NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. CAAP-14-0001019

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE MATTER OF STEPHANIE C. STUCKY,
Complainant-Appellant,
v.
DWIGHT TAKENO, HSTA Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA Uniserve Director, and HAWAI'I STATE TEACHERS ASSOCIATION,
Respondents-Appellees,
and
HAWAI'I LABOR RELATIONS BOARD,
State of Hawai'i,
Intervenor-Agency-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 12-1-0704(2)).

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, and Reifurth and Chan, JJ.)

In this appeal arising out of a termination dispute before Intervenor-Agency Appellee Hawaii Labor Relations Board, Complainant-Appellant Stephanie Stucky appeals from the Circuit Court of the Second Circuit's

("Circuit Court")[1] June 27, 2014 Final Judgment in favor of Respondents-Appellees Dwight Takeno, Ray Camacho, Eric Nagamine, David Forrest, and Hawaii State Teachers Association (collectively, "Union"), and the Board. The Final Judgment was entered pursuant to the March 25, 2013 Findings of Fact, Conclusions of Law and Order which affirmed the Board's Order No. 2854 dismissing Stucky's prohibited practices complaint against the Union as moot.

Stucky was a teacher with the State of Hawaii, Department of Education ("DOE"). On May 1, 2009, she was notified of an unsatisfactory performance review and the DOE's intention to terminate her employment. The Union, on behalf of Stucky, filed a Step 2 grievance with the DOE contesting the discharge action (the "Termination Case"). In a decision dated July 13, 2009, the DOE concluded that Stucky was properly terminated. The Union timely notified DOE of its intent to arbitrate the Termination Case on July 15, 2009.

When the Termination Case did not proceed promptly to arbitration, Stucky filed the instant complaint with the Board on October 27, 2009, alleging that Union, in the course of representing her in the Termination Case, failed to maintain their duties in good faith, and committed prohibited practices under Hawaii Revised Statutes ("HRS") section 89-13(b)

[1] The Honorable Peter T. Cahill presided.

("Prohibited Practices Case").[2] Specifically, Stucky alleged that Union failed to commence arbitration in her case in conformance with the timelines established by the Collective Bargaining Agreement ("Agreement").

The Termination Case proceeded to arbitration on May 12, 2010, concluding with an arbitration award vindicating the termination and awarding nothing to Stucky. The arbitration award noted that the parties stipulated that the matter was arbitrable, and that the preliminary steps leading to arbitration had either been met or waived, and the matter was properly before the arbitrator.

On May 21, 2012, Union filed a motion with the Board to dismiss the prohibited practices complaint

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[2] HRS section 89-13(b) provides that:

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
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> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
>
> (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

Haw. Rev. Stat. § 89-13 (Supp. 2008).

because the claim was now moot. The Board agreed and dismissed the complaint in Order No. 2854. Stucky appealed to the Circuit Court, which affirmed the Board's order.

On appeal, Stucky contends that the Circuit Court erred in affirming the Board's dismissal of her complaint as moot, specifically challenging the Circuit Court's affirmation of Findings of Fact ("FOF") 23 and 24 and Conclusions of Law ("COL") 6, 8, 9, 10, and 11 contained in Order No. 2854.[3] Stucky argues that the issue is not moot as the Union's practice is both a matter of public concern and one that is capable of repetition yet evading review.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Stucky's point of error as follows and affirm.

"It is axiomatic that mootness is an issue of subject matter jurisdiction. Whether a court possesses subject

[3] Stucky presumably also challenges the March 25, 2013 Findings of Fact, Conclusions of Law and Order, specifically, FOF 18 (finding that the Circuit Court "cannot state that the Board's Findings of Fact Nos. 23 and 24 . . . were clearly erroneous"), COL 12 (concluding that "given the totality of the record in this particular case and the arbitration that proceeded specifically, the Court cannot say that Board Conclusions of Law Nos. 6 and 8 were wrong under the right-wrong standard"), and COL 18 (concluding that "[t]herefore, the Court cannot say the Board erred as a matter of law in Conclusions of Law Nos. 9 and 10), but makes no argument specific to those FOF or COL.

matter jurisdiction is a question of law reviewable *de novo*." *Cnty. of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 403-04, 235 P.3d 1103, 1115-16 (2010) (emphasis added) (quoting *Hamilton ex rel. Lethem v. Lethem*, 119 Hawai'i 1, 4-5, 193 P.3d 839, 842-43 (2008)). As a preliminary matter, we must determine that Stucky's claim is indeed moot before we consider possible exceptions to the mootness doctrine.

