STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of NARCIS D. SALERA, Complainant(s), and WESLEY T. YOKOYAMA, Director, Department of Environmental Services, City and County of Honolulu, Respondent(s).	CASE NO(S). 20-CE-01-952 ORDER NO. 3799 ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT; GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; DENYING RESPONDENT'S MOTION TO JOIN UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; AND DENYING RESPONDENT'S MOTION TO PERMIT DISCOVERY DEPOSITIONS

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On July 27, 2021, Complainant NARCIS D. SALERA (Salera) filed his Second Amended Prohibited Practice Complaint (Second Amended Complaint) with the Hawai‘i Labor Relations Board (Board). The Second Amended Complaint, among other things, alleges that Respondent WESLEY T. YOKOYAMA, Director, Department of Environmental Services, City and County of Honolulu (Respondent, ENV Director, or Yokoyama) committed certain prohibited practices, enumerated as Counts I through X. The Board previously dismissed Counts VI and VII for lack of jurisdiction, as the Board does not have jurisdiction over the Hawai‘i Whistleblower Protection Act (HWPA) or the Hawai‘i State Constitution (Constitution).

After the dismissal of Counts VI and VII, Salera filed a Motion for Summary Judgment (MSJ), arguing, among other things, that Salera is entitled to summary judgment on all remaining counts in this case. The ENV Director opposed the MSJ.

The ENV Director filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (MTD), arguing, among other things, that Salera failed to exhaust his contractual remedies; that a pending Circuit Court case arises from and/or is related to the same matter before the Board; that a necessary party, United Public Workers, AFSCME, Local 646, AFL-CIO (UPW), has not been joined to this action; that there is no causal connection between any of Salera's protected activities and the alleged retaliation by the ENV Director; that there has been no wilfull violation of Hawai'i Revised Statutes (HRS) Chapter 89; and that Salera's complaint is time-barred as a matter of law. Salera opposed the MTD.

The ENV Director also filed a Motion to Join UPW (Motion to Join), arguing that UPW must be joined to this case, and a Motion to Permit Discovery Depositions (Motion for Depositions); Salera opposed both.

The Board held a motion hearing on the MSJ, the MTD, and the Motion to Join on September 28, 2021. Among the other arguments made, the ENV Director argued that this case should be stayed, pending the outcome of Salera's grievances regarding his disciplinary actions.

Based on the record, the Board grants, in part, and denies in part the MTD; denies the MSJ; denies the Motion to Join; and denies the Motion for Depositions. More specifically, the Board dismisses Counts VIII, IX, and X in their entireties and limits the other counts to the events that took place on or after August 4, 2020 (ninety days prior to the filing of the Complaint).

The Board also denies the ENV Director's request to stay this case. Accordingly, the Board will amend the pretrial order in this case to reflect subsequent dates and deadlines.

1. Background

Salera is a blue collar, non-supervisory employee[i] who works for the Department of Environmental Services, City and County of Honolulu (ENV) and a member of bargaining unit 1 (BU 1)[ii]. Yokoyama is the current director of ENV; Lori M.K. Kahikina, PE (Kahikina or Former ENV Director) preceded him in this position[iii].

During Salera's time with ENV, he has gained seniority, which provides him with greater opportunity to obtain overtime work than those employees with less seniority.

In 2014, Salera, as the lead plaintiff, filed a civil action against Kahikina challenging Kahikina's decision regarding, among other things, privatization of certain services. These proceedings are pending before the Circuit Court.

In 2015, through the exclusive representative[iv] for BU 1, namely UPW, Salera and other BU 1 employees filed a class grievance challenging certain decisions by Kahikina. The grievance proceeded through the process provided for in the BU 1 collective bargaining

agreement (CBA), culminating in an arbitration decision by Arbitrator Ted Sakai (Sakai) issued on June 17, 2020.

Salera participated in several other class grievances brought by the UPW against ENV.

In May 2020, UPW underwent a change in leadership.

Kahikina issued two letters in May 2020 that disciplined Salera.

By letter dated August 5, 2020 (August 2020 Letter), Kahikina suspended Salera for ten days. The August 2020 Letter states that the suspension was issued due to a tire being bald, despite Salera's pre- and post-trip inspections of the truck, including the inspection reports, which did not reference the condition of the tire. The August 2020 Letter further informs Salera that "Any future offenses of this nature may be cause for more severe disciplinary actions, up to and including termination."

By letter dated December 23, 2020 (December 2020 Letter), Kahikina suspended Salera for ten days. The December 2020 Letter states that the suspension is due to a vehicular accident and references three prior disciplines. The December 2020 Letter further informs Salera that "Any future offenses of this nature may be cause for more severe disciplinary actions, up to and including termination."

