions for summary judgment used by the Hawai‘i Supreme Court (HSC). Caspillo v. Dep't of Transportation, Board Case No. 17-CE-01-899, Decision No. 509, at *6 (November 22, 2021) (Caspillo).

Summary judgment is appropriate only when the record shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law; and the Board must review the evidence in the light most favorable to the party opposing the motion for

summary judgment and resolve any doubt about whether or not such a motion should be granted in favor of the non-moving party. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kawakami, Board Case No. 20-CE-03-946, Decision No. 506, at *22 (June 23, 2021).

As in this case, where the non-moving party bears the burden of proof at trial, the HSC has adopted a burden shifting paradigm. Therefore, the moving party has the initial burden of proof and must show the absence of genuine issues of material facts and prove that it is entitled to judgment as a matter of law. *Id.* (citing French v. Hawaii Pizza Hut, Inc., 105 Hawaiʻi 462, 470, 99 P.3d 1046, 1054 (2004)). After the moving party satisfies both points, the burden shifts to the non-moving party to respond and demonstrate specific facts—not allegations—to present a genuine issue worthy of trial. *Id.* The burden of persuasion always remains with the moving party. The moving party must show there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-moving party's claim, or (2) demonstrating that the non-moving party will be unable to carry their proof at trial. *Id.* at *22-23 (citing Ralston v. Yim, 129 Hawaiʻi 46, 56-57, 292 P.3d 1276, 1286-87 (2013)).

3.2.1.2. Motions to Dismiss for Lack of Subject Matter Jurisdiction

The Board may only hear cases within its jurisdiction. The Board's jurisdiction is defined by both statute and court decisions. *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 subject matter jurisdiction may be raised at any time. Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *34 (February 23, 2023) (Taum) (citing Rodrigues v. Perry, Board Case No. CE-12-82, Order No. 2942, at *8 (August 27, 2013)).

The party seeking to invoke the Board's jurisdiction has the burden of establishing that jurisdiction exists. Caspillo, Decision No. 509, at *7. The Board may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. *Id.* (citing Casumpang v. ILWU, Local 142, 94 Hawaiʻi 330, 337, 13 P.3d 1235, 1242 (2000)).

The Board's relevant standards 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. *Id.* at *6. The Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint. *Id.* at *7 (citing Tupola v. Univ. of Haw. Prof'l Assembly, Board Case No. CU-07-330, Order No. 3054, at *17 (February 25, 2015) (Tupola)). 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. *Id.* (citing Haw. State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P. 3d 482, 88 (App. 2011)).

3.2.1.3. Lack of Jurisdiction Based on Untimeliness

HRS § 377-9(l) requires that for prohibited practice cases under HRS 89-13, the Board can only hear complaints filed within 90-days of the action that the alleged prohibited practices are based on. HRS § 377-9(l); Aio, 66 Haw. at 404 n. 3, 664 P.2d at 729 n.3. The administrative rules governing the Board proceedings further include this 90-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board strictly construes the limitations period and will not waive a defect of even a single day. Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *34 (February 23, 2023) (Taum). As the 90-day limitation is jurisdictional and provided by statute, neither the Board nor the parties may waive this requirement. *Id.* (citing 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)). Further, the limitations period begins when the complainant knew or should have known that his rights were being violated. Caspillo, Decision No. 509, at *7 (citing United Pub. Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 30, 2006)). In breach of the duty of fair representation cases, this limitations period begins when the employee receives notice that the union will not represent the employee. Taum, Decision No. 514, at *35 (citing DePonte, Jr. v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-01-100, Order No. 1105, at *7 (September 1, 1994)).

For hybrid cases involving a claim for breach of the CBA against the employer and a claim for breach of the duty of fair representation against the union, the principle of exhaustion applies. Therefore, the complainant is unable to file a valid prohibited practice complaint with the Board until after the parties complete the grievance process. The date of the union's issuance of notice to the complainant of its refusal to take his grievance to arbitration is the date on which the complainant exhausted his contractual remedies and knew or should have known that his rights have been violated. Caspillo, Decision No. 509, at *7-8 (citing Hsiao v. Haw. Gov't Emps. Ass'n., Board Case No. 20-CU-08-383, Decision No. 498, at *12 (October 14, 2020)).

Based on a review of the Second Amended Complaint and the attachments, Mr. Keopuhiwa was notified of the HFFA's decision not to arbitrate his Placement and Waiakea Transfer Denial Grievances by a letter, dated August 20, 2019. Hence, the 90-day limitation period for the hybrid claims would have ended on or about November 19, 2019. The Second Amended Complaint was filed on October 19, 2019 well within the 90-day period.[18] Accordingly, Mr. Keopuhiwa has carried his burden of establishing that the Board has jurisdiction based on the timeliness of the Second Amended Complaint.

Respondents' untimeliness arguments focus also on the retaliation claims. Consistent with the federal law rulings in breach of duty of fair representation cases, *see* Saunders v. NY Convention Ctr. Operating Corp., 2021 U.S. Dist. LEXIS 182247, at *22-23 (D.N.Y. Sep. 23, 2021) (citing Davis-Garrett v. Urban Outfitters, 921 F.3d 30, 42 (2d Cir. 2019)), the Board has relied on evidence of antecedent events as a background or to shed light on the true character of events occurring within the limitations period, and the limitations period has been held not to bar an employee from using prior acts as background evidence in support of a timely claim. Taum, Decision No. 514, at *35 (citing Caldeira v. Kunimura, Board Case No. CE-03-97, Order No. 714, at *10 (November 1, 1988)). Therefore, the Board finds that these allegations constitute background evidence shedding light on the timely breach of the duty of fair representation allegations against HFFA, and these allegations should not be dismissed for untimeliness.

3.2.1.4. Lack of Jurisdiction Based on Mootness

The Board does not have jurisdiction to decide abstract propositions of law or moot cases. *See* State v. Nakanelua, 134 Hawai‘i 489, 501-02, 345 P.3d 155, 167-68 (2015) (Nakanelua) (citing Lathrop v. Sakatani, 111 Hawai‘i 307, 312, 141 P.3d 480, 485 (2006) (Lathrop)). An issue is moot where the question to be determined is abstract and does not rely on existing facts or rights. The mootness doctrine is properly invoked where the two conditions for justiciability—adverse interest and effective remedy has been compromised. Rodrigues v. Perry, Board Case No. CE-12-822, Order No. 3133, at *9-10 (December 21, 2015) (citing Lathrop, 111 Hawai‘i at 312-13, 141 P.3d at 485-86). However, where a case still presents a live controversy for which the Board can provide an effective remedy, the mootness doctrine does not apply. Further, the well-established exception to the mootness rule for cases involving questions that affect the public interest and are "capable of repetition, yet evading review" has been specifically held applicable to prohibited practice cases because of HRS § 377-9(d).[19] *Id.* at *11 (citing Nakanelua, 134 Hawai‘i at 502-03, 345 P.3d at 168-69).

