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STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of JANET WEISS, Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	CASE NO. 22-CU-05-390 DECISION NO. 520 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER
In the Matter of JANET WEISS, Complainant, and JANETTE SNELLING, Honoka'a-Kealakehe-Kohala-Konawaena Complex Area Superintendent, Department of Education, State of Hawai'i, Respondent.	CASE NO. 22-CE-05-970

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

Complainant JANET WEISS (Complainant or Ms. Weiss), self-represented litigant (SRL), was a teacher for many years with the Department of Education, State of Hawai'i (DOE) and a member of bargaining unit 5 (BU 5).

During her employment with DOE, Ms. Weiss had disputes with DOE and some of its employees, including Respondent JANETTE SNELLING, Honoka'a-Kealakehe-Kohala-

Konawaena Complex Area Superintendent, Department of Education, State of Hawai‘i (Ms. Snelling, Respondent, or Employer), and with her union Respondent HAWAI‘I STATE TEACHERS ASSOCIATION (HSTA, Union, or Respondent and collectively Respondents with Ms. Snelling). Some of the disputes resulted in Ms. Weiss filing prohibited practice complaints with the Hawai‘i Labor Relations Board (Board).

Ultimately, Ms. Snelling discharged Ms. Weiss from her DOE employment, and HSTA filed a grievance over the discharge. The grievance proceeded through the grievance procedure under the relevant collective bargaining agreement (CBA) between HSTA and the DOE.

After submitting the notice of intent to arbitrate Ms. Weiss' grievance, HSTA negotiated a settlement agreement (SA) with the DOE to settle the grievance. In 2020, then-DOE Superintendent Christina M. Kishimoto (Kishimoto) signed the SA on behalf of the DOE, and HSTA UniServ Director Ray Camacho (Camacho) signed the SA on behalf of HSTA.

After the SA was signed, HSTA was unable to contact Ms. Weiss for almost two years because she went "off the grid". After Ms. Weiss resumed contact with Camacho on March 12, 2022, she signed the SA. HSTA submitted the SA to the DOE for processing.

Subsequently, Ms. Weiss became dissatisfied with the SA. Rather than submit the necessary paperwork to process the SA, Ms. Weiss filed these prohibited practice complaints against the HSTA for breach of its duty of fair representation and Snelling for her discharge with the Board.

1.1. Statement of the Case

1.1.1. CU Complaint

In her prohibited practice complaint against HSTA (CU Complaint), Ms. Weiss asserts, among other things, that HSTA breached its duty of fair representation owed to her by failing to comply with the CBA timelines for the Step 2 and arbitration step in processing her grievance and settling her grievance against her wishes in violation of Hawai‘i Revised Statutes (HRS) §§ 89-13(b)(4) and (5).

HSTA filed a motion to dismiss (MTD) the CU Complaint, arguing, among other things, that the CU Complaint was untimely and failed to state a claim, and that the SA precluded Ms. Weiss' ability to bring the CU Complaint. Ms. Weiss opposed the MTD. After a hearing, the Board took the motion under advisement and proceeded to the hearing on the merits (HOM).

The Board issued Order No. 3858 Minute Order (Order No. 3858). This Order notes that this case is a "hybrid case" as defined by the Hawai‘i Supreme Court (HSC) in Poe v. Haw. Labor Rels. Bd, 105 Hawai‘i 87, 102, 94 P.3d 652, 657 (2004) (Poe II). Hybrid cases consist of two parts—the case against the DOE for violation of the collective bargaining agreement and the

case against the HSTA for breach of its duty of fair representation. Accordingly, the Board bifurcated the case to first address the alleged misconduct of HSTA and held that during this portion of the case, the DOE's conduct was presumed irrelevant and would not be entered into the record. Finally, the Board established some relevant facts and took judicial notice of prior Board decisions brought by Ms. Weiss against HSTA.

On June 27, 2022, the Board held an HOM on the CU Complaint.

Ms. Weiss called as witnesses Andrea Eshelman (Eshelman) and Maia Daugherty (Daugherty).

During the HOM, the Board admitted into evidence Board Exhibits 1 and 2, and Complainant's Exhibits C, D, K, M, N. Q, R, U, BB, II, JJ, LL, MM, UU- ZZ, and CCC (already admitted in evidence as Exhibit LL).

1.1.2. CE Complaint

After the June 27, 2022 HOM on the CU Complaint, Ms. Weiss filed a prohibited practice complaint (CE Complaint and collectively Complaints with the CU Complaint) claiming that, by discharging Ms. Weiss, Ms. Snelling committed prohibited practices in violation of HRS §§ 89-13(a)(1), (4), (6), (7), and (8) and 378-62.

Ms. Snelling joined the MTD in lieu of filing an Answer.

1.1.3. Consolidated CU and CE Case

The Board issued Order No. 3871 consolidating the CE and CU Complaints.

On August 4, 2022, the Board issued Order No. 3880 disposing of HSTA's MTD. The Board, among other things, dismissed the claims for violations of the Board of Education policy and HRS § 378-62 (the Hawai'i Whistleblower Protection Act) for lack of jurisdiction; and the HRS § 89-13(a)(6) claim for lack of standing. Finally, the Board held that the only timely issues are the ones related to the hybrid case and dismissed all other issues for untimeliness[1], including claims prior to her January 2017 discharge unless proven relevant and necessary for context. The Board finally denied HSTA's MTD on all other grounds.

The Board then proceeded with the bifurcated case against HSTA under Order No. 3858.

The Board held a Status Conference. At the conference, Ms. Snelling did not object to the inclusion of the testimonies of Eshelman and Daugherty presented in the HOM on the CU Complaint.

After holding a pretrial conference, the Board issued Order No. 3888 (Order No. 3888) that, among other things, took judicial notice of Decision Nos. 420 and 425 and Order No. 3031.

At the September 12, 2022 HOM, the Board further admitted HSTA's Exhibits R-1 through R-23.

Ms. Snelling submitted no exhibits for admission in evidence.

Ms. Weiss called Camacho and herself as witnesses.

After Complainant rested her case, HSTA made an oral motion for reconsideration of its MTD or for partial findings and for leave to file a written motion for partial judgment. The Board granted HSTA's request to file the written motion for partial judgment with Ms. Weiss being given the opportunity to respond.

1.2. Issues

In Order No. 3880, the Board determined that the relevant issues as follows:

1. Whether HSTA committed a prohibited practice by breaching the duty of fair representation owed to Ms. Weiss in the processing and handling of Ms. Weiss' grievance, including settlement of the grievance; and

2. Whether Ms. Snelling committed a prohibited practice by wilfully violating the BU 5 CBA, when she discharged Ms. Weiss, and whether such violation was retaliatory or interfered with Ms. Weiss' HRS Chapter 89 rights?