By letter dated January 13, 2021 (January 2021 Letter), Yokoyama, now the ENV Director, suspended Salera for ten days. The January 2021 Letter supersedes the December 2020 Letter and states that the suspension is due to a vehicular accident and references three prior disciplines. The January 2021 Letter further informs Salera that "Any future offenses of this nature may be cause for more severe disciplinary actions, up to and including termination."

On or about March 30, 2021, Yokoyama issued a job performance appraisal to Salera.

Salera alleges that he was denied temporary assignment to positions on or after April 24, 2021.

By letter dated June 21, 2021 (June 2021 Letter), Yokoyama suspended Salera for fifteen days. The June 2021 Letter states that the suspension is due to alleged negligence resulting in damage to the windshield of the refuse collection truck and references four prior disciplines. The June 2021 Letter further informs Salera that "Any future offenses of this nature may be cause for more severe disciplinary actions, up to and including termination."

2. The Complaint

Salera filed his prohibited practice complaint (Complaint) on November 2, 2020, and the Board permitted him to amend his Complaint twice. Salera filed his first amended prohibited

practice complaint (First Amended Complaint) on April 20, 2021, and his second amended prohibited practice complaint (Second Amended Complaint) on July 27, 2021.

During the proceedings, Salera and the ENV Director attempted to settle this case. No settlement resulted from this attempt.

3. Board Case No. 21-CE-01-959 and Order No. 3734

On March 19, 2021, Salera filed a prohibited practice complaint in Board Case No. 21-CE-01-959 which mirrored the proposed amendment in the First Motion to Amend.

The Board issued a notice of intent to dismiss the complaint unless a written objection was received from ay party within ten days of the issuance of this notice. This notice of intent to dismiss was based on HAR § 12-42-42(f), which provides that only one complaint shall issue against party with respect to a single controversy based on Salera's admission that the complaint in this case is substantially similar to the proposed First Amended Complaint in Board Case No. 20-CE-01-952.

On April 19, 2021, the Board issued Order No, 3734 dismissing the case with prejudice and closing the case based on the notice of intent to dismiss.

4. Discussion

4.1. Genuine Issues of Material Fact

The Board has previously adopted the standards for motions for summary judgment articulated by the Hawai'i Supreme Court (HSC) in Thomas v. Kidani, 126 Hawai'i 125, 129-30, 267 P.3d 1230, 1234-35 (2011), and French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 470-71, 99 P.3d 1046, 1054-55 (2004). *See, e.g.,* Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Kawakami, Board Case Nos. 20-CE-03-946a; 20-CE-04-946b; 20-CE-13-946c, Decision No. 506, at *22 (June 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No-506.pdf) (Kawakami); *see also* Tupola v. University of Hawaii Professional Assembly et al., Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *18 (2015) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf) (Tupola).

Accordingly, summary judgment is appropriate only when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the Board must review the evidence in the light most favorable to the party opposing the motion for summary judgment; and any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. Kawakami, Decision No. 506, at *22.

Preliminarily, the Board addresses Respondent's contention that Salera cannot reference previously filed documents with the Board because they were filed before the Second Amended Complaint became the charging document. Respondent makes this argument without providing any case law or statutory support.

The Board rejects this contention. Although Salera's prior motions on prior charging documents are moot because they were made on those prior charging documents, that does not remove those prior motions and their supporting memoranda from the record. Accordingly, as those documents are in the record, they may be referenced.

Moving to the actual issue of summary judgment, the Board notes that both parties have moved for summary judgment. However, the parties have raised several disputes of material fact that the Board cannot ignore.

The primary dispute surrounds whether Kahikina and Yokoyama retaliated and/or discriminated against Salera by, among other things, issuing him disciplinary actions. Respondent argues that Kahikina and Yokoyama disciplined Salera due to his "shoddy work performance and violations of ENV's workplace rules and policies…not in retaliation for any matters in which Complainant participated against ENV…" and further argues that Salera has failed to show that Kahikina and Yokoyama's conduct constituted wilfull violations of HRS Chapter 89. Salera argues that Kahikina and Yokoyama "possessed some animus, or hostility, towards Salera's protected activity."

The question of Kahikina and Yokoyama's motives for disciplining Salera—and the potential wilfullness of those actions—are at the heart of this case. Despite the amount of evidence presented to the Board in declarations and other documents, the Board cannot resolve this question yet. Salera engaged in protected activity dealing with ENV, and Kahikina was a named party to at least one of those protected activities. However, despite Salera's strong past performance reviews, the Board finds it possible that the discipline was warranted. This question of fact must be resolved at a further hearing on the merits.

Accordingly, the Board denies both motions for summary judgment, as material facts are in dispute.