Contrary to Respondents' assertions, Mr. Keopuhiwa's voluntary demotion did not make his remedy sought under the Grievances moot. By these Grievances, Complainant sought to be returned to Waiakea as an FRS. His voluntary demotion resulted in him being placed at Central in a lower ranked position of Fire Fighter with a reduction in salary and benefits. Accordingly, he did not receive the remedies that he sought by filing the Grievances.

Nor did the voluntary demotion or HFFA's refusal to take the Grievances to arbitration moot the Second Amended Complaint because the Grievances and the underlying actions are implicated in the hybrid claims. Obviously, HFFA's refusal to proceed to arbitration on the Grievances is the basis for the breach of the duty of fair representation claim. HFD-COH's actions in placing Mr. Keopuhiwa in Kailua and then refusing to transfer him back to Waiakea remain the bases for the breach of the CBA regardless of whether he took the voluntary demotion and transfer to Central. If HFD-COH's Kailua Placement and Waiakea Transfer Denial violated

the CBA, then his voluntary demotion and Central transfer were a direct consequence of and a part of those violations. Mr. Keopuhiwa would not have taken the voluntary demotion and transfer to Central but for the alleged CBA breach.

Finally, in Nakanelua, the HSC held that a prohibited practice case may not be moot because the Board may consider past decisions in determining a current prohibited practice complaint against HFD-COH. In so ruling, the HSC relied on the Board's authorization to assess a monetary penalty against an employer or employee under HRS § 377-9(d) [20] in current prohibited practice cases based on past findings of prohibited practices. 134 Hawaiʻi at 502, 345 P.3d at 168. Therefore, as any prohibited practices found in this case against HFD-COH may be relevant to determination of a civil penalty against these parties in future cases, this case is not moot.

As the Board considers these issues significant to the prohibited practices alleged in the Second Amended Complaint, the two conditions for justiciability of adverse interest and effective remedy have not been compromised. Therefore, the Second Amended Complaint is not moot and cannot be dismissed for lack of Board jurisdiction.

3.2.1.5. Lack of Jurisdiction for Failure to Exhaust

Based on Poe v. Haw. Lab. Rels. Bd., 97 Hawaiʻi 528, 531, 40 P.3d 930, 933 (2002) (Poe I) and Poe v. Haw. Lab. Rels. Bd., 105 Hawaiʻi 97, 101, 94 P.3d 652, 656 (2004) (Poe II), before a complainant can bring a prohibited practice claim that the employer violated the applicable collective bargaining agreement, they must first exhaust contractual remedies unless attempting to exhaust would be futile.

HFD-COH argues that in the original Complaint, Mr. Keopuhiwa recognized that "he must wait until the grievance process is exhausted[]" and that under the appellate courts' holding in Santos v. State of Hawaiʻi, 64 Hawaiʻi 648, 646 P.2d 962 (1982) and Winslow v. State, 2 Haw. App. 50, 625 P.2d 1046 (1981), an employee must exhaust the grievance and arbitration procedures before filing a complaint.

The Board finds that this argument has no merit for the HFD-COH MTD/MSJ on the Second Amended Complaint. The Second Amended Complaint alleges that the HFFA submitted a notice to proceed to arbitration on the Placement Grievance. There is no dispute and the exhibits attached to the HFD-COH MTD/MSJ confirm that HFFA notified HFD-COH of its intent to arbitrate both the Placement and Waiakea Transfer Denial Grievances. There is also no dispute that HFFA later notified Complainant of its decision not to arbitrate these Grievances.

A public employee pursuing an individual grievance exhausts his administrative remedies for HRS Chapter 89 purposes when he completes every step available to the employee in the

grievance process and a request to his union to proceed to the last grievance step that only the union can take, would be futile. Poe I, 97 Hawai‘i at 531, 40 P.3d at 933.

When HFFA notified Complainant that it would not take his Grievances to arbitration, he could not progress any further under the CBA grievance process. Therefore, based on Poe I, he exhausted his contractual remedies. Mr. Keopuhiwa did not need to appeal the Division Committee Decision because it was futile after being explicitly notified of the HFFA’s decision and Spain’s membership on the HFFA Executive Board. *See* Caspillo, Decision No. 509, at *9. Further, the Board has no jurisdiction over internal union processes. Stucky v. Okabe, Board Case No. CU-05-303, Decision No. 508, at *3 (June 30, 2021) (citing State of Hawai‘i Org. of Police Officers v. Ballard, Board Case No. 18-CE-12-910, Order No. 3442, at *8 (January 17, 2019)). Hence, exhaustion for purposes of a prohibited practice case cannot include the internal union process. *See, e.g.*, Stucky v. Takeno, Board Case No. CU-05-283, Order No. 2834, at *15 (March 15, 2012).

Therefore, for these reasons, the Board rejects HFD-COH’s position that Complainant has failed to show that he exhausted his contractual remedies.

3.2.1.6. Deferral to Arbitration

HFD-COH asserted that the Board should defer to the arbitration process.

The Board denies this assertion for two reasons. First, there is no pending arbitration process because HFFA decided not to proceed to arbitration on the Complainant’s Grievances.

Second, the Board has the authority to exercise its jurisdiction over contract violations on a case-by-case basis. State of Haw. Org. of Police Officers v. Lingle, Board Case No. CE-12-238, Decision No. 377, at *3 (May 31, 1996). While deferral has been done in certain cases, the Board does not defer to the grievance process where breach of the duty of fair representation involves the union’s decision not to proceed to arbitration. *See, e.g.*, Victorino v. Ariyoshi, Board Case No. CE-01-96, Order No. 579, at *3 (January 27, 1986).

Accordingly, the Board will not defer to the grievance process in this case.