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

2. Background and Findings of Fact

2.1. The Parties

2.1.1. Complainant

For the relevant time until her January 2017 discharge, Ms. Weiss was employed[2] by DOE[3] as a teacher and was a member of BU 5.[4]

2.1.2. Respondent HSTA

During the relevant time, HSTA was the exclusive representative[5] for BU 5. Wilbert Holck (Holck) was the Executive Director, Eshelman was the Deputy Director, and Camacho and Daugherty were HSTA UniServs (business agents).

Camacho was assigned to represent Ms. Weiss for her grievance because of, among other things, his extensive experience with grievances.

2.1.3. Respondent Ms. Snelling and the DOE

During the relevant time, Ms. Snelling was the DOE Honokaa-Kealakehe-Kohala-Konawaena Complex Area Superintendent. In this capacity, Ms. Snelling was a public employer[6].

Kishimoto was the DOE Superintendent when the SA was signed in June 2020. Katherine Tolentino (Tolentino) was Labor Relations Section Administrator, Laraine Hasegawa (Hasegawa) was an Acting Labor Relations Section Administrator, and Brandon Lee (Lee) was a Labor Relations Section employee responsible for handling discharge cases of DOE employees.

2.1.4. BU 5 CBA

During the relevant time, HSTA and the relevant employer group for BU 5[7] were parties to the BU 5 CBA.[8]

The BU 5 CBA Article V- GRIEVANCE PROCEDURE[9] (Article V.) sets forth the process to grieve claims over a CBA violation (Article V.A.), including discharges (Article V.O.). This process includes specific deadlines for each step of the grievance and arbitration process that may be waived by a written mutual agreement (Article V.C.).

Article V.I.(c) requires that the arbitration time limits comply with those set by the American Arbitration Association for which written waiver of the time limits is limited to up to six months. However, the arbitrator may request a waiver done by mutual agreement of the parties for extraordinary circumstances.

The HSTA and DOE regularly rescheduled CBA timelines by a phone call documented by an email. Camacho regularly accommodated delays that were beyond control of the parties. However, when a CBA deadline was not met or where a delay was not in good faith, HSTA proceeded to the next step under Article V.C.

2.2. Ms. Weiss' Discharge and Grievance

2.2.1. Ms. Weiss' Discharge

On or about January 31, 2017, Ms. Weiss was discharged from her DOE employment for allegedly violating BOE and DOE policies.

2.2.2. Grievance Processing over Ms. Weiss' Discharge

Ms. Weiss requested HSTA's assistance with her discharge. On February 15, 2017, HSTA filed a grievance over her discharge (Weiss Grievance).

The CBA grievance process timelines and procedures were not strictly followed for the Weiss Grievance, mostly due to DOE personnel changes and scheduling problems.

The Step 2 meeting was held on April 3, 2017.

On May 4, 2017, Camacho notified Ms. Weiss that the DOE had not sent the Step 2 decision and provided her with copies of Tolentino's emails promising that the decision would be given shortly.

On May 20, 2017, HSTA approved the Weiss Grievance for arbitration and filed its notice of intent to arbitrate the Weiss Grievance without the Step 2 decision. Camacho notified Ms. Weiss of the approval.

On July 10, 2017, Camacho received the Step 2 decision but did not file a second demand for arbitration.

Camacho notified Ms. Weiss of the Step 2 decision, that he was working with DOE's Deputy Attorney General Bosko Petricevec (Petricevec) on arbitrator selection and would keep her posted.

On August 30, 2017, Camacho informed Ms. Weiss that he was requesting a list of arbitrators from the Board because the parties could not agree on an arbitrator.

Two months later, Camacho informed Ms. Weiss that he was still waiting for the Board list.

After receiving the list, Camacho and Petricevec selected an arbitrator under the CBA process.

In December 2017, Camacho updated Ms. Weiss about the arbitrator selection and schedule. Camacho told Weiss that Petricevec was bullying and inflexible about scheduling.

At the December 14, 2017 pre-arbitration meeting, Arbitrator Lou Chang (Chang or Arbitrator) scheduled a pre-arbitration status/scheduling conference call on May 30, 2018, and arbitration hearings on O‘ahu and Hawai‘i Island on October 1-5, 8-12, 2018.

Camacho scheduled a February 14, 2018 meeting with Ms. Weiss.

Petricevec missed the status conference. Chang held the prehearing conference on June 1, 2018 and continued the arbitration hearings to January 22, 2019 through February 4, 2019 based on a mutual agreement, and a conference call for December 3, 2018 to set necessary deadlines and hearing locations.

The Arbitrator did not want to be involved in settlement, so Camacho and Petricevec only kept him updated about the settlement as it affected the arbitration hearings.

On January 11, 2019 meeting in Kohala (Kohala meeting), Camacho and Daughterty met with Ms. Weiss to prepare for the hearing. Camacho spoke about a settlement offer. During this meeting, he also talked about the difficulties of Ms. Weiss as a witness for the arbitration because she failed to follow a script very well.

After the meeting, Ms. Weiss expressed her opposition to settling rather than going to arbitration. She requested a summary of the preparation done for the arbitration, which Camacho provided.

2.2.3. Settlement Negotiations Between HSTA and DOE

The SA negotiations process took from January 2019 to June 2020. During this period, delays were caused by the unusual nature of the settlement and changes in the DOE and Attorney General (AG) personnel involved.

During this time, Camacho had multiple communications and discussions with the DOE, the deputy attorney general, and Ms. Weiss to obtain the draft settlement agreement. Camacho communicated with Ms. Weiss about the progress of the SA, her concerns, and the grievance issues, such as witnesses and "holes" in the grievance.

Ms. Weiss provided input on the SA. Camacho's initial understanding when Ms. Weiss was terminated was that she wanted to return to her teaching position. However, during the grievance process, she changed her mind about returning in favor of "beef[ing] up" the cash settlement to $70,000 and getting an expeditious settlement.

On January 15, 2019, Camacho asked the Arbitrator to postpone the arbitration hearings for a month to allow the parties to continue work on a settlement.