4.2. Motions to Dismiss Generally

The contents of the complaint serve as the basis for motions to dismiss for lack of subject matter jurisdiction, and, accordingly, when considering a motion to dismiss, the Board must accept the allegations of the complaint as true and view those allegations in the light most favorable to the complainant. *See* Jones v. Lee, et al., Board Case No. 21-CE-06-960, Order No. 3781, at *2 (July 16, 2021) (https://labor.hawaii.gov/hlrb/files/2021/07/Order-No-3781.pdf) (Jones). The Board is not required to accept conclusory allegation on the legal effect of the

events alleged in the complaint. Tupola, Order No. 3054, at *17. However, the Board may dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Hawaii State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

The party seeking to invoke the Board's jurisdiction has the appeal of establishing that jurisdiction exists. Jones, Order No. 3781, at *2. The Board may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

4.3. Timeliness

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

HRS § 377-9 sets forth a requirement that the Board can only hear complaints filed within ninety days of the action that the alleged prohibited practice is based on. HRS § 377-9(l); Id. at 505 n. 3, 664 P.2d at 729 n. 3. The administrative rules governing the Board further include this ninety-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, et al., Board Case Nos. CE-10-175; CU-10-43, Decision No. 175, at *21-22 (July 29, 1983) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-175.pdf). The ninety-day limit is jurisdictional and provided by statute; therefore, neither the Board nor the parties may waive this requirement. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *6 (October 3, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3023.pdf). Further, the ninety-day period begins when the complainant knew or should have known that his rights were being violated. United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 30, 2006) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-443.pdf).

The ENV Director sets forth multiple arguments as to the timeliness of Salera's allegations. First, the ENV Director argues that the May 2020 disciplines occurred prior to the relevant ninety-day period. Second, he argues that all the disciplines that occurred after Salera filed his initial Complaint are time-barred because those events had not occurred as of November 2, 2020.

Taking the second argument first, the Board dismisses the argument that events after the filing of the Complaint are time-barred under the circumstances of this particular case. The ENV

Director cites no case law supporting his position, and the Board finds the ENV Director's argument inherently flawed for several reasons.

The ENV Director appears to suggest that the Board should have required that Salera file a new case for each subsequent disciplinary action, even though such cases would necessarily involve the same parties and the same underlying facts. And, in fact, Salera proceeded down this path by filing the prohibited practice complaint in Board Case No. 21-CE-01-959.

The Board acknowledges that that under its administrative rules, it is permitted to consolidate cases that involve substantially the same parties or issues if it finds that the consolidation will be conducive to the ends of justice and will not unduly delay the proceedings. HAR § 12-42-8(g)(13). However, this approach would leave the Board consolidating proceeding after proceeding and would both delay the proceedings and be a detriment to the Board's judicial economy. Further, this approach run afoul of HAR § 12-42-42(f), which provides that with respect to a single controversy, "only one complaint shall issue against a party."

The Board's rules are to be liberally construed to effectuate the purpose of HRS Chapter 89, and to secure the just and speedy determination of every proceeding. HAR § 12-42-2. Further, the Board is mandated to take actions that it deems necessary and proper with respect to prohibited practice complaint proceedings. Hawai'i Gov't Emples. Ass'n v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 349 (2007) (Casupang) (*citing to* HRS § 89-13(i)(4)).

The Board decided to establish these proceedings in these two prohibited practice cases (20-CE-01-952 and 21-CE-01-959) down a more expeditious and economical path permitted by its own rules.

HAR §§ 12-42-8(g)(10)(A) and 12-42-43 allow the Board, in its discretion, to allow any complaint to be amended at any time prior to the issuance of a final order.

In addition, HAR § 12-42-8(g)(10)(C) provides that the amended pleading is effective as of the date of the original filing if it relates to the same proceeding.

In this case, as the ENV Director is well aware, Salera's First Motion to Amend Complaint was filed on March 8, 2021. The First Motion to Amend, among other things, added the ten-day suspensions issued in December 2020 and January 2021.

Therefore, in dealing with the prohibited practice complaint in Board Case No. 21-CE-01-959, which mirrored the proposed amendment in the First Motion to Amend filed on March 8, 2021 in this case, the Board chose not to proceed with two cases. Rather, the Board permitted Salera to amend the initial Complaint filed in this case in Order No. 3732 to, among other things, include allegations regarding disciplinary actions taken against him after the initial Complaint

was filed. Further, the Board dismissed Board Case No. 21-CE-01-959 because the complaint in that case was substantially like the First Amended Complaint.

Salera's Second Motion to Amend, filed on July 9, 2021, which incorporated the March and June disciplines, was following the Board's prior orders as to how to proceed in this case. Therefore, all the disciplines that occurred after Salera filed his initial Complaint were incorporated into the Second Amended Complaint, which the Board, in its discretion, permitted to be filed.

Accordingly, the Board holds that Salera's allegations of occurrences after November 2, 2020 are timely based on HAR § 12-42-42(f). To find otherwise would be to substantially prejudice Salera based on the Board's prior rulings in the two prohibited practice cases at issue.