3.2.1.7. Motions to Dismiss for Failure to State a Claim

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. Taum, Decision No. 514, at *36 (citing Justice v. Fuddy, 125 Hawai‘i 104, 108, 253 P.3d 665, 669 (App. 2011)). 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.* The Board is strictly limited to the allegations of the complaint, must deem these allegations to be

true, and view them in the light most favorable to the complainant to determine whether the allegations in the complaint would warrant relief under any alternate theory. However, the Board is not required to accept legal conclusions made in the complaint. *Id.* (citing Pavsek v. Sandvold, 127 Hawaiʻi 390, 402-03, 279 P.3d 55, 67-68 (App. 2021)).

Moreover, in determining whether to dismiss a complaint for failure to state a claim and insufficiency of a pleading, the Board adheres to the fundamental tenet of Hawaiʻi law regarding pleadings standards established by the Hawaiʻi appellate courts for SRLs, that "Hawaiʻi's rules of notice pleading require only that a complaint set forth a short and plain statement of the claim that provides respondent with fair notice of what the complainant's claim is and the grounds upon which the claim rests, and that pleadings be construed liberally." Bank of America, N.A. v. Reyes-Toledo, 143 Hawaiʻi 249, 259, 428 P.3d 761, 771 (2018) (Reyes-Toledo) (citing In re Genesys Data Techs., Inc., 95 Hawaiʻi 33, 41, 18 P.3d 895, 903 (2001)); Paio v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. 16-CU-10-344, Decision No. 497, at *26 (2020) (citing Suzuki v. State of Hawaiʻi, 119 Hawaiʻi 288, 296, 196 P.3d 290, 298 (App. 2008)). Following the HSC, the Board has reaffirmed the application of this well-established notice pleading standard. *Id.* (citing Reyes-Toledo, 143 Hawaiʻi at 257-63, 428 P.3d at 769-75).

The Board complies with the HSC principle that the purposes of the rules governing pleadings are to ensure that all pleadings should be construed to do substantial justice. Reyes-Toledo, 143 Hawaiʻi at 259, 428 P.3d at 771.

HFFA argues that the Second Amended Complaint fails to state a claim because Mr. Keopuhiwa's claims are based on opinion and argument that HFFA defeated. HFFA summarily dismisses Mr. Keopuhiwa's allegations that HFFA violated the deadlines for mutual selection of an arbitrator for the Grievances. The Union further asserts that his demand for the Union to arbitrate the Grievances has been answered due to lack of proof and mootness, and that the claim for breach of the duty has been defeated by Board precedent.

The Board finds that the Second Amended Complaint gave Respondents fair notice of the claims and the grounds upon which they rest. Viewing the allegations of the Second Amended Complaint in the light most favorable to the Complainant and deeming them to be true, the Board is unable to dismiss the Second Amended Complaint because HFFA has not shown that there is no doubt that the Complainant cannot prove any set of facts supporting his claims that would entitle him to relief.

3.2.2. Motions for Directed Verdict

Respondents moved for directed verdict at the close of Complainant's case-in-chief that the Board took under advisement. Upon Respondents' renewal of their Motions for Directed Verdict, the Board denied the Motions.

The Board can hear motions akin to a motion for directed verdict if the party opposing the motion has a full and fair opportunity to be heard on the motion after reasonable notice and if the Board's rules are not otherwise violated. Guzman v. Honolulu Police Dep't, Board Case Nos. 19-CE-03-925 and 19-CU-03-371, Decision No. 512, at *3 (July 8, 2022).

Motions for directed verdict are made after the non-moving party—Mr. Keopuhiwa—has been fully heard on the issue On a motion for directed verdict, the Board is required to answer the question—whether the complainant has met his required burden of proof after presenting all his evidence and resting his case. If not, the Board must find that he failed to carry his burden of proof and dispose of the case. *Id.* at *4. In considering a motion for directed verdict, the Board must view the evidence and inferences in the light most favorable to Mr. Keopuhiwa, the non-moving party. Kapesi v. Dep't of Pub. Safety, State of Hawai'i, Board Case Nos. 17-CE-10-908 and 17-CU-10-359, Decision No. 510, at *10 (March 2, 2022)).

Under HRS § 91-10(5) and HAR § 12-42-8(g)(16), the complainant in prohibited practice cases has the burden of proof, including the burden of producing evidence as well as the burden of persuasion, by the preponderance of the evidence. The preponderance of the evidence means that it is more likely than not that Mr. Keopuhiwa has proven that Respondents committed a prohibited practice. The Board can only grant a motion for directed verdict if the only reasonable conclusion is that Mr. Keopuhiwa has failed to meet his burden of proof. *Id.* at *10-11 (citing Makino v. Cnty of Hawai'i v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case Nos. CE-01-856, CU-01-832, Decision No. 492, at *19 (2017)).

The Board finds and concludes for the reasons discussed below that Mr. Keopuhiwa carried his burden of proving the hybrid case. Therefore, the Board denied the Motions for Directed Verdict.

3.3. The Hybrid Case

The HSC has held that in a "hybrid case" for an alleged breach of the duty of fair representation by the union and an alleged breach of the CBA by the employer, the claims are "inextricably interdependent", so both must be proven in the proceedings. Therefore, while an employee may choose to sue one defendant and not the other, the proof is the same. The employee must prove both parts of the "hybrid case". Poe II, 105 Hawai'i at 102, 94 P.3d at 657.

3.3.1. Violation of the CBA

CBA § 16.e. specifically provides that employees shall not be disciplined without just and proper cause.[21] None of the other incidents identified were substantiated, except for the partial finding on the VIWP filing that had already been subject to corrective action. In short, there was no just and proper cause to support the disciplinary transfer. In fact, HFD-COH's

assertion that Complainant's involuntary transfer was not disciplinary was, in effect, admitted that there was no just and proper cause for the transfer.

CBA § 10A specifically provides that while the Fire Chief has the authority for placement of employees, "the placement of Employees shall not be utilized as a disciplinary measure. The placement of Employees shall be for legitimate operational reasons and due consideration shall be given for cases involving personal hardship."[22]

HFD-COH asserts in this case that while Mr. Keopuhiwa's Kailua Placement was not a disciplinary measure, his presence was not in the best interest of efficient operations at Waiakea. The Board finds that Complainant has proven otherwise.

