STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of LENORA L. ASATO; JENNIFER E. HALASZYN; JEFF IBARA; YOSHIAKI IINUMA; CHARLES LUK; JOY MAGARIFUJI; SIIRI AILEEN WILSON; and GANG YUAN, Complainant(s), and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; and UNIVERSITY OF HAWAI‘I, Respondent(s).	CASE NO(S). 18-CU-08-365a-h 18-CE-08-921a-h DECISION NO. 517 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

This case arises from Respondent UNIVERSITY OF HAWAI‘I’s (UH or Employer) early termination of eight temporary employees who belonged to bargaining unit 8 (BU 8). Complainants LENORA L. ASATO (Ms. Asato); JENNIFER E. HALASZYN (Ms. Halaszyn); JEFF IBARA (Mr. Ibara); YOSHIAKI IINUMA (Mr. Iinuma); CHARLES LUK (Mr. Luk); JOY MAGARIFUJI (Ms. Magarifuji); SIIRI AILEEN WILSON (Ms. Wilson); and GANG YUAN (Mr. Yuan and collectively with the other Complainants, Complainants) filed this prohibited practice case to challenge this early termination and the actions of Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) in handling the subsequent grievance.

Among other things, the Complainants have raised the issue of Dwight Takeno’s (Mr. Takeno) involvement in their termination and the subsequent grievance proceedings. Mr. Takeno was a BU 8 member but also dealt with confidential personnel matters involving other BU 8 members.

The Board allowed the Complainants to amend their initial complaint so that each Complainant had their own Complaint specifically laying out their positions on the issues (collectively, Amended Complaints). UH challenged the Amended Complaints with a Motion to Dismiss, which HGEA joined, and the Complainants opposed. The Board orally denied the Motion to Dismiss.

In this Decision and Order, the Board reconsiders[1], in part, its oral ruling by finding that Complainants did not exhaust their administrative remedies for certain claims and that Complainants do not have standing to pursue claims related to consultation and the requirements of Hawai'i Revised Statutes (HRS) § 89-9.

The Board further denies the remaining dispositive motions made by UH in this Decision and Order for the reasons discussed below.

Upon review of the entire record, the Board finds that UH violated HRS § 89-6(f)(5), committing a prohibited practice under HRS § 89-13(a)(7), by impermissibly allowing a BU 8 member to be involved in confidential employee matters involving other BU 8 members. The Board further finds that HGEA did not violate HRS § 89-6(f)(5) because that section does not impose a duty upon HGEA to address. The Board also finds that HGEA did not breach its duty of fair representation owed to the Complainants; therefore, the Board does not address whether UH violated the BU 8 collective bargaining agreement (CBA).

Any finding of fact improperly listed as a conclusion of law is a finding of fact. Any conclusion of law improperly listed as a finding of fact is a conclusion of law.

2. Background and Findings of Fact

2.1. Parties

2.1.1. Complainants

During the relevant period, Complainants[2] worked for UH[3] in temporary positions at the Office of the Vice President for Research and Innovation (OVPRI). Complainants were all bargaining unit members in BU 8.[4]

Additional facts related to the Complainants individually are included below.

2.1.2. UH

OVPRI is a division of UH which, during the relevant period, was led by Dr. Syrmos.

Ms. Sanders was a Human Resources Specialist in OVPRI. She reported to Dana Funai (Ms. Funai), who reported to Mr. Takeno.

Mr. Takeno was hired in 2016 to work in OVPRI as the Senior Administrative Services Manager. In that position, he oversaw fiscal operations and human resources. Mr. Takeno reported directly to Dr. Syrmos.

When UH hired Mr. Takeno as the Administrative Services Manager, it hired him as a temporary employee and a member of BU 8. UH intended to convert Mr. Takeno's position to a permanent position when one became available but did not do so until after UH announced its intention to terminate other temporary BU 8 positions at OVPRI.

Mr. Takeno's duties included supervising the other employees in OVPRI who dealt with human resources matters, including Ms. Sanders. As the supervisor for these employees, UH expected Mr. Takeno to have knowledge about the matters his subordinates were handling. Mr. Takeno was further authorized to be a fact finder on personnel investigations

2.1.3. HGEA

HGEA is the exclusive representative[5] for BU 8. Mr. Ngai is a union agent for HGEA.

2.2. Collective Bargaining Relationship

HGEA and the relevant employer group[6] for BU 8 are parties to a collective bargaining agreement (CBA) for the bargaining unit. The BU 8 CBA covers issues including, but not limited to, grievances and layoffs.

2.3. Subject Events

In or about June 2017, UH extended Complainants' appointments to end on June 30, 2018.