Turning to the May 2020 disciplines, Salera presents several arguments as to why the May 2020 disciplines are timely. First, Salera argues that he did not have knowledge that his statutory rights may have been violated until he was told so by his attorney. Second, he argues that the May 2020 disciplines are part of a pattern of behavior by ENV. Third, he argues that, because each discipline referenced the prior disciplines, the disciplines represent a continuing violation that gives the Board jurisdiction over all of the disciplines.

Salera filed the Complaint on November 2, 2020. Therefore, the relevant ninety-day period began on August 4, 2020.

It is undisputed that May 2020 came before August 4, 2020. Thus, unless a relevant exception would apply, the May 2020 disciplines are untimely as prohibited practice complaints.

Salera's first argument, that he did not know his statutory rights may have been violated until his attorney told him, is flawed. The Board has previously explained that:

> …the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. The applicable period begins to run when "an aggrieved party knew **or should have known** that his statutory rights were violated."

Roberts v. Leonard, et al., Case Nos. 18-CU-05-369; 18-CE-05-911, Decision No. 493, at *7 (April 4, 2018) (emphasis added) *quoting* United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (Okimoto).

It may be true that Salera did not have actual knowledge that his statutory rights may have been violated until his attorney told him. However, the question before the Board is not whether he had actual knowledge but whether he should have had that knowledge.

Salera had unequivocal notice of the May 2020 disciplines in May 2020. Salera knew he participated in prior court cases and grievances against ENV. Salera may have been mistaken about the law surrounding discrimination from those disciplines, but a mistake or ignorance of the law does not extend the statutory ninety-day period.

The HSC has stated that "only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect" that would constitute cause to extend a deadline to appeal a case. Eckard Brandes, Inc. v. Dep't of Labor and Indus. Rels., 146 Hawai'i 354, 360, 463 P.3d 1011, 1017 (2020) (*citing* Enos v. Pacific Transfer & Warehouse, 80 Hawai'i 345, 353, 910 P.2d 116, 124 (1996)). Ignorance of the law, therefore, does not constitute good cause to extend an appeal deadline authorized by rule—let alone good cause to extend a statutory limitations period that cannot be extended by the parties or by the Board.

Therefore, the Board rejects Salera's first argument.

For his other two arguments, Salera discusses that the May 2020 disciplines are part of a pattern of behavior on behalf of ENV. Salera cites to U.S. v. Hurt, 676 F.3d 649, 654 (8th Cir. 2012) (Hurt), for the proposition that, as long as one claim is timely, all others in the "pattern" are timely. Hurt is inapplicable. Hurt dealt with a question of attorney's fees under the Equal Access to Justice Act (EAJA), in a case arising from an alleged violation of the Fair Housing Act (FHA). As a fee-shifting statute, the EAJA favors treating "a case as an inclusive whole, rather than as atomized line-items." Comm'r v. Jean, 496 U.S. 154, 161-62 (1990). Further, the underlying claim in Hurt dealt with a single pattern or practice claim of sexual harassment in violation of the FHA.

This case is not brought under the limitations set forth in the FHA. Salera has pointed to no cases or statutes under HRS Chapter 89 that permit this type of proposition.

The Board has previously taken jurisdiction over a case to consider an alleged "plan or pattern…systematically destructive of employee rights" where, "If each violation were addressed through the grievance process, any such pattern of systemic derogation might proceed undetected." Okimoto at *22. However, Okimoto dealt with something akin to a "continuing violation in which each occurrence of an initially wrongful act represents a new, contestable, violation" because the pilot program was continuing to run and the implementation of the pilot program was the alleged violation. Okimoto, at *23-24.

Unlike Okimoto, this case is not tied to a program or any overarching item that would permit the Board to consider these alleged violations tied together. Therefore, the Board is compelled to find that the prohibited practice claims as to the May 2020 disciplines are untimely and dismisses them accordingly.

4.4. Failure to State a Claim

The Board only dismisses a complaint for failure to state a claim if the claim is "clearly without any merit" and if the lack of merit leads to a conclusion that no law supports the claim. 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) (Parker). Further, the Board dismisses a complaint for failure to state a claim only when it appears beyond doubt that the complainant cannot prove any set of facts that would entitle him to relief. Tupola, at *17. Therefore, the Board must view Salera's complaint in the light most favorable to him to determine whether the allegations in the complaint could warrant relief under any alternative theory. Id.

When considering a motion to dismiss for failure to state a claim, while the Board must deem the factual allegations of the complaint to be true, the Board is not required to accept conclusory allegations on the legal effect of the factual allegations. Parker, at *54 *citing* Tupola, at *17-18.