The Kailua Placement was in fact a transfer. Transfers under similar circumstances have been recognized as disciplinary or adverse employment actions in other legal contexts. In McCabe Hamilton & Renny Co. Int'l Longshore & Warehouse Union, Local 142, 624 F.Supp.2d 1236, 1241-42 (D. Haw. 2008) (McCabe), the Hawai'i federal district court confirmed an arbitrator's decision that an employee's transfer to diffuse a longstanding workplace violence situation with another employee constituted a demotion and a disciplinary action because it deprived him of the benefits associated with that position. In ruling, the arbitrator recognized that while an employer has wide discretion in making transfer decisions, the discretion does not provide an avenue for the company to take action that effectively punishes an employee without meeting the disciplinary requirements of the collective bargaining agreement. *See also*: Horne v. Texas Dep't of Transp., 2020 U.S. Dist. LEXIS 175833, at *43-44 (D. Tex. 2020) (Plaintiffs established a genuine issue of material fact as to whether their involuntary transfers would have dissuaded a reasonable worker from opposing discrimination). Even where a lateral transfer has no reduction in pay or benefits, a transfer may be sufficient for an adverse job action. *See, e.g.*, Jones v. Sch. Dist. Of Philadelphia, 198 F.3d 403, 411-12 (3d Cir. 1999); Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987) (The Seventh Circuit specifically noted that an adverse job action may include moving an employee to an undesirable location reasoning that "[o]ne does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.").

Like the McCabe employee, Mr. Keopuhiwa suffered an adverse employment action that was effectively disciplinary to diffuse a workplace violence situation. It was an involuntary permanent transfer with a significant personal cost of a long commute that took him further away from his wife with a medical condition. It also effectively cost him his FRS position because to return to Hilo, he was forced to take a voluntary demotion with a loss of salary and benefits. The Board finds no question that this involuntary transfer made Complainant's job more undesirable and that the voluntary demotion was required for him to return to a fire station closer to home.

While denying that Mr. Keopuhiwa's transfer was disciplinary, the Placement Notice specifically notes several incidents between Mr. Keopuhiwa and the Captains that were

investigated and resulted in corrective action. Contrary to Rosario's statement in the Placement Notice, only one of those incidents resulted in a partial finding that Complainant violated HFD Rules and Regulation—the filing of the VIWP Complaints for which the consequence was mediation.

In addition, there is no evidence that HFD-COH inquired into or considered any personal hardship caused by the Kailua Placement for Complainant.

Finally, CBA § 10.B. provides that if an employee submits a written request to be considered for transfer to another station, he shall receive written acknowledgement of the request from the Fire Chief or designee and "shall be given full consideration by the Fire Chief or designee."[23]

Regarding the Waiakea Transfer Denial request, HFD-COH simply failed to properly consider the request under the CBA § 10.B. There was no evidence that HFD-COH acknowledged the request in writing until Complainant filed a request for an informal step grievance meeting to discuss the lack of transfer. In addition, Mr. Keopuhiwa's request was for a transfer to Waiakea A, B, and C, Kailua B, and any shift at Central, Haihai, Laupahoehoe, or Volcano. The acknowledgment only considered the transfer to Waiakea C and not the other stations and shifts. Therefore, the Board finds that HFD-COH did not fully consider Mr. Keopuhiwa's transfer request as required by CBA § 10.B.

Finally in making the Kailua Placement and the Waiakea Transfer Denial decisions, HFD-COH failed to fully consider the options of red circling or placing Mr. Keopuihiwa in a HAZMAT position to enable him to be assigned to a fire station in or nearer to Hilo as required by CBA § 10.A. and B.

Based on the record and these reasons set forth above, the Board finds and holds that Complainant proved that HFD-COH failed to comply with CBA §§ 10 and 16 in violation of HRS § 89-13(a)(8).

3.3.2. Wilfullness of HFD-COH's Conduct

For HFD-COH's conduct to violate HRS 89-13(a)(8), the violation must be wilfull. The Board must make a specific finding that HFD-COH acted with the conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89. Taum, Decision No. 514, at *49.

The Board finds the requisite wilfullness for HFD-COH's conduct based on Rosario's obvious bias in favor of Spain and his efforts to deliberately conceal the reasons for the Kailua Placement.

Rosario knew that Spain was a significant participant in the underlying incidents that resulted in the Mr. Keopuhiwa's Kailua Placement based on the Spain VWIP Complaint, the

Spain Investigation Report, and the Spain Notice. He knew that it would be a conflict for Spain to be involved in the processing of the Grievances because he notified Lee not to have Spain represent the Union in the Step 1 Kailua Placement Grievance meeting.

Despite his knowledge, Rosario showed bias in favor of Spain on several occasions during the disciplinary and grievance processes—by his statement that he trusted the Captains without question, by including him in discussions of the options before imposing the Kailua Placement. by resolving the VIWP situations by transferring Mr. Keopuhiwa and not Spain (or the other Captains), and by allowing the Union to have Spain as its representative during the Steps 1 and 2 of the Placement Grievance and Step 1 of the Waiakea Transfer Grievance...

Further, Rosario attempted to conceal and confuse the basis for Complainant's Kailua Placement. While Rosario relied on numerous incidents involving Complainant and the Captains that he claimed were investigated and resulted in corrective action in the Placement Notice, he attempted to characterize the Kailua Placement as operational and not disciplinary.

For these reasons, the Board finds and holds that Complainant carried his burden of showing that HFD-COH wilfully violated HRS § 89-13(a)(8) by violating the terms of the CBA.

3.3.3. Duty of Fair Representation

The Board has well-established principles for breach of the duty of fair representation cases.

Under Poe II, a union, as the exclusive representative of the employees in the bargaining unit, has a duty to fairly represent all those employees, both in its collective bargaining and in its enforcement of the collective bargaining agreement. Tupola, Order No. 3054, at *27 (citing Poe II, 105 Hawai'i at 101, 94 P.3d at 656)). A union breaches a duty of fair representation when its conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith. *Id.* at *27 (citing Vaca v. Sipes, 386 U.S. 171, 190 (1967)). A union is obligated to serve the interests of all members without hostility or discrimination toward any, exercise its discretion with complete good faith and honesty, or avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. 335, 342 (1964) (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953)).