Less than two weeks later, Complainants' supervisors began to notify Complainants that their positions would be terminated six months early, on or about December 31, 2017.

UH did not receive any new information about its financial condition between June 30, 2018 and when Complainants began to be notified about their termination.

By letter dated July 18, 2017, UH informed HGEA that it would terminate several positions, including Complainants' positions, due to, among other things, budgetary projections. UH's letter included the instructions to HGEA that, if it required additional information or wished to meet to discuss the issue, HGEA should contact Mr. Takeno.

On or about August 1, 2017, Mr. Ngai requested additional information from UH about these proposed terminations. UH provided additional information on or about August 14, 2017,

including information that OVPRI considered "what positions can be terminated via a non-reappointment of temporary appointments."

On or about August 15, 2017, Mr. Ngai filed a class grievance on the Complainants' behalf, challenging the terminations and requesting additional information.

UH provided additional information on or about August 31, 2017. UH's letter included the instructions to HGEA that, if it required additional information or wished to meet to discuss the issue, HGEA should contact Mr. Takeno.

UH and HGEA scheduled a Step 2 Meeting for September 11, 2017. The plan was for Mr. Takeno to represent UH and Mr. Ngai to represent HGEA at this meeting. The meeting was postponed, and, on September 11, 2017, Mr. Takeno deferred the grievance to Ms. Sanders.

The deferral of the grievance occurred because an anonymous whistleblower brought UH's attention to the fact that a BU 8 member was the Employer's representative for a grievance involving BU 8 members.

Despite Mr. Takeno's removal from direct work on the grievance, he remained involved in the grievance process by meeting with and assisting Ms. Sanders as she processed the grievance.

HGEA did not take action to remove Mr. Takeno from BU 8 or the grievance process because he was the Employer's designated representative.

Ms. Sanders and Mr. Ngai held a Step 2 meeting on September 18, 2017.

By letter dated September 27, 2017, Ms. Sanders denied the Step 2 grievance.

HGEA pursued the grievance at Step 3. Mr. Ngai and Mr. Thomason agreed to waive the Step 3 hearing and decision on October 12, 2017.

HGEA filed a notice of intent to arbitrate the grievance dated October 13, 2017.

HGEA solicited opinions from a variety of sources prior to proceeding to arbitration. These sources included former management and union personnel and an attorney specializing in labor law. Based on those opinions, by letter dated August 3, 2018, HGEA informed the Complainants that it would not pursue the grievance to arbitration.

3. Analysis and Conclusions of Law

3.1. Preliminary Motions; Jurisdiction; Standing

3.1.1. Standards for Motions to Dismiss

The Board uses the contents of the Complaint as the basis to consider the motion to dismiss or for summary judgment's (MTD/MSJ)' arguments regarding lack of subject matter jurisdiction, and the Board must accept the factual allegations in the Complaint as true and view those allegations in the light most favorable to the Complainants. *See* Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kishimoto, Board Case Nos. 20-CE-02-947a-f, Decision No. 503, at *2 (April 9, 2021) (https://labor.hawaii.gov/hlrb/files/2021/05/Decision-No.-503.pdf) (Kishimoto) (citing Tupola v. Univ. of Haw. Prof'l Assembly, Board Case Nos. CU-07-330, CE-07-847, Order No. 3054, at *17 (February 25, 2015) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf) (Tupola)). The Board does not have to accept conclusory allegations about the legal effect of the events alleged in the complaint. *Id.*

The Complainants must establish that jurisdiction exists. *See* Kapesi v. Dep't. of Pub. Safety, Board Case Nos. 17-CE-10-908, 17-CU-10-359, Decision No. 510, at *11 (March 2, 2022) (https://labor.hawaii.gov/hlrb/files/2022/03/Decision-No.-510.pdf) (Kapesi). The Board may review evidence, including affidavits and testimony, to resolve factual disputes about whether the Board has jurisdiction to hear the case. 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).

3.1.2. The Board Follows the Notice Pleading Standard

As a preliminary matter, the Board uses the traditional "notice pleading" standard used by the Hawai'i Supreme Court (HSC) to enhance citizen access to the Board and to justice. *See* Campos v. Univ. of Haw. Prof'l Assembly, Board Case No. 19-CU-07-374, Decision No. 511, at *4 (June 28, 2022) (https://labor.hawaii.gov/hlrb/files/2022/06/Decision-No.-511.pdf) (Campos II).

The Board construes pleadings liberally and requires only that the Complainants provide a short and plain statement of the claim to provide HGEA and UH with notice of the complaint and the relevant grounds. *See* Parker v. Dep't of Pub. Safety, State of Hawai'i, Board Case No. 19-CE-10-923 Decision No. 502, at *54 (March 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-502.pdf) (Parker). The Board does not require that the Complainants plead legal theories with precision, and the pleading of evidence, facts, or law is not dispositive. *Id.*

The Board reviews this case with these points in mind.