Camacho sent a January 23, 2019 certified letter to Ms. Weiss following up on their conversations regarding the settlement. In the transmittal letter, Camacho addressed the material terms of the SA that included forgiveness of a $10,000 lien for back rent, a $20,000 lump sum payment, her resignation rather than termination, and withdrawal of her grievance. He stated HSTA's belief that this was a favorable outcome for her and laid out the reasons for the opinion. Those reasons addressed the challenges of taking the Weiss Grievance to arbitration, including an analysis of the Union's arguments and the DOE's counter arguments regarding the grievance,

his serious concerns about Ms. Weiss as a witness, that her expectations from arbitration could not be realized, and her disclosure that she did not intend to return to a teaching position.

On February 28, 2019, HSTA informed Ms. Weiss that the settlement document and funds would be ready in three to four weeks with more follow-up information.

In April 2019, Camacho sent Ms. Weiss an email chain with an April 5, 2019 email from Tolentino assuring Camacho that she would finish the settlement agreement, and an April 24, 2019 email from Camacho requesting an update.

On April 24, 2019, Tolentino contacted Camacho about a conference call with James Halvorson, Deputy Attorney General (Halvorson) about settlement terms. After the May 3, 2019 meeting, Camacho requested a draft settlement document to share with Holck.

On May 10, 2019, Ms. Weiss informed Camacho of the difficulties caused by the lack of a settlement and requested an update. Camacho promised to call Tolentino about the status and requested an estimated cost for Ms. Weiss' truck tags and safety check.

On May 13, 2019, Tolentino notified Camacho that Halvorson promised to get a draft settlement agreement to him that week. However, on May 31, 2019, Tolentino reported to Camacho that there were no updates on the draft.

On June 12, 2019, Camacho notified Ms. Weiss that Tolentino informed him that Halvorson was finalizing the settlement.

On July 17, 2019, Camacho informed Halvorson and Tolentino that "this [settlement] could have been resolved by now."

Tolentino informed Camacho that she had left the Labor Relations (LR) Section and would forward the message to Hasegawa.

On July 18, 2019, Hasegawa told Camacho that there was no settlement draft, but she promised to work on it and keep him informed.

On July 26, 2019, Hasegawa and Camacho set a phone call to discuss the Weiss case.

On August 20, 2019, Camacho again contacted Hasegawa to inquire about the draft settlement.

In September 2019, Camacho informed Ms. Weiss that Eshelman met with Lee, who promised to work on her case.

On October 23, 2019, Ms. Weiss contacted Camacho asking about the settlement. Camacho informed her that Lee told Eshelman that the settlement would be transmitted the next week.

On November 26, 2019, Ms. Weiss again contacted HSTA for an update. Camacho responded that he and Eshelman contacted the DOE and would continue to follow up.

On January 16, 2020, Lee informed Camacho that Halvorson had not completed the SA and had no specific timetable. Lee promised to continue reminding Halvorson.

On February 11, 2020, Lee notified Camacho that Ms. Weiss called requesting an update. Lee expressed concerns about whether Ms. Weiss would sign the settlement and informed Camacho that the AG and the DOE would not move on the SA without her commitment. Lee requested that Camacho provide the specific terms of the prior tentative settlement agreement. If the Employer agreed with the terms, Halvorson would draft the formal SA for transmittal to HSTA.

After Camacho provided the terms of the settlement, Lee incorporated additional terms—Ms. Weiss agreed to drop all future claims against the HSTA, the DOE, and its employees. In the SA, Ms. Weiss admitted that the Union fully and fairly represented her and that she freely and voluntarily accepted the SA with full knowledge of the contents and meaning.

On March 9, 2020, Ms. Weiss requested that Camacho "get this business concluded". Camacho agreed to check on the status and have the matter expedited. Camacho notified Lee that Ms. Weiss was "pleading to have the settlement expedited" due to a family medical hardship.

On March 18, 2020, Ms. Weiss contacted HSTA and requested that the SA be finished.

2.2.4. HSTA's Handling of the SA Up to July 2020

After Lee transmitted the SA, Camacho notified Lee on April 16, 2020 that HSTA agreed with the draft settlement.

Camacho discussed Lee's additional terms with Ms. Weiss, and his understanding was that Ms. Weiss did not want to return to teaching.

HSTA notified Ms. Weiss that the final SA was reached with DOE.

On June 9, 2020, Kishimoto signed the SA on behalf of the DOE.

On June 23, 2020, Lee transmitted a copy of the SA to Camacho to sign. On June 26, 2020, Camacho notified Ms. Weiss that HSTA received the SA signed by Kishimoto that would

be sent to her for her review and signature and returned to the DOE before payment would be made. Before Ms. Weiss signed and agreed, Camacho reviewed the SA terms with her.

Sometime after her agreement in June 2020, Ms. Weiss contacted Camacho and Eshelman about the settlement progress and went "off the grid". During this time, she did not check emails, her phone, or her mail more than once a month.

On July 1, 2020, HSTA signed and sent the SA by certified mail to Ms. Weiss for signature. However, the certified mail was returned to HSTA on July 29, 2020 as "unclaimed, unable to forward". HSTA was unsuccessful in contacting her by mail, email, or telephone.

2.2.5. HSTA's Handling of the SA after March 12, 2022

On March 12, 2022, Ms. Weiss contacted Camacho and asked where the SA was. On March 15, 2022, Camacho informed her of his multiple attempts to contact her between June and September 2020 without any response.

On March 29, 2022, Camacho notified Ms. Weiss that he would need to retrieve the settlement documents from storage and contact DOE about the processing.

Camacho contacted Lee about processing the unfinished SA. Lee had to run the SA by the DOE and the AG again because of the new Superintendent.

On April 5, 2022, Camacho notified Ms. Weiss that the DOE was inquiring as to what took her so long time to contact HSTA and whether she was really interested in the settlement. Camacho told Ms. Weiss that he did not know how long it would take to get the SA fully executed because of these concerns.

Ms. Weiss' excuse was that she did not receive the SA because she was off the grid.

At this time, Ms. Weiss wanted the settlement without any discussion of any different terms. Eshelman reached an agreement with DOE on the SA.

Camacho went over the SA terms with Ms. Weiss, who requested to review it before signing.

On April 8, 2022, HSTA mailed the SA via certified mail with a transmittal letter giving instructions for signing and returning. Camacho cautioned Ms. Weiss that DOE may challenge the untimeliness of the SA.

On April 12, 2022 Ms. Weiss reviewed, signed, and returned the SA to HSTA.

On April 21, 2022, Camacho informed Ms. Weiss that the signed SA was transmitted to the DOE. Ms. Weiss thanked Camacho for finishing the SA.

On May 20, 2022, Camacho notified Ms. Weiss that the DOE was considering whether to accept the settlement because of her inaction and that HSTA would decide what action to take after the DOE response. Camacho notified Ms. Weiss that Eshelman was now her HSTA contact because of his retirement.