The Board has adopted a two-step analysis to determine whether a union has breached its duty of fair representation. The Board first looks at whether the alleged union misconduct involved the union's judgment or whether it was "procedural or ministerial". Caspillo, Decision No. 509, at *11-12 (citing Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 337F, at *31 (May 7, 2018) (Mamuad)). If procedural or ministerial, the complainant may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. *Id.* at *12. If the conduct involved the union's judgment, then the complaint may prevail only if the union's conduct was

discriminatory or in bad faith. Mamuad, Order No. 3337F, at *31 (citing Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1486 (9th Cir. 1993)).

If the union ignores or processes a meritorious grievance in an arbitrary or perfunctory manner, such actions are ministerial and can be considered as potential breaches of the duty of fair representation. Caspillo, Decision No. 509, at *12.

In this case, Mr. Keopuhiwa's complaints about HFFA's handling of his grievances were focused on the processing of his grievance. The Board, therefore, finds that these actions are procedural or ministerial.

As exclusive bargaining agent of the employee, the union has certain statutory duties. It must fairly represent the employee in any meritorious grievance without hostility or discrimination. Cabatbat v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CU-10-63, Decision No. 305 at *18 (June 25, 1990). It must not perfunctorily deal with the employee's problem or refuse to treat it, and it must not discriminate against the employee or act arbitrarily toward them in their cause. Caspillo, Decision No. 509, at *12.

A basic tenet of employment law is that a bargaining unit member should have the right to a fair and impartial tribunal. Where even one member of a union's three-member trial board shows prejudgment on the bargaining member's guilt, a member is deprived of a fair and impartial hearing. *See, e.g.*, Falcone v. Dantinne, 420 F.2d 1157, 1160-61 (3d Cir. 1969) (Falcone). Therefore, an unbiased or untainted finder of fact is fundamental to a fair and full hearing and procedural due process. Myers v. Affiliated Property Craftsment Local No. 44, 667 F.2d 817, 820 (9th Cir. 1982) (citing Falcone, 420 F.2d at 1166. Moreover, the prejudgment by a single decisionmaker in a tribunal of limited size is sufficient to taint the proceedings and constitute a denial of the right to a full and fair hearing.); Goodman v. Laborers' Int'l Union, 742 F.2d 780, 784 (3d Cir. 1984) (citing Falcone, 429 F. 2d at 1163).

3.3.3.1. Procedural or Ministerial Acts—Arbitrariness

A union has broad discretion in deciding whether and how to pursue a grievance. Tupola, Order No. 3054, at *28-29 (citing Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-68 (1990)). However, union conduct that shows an egregious disregard for the rights of union members is arbitrary conduct that breaches the duty of fair representation. *Id*. at *27. A union does not act perfunctorily if the union undertakes some minimal investigation of the grievance. The required thoroughness of the investigation depends on the particular facts of the case. Caspillo, Decision No. 509, at *12 (citing Emura v. Haw. Gov't Emp. Ass'n., AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at *13 (October 27, 2014)).

The circumstances of this case indicate that HFFA handled Mr. Keopuhiwa's grievance arbitrarily and perfunctorily.

The Board finds that HFFA did conduct a minimal investigation based on its representation to Mr. Keopuhiwa in the Division Grievance Committee Decision regarding the review of Mr. Keopuhiwa's arguments and allegations, his documents and information, and the HFD-COH information and documentation.

However, the Kailua Placement being grieved was done to diffuse the longstanding antagonistic and workplace violence situation between Complainant and Spain and the other Captains. Spain's hostility, conflicts of interest, and bias against Mr. Keopuhiwa are well-documented in the record. The Notice of Placement specifically referenced the Spain Complaint, the Spain Investigation, and the Spain Notice as grounds for Mr. Keopuhiwa's Kailua Placement. Spain's attempt to influence Rosario after the mediation by refusing to work with Mr. Keopuhiwa further shows his prejudgment. Nevertheless, HFFA insisted Spain be involved in the discussion of options with Rosario prior to the Kailua Placement decision and at all stages of the processing of the Grievances. This included as the Union representative at Steps 1 and 2, responsibility for settlement decisions, and serving on and chairing the Division Grievance Committee that decided not to arbitrate these Grievances. There is no question that Spain was not and could not be an unbiased and untainted finder of fact. Therefore, HFFA did not provide Mr. Keopuhiwa with a fair and full processm rendering HFFA's conduct arbitrary.

3.3.3.2. Bad Faith

Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted or failed to act due to an improper motive. Bad faith requires more than bare assertions of the union's state of mind but requires factual support. Tupola, Order No. 3054, at *34. A union's actions are in bad faith where the union and its representatives harbored animosity towards the employee, and that animosity manifested itself as a material factor in the union's handling of the employee's grievance. Smokowicz v. Graphic Packing Int'l, Inc., 2017 U.S. Dist. LEXIS 82743, at *8 (D. Pa. May 30, 2017).

In this case, HFFA's conduct provides substantial evidence of its bad faith.

The HFFA's animosity manifested itself through Spain's conduct as a material factor in the handling of these Grievances. The longstanding hostile relationship between Spain and Mr. Keopuhiwa was indisputably at the heart of the VIWP Complaints, the Spain Investigation, the unsuccessful mediation, and the Kailua Placement and the Waiakea Transfer Denial that were the bases for the Grievances.

Under HFFA's internal procedures for handling grievances, the HFFA Division Chair is the most instrumental Union leader in the processing of grievances arising in their division.

Despite this fact, the Union failed to provide any protections to ensure that the processing of Complainant's Grievances was fair and that Spain was unable to exert any influence or prejudice in this process. In fact, HFFA affirmatively rejected Rosario's recommendation that Spain not be the HFFA representative at the Step 1 Placement Grievance and maintained Spain as the HFFA Representative and decisionmaker at every step of the Grievances, including the significant adverse decision not to proceed to arbitration on the Grievances.

For these reasons, the Board concludes that Complainant carried the burden of proving that HFFA acted in bad faith.

3.3.3.3. Discriminatory

Like bad faith, the discriminatory element looks to the subjective motivation of the HFFA officials. Tupola, Order No. 3054, at *33 (citing Simo v. Union of Needletrades, 322 F.3d 602, 617 (9th Cir. 2003)). Only "invidious" discrimination based on impermissible or immutable classifications such as race or other constitutionally protected categories or which arises from prejudice or animus or discrimination because of union membership breaches the duty of fair representation. *Id.*

In this case, there was no evidence that HFFA's conduct was based on impermissible invidious discrimination. Therefore, the Board does not find that HFFA breached its duty of fair representation to him on this ground.