3.1.3. The Complaints are Timely

Based on the requirement in HRS § 377-9, the Board can only hear complaints filed within ninety days of the action that gave rise to the alleged prohibited practice. HRS § 377-9(l); Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983). The Board's administrative rules also include this ninety-day limit. HAR § 12-42-42(a).

The period is set by law, so the Board must construe the limitations period strictly and cannot waive a defect of even a single day. Ishida v. United Pub. Workers, Board Case No. 22-CU-01-387, Decision No. 516, at *4-5 (June 30, 2023) (https://labor.hawaii.gov/hlrb/files/2023/07/DECISION-516-Ishida-signed.pdf). The limitations period begins when HGEA notified the Complainants that it was not going to take their grievances to arbitration. Awana v. Honolulu Police Dep't, Board Case Nos. 22-CE-12-965, 22-CU-12-388, Order No. 3842, at *4 (April 22, 2022) (https://labor.hawaii.gov/hlrb/files/2022/04/Order-No.-3842.pdf).

UH argues that the Complaints are untimely because the events occurred in 2017. The Board rejects this argument as a clear misstatement of law.

The issues all arise out of the same factual event: UH's termination of the Complainants. As UH knows, the law requires that complainants exhaust their administrative remedies before filing a prohibited practice complaint. *See* Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe). The Complainants, in this case, did file a timely grievance.

Based on the exhaustion requirement, the Complainants could not have filed their Complaints before exhausting their administrative remedies. *See, e.g.*, Guzman v. Honolulu Police Dep't, Board Case Nos. 19-CE-03-925, 19-CU-03-371, Order No. 3804, at *5 (October 25, 2021) (Guzman) (https://labor.hawaii.gov/hlrb/files/2022/03/Order-No.-3804-ADA.pdf). The Complainants had not exhausted their administrative remedies until HGEA notified the Complainants that it would not arbitrate the matter.

Therefore, the 90-day period did not begin until after the Complainants knew that HGEA would not arbitrate their grievance, and the Complaints are timely.

3.1.4. Exhaustion of Administrative Remedies

The Board has consistently held that it does not have jurisdiction over complaints alleging violations of HRS § 89-13(a)(8) until after the complainant exhausts their contractual remedies, unless attempting to exhaust those remedies would be futile. *See* Kapesi, Decision No. 510, at *9-10. The Board rests this position on the HSC's decisions in Poe, 97 Hawai'i at 531, 40

P.3d at 933 and Poe v. Haw. Lab. Rels. Bd., 105 Hawai‘i 97, 101, 94 P.3d 652, 656. Kapesi, Decision No. 510, at *9-10.

In Hokama v. Univ. of Haw., 92 Hawai‘i 268, 272, 990 P.2d 1150, 1154 (1999) (Hokama), the HSC refined the exhaustion doctrine for cases brought under HRS Chapter 89. The HSC stated that, if the applicable CBA includes a grievance procedure, that procedure must "serve as the exclusive vehicle for resolving disputes regarding the terms of the collective bargaining agreement." *Id.*, 990 P.2d at 1154 (emphasis added).

Accordingly, to "preserve the integrity and autonomy of the collective bargaining process," if the CBA contains a grievance procedure, complainants must exhaust that grievance procedure for all disputes, including those based on "procedural" requirements, before pursuing any other claims. *Id.* at 272, 275, 990 P.2d at 1154, 1157.

The exhaustion doctrine, however, "is not absolute." Kellberg v. Yuen, 131 Hawai‘i 513, 531, 319 P.3d 432, 450 (2014) (Kellberg). If exhausting administrative remedies would be futile, it is not required. Poe, 97 Hawai‘i at 536, 40 P.3d at 938.

The HSC defines futility as "the inability of an administrative process to provide the appropriate relief." In re Doe Children, 96 Hawai‘i 272, 287 n.20, 30 P.3d 878, 893 n.20 (2001) (Doe Children) (citing Hokama, 92 Hawai‘i at 273, 990 P.2d at 1155). The party trying to bypass the exhaustion requirement has the burden to prove that the process cannot provide appropriate relief. *Id.*

If administrative relief would culminate with an arbitrator's decision, such as in HRS Chapter 89 cases, complainants must pursue claims through the appropriate contractual forums to determine whether the process is able to provide appropriate relief because arbitrators "normally have broad discretion to fashion appropriate remedies." Hokama, 92 Hawai‘i at 274, 990 P.2d at 1156. Before going through the contractual forums, "any assessment of the actual availability of the relief requested [is] speculative and premature." *Id.*

Therefore, to prove that exhaustion of administrative remedies is futile, a complainant must prove that an arbitrator cannot provide the appropriate remedies through going through the contractual forums or must prove that the arbitrator is otherwise unable to provide the relief. *See*, *e.g.*, *Id.* at 273, 990 P.2d at 1155 (discussing that arbitrators determine claims arising from the terms of the CBA, not claims arising from statutory or other rights).