Ms. Weiss claimed that between July 25, 2017 and the final SA, the terms were changed to include resignation from her teaching job, which she refused to do.

On June 10, 2022, Ms. Weiss was informed that the DOE agreed to honor the SA. However, she refused to give DOE the necessary information to process the SA.

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. Finally, the Board 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 of the witnesses in this case to be straightforward and credible and accepted their testimony to the extent that their testimony is consistent with the findings of fact above.

3.2. Standard of Review

3.2.1. Motion for Reconsideration

The Board has no administrative rules specifically providing for a motion for reconsideration.

Motions for reconsideration have been considered by the Board under the Hawai‘i Rules of Civil Procedure (HRCP) Rule 59(e). The purpose of a motion for reconsideration is to allow the parties to present new evidence and arguments that could not have been presented during the earlier adjudicated motion. James B. Nutter & Co. v. Namahoe, 153 Hawai‘i 149, 162, 528 P.3d 222, 235 (2023) (Nutter) (citing Sousaris v. Miller, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000)).

The reference to established court rules and cases interpreting such rules as guidance in applying the Board's own rules of practice and procedure is generally permissible. *See:* Los Banos v. Hawai'i Lab. Rels Bd., 2019 Haw. App. LEXIS 510, at *42-43 (Los Banos).

3.2.2. Motion for Partial Findings

Likewise, the Board's administrative rules do not specifically provide for a motion for partial findings. However, the Board has the authority to hear motions akin to a motion for partial findings under HRCP Rule 52(c) so long as the party opposing the motion is given a full and fair opportunity to be heard on the motion after reasonable notice, and the rules applicable to the Board are not otherwise violated. Los Banos, at *43.

A Rule 52(c) motion permits the Board to enter judgment as a matter of law with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. Under this rule, the Board is authorized to resolve disputed issues of fact and is not required to draw any inferences in favor of the non-moving party; rather the Board may make findings in accordance with its own view of the evidence. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *26-27 (May 7, 2018) (https://labor.hawaii.gov/hlrb/files/2021/05/HLRB-Order-3337F.pdf) (Mamuad).

3.2.3. Burden of Proof

Under HRS § 91-10(5) and Hawai'i Administrative Rules (HAR) § 12-42-8(g)(16), unless otherwise provided by law, the party initiating the proceeding has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of the burden of proof is by the preponderance of the evidence. Hawai'i Gov't Emp. Ass'n., AFSCME, Local 152, AFL-CIO v. Kawakami, Board Case Nos. 20-CE-03-946a, 20-CE-04-946b, and 20-CE-13-946c, Decision No. 506, at *18 (June 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-506.pdf). However, if another party raises any subsequent issues, that party has the burden of proving that issue by a preponderance of the evidence. HRS § 91-10(5); HAR §12-42-8(g)(16); *see also*: Haw. Gov't Emps. Ass'n., Local 12 v. Keller, Board Case No. CE-03-597, Decision No. 456, at *16 (November 8, 2005) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No.-456-CE-13-597-HGEA-v-Keller.pdf).

Accordingly, Ms. Weiss must present both evidence and argument that it is more probable than not that HSTA violated HRS Chapter 89. *See* Minnich v. Admin. Dir. of the Courts, 109 Hawai'i 220, 229, 124 P.3d 965, 974 (2005) (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (989)). In other words, Ms. Weiss must produce sufficient evidence and support that evidence with arguments that apply the relevant legal principles. Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *29 (February 21, 2023) (https://labor.hawaii.gov/hlrb/files/2023/02/Decision-No.-514.pdf) (citing United Pub. Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, at *12

(September 6, 1990) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No.-309-CE-01-122-UPW-v-John-Waihee.pdf)).

If the party with the burden of proof does not present sufficient evidence and legal arguments regarding an issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. Mamuad, Order No. 3337F, at *25.

3.3. HSTA Motion for Reconsideration of its MTD or Alternatively for Partial Findings

After Ms. Weiss rested her case, HSTA made an oral motion to reconsider its MTD based on the new evidence, or in the alternative for a judgment on partial findings under HAR § 12-42-8(g)(3) and the guidance of HRCP Rule 52(c) (motion for reconsideration).

3.3.1. Motion for Reconsideration

HSTA argues in support of its motion for reconsideration that any claims based on the SA and the cancellation of the January 16, 2019 arbitration period are beyond the limitations period and untimely and that the evidence shows that HSTA did not breach its duty of fair representation.

The Board denies the motion for reconsideration of the HSTA's MTD based on newly discovered evidence.

A party seeking reconsideration based on newly discovered evidence must establish that the evidence meets the following requirements: (1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature, as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness. Ticor Title Co. v. Mau, 2013 Haw. App. LEXIS 185, at *7-8.

Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding. Nutter, 153 Hawai'i at 162, 528 P.3d at 235 (citations omitted).

In its MTD, HSTA argues, among other things, that the Complaint was untimely and that HSTA complied with its duty of fair representation. In Order No. 3880, the Board had already ruled that the remaining issue against HSTA was whether HSTA committed a prohibited practice by breaching the duty of fair representation in the processing and handling of the Weiss Grievance, and that all other issues based on untimeliness were dismissed, including claims prior to Ms. Weiss' January 2017 discharge except as shown to be relevant for context.

While HSTA's witness testimony, documents, and arguments presented during the HOM provided a more robust record on the duty of fair representation issue, the only potentially new evidence that HSTA raised in its motion for reconsideration was that the reason for the SA never being fully implemented was due to Ms. Weiss' refusal to provide the information necessary for processing the payment under the SA. While relevant to the portion of the hybrid case against DOE for the breach of the CBA, this evidence is not of "a material and controlling nature as will change the outcome" of the case against HSTA.

Therefore, the Board denies the HSTA's motion for reconsideration of the MTD for newly discovered evidence but will proceed to consider HSTA's motion for partial findings.

3.4. HSTA's Motion for Judgment

As the moving party, HSTA must show that Complainant failed to carry her burden of showing that HSTA breached its duty of fair representation to her. HRS § 91-10(5); HAR §12-42-8(g)(16); *see, e.g.* Parker v. Dep't of Pub. Safety, State of Hawai'i, Board Case No. CE-10-923, Decision No. 502, at *49 (March 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-502.pdf).

In Order No. 3858, as clarified and further limited by Order No. 3880[10], the Board stated that the issues to be addressed in Ms. Weiss' case in chief against HSTA were whether: the Union wilfully breached its duty of fair representation in an arbitrary manner by perfunctorily processing the Weiss Grievance, and by acting in a discriminatory manner or in bad faith.