However, based on this evidence of HFFA's arbitrary and bad faith conduct, the Board holds that Mr. Keopuhiwa carried his burden of establishing that HFFA breached its duty of fair representation to Complainant under Poe II in the processing of his Grievances.

Therefore, the Board concludes and holds that Complainant has established the hybrid case that HFD-COH breached the CBA in violation of HRS § 89-13(a)(8) and that HFFA breached its duty of fair representation under Poe II.

3.4. Other Prohibited Practice Allegations

In the Second Amended Complaint, Mr. Keopuhiwa asserts that Respondents failed to select or extend the time to select an arbitrator under the CBA grievance process in wilfull violation of HRS § 89-13(a), (1), (4), and (7) and HRS § 89-13(b)(5).

CBA § 18.G. provides, in relevant part:

> G. Step 3. Arbitration. If the grievance is not resolved at Step 2 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designee of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 2. If the agreement on

> an arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawai‘i Labor Relations Board to submit a list of five (5) arbitrators…

Contrary to Complainant's position, there was no mandatory requirement that the parties select an arbitrator on a specific time schedule. The only requirement is that the Union serve written notice on the Employer within ten working days after receipt of the Employer's Step 2 decision and that the parties **<u>attempt</u> to select an arbitrator immediately thereafter."** (emphasis added) Therefore, Respondents committed no prohibited practices.

Further, there are other reasons that Respondents did not commit prohibited practices based on the specific violations alleged.

3.4.1. <u>HRS §§ 89-13(a)(1) and 89-13(b)(1)</u>

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 Chapter 89. HRS § 89-13(b)(5) is the analogous prohibited practice provision against the Union.

Both prohibited practice provisions require that there be a protected right established and recognized by HRS Chapter 89. Protected rights that have been recognized include the right to pursue lawful, concerted activities for the purpose of collective bargaining or other mutual aid under HRS § 89-3, the exclusivity right of an employee organization certified by the Board as representing an appropriate bargaining unit under HRS § 89-8(a), and the right to ratification of a collective bargaining agreement under HRS § 89-10(a). <u>Taum</u>, Decision No. 514, at *43; <u>Brown v. State of Hawaii Org. of Police Officers</u>, Board Case Nos. CU-12-41 and CU-12-42, Decision No. 170, at *11-12 (March 4, 1983).

In this case, because Mr. Keopuhiwa did not specifically identify any other HRS Chapter 89 protected right, the Board is unable to find a violation of HRS §§ 89-13(a)(1) or 89-13(b)(1). Therefore, these allegations are dismissed.

3.4.2. <u>HRS § 89-13(a)(4)</u>

HRS 89-13(a)(4) makes it a prohibited practice for a public employer to discharge or otherwise discriminate against an employee because the employee has filed a complaint under HRS Chapter 89.

The Board is unable to determine how a failure to select an arbitrator violates HRS § 89-13(a)(4) and finds no evidence that HFD-COH discharged or otherwise discriminated against Mr. Keopuhiwa for filing prohibited practice complaints under HRS Chapter 89. So, this claim is likewise dismissed.

3.4.3. HRS § 89-13(a)(7) and 89-13(b)(4)

HRS § 89-13(a)(7) makes it a prohibited practice for a public employer to refuse or fail to comply with any provision of HRS Chapter 89.

HRS §§ 89-13(a)(7) and 89-13(b)(4) are also analogous prohibited practice provisions against the employer and the union, respectively.

To support a violation of HRS § 89-13(a)(7) or HRS § 89-13(b)(4), the Board requires a showing of violations of other HRS Chapter 89 provisions independent of HRS § 89-13(a). Asato v. Hawaii Gov't Emp. Ass'n., Board Case Nos. 19-CU-03-375 and 19-CE-03-934, Decision No. 504, at *4 (May 5, 2021).

As Mr. Keopuhiwa has not pled or proven a violation of an independent HRS Chapter 89 provision,[24] the Board dismisses these claims.

3.4.4. HRS § 89-13(b)(5)

HRS § 89-13(b)(5) makes it a prohibited practice for the exclusive representative to violate a collective bargaining agreement.

As the Board has already determined, the CBA does not require that Respondents select an arbitrator or adhere to a specific time schedule. For this reason, the Board is unable to find that HFFA violated the CBA.

4. Remedies

HRS § 377-9(d) provides the Board with authority to make final orders dismissing the complaint, requiring the person complained of to cease and desist from the [prohibited practices] found to have been committed, and requiring the person to take affirmative action, including making orders making them whole, including back pay with interests, costs and attorneys' fees. *See* Taum, Decision No. 54 at *52.

Under this provision, the Board finds that Mr. Keopuhiwa is entitled to reinstatement to his FRS position and make whole relief as provided below.

5. Order

For the reasons set forth above, the Board holds and concludes that Complainant carried the burden of establishing the Poe II hybrid case that HFD-COH violated CBA §§ 10 and 16 in violation of HRS § 89-13(a)(8), and that HFFA breached its duty of fair representation because of its arbitrary and bad faith conduct. Therefore, the Board orders the following:

1. Respondent HFD-COH shall cease and desist from violating the CBA in violation of HRS § 89-13(a)(8);

2. Respondent HFFA shall cease and desist from breaching its duty of fair representation by having a Union official involved in the underlying grievance serve as a Union representative or decisionmaker during the processing of this grievance and decision whether to proceed to arbitration;

3. Within 30 days of this Order, HFD-COH shall reinstate Mr. Keopuhiwa to his FRS position without prejudice to his seniority, other rights, benefits, or privileges previously enjoyed that he possessed prior to his demotion and place him at Waiakea or other fire station located at or near Hilo, Hawaiʻi;

4. Respondents HFFA and HFD-COH shall reimburse Mr. Keopuhiwa for the net loss of earnings and benefits between his demotion and the date of his reinstatement to his FRS position. The reimbursement liability shall be divided equally between the Respondents and the specific amount owed by each Respondent shall be determined by the Board following the filing of a request by the Complainant;

5. Preserve and within 14 days of a request from Mr. Keopuhiwa, 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 net loss of earnings and benefits due to make Complainant whole under the terms of this Order to Complainant;

6. HFFA shall post at the Waiakea Fire Station, 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 HFD-COH and HFFA customarily communicate with its employee; and

7. Respondents 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, Hawaiʻi, June 30, 2023.

HAWAIʻI LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

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[1] HRS § 89-13(a) states in relevant part:

> (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;
>
> ***
>
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
>
> ***
>
> (7) Refuse or fail to comply with any provision of this chapter; and
>
> (8) Violate the terms of any collective bargaining agreement[.]