The Board follows the pleading standards established by the Hawai'i appellate courts. Paio, et al. v. UPW, Board Case Nos. 16-CU-10-344, 16-CU-10-345, Decision No. 497, at *26 (February 21, 2020). Therefore, the Board must construe the pleadings liberally and requires only that the complaint contain a short and plain statement of the claim to provide the respondent with fair notice of the complaint and the relevant grounds. Parker, at *54 *citing* Paio, at 26.

All that is required for notice pleading under Hawai'i law is fair notice to the respondent of what the complainant's claim is and upon what grounds the claim rests. Id. Complainants are not required to plead legal theories with precision, and the pleading of evidence, facts, conclusions, or law is not dispositive. Id. *citing* Paio, at 26-27.

The Second Amended Complaint alleges, in some detail, that Respondent's actions violated various sections of HRS § 89-13, as well as §§ 89-3 and 89-10.8.

Respondent argues that, under the Hawai'i Rules of Civil Procedure's (HRCP) Rule 12(b)(6), Salera fails to state a claim upon which relief can be granted because, among other things, the alleged retaliation occurred years after the alleged protected activity. Respondent further cites to cases brought under Title VII for the proposition that, under Title VII retaliation claims, a three-month period between protected activity and adverse action is too long to establish causation.

The Board has not adopted the HRCP and is thus not bound by the HRCP. Los Banos v. Haw. Lab. Rels. Bd., No. CAAP-17-0000476, 2019 Haw. App. LEXIS 510, at *43 (Haw. November 22, 2019). However, the Board has looked to analogous provisions of court rules and decisions interpreting such rules for guidance when the Board's rules are silent or ambiguous on procedural matters. Parker, at 39.

The Board further does not interpret Title VII and is not bound to apply the same reasoning as Title VII decisions to HRS Chapter 89 cases.

Salera has alleged that an intervening incident, namely the removal of former UPW State Director, Dayton Nakanelua, provided the ENV Director with the opportunity to retaliate against Salera for his alleged protected activities from years before. Further, the civil proceedings have not been completed, and arbitrator Sakai did not issue his decision until June 17, 2020. Therefore, these cases implicated in Salera's protected activities cannot be said to have happened years ago.

Accordingly, the Board denies Respondent's Motion to Dismiss as to the allegation that Salera failed to state a claim on which relief could be granted.

4.5. Exhaustion

When considering an allegation that an employer has committed a prohibited practice by violating the relevant collective bargaining agreement, the Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile, based on the Court's reasoning in Poe v. Haw. Labor Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (Poe II). *See, e.g.*, University of Hawaii Professional Assembly v. Board of Regents, Case No. CE-07-804, Board Order No. 2939 (August 22, 2013) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2939.pdf) (Board of Regents).

Two counts in Salera's complaint allege that the ENV Director violated the collective bargaining agreement: namely, Counts VIII and X.

In discussing the doctrine of exhaustion, the ENV Director argues that Salera's grievances over the disciplinary actions are proceeding; therefore the Board should follow its established practice of deferring to the collective bargaining process.

However, the Board notes that neither party has argued that a grievance has been filed as to the issues in the two counts relevant to the exhaustion question, namely the issue of temporary assignment and the issue of adherence to Sakai's arbitration decision. Therefore, the pendency of the five grievances related to the disciplinary actions is not applicable to an analysis of Counts VIII or X.

This finding, however, does not end the Board's analysis of the counts as pertain to the doctrine of exhaustion.

The doctrine of exhaustion speaks to the Board's jurisdiction over the claims. Even if the parties do not raise the issue of a jurisdictional requirement, the Board, *sua sponte*, will raise the issue because if the Board does not have jurisdiction over a claim, the Board cannot issue a

judgment on the issue. Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees' Ret. Sys., 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (Chun)).

As noted above, the Board has held that, generally, a complainant must exhaust his contractual remedies prior to claiming that the employer has committed a prohibited practice by violating the collective bargaining agreement. Board of Regents at *10. As no one has alleged that Salera has exhausted the relevant process as to Counts VIII and X, the question before the Board then is whether Salera falls into an acceptable exception to the exhaustion doctrine.

Salera argues that the exhaustion doctrine does not apply where there are "superseding matters of policy." However, in both Okimoto and United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Leopardi, Case No. CE-01-538, Order No. 2227 (2003) (Leopardi) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2227.pdf), UPW brought prohibited practice complaints where alleged violations affected multiple employees. By affecting multiple employees, the policies at issue in both Okimoto and Leopardi presented superseding policy considerations.

Here, Salera is a single employee, and no other employees have alleged that they have been denied temporary assignment or that they have been injured by Respondent's alleged failure to comply with the Sakai Decision. Therefore, there is no alleged pattern of behavior affecting multiple employees across the bargaining unit; indeed, the crux of Salera's case is that Kahikina and Yokoyama discriminated against him personally for his specific protected activities.