Here, the Complainants did not file a grievance about the Employer's alleged failure to follow the grievance timelines. Therefore, the Board must find that these claims have not been exhausted.

Accordingly, the Board dismisses the HRS § 89-13(a)(8) claim that UH wilfully violated the BU 8 CBA by failing to follow the grievance timelines.

3.1.5. Standing

When it comes to the issue of standing, the Board considers whether the parties have the right to bring suit. Kapesi, Decision No. 510, at *8. Because standing is a prudential consideration, the Board must determine not only whether the Complainants alleged a sufficient personal stake in the outcome of the controversy but also whether the legislative declarations of policy and legislative enactments allow them standing. Bennett v. HGEA, Board Case No. 18-CU-06-369, Decision No. 496 at *6 (February 6, 2020) (https://labor.hawaii.gov/hlrb/files/2020/09/Decision-No-496.pdf) (Bennett).

UH presents several arguments as to why the Complainants lack standing to bring various allegations. The Board addresses each here.

First, the Board rejects UH's argument that the Complainants needed to specifically allege a breach of the duty of fair representation to have standing to bring a claim that UH violated the collective bargaining agreement.

The hybrid case established by the HSC requires that the Complainants prove both the case against the Employer and against the Union to succeed. Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57. Under the notice pleading standard, the Complainants are not required to plead legal theories with precision; rather, the law requires that the Complainants provide a short and plain statement of the claim to provide the Respondents with notice. Parker, Decision No. 502, at *54.

Here, the Complainants allege multiple claims against HGEA that allude to a breach of the duty of fair representation. HGEA clearly understood that, as a part of the hybrid case, the Complainants needed to prove both prongs of the case. Therefore, the Board finds that the Complainants have met the relevant pleading standards.

Next, the Board turns to UH's argument that Complainants do not have standing to bring claims about UH's alleged failure to consult with HGEA and alleged false representations to HGEA.

HRS § 89-13(a)(5) deals with an employer's refusal to bargain collectively as required by HRS § 89-9. HRS § 89-9 lays out the negotiation and consultation requirements that the employer and exclusive representative must follow.

Legislatively, the rights assigned in HRS § 89-9, including the right of consultation, are given to the employers and exclusive representatives, not to public employees. Accordingly, employees do not have standing to bring claims of prohibited practices under HRS § 89-13(a)(5).

See, e.g., Siu v. HGEA, Board Case No. CU-04-291, Decision No. 505, at *9-10 (June 14, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-505.pdf).

Based on the above, the Board dismisses the HRS § 89-13(a)(5) claim and all claims related to HRS § 89-9 and consultation between UH and HGEA.

Finally, the Board addresses the issue of whether the Complainants have standing to bring an alleged violation of HRS § 89-6(f)(5).

To determine these issues of standing, the Board uses the three-part test found in Akinaka v. Disciplinary Board, 91 Hawai'i 51, 979 P.2d 1077 (1999) (Akinaka) (overruled in part by Tax Foundation of Haw. v. State, 144 Hawai'i 175, 192, 439 P.3d 127, 144 (2019)).

The Akinaka test considers whether the Complainants have the required personal stake required for the Board to decide the case and asks: 1) did the Complainants suffer an actual or threatened injury because of the Respondents' wrongful conduct; 2) is the injury traceable to the Respondents' actions; and 3) would a favorable decision likely provide relief for the injury. *See* Bennett, Decision No. 496, at *7.

HRS Chapter 89 separates out supervisory and nonsupervisory employees into separate bargaining units, and excludes, among others, those who have access to confidential matters involving employer-employee relations. *See* HRS § 89-6(a), generally, and § 89-6(f)(5). This latter prohibition is designed to ensure that employees are "freed of any conflict of interest in the faithful performance of his duties." HGEA v. State of Hawai'i, Case No. R-12-8, Decision No. 18, at *18 (June 6, 1972) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-18.pdf); *see also*, State of Hawai'i v. HGEA, Case Nos. RA-03-8, RA-13-9, Decision No. 40, at *6 (December 28, 1973) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-40.pdf) ("We believe the policy behind this provision to be one of not putting an employee in a situation in which there is a potential for a conflict of interest." (emphasis in original)).