[2] HRS § 89-13(b) states in relevant part:

> (a) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> ***
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

[3] HRS 91-11 states:

§91-11 Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

[4] HRS § 89-2 defines "public employee" as "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)]."

[5] HRS § 89-6(a) provides in relevant part:

HRS § 89-6 Appropriate bargaining units. (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

***

(11) Firefighters[.]

[6] HRS § 89-2 defines "employer" or "public employer" as "…the respective mayors in the case of the counties…and any individual who represents one of these employers or acts in their interest in dealing with public employees."

[7] HRS § 89-2 defines "exclusive representative" as "the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employer organization membership.

[8] CBA Section 10.A. states

A. Placement of Employees. The placement of Employees within each Fire Department shall be the responsibility of the respective Fire Chiefs or designee. However, the placement of employees shall not be used as a disciplinary measure. The placement of Employees shall be for legitimate operational reasons and due consideration shall be given for cases involving personal hardship…

[9] CBA Section 10.B. states in relevant part:

B. Employee Transfer Requests. Employees may submit written requests to the Fire Chief or designee to be considered for transfer to another company, station or work site and shall receive written acknowledgement of such request from the Fire Chief or designee…All valid Employee requests shall be given full consideration by the Fire Chief or designee.

[10] CBA **Section 16 DISCIPLINE** states:

Employees shall not be disciplined without just and proper cause. The Employer shall provide written notice of all verbal reprimands (if documented), written reprimands, suspensions, and dismissals to the Employee and Union withing ten (10) business days after the effective date of the disciplinary action. Grievances regarding these matters shall be handled in accordance with the provisions of Section 18. Grievance Procedure.

[11] **Section 18. GRIEVANCE PROCEDURE.**

A. Any complaint by an Employee or the Union concerning the application and interpretation of this agreement shall be subject to the grievance procedure. Any relevant

information specifically identified by the grievant or the Union in the possession of the Employer and needed by the grievant or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days…

B. An individual Employee may present a grievance to the Employee's immediate supervisor and have the Employee's grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance…

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the Employee's immediate supervisor within the twenty (20) working days limitation provided for in Paragraph A. above. In such an event the Employee shall identify the discussion as an informal step grievance. The grievant may be assisted by the grievant's Union representative. The immediate supervisor shall reply within seven (7) working days. In the event the Employer does not respond within the time limits prescribed herein, the Union may pursue the grievance to the next step.

D. Step 1. If the grievant is not satisfied with the result of the informal conference, the grievant or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the Fire Chief or designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the Fire Chief or designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and the Employee's immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the Fire Chief or designee within the twenty (20) working day limitation provided for in Paragraph A. above. A meeting shall be held between the grievant and a Union representative with the Fire Chief or designee within seven (7) working days after the written grievance is received. Either side may present witnesses. The Fire Chief or designee shall submit a written answer to the grievant or the Union within seven (7) working days after the meeting.

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the Employer or designee within seven (7) working days after receiving the written answer. The Employer or designee need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Employer or designee shall reply in writing to the grievant or the Union within seven (7) working days after the meeting.

***

G. Step 3. Arbitration. If the grievance is not resolved at Step 2 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designee of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 2. Representatives of the parties shall attempt to select an arbitrator immediately thereafter. If agreement on an arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawaii Labor Relations Board to submit a list of five (5) arbitrators. Selection of an arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first

party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the arbitrator. No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the agreement.

> ***

[12] *See* endnote 11, *supra*.

[13] *See* endnote 11, *supra*.

[14] *See* endnote 11, *supra.*

[15] *See*, endnote 11, *supra.*

[16] *See* endnote 11, *supra*.

[17] The Spain Investigation Report found that Mr. Keopuhiwa violated HFD Rules § 3 prohibiting an employee from publicly criticizing or ridiculing the Department, its policies, or members by filing the VIWP documents but did not violate HFD Rules § 19 Class E. regarding the mishandling of departmental records.

[18] In addition, the Second Amended Complaint was also timely under the Board's administrative rules because an amended document is effective as of the date of the original filing if it relates to the same proceeding. HAR § 12-42-8(g)(10)(C).

[19] HRS § 377-9(d) provides in relevant part:

> (d) …Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take affirmative action, including …make orders in favor or employees making them whole, including back pay with interest costs and attorney's fees…

[20] See endnote 19, *supra.*

[21] *See* endnote 10, *supra*.

[22] *See* endnote 8, *supra*.

[23] *See* endnote 9, *supra.*

[24] A breach of the duty of fair representation under HRS § 89-8(a) has been deemed a violation of HRS § 89-13(b)(4), *see e.g.,* Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'i 317, 324, 260 P.3d 1135, 1142 (App. 2011). However, as Complainant in this case failed to plead a statutory violation of HRS § 89-8(a), the Board holds that there is no violation of HRS § 89-13(b)(4) despite its determination that HFFA breached its duty of fair representation under Poe II.

<u>DISSENTING OPINION OF BOARD MEMBER J N. MUSTO, Ph.D</u>

The undersigned concurs with the FINDINGS OF FACT in DECISION NO. 515. However, the concurrence with those facts leads this Member to conclude that the Respondent Hawaiʻi FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 1463, AFL-CIO (HFFA), did not violate its duty of fair representation to the Complainant BRAN KEOPUHIWA (Complainant or Mr. Keopuhiwa) as set forth in <u>Section 3. Analysis and Conclusions of Law, subsection 3.3.3 Duty of Fair Representation</u>. Nor that the Respondent HAWAIʻI FIRE DEPARTMENT, County of Hawaiʻi (HFD-COH) violated Collective Bargaining Agreement (CBA) in violation of Hawaiʻi Revised Statutes (HRS) § 89-13(a)(8).