Salera has grieved other matters related to his personal experiences; however, he has not grieved the issues raised by Counts VIII and X. The Board, thus, finds no superseding policy consideration exists in this case that would permit the Board to refuse to defer to the grievance process.

Accordingly, the Board dismisses the HRS § 89-13(a)(8) claims in both Count VIII and X.

4.6. Arbitration Decisions in Counts VIII and X

Counts VIII and X allege statutory violations in addition to the HRS § 89-13(a)(8) claims dismissed above; namely, violations of HRS §§ 89-13(a)(7) and 89-10.8.

Salera relies on United Public Workers, AFSCME, Local 646, AFL-CIO v. Takaba, et al., Case No. CE-01-532, Decision No. 469 (June 29, 2007) (Takaba) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-469.pdf) for the premise that an employer's failure to comply with an arbitration decision constitutes a prohibited practice under

HRS § 89-13(a)(7) as well as a violation of HRS § 89-10.8. The Board finds Takaba inapplicable.

Preliminarily, in Takaba, the respondents did not file a timely answer to UPW's complaint. Therefore, the Takaba Board took all material facts as admitted and found that the respondents committed prohibited practices under HRS § 89-13(a)(7) and (8) and violated HRS § 89-10.8.

The Takaba Board relied solely on the respondents' failure to file a timely answer to make findings that the respondents committed a prohibited practice. No hearing on the merits occurred. The decision is void of any analysis of any affirmative defenses that the respondents may have raised. Therefore, the Board finds that Takaba cannot be relied on as a general principle.

Further, even if Takaba were able to be relied on generally, that case is inapplicable to Salera. In Takaba, UPW brought a complaint on behalf of its bargaining unit members over an arbitration decision—not an individual employee. As the exclusive representative for BU 1, UPW was one of the parties to the arbitration at issue. Takaba did not decide that employers commit prohibited practices under HRS § 89-13(a)(7) and 89-10.8 when individual employees are allegedly injured due to the employer's failure to comply with an arbitration decision.

Only a party to an arbitration proceeding may confirm or vacate the arbitration award under HRS Chapter 658A. HRS §§ 658A-22 and 658-23; *see*, Gao v. State, 130 Hawai'i 303, ____, 309 P.3d 971, ____ (App. 2013) (finding that an individual employee could not move to vacate an arbitration award under HRS Chapter 658A because he was not a party to the arbitration—only the relevant exclusive representative or public employer would have that right); *see also* Gao v. Hawai'i Labor Rels. Bd., 129 Hawai'i 106, ____, 294 P.3d 1092, ____ (App. 2013) (upholding HLRB's finding that HLRB does not have jurisdiction to vacate an arbitration award).

Salera appears to argue that he suffered individual harm under Count VIII due to Respondent's alleged failure to comply with the arbitration award, resulting in him not receiving temporary assignments.[v] However, even if Salera did suffer individual harm due to such alleged failure, this harm does not provide Salera with the required standing to bring this type of prohibited practice complaint.

The parties agree that Salera was not a party to the arbitration. Therefore, while he may suffer individual harm arising from an alleged failure to comply with an arbitration agreement, that injury is not properly addressed by bringing these prohibited practice claims. As noted above, any individual harm Salera suffers due to an alleged violation of the collective bargaining agreement—and those decisions interpreting the collective bargaining agreement—must go through the grievance process absent a superseding policy issue.

Accordingly, the Board dismisses the remainder of Count VIII and X in their entireties.

4.7. Repudiation of Oral Agreement

Although Respondent did not argue in his MTD that Count IX of the Second Amended Complaint should be dismissed, he does raise the issue in his opposition to the MSJ. Accordingly, the Board will consider the question of its jurisdiction to determine Count IX.

Count IX centers around Respondent's alleged repudiation of an oral agreement to attempt settlement negotiations in this case. Salera argues that Respondent's actions constitute a prohibited practice under HRS § 89-13(a)(7) due to a violation of HRS § 89-3. Respondent argues that the Second Amended Complaint does not assert a prohibited practice violation under HRS Chapter 89; that the MSJ fails to articulate how this alleged repudiation of an oral agreement constitutes an interference with Salera's HRS Chapter 89 rights; and that Salera has not proved wilfullness on the part of Respondent's counsel. Respondent further argues that settlement discussions are protected by the Hawai'i Rules of Evidence (HRE); and that there was no enforceable oral agreement.

Initially, the Board dismisses two of Respondent's arguments. First, Salera plainly did allege a prohibited practice in the Second Amended Complaint related to the alleged repudiation of an oral agreement. Respondent's argument that Salera did not allege a prohibited practice related to this issue is a false allegation, refuted by the plain language of the Second Amended Complaint, Paragraph 96. The Board is unsure of why Respondent would make such an easily disproven allegation.