The Board has previously found that, when bargaining unit members are supposed to serve as counselors or advisors to higher ranking officials and to act in their interests, this inclusion creates "real and serious" conflicts of interest. *See* Haw. Federation of College Teachers, Board Case No. R-07-12, Decision No. 21, at *9 (September 15, 1972) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-21.pdf).

While it is true that the Board has previously focused on the ways that an employer may be prejudiced by the inclusion of impermissible members because those members would be unable to perform their duties, *see, e.g., Id.* at *10, the Board has not dealt with a situation where the employer blatantly disregarded the conflicts of interest and continued to assign a bargaining unit employee to tasks they are clearly, statutorily precluded from. The question that the Board

must answer here is whether the Complainants were injured by Mr. Takeno's presence in the bargaining unit.

"A basic tenet of employment law is that a bargaining unit member should have the right to a fair and impartial tribunal." Keopuhiwa v. United Pub. Workers, Board Case Nos. 19-CE-11-930, 19-CU-11-373, Decision No. 515, at *22 (June 30, 2023) (https://labor.hawaii.gov/hlrb/files/2023/07/Decision-515-Keopuhiwa.pdf) (Keopuhiwa). Further, a key element of HRS Chapter 89 involves an employee's right to a full and fair process in challenging termination. *See* Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *42 (February 21, 2023) (https://labor.hawaii.gov/hlrb/files/2023/02/Decision-No.-514.pdf).

These conflicts of interest do not extend only to Mr. Takeno or the Employer.[7] Employees have the right to unbiased individuals handling their confidential employee matters.

While in a BU 8 position, Mr. Takeno served as the Employer's representative in dealing with the issue of the terminations and the subsequent grievance. Rather than dealing with the issue himself, Dr. Syrmos, on multiple occasions, requested that the Union deal with Mr. Takeno directly on these matters.

Dr. Syrmos explained this request by establishing that Mr. Takeno's subordinate, Ms. Sanders, would have been the one directly involved with working with HGEA on the issue, and that Mr. Takeno was referenced because the supervisor should have knowledge about the matters his subordinates were handling.

Regardless of whether Mr. Takeno dealt directly with the issue of terminations or not, he oversaw the individuals who did deal with the issues. He advised Ms. Sanders on the matter, and there are allegations that he dealt more directly with the terminations than that.[8] Mr. Takeno had the ability to influence those handling the terminations because of his supervisor-subordinate relationship with Ms. Sanders.

There is no evidence that UH took any actions to ensure that Mr. Takeno, who was similarly situated to the Complainants, would be removed from the termination discussions. Rather, it appears that, because UH intended to have Mr. Takeno in a different position to begin with, they treated Mr. Takeno as if he were not in a temporary BU 8 position.

Based on that treatment, Mr. Takeno was not considered for termination based on the need to reduce positions. This consideration (or lack thereof) would have impacted those Complainants who had more seniority than Mr. Takeno. That impact constitutes an injury that is directly traceable to UH's impermissible placement of Mr. Takeno in the bargaining unit.

Accordingly, the Board finds that the Complainants have met all three prongs of the Akinaka test and have standing to bring the HRS § 89-6(f)(5) claim.

3.1.6. Mootness

Respondents further argue that Complainants' claims related to Mr. Takeno are moot. The Board disagrees.

An issue is moot if the question before the Board is abstract and does not rely on existing facts or rights. Keopuhiwa, Decision No. 515, at *14. If the case has a live controversy and the Board can provide an effective remedy, the mootness doctrine does not apply. *Id.*

UH appears to believe that the Board cannot provide an effective remedy to address this issue. The Board disagrees. There are a variety of remedies at the Board's disposal under HRS § 377-9.

Therefore, the Board finds that the claims related to Mr. Takeno are not moot.

3.2. Other Dispositive Motions

3.2.1. The Board Denies UH's Motion for Partial Summary Judgment

The Board can grant summary judgment only if the pleadings show that there is no genuine issue of material fact and that UH is entitled to judgment as a matter of law. *See* Thomas v. Kidani, 126 Hawai'i 125, 128, 268 P.3d 1230, 1233 (2011) (citing Fujimoto v. Au, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001)).

As UH describes in its Motion for Partial Summary Judgment, a summary judgment motion deals with a question of "if the case went to trial" competent evidence could support judgment for the non-moving party. Exotics Hawaii-Kona, Inc. v. E. I. du Pont de Nemours & Co., 116 Hawai'i 277, 302, 172 P.3d 1021, 1046 (2007) (emphasis added).

UH filed its Motion for Partial Summary Judgment after nine days of HOM. Therefore, the question of what would happen "if the case went to trial" is moot—the case already has gone to trial.

Accordingly, the Board denies the Motion for Partial Summary Judgment.