Stucky's claim for relief relate directly to her Termination Case. Stucky demanded that Union cease and desist the alleged prohibited practice, namely failing to conform to the Agreement's timelines. She also demanded that Union bring her termination proceeding to arbitration as soon as possible. Subsequent to filing the complaint, but prior to the hearing in the Prohibited Practices Case, the Termination Case was arbitrated, and Stucky's termination was upheld.

> It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised."

In re Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992) (quoting *Wong v. Bd. of Regents, Univ. of Hawaii*, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980)).

Here, Stucky has already received the relief that she sought in her Prohibited Practices Case. Additionally, as in *Thomas*, the relationship between the parties has been altered, in this case terminated, such that the controversy is no longer alive, and the Board could afford her no meaningful remedy. *See Brownlow v. Schwartz*, 261 U.S. 216, 217-18 (1923) (finding moot a case where "[a]n affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall.") Accordingly, Stucky's claim is moot, and we proceed to consider whether any exceptions apply.

Stucky contends that her complaint represents an exception to the mootness doctrine, in that it is a matter of public interest. In support, she relies upon the fact that the Union represents 13,000 employees.[4] Further, she argues that "a union could provide the arbitration eventually (as in Stucky's case) even though it failed to follow the clear and unambiguous terms regarding timelines to arbitrate."

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[4] Stucky also refers to "[t]he decision of the union to willfully comply or willfully fail to comply with the [Agreement] is an important public policy that must be enforced." She does not subsequently clarify this statement, so it is unclear on what basis she contends that an agreement between an employer and its employees is a matter of public concern.

"When analyzing the public interest exception, this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." *Hamilton*, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (brackets omitted) (quoting *Doe v. Doe*, 116 Hawai'i 323, 327, 172 P.3d 1067, 1071 (2007)). Often, a dispute between a union and a government employer is a matter of public interest. *See State v. Nakanelua*, 134 Hawai'i 489, 503, 345 P.3d 155, 170 (2015) (holding that a dispute between the state and a union representing state employees was public in nature); *accord Kaho'ohanohano v. State*, 114 Hawai'i 302, 333, 162 P.3d 696, 727 (2007) (finding that a dispute fell within the public interest exception because the outcome would impact all state employees).

The nature of the claims and the potential impact on the public and the issues of alleged public interest in this case, however, are significantly different from those in *Nakanelua* or *Kaho'ohanohano.* The supreme court has expanded on this point, stating:

> the cases in this jurisdiction that have applied the public interest exception have focused largely on political or legislative issues that affect a significant number of Hawai'i residents. For example, in *Doe*, we held that the public interest exception applied because it was "in the public's interest for this court to review the family court's ruling that Hawaii's grandparent visitation statute [was] unconstitutional on its face." 116 Hawai'i at 327, 172

> P.3d at 1071. Additionally, in *Kahoʻohanohano v. State*, 114 Hawaiʻi 302, 162 P.3d 696 (2007), this court held that the subject appeal was of a public nature because the outcome would affect all state and county employees. Id. at 333, 162 P.3d at 727. Likewise, in *Right to Know Committee v. City & County of Honolulu*, 117 Hawaiʻi 1, 175 P.3d 111 (App.2007), the ICA held that the question presented was of a public nature because the issue whether the City council must conduct its business in full view of the public and in compliance with the Sunshine Law was more public in nature than private. *Id.* at 9, 175 P.3d at 119. In the instant case, Father has not provided any evidence in the record that the issues presented in his appeal involve political or legislative matters that will affect a significant number of people. Thus, inasmuch as Father's appeal is of a purely personal nature, it fails to meet the first prong of the public interest exception.

Hamilton, 119 Hawaiʻi at 7, 193 P.3d at 845.

In the instant case, Stucky litigates on behalf of herself, rather than as a class representative in a class-action. The right she seeks to enforce and the remedies she pleads are all personal to her. As such, her claims are more like those in *Hamilton* where the remedies are personal in nature. Stucky contends that the fact that the Union represents 13,000 employees implicates the public interest exception, but fails to explain how a private claim alone, even when brought against a sizable employer, implicates a matter of public

interest. Accordingly, Stucky fails to establish application of the public interest exception.

Stucky also argues that her claims are not moot because they are capable of repetition, yet evade review. She argues that "a union could provide the arbitration eventually (as in Stucky's case) even though it failed to follow the clear and unambiguous terms regarding timelines to arbitrate."