Ms. Weiss argued that HSTA breached its duty of fair representation in the handling of her grievance by relying on a biased DOE investigation; and further failing to: adhere to the specific deadlines set forth in the CBA; communicate with her about the delays in the processing of her grievance and arbitration; adequately prepare for the arbitration hearing; and fully negotiate the SA.

3.4.1. Duty of Fair Representation

Under Poe II, the Board has well-established principles for breach of the duty of fair representation. Keopuhiwa v. Hawai'i Fire Dep't, County of Hawai'i, Board Case Nos. 19-CE-11-930 and 19-CU-11-373, Decision No. 515, at *21 (June 30, 2023) (https://labor.hawaii.gov/hlrb/files/2023/07/Decision-515-Keopuhiwa.pdf) (Keopuhiwa).

The union, as the exclusive representative of the bargaining unit employees has a duty to fairly represent all these employees, both in collective bargaining and in enforcement of the collective bargaining agreement. *Id.* (citing Tupola v. Univ. of Haw. Prof'l Assembly, Board Case No. CU-07-330, Order No. 3054, at *27 (February 25, 2015) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf) (Tupola)). A union breaches

its duty of fair representation only if its conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith. *Id.*

The Board has applied a two-step analysis to determine whether a union has breached the duty of fair representation owed to a bargaining unit member. First, the Board looks at whether the alleged union misconduct involves the union's judgment or whether it is "procedural or ministerial". Caspillo v. Dep't of Transportation, Board Case Nos. 17-CE-01-899 and 17-CU-01-355, Decision No. 309, at *12 (November 22, 2021) (https://labor.hawaii.gov/hlrb/files/2021/11/Decision-No.-509.pdf) (Caspillo) (citing Mamuad, Order No. 3337F, at *31); s*ee*, Hernandez v. CIA Mexicana de Aviacion, S.A., 1989 U.S. App. LEXIS 23911, at *3 (9th Cir. 1989) (Hernandez). Second, if the conduct involved the union's judgment, then the complainant may prevail only if the union's conduct was discriminatory or in bad faith. On the other hand, if the conduct was procedural or ministerial, then the complainant may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. Mamuad, Order No. 3337F at *31.

3.4.2. Procedural or Ministerial--Arbitrariness

Therefore, the "arbitrary" prong of a breach of the duty of fair representation is controlling only when the challenged union conduct is procedural or ministerial. Peterson v. Kennedy, 771 F.2d 1244, 1253-54 (9th Cir. 1985) (Peterson).

The act in question must have no rational or proper basis, been in reckless disregard of the employee's rights, and prejudice a strong interest of the employee. Mere negligence does not rise to the level of arbitrariness that constitutes a breach of the duty of fair representation. Caspillo, Decision No. 509, at *12 (citing Asato v. Haw. Gov't Emp. Ass'n, Board Case Nos. 19-CU-03-375, 19-CE-19-934, Decision No. 504, at *5-6 (May 5, 2021) (https://labor.hawaii.gov/hlrb/files/2021/05/Decision-No.-504.pdf)).

An individual employee lacks direct control over a union's action taken on her behalf, Tupola, Order No. 3054, at *31. An employee has no absolute right to have a grievance taken to arbitration, and the fact that an underlying grievance was meritorious is not sufficient to establish a breach of the duty of fair representation. *Id.* at *29. In handling a grievance, a union has broad discretion in deciding whether and how to pursue it. *Id.* at *17.

A union acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory manner—ministerial actions. Peterson, 771 F.2d at 1253-54. A union does not act perfunctorily unless it treats the union member's claim so lightly as to suggest an "egregious disregard" of their rights. Mamuad, Order No. 3337F, at *32 (citations omitted). A procedural or ministerial omission by the union constitutes arbitrary union behavior where the conduct "place[s] the union in a situation where it either could not or would not make an informed

judgment regarding the merits of individual claims." Banks v. Bethlehem Steel Corp., 870 F.2d 1438, 1443 (9th Cir. 1989).

Applying these standards to HSTA's handling of the Weiss Grievance, the Board holds that the HSTA did not act in a perfunctory manner in processing this grievance.

Contrary to Ms. Weiss' allegations, HSTA argued that the timelines and deadlines established in CBA Article V. C. were observed because the parties either met the deadlines or agreed to an extension by email. Further, if a grievance deadline was not met, HSTA moved the grievance to the next level that included arbitration and selection of an arbitrator. Therefore, Ms. Weiss never suffered any harm because of any perceived violations.

The Board acknowledges that except for the filing of the grievance on February 15, 2017, the parties did not technically adhere to the specific deadlines stated in the CBA Article V.C. Moreover, while the Board agrees with HSTA's interpretation of CBA Article V.C. that the parties can waive the deadlines by a written "mutual agreement", HSTA provided no evidence of any written mutual agreements. Accordingly, this defense is unsupported.

However, a union's failure to process the grievance in a timely manner only constitutes arbitrary conduct if done without justification or excuse. Vanfossan v. Int'l Union, United Plan Guard Workers of America, Local 117, No. 01-2066, 2003 U.S. App. LEXIS 7946, *12 (6th Cir.) (Vanfossan). Or, where the individual interest at stake is strong and the union's failure to perform a ministerial act either affects the union's judgment regarding the validity or merits of the employee's claim or completely extinguishes the employee's right to pursue her claim. Hernandez, 1989 U.S. App. LEXIS 23911, at *7.

HSTA's failure to comply with the CBA deadlines is obviously a procedural or ministerial act, and Ms. Weiss' individual interest is strong because her grievance concerns her discharge, a serious sanction. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983). However, under CBA Article V.C., HSTA could revert to the contractual timelines and move the grievance to arbitration. Therefore, these delays in her grievance processing had no effect on HSTA's judgment on the merits of Ms. Weiss' claim nor did the delays extinguish her right to pursue her grievance or taint the grievance process in any way. *See, e.g.*, Vanfossan, 2003 U.S. App. LEXIS 7946, at *12 (6th Cir.) (held that "even assuming that the Union acted in an arbitrary manner by taking no action on Vanfossan's grievance for over eight months, there is not any evidence to support a finding that such inaction 'tainted the grievance procedure such that the outcome was more likely affected by the Union's breach.'").

Further, HSTA proved that the delays in processing were due primarily to the DOE's changes in personnel, and that Camacho made continual efforts to push the DOE Labor Relations personnel to a resolution. Therefore, HSTA proved that the delays were not due to any misconduct on its part.