3.2.2. The Board Denies UH's Motion for Directed Verdict

The Board may hear motions like 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 the Board's rules are not otherwise violated. Taum, Decision No. 514, at *36.

UH made its Motion for Directed Verdict after the close of the HOM. Accordingly, the analysis applicable to the issues in the Motion for Directed Verdict are the same as the analysis of those issues on the overall merits. Therefore, the Board denies the Motion for Directed Verdict for the reasons described below.

3.3. Remaining Issues on the Merits

The remaining issues before the Board are:

1. Whether UH committed a prohibited practice under HRS § 89-13(a)(8) by wilfully violating the BU 8 CBA as to layoffs;

2. Whether HGEA breached its duty of fair representation owed to the Complainants when it declined to take the grievance to arbitration;

3. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(1) by failing to provide requested documents to the Complainants;

4. Whether UH committed a prohibited practice under HRS § 89-13(a)(7)[9] by violating HRS § 89-6(f)(5), by allowing Mr. Takeno, an included member of a bargaining unit, to deal with confidential matters concerning employee-employer relations, namely dealing with the Complainants' terminations and the subsequent grievance; and

5. Whether HGEA committed a prohibited practice under HRS § 89-13(b)(4) by violating HRS § 89-6(f)(5) by approving Mr. Takeno's position as an included member of BU 8, by failing to take action after being notified of Mr. Takeno's dealings with confidential matters, and by dealing with Mr. Takeno in the grievance process?

3.3.1. Hybrid Case

As discussed above, the hybrid case requires that the Complainants prove both the case against the Employer and against the Union to succeed. Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57. The Board first looks at the duty of fair representation owed by HGEA to the Complainants and finds that HGEA did not breach its duty of fair representation. Accordingly, Complainants do not have standing to pursue the HRS § 89-13(a)(8) claim.

3.3.1.1. HGEA Did Not Breach Its Duty of Fair Representation Owed to the Complainants

The Board can find a breach of the duty of fair representation only if HGEA's conduct towards the Complainants was arbitrary, discriminatory, or in bad faith. Poe II, 105 Hawai'i at

104, 94 P.3d at 659. To determine which of these three elements apply, the Board has adopted a two-step analysis, first looking at whether the alleged union misconduct involved the union's judgment or whether it was 'procedural or ministerial.' Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *31 (May 7, 2018) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3337F.pdf) .

3.3.1.1.1. Procedural or Ministerial – Arbitrariness

The "arbitrary" prong of a breach of the duty of fair representation controls only when looking at procedural or ministerial union conduct. Caspillo v. Dep't of Transportation, Board Case No. 17-CE-01-899, 17-CU-01-355, Decision No. 509, at *11-12 (November 22, 2021) (https://labor.hawaii.gov/hlrb/files/2021/11/Decision-No.-509.pdf) (Caspillo). 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. *Id.*

HGEA's actions will not be considered "perfunctory" unless those actions treat the Complainants' claims so lightly as to suggest an "egregious disregard" of their rights. Campos II, Decision No. 511, at *9.

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

Here, Mr. Ngai did not perform all the investigation that the Complainants wished. However, the evidence shows that Mr. Ngai did perform an investigation by seeking additional information from Dr. Syrmos and reviewing UH's arguments as to the applicability of Article 11 of the CBA to the Complainants. Mr. Ngai further requested additional information from UH and Dr. Syrmos after filing the grievance.

Further, Mr. Ngai consulted with a range of professionals with experience in labor law before recommending that the case not proceed to arbitration. This investigation into the applicability of the CBA sections was in depth and involved a variety of opinions.

The Board finds that Mr. Ngai's investigation was sufficient. Accordingly, HGEA did not act in a perfunctory or arbitrary manner.

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

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

HGEA must retain discretion to act in what it believes to be their members' best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation is narrowly construed, and the Board must be deferential in substantively examining HGEA's performance. Caspillo, Decision No. 509, at *14 (citing Tupola, Order No. 3054, at *27). The Board is not considering whether HGEA made the right decision; rather, the Board is only asking whether HGEA made its decision rationally and in good faith. *Id.* (citing Emura, Order No. 3028, at *15-16.).

HGEA's decision to withdraw the case from arbitration was made based on advice of counsel and former arbitration decisions. There is no evidence that HGEA discriminated against the Complainants or acted in bad faith.

Accordingly, the Board cannot find that HGEA breached its duty of fair representation owed to the Complainants.

3.3.1.2. Complainants Do Not Have Standing to Pursue the HRS § 89-13(a)(8) Claim

As discussed above, the hybrid case requires that the Complainants succeed on both issues. Because Complainants failed to prove that HGEA breached its duty of fair representation, the Board cannot find that UH committed a prohibited practice under HRS § 89-13(a)(8).