Second, as Respondent is well-aware, the Board is not bound by the technical rules of evidence. HRS § 91-10; HAR § 12-42-8(g)(8)(A). The Board is required to give effect to the rules of privilege provided by law. HRS § 91-10; HAR § 12-42-8(g)(8)(C). However, while HRE Rule 408 does protect certain settlement communications, Hawai'i does not include this as a "privilege." *See*, HRE Article V. Privileges. Further, even if HRE did apply, HRE Rule 408 permits settlement negotiations to be entered into evidence under certain circumstances.

As discussed above, the wilfullness of Respondent's conduct is an issue of material fact. Therefore, this issue must be determined at a hearing on the merits. *See*, Casupang, 116 Hawaii at 99, 170 P.3d at 350.

The question for the Board then, is whether there was an enforceable agreement which, if repudiated, would constitute a violation of HRS § 89-3. The Board finds there was not.

Salera cites to a number of cases brought under the National Labor Relations Act (NLRA) where oral agreements have been enforced between unions and employers. None of them are factually or legally similar to this case, as both the status of the parties (union and

employer versus employee and employer) and the relevant law (NLRA vs. HRS Chapter 89) are inherently different.

Salera further relates this case to United Public Workers, AFSCME, Local 646, AFL-CIO v. Bernard Akana, Board Case No. CE-01-121, Decision No. 337 (April 27, 1993) (Akana). Akana is not on point.

In Akana, UPW brought a case alleging that the employer committed a prohibited practice with regard to repudiating a grievance settlement agreement. The respondent, citing to Honolulu Police Dep't v. State of Hawaii Org. of Police Officers, Board Case No. CU-12-57, Decision No. 284 (October 20, 1988) (HPD) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-377.pdf), argued that no final, binding agreement had been executed. In both Akana and HPD, the unions and the employers orally agreed to the specific terms of a settlement that would end grievance procedures.

Unlike in Akana and HPD, the alleged oral agreement here was an agreement to attempt to agree—not an agreement that would end the proceedings. Nowhere has Salera alleged that Respondent or his counsel agreed to accept Salera's proposal. The Board cannot order the parties to settle a case; therefore, the Board does not have jurisdiction over any settlement negotiations that take place between the parties.

Further, any settlement negotiations in this case would be dealing with Salera, and Salera alone. Unlike in Akana and HPD, where unions represented their members in the settlement discussions, Salera is not represented in these discussions by UPW. Salera further has no co-complainant.

HRS § 89-3 reads in relevant part:

> Employees shall have the right of self-organization and the right…to engage in lawful, **concerted** activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion…

(Emphasis added).

Here, the settlement discussions between Salera and Respondent affected Salera and no other employees. Only Salera was involved in the discussion, no other employees. Accordingly, Salera's conduct in engaging in the settlement discussions cannot be said to be concerted.

Based on the foregoing, the Board dismisses Count IX in its entirety.

4.8. Pending Circuit Court Case

Respondent asserts that the pending circuit court case of Civil No. 14-1-2655-12 and this prohibited practice complaint are based on the same issues because one of the remaining counts deals with an alleged violation of the right to collectively bargain under Article XIII, Section 2 of the Hawai‘i State Constitution and identifies Kahikina as a Defendant.

The Board is not persuaded by Respondent's allegations. As discussed previously in this case in Order No. 3792, the Board does not have jurisdiction over constitutional claims. The HSC has found that such constitutional analyses are unnecessary for the Board to decide the statutory issues. Hawaii Gov't Emp. Ass'n, AFSCME, Local 152 v. Lingle, 124 Hawai‘i 197, 207, 239 P.3d 1, 11 (2010). Generally, the courts should defer ruling on constitutional issues connected to HRS Chapter 89 questions until the Board rules on the underlying issues. Id. 124 Hawai‘i at 200, 239 P.3d at 4.

Constitutional claims that do not arise from statutory issues under HRS Chapter 89 may be decided without the Board first considering statutory issues. *See, e.g.*, United Pub. Workers AFSCME, Local 646 v. Yogi, 101 Hawai‘i 46, 62 P.3d 189 (2002); *compare with* Hawaii State Teachers Association v. Abercrombie, 126 Hawai‘i 318, 321-22, 271 P.3d 613, 616-17 (2012).

Accordingly, if the circuit court case's constitutional issue does, in fact, arise from an underlying statutory issue, this does not deprive the Board of jurisdiction. On the contrary, the Board would still have jurisdiction based on the doctrine of primary jurisdiction.

Therefore, the Board finds that it has jurisdiction to continue with this case, regardless of what is occurring at the circuit court.

4.9. UPW's Relation to the Case

Respondent argues that UPW must be joined to this case as an indispensable party because UPW represents Salera in pending grievances related to the same disciplinary actions. The Board disagrees.