> The phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged *governmental action* would evade full review because of the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

Life of the Land v. Burns, 59 Haw. 244, 251, 580 P.2d 405, 409-10 (1978) (emphasis added). Stucky's contention fails for two reasons. First, the Union defendant is not charged with "governmental action." Second, the exception applies specifically to the parties, not to similarly situated hypothetical parties. *See Wong*, 62 Haw. at 396, 616 P.2d at 205 (holding that a student's claim, seeking to enjoin his school from disciplining him, was moot and not within the exception where he was no longer a student and stating, "[t]he controversy between the parties has thus clearly ceased to be definite and concrete and no longer touches the legal relations of parties having adverse legal interest." (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937))); *see also Funbus Sys., Inc. v. State of Cal. Pub.*

Utilities Comm'n., 801 F.2d 1120, 1131 (9th Cir. 1986) (stating that "[t]his exception is applicable, however, only in exceptional situations where the plaintiff can show that *he* will again be subject to the same injury.")

The "capable of repetition, yet evading review" exception requires that the aggrieved party be at risk of receiving the same harm from the same party. *Wong*, 62 Haw. at 396, 616 P.2d at 204-05 (holding that a former student that suffered no enduring harm from an incomplete disciplinary proceeding could not seek declaratory relief because the end of the parties' relationship prevented the possibility of any recurrent harm). Stucky is no longer a member of the Union and does not seek reinstatement. Accordingly, she fails to "show that the subject complained of could 'reasonably be expected to recur' ", *Life of the Land*, 59 Haw. at 252, 580 P.2d at 410 (quoting *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)), and thus fails to establish application of the capable of repetition, yet evading review exception.

Therefore, the June 27, 2014 Final Judgment and the March 25, 2013 Findings of Fact, Conclusions of Law and Order entered in the Circuit Court of the Second Circuit are affirmed.

DATED: Honolulu, Hawai'i, May 25, 2018.

On the briefs:

Shawn A. Luiz for Complainant-Appellant	/s/	Katherine G. Leonard Presiding Judge
Rebecca L. Covert and Herbert R. Takahashi (Takahashi and Covent) for Respondents-Appellees.	/s/	Lawrence M. Reifurth Associate Judge
	/s/	Derrick H.M. Chan Associate Judge

NO. CAAP-14-0001019

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE MATTER OF STEPHANIE C. STUCKY,
Complainant-Appellant,
v.
DWIGHT TAKENO, HSTA Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA Uniserve Director, and HAWAIʻI STATE TEACHERS ASSOCIATION,
Respondents-Appellees,
and

HAWAIʻI LABOR RELATIONS BOARD,
State of Hawaiʻi,
Intervenor-Agency-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 12-1-0704(2))

JUDGMENT ON APPEAL
(By: Reifurth, J., for the courts[1])

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawaii entered on May 25, 2018, the June 27, 2014 Final Judgment and the March 25, 2013 Findings of Fact, Conclusions of Law and Order, both entered in the Circuit Court of the Second Circuit, are affirmed.

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[1] Leonard, Presiding Judge, and Reifurth and Chan, JJ.

DATED: Honolulu, Hawai‘i, September 17, 2018.

FOR THE COURT:

/s/ Lawrence M. Reifurth
Associate Judge

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IN THE CIRCUIT COURT
OF THE SECOND CIRCUIT

STATE OF HAWAII

In the Matter of STEPHANIE C. STUCKY, Complainant-Appellant, vs. DWIGHT TAKENO, HSTA, Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director; ERIC NAGAMINE, HSTA UniServ Director; DAVID FORREST, HSTA UniServ Director; and HAWAII STATE TEACHERS ASSOCIATION, (2009-026) Respondents-Appellees, and HAWAII LABOR RELATIONS BOARD, State of Hawaii, Intervenor-Agency Appellee.	Civil No. 12-1-0704 (2) (Agency Appeal) FINAL JUDGMENT Hearing: Date: January 7, 2013 Time: 9:00 a.m. Judge: Peter T. Cahill

FINAL JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law and Order dated and filed on March 25, 2013 and entered by this Court on March 25, 2013, Hawaii Rules of Civil Procedure Rule 72(k), and *Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 869 P.2d 1334 (1994), it is hereby ordered that Final Judgment is rendered in favor of Respondents-Appellees Dwight Takeno, Ray Camacho, Eric Nagamine, David Forrest, and Hawaii State Teachers Association and Intervenor-Agency Appellee Hawaii Labor Relations Board and against Complainant Appellant Stephanie C. Stucky.