Accordingly, the Board dismisses the HRS § 89-13(a)(8) claim for lack of standing and makes no other findings as to this claim.

3.3.2. HGEA Did Not Commit a Prohibited Practice Under HRS § 89-13(b)(1)

Complainants argue that HGEA committed a prohibited practice under HRS § 89-13(b)(1) by violating HRS § 89-3 when HGEA did not provide Complainants with all grievance documents. The Board disagrees.

HRS § 89-3 permits employees to organize on collective bargaining issues, free from interference, restraint, or coercion. It does not, however, guarantee that the exclusive representative must do everything that its members wish.

There is no requirement in law that HGEA provide to the Complainants every document in a grievance that HGEA files. HGEA is required to fulfill its duty of fair representation, but, as discussed above, HGEA has fulfilled that duty here.

If the Complainants wished to control the grievance process, they could have filed individual grievances specific to their situations. *See* HRS § 89-8(b). They did not.

Accordingly, the Board cannot find that HGEA violated HRS § 89-13(b)(1) and dismisses the claim.

3.3.3. UH Violated HRS § 89-6(f)(5); HGEA Did Not Violate HRS § 89-6(f)(5)

UH does not dispute that Mr. Takeno should have been excluded from BU 8. Rather, UH argues that the Complainants were not injured by Mr. Takeno's improper placement in a temporary BU 8 position. The Board disagrees.

As discussed above, Mr. Takeno's improper placement in a temporary BU 8 position caused the Complainants actual injury. The issue remaining for the Board to address is whether UH's conduct was wilfull.

To determine wilfullness, the Board is concerned with whether Respondents had the "conscious, knowing, and deliberate intent to violate the provisions of [HRS] chapter 89." Haw. Gov't Emples. Ass'n v. Casupang, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007). Here, the Board finds that UH's conduct was wilfull.

UH chose to hire Mr. Takeno into a temporary position, which was included in BU 8 and, therefore, subject to the same requirements as any other BU 8 member. Due to his temporary position, Mr. Takeno did not have employment security during the relevant period. Based on his seniority, Mr. Takeno's temporary position should have been eliminated before several of the Complainants' positions.[10]

Rather than place Mr. Takeno in a permanent, excluded position when they hired him, UH sought to use a temporary, included BU 8 position to retain Mr. Takeno. Because UH intended to transfer Mr. Takeno to a different position when one became available, he was tasked with handling matters that any other BU 8 member would have been precluded from addressing. Rather than ensuring that it followed the requirements of law, UH placed Mr. Takeno in a situation where he was required to take on tasks that he should not have been handling because they dealt with confidential employee matters.

Based on Mr. Takeno's position description, it was clear that his assigned duties required him to access confidential matters—a short review of the description by the then-Director of Collective Bargaining confirmed that. UH knew that placing Mr. Takeno in this position would violate HRS § 89-6(f)(5) when they hired him into that position, and they did nothing to alter his

duties to ensure that the law would not be violated. Accordingly, the Board finds that UH's conduct was wilfull, and UH committed a prohibited practice under HRS § 89-13(a)(7).

However, nothing in HRS Chapter 89 requires that HGEA immediately challenge the inclusion or exclusion of any employee in a bargaining unit. While it may be prudent for HGEA to seek to clarify its bargaining units and ensure that the composition of the bargaining unit meet the statutory requirements, HGEA has no control over the Employer's distribution of tasks or misuse of positions.

Accordingly, the Board cannot find that HGEA violated HRS § 89-6(f)(5).

4. Findings Specific to Damages

Each Complainant's specific factual situation about damages from UH's actions differs. However, the baseline information that all Complainants share is that their appointment periods were extended to have an end date of June 30, 2018.

Ms. Halaszyn has asserted that she seeks no damages for herself. Therefore, none are considered in this Decision and Order.

Due to UH's improper usage of Mr. Takeno in the termination process, the Board finds that the terminations were improper. Without improper terminations, the Complainants would have been permitted to fulfill the remainder of their appointed period.

Accordingly, the Board finds the following for make whole purposes:

Ms. Asato

At the relevant time, UH employed Ms. Asato at a salary based on the CBA's Band B, at Step 24. Ms. Asato had employment security under the CBA.

Due to her termination, Ms. Asato took a position with UH at a salary based on the CBA's Band B, at Step 12.

Ms. Asato did not suffer a break in service.

Mr. Ibara

At the relevant time, UH employed Mr. Ibara, and he had employment security under the CBA.

Due to his termination, Mr. Ibara took another position and spent time learning new job skills.