The Majority Decision begins with <u>Section 1. Introduction and Statement of the Case</u>. The second paragraph reads:

> Mr. Keopuhiwa pursued grievances over both the Kailua Placement and Waiakea Transfer Denial (Placement Grievance and Waiakea Transfer Denial Grievance, respectively, and collectively Grievances). After HFD-COH denied the Grievances, Respondent HAWAII FIRE FIGHTERS ASSOCIATION (HFFA or Union and collectively Respondents with HFD-COH) **sent a notice of intent to arbitrate both Grievances**. While the Grievances were pending arbitrator selection, **Mr. Keopuhiwa requested a voluntary demotion and transfer to Central Fire Station** (Central) that HFD-COH approved**. HFFA withdrew both Grievances from arbitration based on, among other things, mootness.**

(Emphasis added) (p. 1).

> In his Second Amended Complaint, Mr. Keopuhiwa argues that HFD-COH **wilfully violated** the relevant bargaining **unit 11 (BU 11) collective bargaining agreement** (CBA), committing prohibited practices under Hawaiʻi Revised Statutes (HRS) § 89-13(a)(1), (4), (7), and (8) and that **HFFA violated its duty of fair representation** and the terms of the CBA, committing prohibited practices under HRS § 89-13(b)(1), (4), and (5) by the handling of his grievances and **failing to arbitrate**.

(Emphasis added, endnotes omitted) (p. 1-2).

It is a long-standing principle, in both private and public sector employment, that an employee must "comply and grieve" in response to the actions of an employer that may violate a collective bargaining agreement. There was <u>no testimony or evidence</u> in the record that the HFFA <u>would not have proceeded to arbitration</u> if Mr. Keopuhiwa had not "…requested a

voluntary demotion and transfer to Central Fire Station." Any other conclusions that would lead to a determination that the union have failed to meet the duty of fair representation, by not proceeding with the arbitration on behalf of the Complainant is simply speculative. Also, the decision of HFFA to withdraw the request for arbitration was based on the Complainant's decision to not comply with the transfer by voluntarily accepting a demotion to remain in Hilo. HFFA determined that the grievance was "moot." The standard applied by both the National Labor Relations Board and this Board for determining if a union decision not to arbitrate a grievance meets the duty of fair representation does not require the union to make the "right decision," but only that the decision is free from fraud or discrimination with respect to grievant. Based on those standards, the HFFA decision under the circumstances falls within those acceptable standards.

The Majority Decision is correct in pointing out that the HFFA was in a precarious position resulting from "…the longstanding antagonistic and workplace violence situation between Complainant and Spain and other Captains." (p. 23).

> Spain's hostility, conflicts of interest, and bias against Mr. Keopuhiwa are well-documented in the record. The Notice of Placement specifically referenced the Spain Complaint, the Spain Investigation, and the Spain Notice as grounds for Mr. Keopuhiwa's Kailua Placement. Spain's attempt to influence Rosario after the mediation by refusing to work with Mr. Keopuhiwa further shows his prejudgment. Nevertheless, HFFA insisted Spain be involved in the discussion of options with Rosario prior to the Kailua Placement decision and at all stages of the processing of the Grievances. This included as the Union representative at Steps 1 and 2, responsibility for settlement decisions, and serving on and chairing the Division Grievance Committee that decided not to arbitrate these Grievances. There is no question that Spain was not and could not be an unbiased and untainted finder of fact.

(p. 23).

I concur with the Majority Decision in the above reference in Section 3.3.3.1. Procedural or Ministerial Acts—Arbitrariness. Mr. Spain on his own behalf should have recused himself from all matters with respect to the processing and disposition of Mr. Keopuhiwa's grievance. Regardless of what office or titles Mr. Spain may have held in the HFFA, by allowing him to continue to be part of the Complainant's grievance procedure and the determination of the HFFA in decision to arbitrate said grievance, he exposed the union to these Prohibited Practice Charges, i.e., a failure of the duty of fair representation. Further, the HFFA itself should have taken notice of the conflict of interest inherent in grievance being brought by Mr. Keopuhiwa and have excused Mr. Spain from participation because of the union's duty of fair representation.

Despite the obvious conflicts between the Complainant and Mr. Spain, and recommendation from Mr. Spain's committee that the grievance not proceed to arbitration, the HFFA did file a demand for arbitration with the employer, the HFD-COH, and was pursuing the selection of an arbitrator to begin a hearing over the Complaint's grievance. There is no evidence in the record that the HFFA demand for arbitration was perfunctory, nor to conclude that the union would withdrawal the demand for arbitration in some point in the future. Even if that speculation had merit with respect to future decision of the HFFA, the Complainant relinquished his claim against the union when he voluntarily took a demotion and reassignment. Mr. Keopuhiwa never reported to duty at the Kailua station.

With respect to Section 3.3.1 Violation of CBA, the Majority Decision states:

> In addition, there is no evidence that HFD-COH inquired into or considered any personal hardship caused by the Kailua Placement for Complainant.

(p.20).

Based on the testimony, I concur with this statement. Mr. Keopuihiwa faced significant personal and family issues that certainly made his decisions understandable. Unfortunately, with respect to provisions of the CBA, as noted in the majority decision:

> Finally, CBA § 10.B. provides that if an employee submits a written request to be considered for transfer to another station, he shall receive written acknowledgement of the request from the Fire Chief or designee and "shall be given full consideration by the Fire Chief or designee.

(p. 20).

Nothing in CBA § 10.B specially requires the employer make accommodations based on Mr. Keopuihiwa's substantial personal and family reasons raised. The ultimate decision over transfers and reassignments still rests with "the Fire Chief or designee" after giving it "full consideration." Unfortunately, the Board cannot substitute its judgment, whether under law or the contract, for those of the employer.

For the reasons stated above, the undersigned Board Member would have found that the Complainant had not established the hybrid case that HFD-COH breached the CBA in violation of HRS § 89-13(a)(8) and that HFFA had not breached its duty of fair representation under Poe II. Therefore, I stand in dissent of the Majority Decision and Order

DATED: Honolulu, Hawaiʻi, June 30, 2023 .

J N. MUSTO, Ph.D., Member

Copies sent to:

Bran Keopuhiwa, Self-Represented Litigant
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Peter Trask, Attorney for HFFA

KEOPUHIWA v. HFD-COH and HFFA
CASE NOS. 19-CE-11-930; 19-CU-11-373
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER; DISSENTING OPINION OF BOARD MEMBER J N. MUSTO, Ph.D.
DECISION NO. 515