Based on the foregoing, Ms. Weiss failed to establish that HSTA breached its duty of fair representation owed to her by processing her grievance in an arbitrary manner for failure to adhere to the specific deadlines in the CBA. Therefore, the Board holds that HSTA did not breach the duty of fair representation for this reason.

3.4.3. Acts of Union's Judgment – Discrimination and/or Bad Faith

Decisions as to how to pursue a particular grievance, including how to present a grievance at the arbitration, 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. A union's decision is arbitrary only if it lacks a rational basis. *Id.* at *31.

"Once a [complainant] proves that the Union acted in bad faith or in an arbitrary or discriminatory manner, however, the [complainant] must also prove that the Union's actions tainted the grievance procedure such that the outcome was more than likely affected by the Union's breach." Dushaw v. Roadway Express, 66 F.3d 129, 132 (6th Cir. 1995). The union only breaches its duty of fair representation when its conduct prejudices a strong interest of the employee. Moore v. Bechtel Power Corp. 840 F.2d 634, 636 (9th Cir. 1988) (citing Galindo v. Stoody Co., 793 F.2d 1502, 1514 (9th Cir. 1988).) An employee cannot prevail on a fair representation claim based on the union's failure to process a meritless grievance. Ooley v. Schwitzer Div. Household Mfg., Inc., 963 F.2d 1293, 1304 (7th Cir. 1992).

Ms. Weiss asserted that Camacho failed to fairly represent her in the grievance by relying on a biased DOE investigation; and further, by failing to adequately communicate with her about the delays in the grievance and arbitration process, prepare for the arbitration hearing, and negotiate the SA.

The Board notes that even if Ms. Weiss proves that HSTA mishandled her grievance for these reasons, this alleged misconduct is a matter of the Union's judgment and not arbitrary. Nevertheless, Ms. Weiss was unsuccessful in showing that Camacho failed to adequately represent her based on these grounds.

Ms. Weiss boldly asserted that the "2-year biased investigation was so full of slanderous mistruths" and "biased information". However, she provided no evidence that the DOE investigation was biased, or what Camacho specifically relied on in making decisions regarding the Weiss Grievance. Therefore, the Board is unable to find that HSTA relied on a biased investigation.

Ms. Weiss obviously felt that Camacho failed to adequately pursue witnesses and prepare documents for the arbitration hearing. Even if true, under the CBA, HSTA is the party to the arbitration step, and therefore, determines how to prepare and present the grievance at the arbitration step. CBA Article V.I.[11]

A union's decision on what evidence to present or not at arbitration is an exercise of its discretion. Harter v. United States Postal Serv., 2021 U.S. Dist. LEXIS 18767, at *21 (citing Marino v. Writers Guild of Am., E., Inc., 992 F.2d 1480, 1487 (9th Cir. 1993)). As long as the union has some reasoned explanation for its decision not to present certain evidence, the Board may not second-guess that decision. *Id.* A union's failure to pursue the possibility of investigating other witnesses or interviewing them must be shown to damage the presentation of the grievance to constitute a failure of fair representation. Findley v. Jones Motor Freight, 639 F. 2d 953, 959 (3d Cir. 1981); *see, e.g.*, Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985).

In this case, Ms. Weiss was obviously disappointed by Camacho's focus at the Kohala meeting on obtaining a settlement rather than to prepare witness testimony and exhibits for the arbitration hearing. However, she did not introduce any specific evidence of his failure to adequately prepare for the arbitration or that this alleged failure damaged the presentation of her grievance. Further, because there was no arbitration hearing on her grievance, the inadequacy of Camacho's preparation for hearing is speculative. Accordingly, the Board does not find that HSTA's conduct regarding preparation for arbitration was arbitrary.

A union breaches the duty of fair representation for a failure to communicate if it makes no effort to communicate with those affected by its conduct and acts with no input from them, without investigation or adequate notice, and opportunity to be heard. NLRB v. Am. Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980).

Clearly, the HSTA's communication in this case does not fall within this situation. The record in this case strongly disputes Ms. Weiss' claim that Camacho and the Union failed to communicate with her about the delays in her grievance and arbitration process and the SA. In fact, the record shows that Camacho had ongoing communications with Ms. Weiss regarding the status of the grievance processing, including the steps, the request for arbitration, the arbitrator selection, the arbitration conferences and hearing schedule, the settlement negotiations and progress; the reasons that the SA terms were favorable and the challenges of taking her grievance to arbitration; and most importantly, about the SA terms before the parties signed. While Ms. Weiss asserted that she did not want to resign and wanted to return to her teaching job and that the settlement terms changed between July 2017 and 2022, she signed the SA and agreed to the resignation after reviewing the terms with Camacho and on her own. The HSTA's actions cannot be viewed as irrational or arbitrary, nor is there any evidence that the Union intended to harm her by not responding at certain times. *See, e.g.*, Davis v. United Steel Local No. 13-423, 750 Fed. Appx. 335, 340-341 (5th Cir. 2018).

Ms. Weiss also failed to prove that HSTA's conduct breached its duty of fair representation because of a failure to negotiate the SA.

As stated above, under CBA Article V.I., the Union, not the grievant Ms. Weiss, is the legal party at the arbitration step. "When employees make their union the sole bargaining representative with the employer, they relinquish the right to control the settlement of their grievances. Unions are free to negotiate and accept settlements even without the grievants' approval." Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1061 (9th Cir. 1989) (Shane). Accordingly, a union's decision about how best to handle a grievance and its decision not to take a grievance to arbitration are matters of judgment. A union does not breach a duty of fair representation merely by settling a grievance instead of arbitrating. Vegas v. USW, Local 12-591, 73 F.Supp.3d 1260, 1269 (D. Haw. 2014) (Vegas). Or, even where the union fails to consult with an employee before settling her grievance. Renner v. Ford Motor Co., 516 Fed. Appx. 498, 506 (8th Cir. 2013). The union's statutory duty of fair representation protects an individual employee only from arbitrary abuses of the settlement device. Vaca v. Sipes, 386 U.S. 171, 193 (1967).

The record in this case simply does not support Ms. Weiss' claim that HSTA failed to adequately negotiate the SA. Camacho's emails to and from the DOE Labor Relations staff and his emails and letters with Ms. Weiss show that he was instrumental in negotiating, obtaining, and finalizing the SA during the initial process from January 2019 to June 2020. Even after Ms. Weiss delayed the final execution of the SA for almost two years, HSTA convinced and pressed the DOE to comply with and finish the SA. While Ms. Weiss asserted that she did not agree to the resignation from her teaching position and withdrawal of her grievance, the fact is that the SA on its face shows that she signed it. and that the SA included terms favorable to Ms. Weiss, such as the forgiveness of the lien for back rent and the $20,000 lump sum[12].