Mr. Iinuma

At the relevant time, UH employed Mr. Iinuma, and he did not have employment security under the CBA.

Due to his termination, Mr. Iinuma took another position with a pay differential.

Mr. Luk

At the relevant time, UH employed Mr. Luk, and he had employment security under the CBA.

Due to his termination, Mr. Luk took another position that paid at a different band level.

Ms. Magarifuji

At the relevant time, UH employed Ms. Magarifuji, and she had employment security under the CBA.

Due to her termination, Ms. Magarifuji took a position that ended on April 26, 2018 and was not selected for a position at OVPRI similar to the position that she was terminated from.

Ms. Magarifuji suffered a break in service as she did not find another position until August 1, 2018.

Ms. Wilson

At the relevant time, UH employed Ms. Wilson, and she did not have employment security under the CBA.

Mr. Yuan

At the relevant time, UH employed Mr. Yuan, and he had employment security under the CBA.

Due to his termination, Mr. Yuan was unemployed for six months before finding a position at UH that paid approximately $15,000.00 a year less than he was previously making.

Mr. Yuan suffered a break in service.

5. Order

Based on the above, the Board finds that the Complainants carried the burden of establishing that UH violated HRS § 89-6(f)(5) and committed a prohibited practice under HRS § 89-13(a)(7). Therefore, the Board orders the following:

1. UH shall cease and desist from using BU 8 members to handle confidential employer-employee matters related to other BU 8 members in violation of HRS § 89-6(f)(5);

2. UH shall cease and desist from improperly classifying employees as BU 8 members when the assigned work for those employees includes matters involving confidential matters affecting employee-employer relations;

3. Within 60 days of this Order, UH shall restore any lost tenure, seniority, other rights, benefits, and privileges to Ms. Magarifuji and Mr. Yuan that were lost due to the breaks in service suffered because of their termination;

4. Within 60 days of this Order, UH shall reimburse Ms. Asato, Mr. Ibara, Mr. Iinuma, Mr. Luk, Ms. Magarifuji, Ms. Wilson, and Mr. Yuan for the net loss of earnings and benefits between their departure from OVPRI and June 30, 2018;

5. UH shall preserve and within 14 days of a request from the Complainants, 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 the Complainants whole under the terms of this Order to the Complainant;

6. Within 60 days of this Order or such time as the Board may allow for good cause shown, Complainants shall provide to the Board any additional costs or fees incurred;

7. UH shall post at the OVPRI, 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 UH customarily communicates with its employees; and

8. UH shall notify the Board of the steps taken to comply with this Order within 90 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai‘i, August 10, 2023.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

Copies sent to:

Jennifer Halaszyn, SRL Representative
Robert Katz, Esq.
Peter Trask, Esq.

[1] Although the Board reconsiders these issues, the Board finds that the parties are not prejudiced by this reconsideration and that the Board is not required to reopen the hearing to consider those dismissed claims. Should Complainants disagree with the Board's Order, they have the right to appeal this Decision and Order within 30 days of service. This right to appeal would not have been available to Complainants until the issuance of this final Decision and Order.

[2] In this capacity, Complainants were public employees within the definition of HRS § 89-2, which 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)].

[3] In this capacity, UH is a public employer within the definition of HRS § 89-2, which defines employer or public employer as:

> "Employer" or "public employer" means…the board of regents in the case of the University of Hawaii…and any individual who represents one of these employers or acts in their interest in dealing with public employees…

[4] HRS § 89-6(a)(8) defines BU 8 as "[p]ersonnel of the University of Hawaii and the community college system, other than faculty[.]"

[5] 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.

[6] HRS § 89-6(d)(8) defines the employer group for BU 8 as:

> (1) For bargaining units…(8) the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote [.]

[7] Mr. Takeno may have been injured by this conflict of interest due to the Employer improperly tasking him with matters he should not have addressed due to his bargaining unit status. Mr. Takeno's options were limited to failing to fulfill the duties tasked to him or to impermissibly address the issues. However, any potential injury to Mr. Takeno is not before this Board at this time.

[8] The Board takes no position on the level of Mr. Takeno's direct involvement in the terminations.

[9] Although the Complainants did not specify an alleged prohibited practice under HRS § 89-13(a)(7), the allegation that UH committed a prohibited practice by violating HRS § 89-6(f)(5) clearly meets the notice pleading standards for an HRS § 89-13(a)(7) violation. Further, UH showed an awareness of this allegation by responding to the allegation of a violation of HRS § 89-6(f)(5) as a prohibited practice.

[10] UH's intention to transfer Mr. Takeno to a permanent position when one became available is irrelevant. UH chose to hire Mr. Takeno into a temporary position where he was subject to BU 8's requirements.