Neither party disputes that UPW is Salera's exclusive representative or that the disciplinary actions are currently the subject of grievances working their way through the relevant process. However, the Board does not find this relevant to the case at hand.

This case is based on the question of whether Kahikina and/or Yokoyama discriminated and/or retaliated against Salera with the conscious, knowing, and deliberate intent to violate his HRS Chapter 89 rights. Whether the disciplinary actions were taken for "just cause" or not is not central to this case. Even if the disciplinary actions can be defended as being issued for "just cause," Kahikina and/or Yokoyama may still have discriminated and/or retaliated against Salera in violation of HRS Chapter 89.

The Board finds that UPW's absence to this case is not "fatal to the continued prosecution." None of Salera's allegations point to UPW as a party who may have committed a prohibited practice against him.

The only allegations that may be tied to UPW are the alleged violations of HRS § 89-13(a)(8) due to such allegations being tied to the "hybrid case" established in Poe v. Hawaii Labor Relations Board, 105 Hawai'i 96, 101-102, 94 P.3d 652, 656-57 (2004)[vi]. However, even if the Board had not dismissed the alleged violations of HRS § 89-13(a)(8) above, this would not necessitate UPW being joined to this case. An employee may, if they choose, sue only the employer in a hybrid case; however, regardless of whether the union is named as a respondent or not, that employee must still prove a breach of the duty of fair representation. Id., 105 Hawai'i at 102, 94 P.3d at 657.

Following the HSC's logic, UPW is not an indispensable party. UPW has not claimed an interest in this case, and Salera has not brought allegations against UPW. Accordingly, the Board finds that UPW is not an indispensable party and denies Respondent's Motion to Join.

4.10. Discovery

The final issue before the Board is the question of whether or not to allow Respondent to take discovery depositions of Salera and his counsel. The Board finds that Respondent has not established good cause for the depositions and, accordingly, denies the motion.

HAR § 12-42-8(g)(6)(A) allows the Board to permit parties to take deposition in the manner prescribed under the HRCP upon written application and "for good cause shown".

Respondent contends that Salera's declarations raise genuine issues of material fact. However, while Respondent claims to be "entitled to conduct discovery" on those issues of material fact, Respondent has not provided any reasoning as to why Salera cannot simply be called as a witness at the hearing on the merits. Lacking any good cause as to this point, the Board cannot permit such a deposition to be taken.

Further, according to Respondent's motion, the information hoped to be gained through depositions of Salera's counsel all relates to Count IX, which the Board dismissed above. Accordingly, no good cause exists to take their depositions.

Based on the foregoing, the Board denies Respondent's motion for depositions.

4.11. Stay

Respondent orally asked the Board to stay this case pending the outcome of the grievances filed on Salera's behalf related to the the disciplinary actions taken against Salera. The Board denies this request.

As discussed above in Section 4.9, the issues being discussed as to the grievances and the issues being discussed as to this case are not the same. The grievances are focused on questions of whether Respondent violated the CBA. The remaining counts in this case do not involve any allegations about a violation of the CBA. Rather, the remaining counts deal with questions of whether Respondents violated HRS Chapter 89. The Board does not have to stay the inquiry into the statutory questions while the grievances are pending.

Therefore, the Board will move forward with the remaining counts in this case.

5. Order

Based on the above, the Board hereby grants, in part, and denies in part the MTD; denies the MSJ; denies the Motion to Join; and denies the Motion for Discovery. More specifically, the Board dismisses Counts VIII, IX, and X in their entireties and limits the other counts to the events that took place on or after August 4, 2020 (ninety days prior to the filing of the Complaint). The Board further will not join UPW to this action and will not permit Respondent to take depositions of Salera or his counsel. and will proceed to a hearing on the merits on all other counts.

The Board will amend its pretrial order to reflect future dates and deadlines.

DATED: Honolulu, Hawai‘i, October 7, 2021.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Rebecca L. Covert, Esq.
Ernest Nomura, Deputy Corporation Counsel
Kurt Nakamatsu, Deputy Corporation Counsel

[i] HRS § 89-2 Definitions 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)].

[ii] HRS § 89-6(a)(1) defines bargaining unit 1 as, "Nonsupervisory employees in blue collar positions."

[iii] In this capacity, both Yokoyama and Kahikina are Employers within the meaning 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…

[iv] HRS § 89-2 Definitions 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.

[v] It is not clear what individual harm Salera allegedly suffered due to Respondent's alleged failure to comply with the arbitration agreement in Count X; however, due to the standards applicable to a motion to dismiss, the Board will, for the sake of argument, that Salera can articulate an individual injury due to this alleged failure to comply.

[vi] In a "hybrid case", the claims of an employer breaching the collective bargaining agreement and a union breaching the duty of fair representation are "inextricably independent." Poe II, 105 Hawai'i at 102, 94 P.3d at 657.