After she signed the SA, Ms. Weiss appears to have gotten "buyer's remorse". She now contends that the settlement terms had changed between July 2017 and final SA. A bargaining unit member's remorse does not make HSTA's decision to settle arbitrary or in bad faith. *See*: Shane, 868 F.2d 1057, 1061 (9th Cir. 1989).

The Board has held that the union retains discretion to act in what it perceives to be in its members' best interest. Caspillo, Decision No. 509, at *14. Accordingly, with questions of judgment, the Board will narrowly construe the breach of the duty of fair representation and be deferential in its substantive review of a union's performance. Therefore, the Board considers not whether the union made the right decision, but whether the union made its decision rationally and in good faith. *Id.* (citations omitted) In this case, the Board determines that HSTA's decision to settle Ms. Weiss' grievance based on the SA was rational, particularly because she signed and agreed to the SA.

As the HSTA's decision to enter into the SA was an exercise of its judgment, the Board must further determine whether Ms. Weiss showed that the union's exercise of judgment in

settling rather than pursuing arbitration was either discriminatory or in bad faith. Vegas, 73 F.Supp.3d at 19.

3.4.4. Discriminatory

The discriminatory element looks to the subjective motivation of the HSTA officials. 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. Keopuhiwa, Decision No. 515, at *24 (citing Tupola, Order No. 3054, at *33).

In this case, Ms. Weiss did not raise the issue of discrimination by HSTA in the Complaint. Nor did she present any argument or evidence that any of HSTA's alleged misconduct was based on impermissible invidious discrimination by the Union. To the extent that Ms. Weiss claims that HSTA treated her grievance differently than other similarly situated employees, Ms. Weiss has provided no evidence of discriminatory intent by HSTA or that HSTA treated any other BU 5 member grievances differently. Therefore, the Board finds that HSTA proved that Ms. Weiss failed to carry her burden of showing that that Union breached its duty of fair representation owed to her based on discrimination.

3.4.5. Bad Faith

Like the discriminatory ground, the issue of whether a union's conduct is in bad faith calls for a subjective inquiry and requires proof that the union acted or failed to act due to an improper motive. Assertions of the state of mind required for this claim must be corroborated by subsidiary facts and show substantial evidence of fraud, deceit, or dishonest conduct. Caspillo, Decision No. 509, at *14 (citing Tupola, Order No. 3054, at *34.) If a complainant fails to present subjective evidence of an improper motive and merely suggests that an improper motive is the only "reasonable explanation" for the conduct, the complainant fails to prove her case. *Id.* (citing Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at *15 (October 27, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3028.pdf)).

Although not alleged in her Complaint, Ms. Weiss appears to suggest that HSTA acted in bad faith based on Camacho's alleged collusion[13] with Petricevic. However, Ms. Weiss failed to carry her burden of proving the alleged collusion. While Camacho dealt with Petricevec during the Weiss Grievance process, those dealings primarily involved the arbitration scheduling. Camacho described Petricevec as bullying and inflexible on scheduling supporting the absence of collusion. Camacho's more significant dealings with the DOE—negotiating the SA— were done with Halvorson representing the DOE. Therefore, Ms. Weiss did not show that HSTA acted in bad faith based on collusion.

In Poe II, the HSC found that the grievance and arbitration procedures in the CBA contemplate that the employer and the union "each will endeavor in good faith to settle grievances short of arbitration." 105 Hawai'i at 101, 94 P.3d at 656. The Board finds that the HSTA, in negotiating the SA, showed a good faith endeavor to settle Ms. Weiss' grievance short of arbitration as contemplated under the CBA.

Therefore, HSTA proved that Ms. Weiss failed to carry her burden of proving that HSTA breached its duty of fair representation based on bad faith.

HSTA demonstrated that Ms. Weiss failed to carry her burden of proving that HSTA's actions regarding the handling, processing, and settling of the Weiss Grievance were arbitrary, discriminatory, or in bad faith. Therefore, the Board holds that HSTA did not breach its duty of fair representation and dismisses the case against the HSTA.

3.4.6. HRS § 89-13(a)(8) Claim

In Order No. 3858 bifurcating this consolidated case, the Board noted that it was undisputed that this case is a "hybrid case" as defined in Poe II. 105 Hawai'i at 102, 93 P.3d at 657.

The HSC has described the "hybrid case" as consisting of two separate claims: one against the employer alleging a breach of collective bargaining agreement; and the second against the union for breach of the duty of fair representation that are inextricably interdependent. To prevail against either the employer or the union, the employee must carry the burden of showing that their discharge was not only contrary to the contract but also that the union breached the duty of fair representation. If the employee fails to carry the burden of demonstrating that the union breached the duty of fair representation, the employee lacks standing to pursue their claim before the board. *Id.* at 104, 93 P.3d at 659.

As Ms. Weiss' failed to carry the burden of showing HSTA's breach of its duty of fair representation owed to her, she lacks standing to pursue her prohibited practice claim against Ms. Snelling. Therefore, the Board dismisses the case against Ms. Snelling.

4. Order

For the reasons set forth above, the Board dismisses the Complaints in both Board Case Nos. 22-CU-05-390 and 22-CE-05-970. These consolidated cases are closed.

DATED: Honolulu, Hawai'i, December 4, 2023.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

Copies sent to:

Janet Weiss, Self-Represented Litigant
Keani Alapa, Esq.
James Halvorson, Deputy Attorney General

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[1] Therefore, Order No. 3880 dismissed, among other things, the HRS § 89-13(b)(4) and (5) claims for untimeliness.

[2] "'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, DOE is an Employer within the meaning of HRS § 89-2, which defines "employer" or "public employer" as:

> "Employer" or "public employer" means the…the board of education in the case of the department of education,…and any individual who represents one of these employers or acts in their interest in dealing with public employees[.]"

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

***

> (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]

[5] "'Exclusive representative' means the employee organization certified by the board under section 89-9 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership."

[6] *See* endnote 3, *supra*.

[7] HRS § 89-6(d) provides in relevant part:

> (d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:
>
> ***
>
> (3) For bargaining units (5) and (6), the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote[.]

[8] During the relevant period of time for this case, there are two BU 5 CBAs that apply. The BU 5 CBA, effective from July 1, 2013 through June 30, 2017 (2013-17 CBA), and the BU 5 CBA, effective July 1, 2017 through June 30, 2021 (2017-21 CBA). Article V-GRIEVANCE PROCEDURE of the CBAs is the relevant provision for purposes of this case. Article V-GRIEVANCE PROCEDURE in the 2013-17 CBA and the 2017-21 CBA appear to be substantively similar. The only change that appears to have been made is in the designation of the subparagraphs. As the Weiss Grievance was filed in February 2017, the Board will reference the 2013-17 CBA.

[9] CBA Article V states in relevant part:

> **ARTICLE V - GRIEVANCE PROCEDURE**
>
> **A. DEFINITION**
>
> Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.
>
> **B. GRIEVING PARTY**
>
> Only teachers or their certified bargaining representative shall have the right to institute and process grievances under this Article.
>
> **C. TIME LIMITS**
>
> All limits shall consist of school days, Monday through Friday, except that when a grievance is submitted on or after June 1, and before the first work day of the next school year, time limits shall consist of all week days, Monday through Friday, so that matters may be resolved before the close of the school term or as soon as possible thereafter. The number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process. There shall be no obligation by the Employer to consider any grievance not filed or appealed in a timely manner. The parties may mutually agree in writing to extend the twenty (20) day time limits to file a grievance at the informal step of the grievance procedure for a period not to exceed ten (10) days.

***

H. STEP 2

(a) Any grievance involving suspensions, terminations, or class grievances involving teachers from more than one school shall be filed with the Superintendent or designee in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved. The Superintendent or designee shall hold a meeting within five (5) days.

***

(e) The Superintendent or designee's answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the meeting.

I. ARBITRATION

If a claim made by the Association or teacher has not been satisfactorily resolved, the Association may present a request for arbitration of the grievance within ten (10) days after the receipt of the decision.

(1) Representatives of the parties shall immediately attempt to select an arbitrator. If the parties have not appointed an arbitrator within two (2) weeks from the receipt of the request for arbitration, the parties will request from the Hawai‘i Labor Relations Board a list of five (5) names from the register of arbitrators.

The arbitrator shall be chosen by the parties by alternately striking one (1) name at a time from the list. The first party to scratch a name shall be determined by lot. The arbitrator whose name remains on the list shall serve for that case…

The arbitration hearing shall commence within forty-five (45) days from the Association's official notification to the Employer that the case is going to arbitration. The parties may mutually agree to a written waiver of the timelines. The arbitrator(s) to be selected must agree to the schedule.

In making a decision on a case, the arbitrator shall not have the authority to consider any facts not in evidence, nor shall the arbitrator add to, subtract from, delete, or in any way amend or modify any term or condition of the Collective Bargaining Agreement. The arbitrator's decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.

***

(f) When the arbitrator finds that any disciplinary action was improper, the action may be set aside, reduced or otherwise modified by the arbitrator. The arbitrator may award back pay to compensate the teacher wholly or partially for any salary lost. Such back pay award shall be offset

by all other compensation received by the grievant(s) including but not limited to unemployment compensation or wages.

***

K. The Employer and Association by mutual written agreement may waive Steps 1 and 2 of the Grievance Procedure and proceed with arbitration. In addition, the parties may voluntarily and mutually agree to mediation at any time prior to arbitration.

***

N. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.

O. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure.

P. Expedited Grievances: Mediation or expedited grievance procedure shall be used for…terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

Q. If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

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

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

[12] The SA states in relevant part:

WHEREAS, on September 15, 2016, the Employer informed Grievant of a recommendation to terminate her employment as a Secondary Teacher (Position No. 61269), for ongoing and repeated violation of BOE policies and for persistently failing to adhere to directives instructing her to present formal complaints about Substitute Teacher to Administration at Kohala Middle School;

WHEREAS, on January 19, 2017, the Employer informed Grievant that it was proceeding with her termination, effective at the close of business on January 30, 2017;

WHEREAS, on February 15, 2017, the Union filed a Step 2 grievance on behalf of Grievant relating to Grievant's discharge asserting violations of Articles II, V, IX, X, and XXV of the Unit 5 Agreement in effect between the Employer and Union;

WHEREAS, on May 9, 2017, the Union submitted its notice of intent to proceed to arbitration pursuant to Article V - Grievance Procedure of the Unit 5 Agreement;

WHEREAS, notwithstanding the parties' respective positions, the Employer, Union, and Grievant desire to effect a full and final compromise and settlement of any and all matters,

claims and causes of action arising out of or connected with the facts and circumstances surrounding the subject Unit 5 grievance and have fashioned a mutually acceptable remedy to resolve this grievance;

NOW, THEREFORE, the parties agree to completely and fully resolve the Unit 5 grievance filed on February 5, 2017, on the terms and conditions stated herein:

1. The discharge action effective close of business, January 30, 2017, is rescinded.

2. In lieu of discharge, Grievant will be deemed to have resigned from the Employer, effective at the close of business on January 30, 2017.

3. The Employer will pay Grievant the total amount of $20,000.00 in a single lump-sum payment within forty-five (45) days of the date of the execution of the Settlement Agreement, time being of the essence.

4. The lien filed against Grievant' s vehicle, as well as the Judgment for Damages in DC Civil No. 3RC-15-1-249H see attachment 1) for delinquent rent and utility reimbursement charges, will be forgiven.

5. Grievant shall not seek re-employment with the State of Hawaii, Department of Education.

6. The Parties further agree that nothing contained herein shall be construed as an admission by the Employer of any violation of the Unit 5 Agreement.

7. The Parties further agree that this Settlement Agreement shall be restricted in scope and application to the parameters of this Unit 5 grievance only, and shall not be construed as precedent in any other grievance, arbitration, or litigation.

8. Grievant hereby releases, and agrees not to sue, and forever discharges the Union and the Employer from any and all claims concerning the subject Unit 5 grievance filed on February 15, 2017.

9. Grievant acknowledges that she has been fully and fairly represented by the Union and that she freely and voluntarily accepts this Settlement Agreement with full knowledge and understanding of its contents and meaning.

10. Grievant further acknowledges that the Union has complied with its duty of fair representation in handling this grievance.

11. The terms of this Settlement Agreement are contractual and binding upon the parties. They may be changed, amended, or modified only by a written instrument signed by the Employer and Union.

12. This Settlement Agreement may be executed in counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

This Settlement Agreement shall be immediately effective upon execution by the parties with no right of rescission or revocation. (footnotes omitted)

[13] Collusion is defined as

> an agreement between two or more persons to defraud a person of her rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kinds, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. A secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose. *See* Conspiracy.

Black's Law Dictionary 264 (6th ed. 199) (brackets added).

Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 243 n.14, 982 P.2d 853, 872 n.14 (1999). (some citations omitted)