This Final Judgment is entered as to all claims raised by all parties, and it resolves all claims by and against all parties in the above case. All other claims, counterclaims, and cross-claims are dismissed.

DATED: Wailuku, Hawaii, JUN 26 2014

BY THE COURT:

/S/ PETER T. CAHILL (SEAL)
Judge of the above-entitled Court

IN THE CIRCUIT COURT
OF THE SECOND CIRCUIT
STATE OF HAWAII

In the Matter of STEPHANIE C. STUCKY, Complainant-Appellant vs. DWIGHT TAKENO, HSTA, Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director; ERIC NAGAMINE, HSTA UniServ Director; DAVID FORREST, HSTA UniServ Director; and HAWAII STATE TEACHERS ASSOCIATION, (2009-026) Respondents-Appellees and HAWAII LABOR RELATIONS BOARD, State of Hawaii, Intervenor-Agency Appellee	Civil No. 12-1-0704 (2) (Agency Appeal) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Oral Argument on Appeal: Date: January 7, 2013 Time: 9:00 a.m. Judge: Peter T. Cahill

FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an agency appeal challenging the decision of the Hawaii Labor Relations Board Order No. 2854, Order Granting Respondents' Second Motion To Dismiss Complaint, that dismissed the prohibited practice complaint filed by Complainant-Appellant Stephanie

C. Stucky ("Ms. Stucky" or "Appellant") with the Hawaii Labor Relations Board ("HLRB" or "Board") against Respondents-Appellees Dwight Takeno ("Takeno"), HSTA, Interim Executive Director, Ray Camacho ("Camacho"), HSTA Deputy Executive Director; Eric Nagamine ("Nagamine"), HSTA UniServ Director; David Forrest ("Forrest"), HSTA UniServ Director; and Hawaii State Teachers Association (jointly referred to as HSTA or Association).

Appellant filed her notice of appeal to this court on July 16, 2012. On August 1, 2012 the Board moved to intervene in the appeal and on September 11, 2012 the order granting intervention was filed. The Board filed with the court the certified record of the agency proceeding (CROA) on August 1, 2012. HSTA filed their answer to the statement of the case on August 6, 2012. Thereafter the opening brief, answering brief, and reply brief were filed with the Court. On January 7, 2013 counsel for Ms. Stucky and for HSTA appeared before the court for oral argument. HLRB joined in HSTA's answering brief and did not make an appearance at oral argument.

The Court, having examined the record on appeal and considered the arguments of counsel, is satisfied that the HLRB was not clearly erroneous in dismissing the prohibited practice complaint and renders its Findings of Fact, Conclusions of Law, and Order affirming the HLRB's dismissal of the prohibited practice complaint filed by Complainant-Appellant Stephanie C. Stucky.

FINDINGS OF FACT

1. Complainant-Appellant Stephanie C. Stucky was employed by the State of Hawaii, Department of Education as a teacher at a public school on. (CROA 237 ¶ 1, CROA 409 ¶ 5). The matter on appeal arose out of Complainant-Appellant Stephanie C. Stucky's termination from her position as a school teacher employed by the State of Hawaii. (CROA 237 ¶ 1, CROA 409 ¶ 5).

2. Respondent-Appellee Hawaii State Teachers Association (HSTA) is an employee organization which at all relevant times herein was the exclusive representative of the employees in bargaining unit 05 as provided in chapter 89, HRS, in which Appellant was a member prior to her termination. (CROA 409 ¶ 3, CROA 411-12).

3. The Hawaii Labor Relations Board is an agency created pursuant to Sections 26-20, 89-5, and 377-2, HRS.

4. At all relevant times herein, Article V(M) of the collective bargaining agreement between the Department of Education and HSTA covering unit 5 employees including Ms. Stucky, stated in relevant portions:

> Disciplinary actions taken against any teacher shall be for proper cause and shall be subject to the grievance procedure. An expedited grievance procedure shall be used for suspensions or terminations of teachers. The informal discussion and/or Step 1 of the

> grievance procedure shall be waived. (Emphasis added).

(CROA 427).

5. Article V.G(2)(a) of the Agreement established the procedure for selecting an arbitrator as follows:

> 2. Arbitration.
>
> Should the parties not agree to mediation, or if the mediated grievance was not resolved, the grievance timeline shall be reinstated.
>
> a. 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 that the Hawaii Labor Relations Board provide 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.
>
> By mutual agreement, the parties may select a permanent umpire to serve on all cases. (Emphasis added).

(CROA 425).

6. On or about May 1, 2009 the State of Hawaii, Department of Education (DOE) notified Stephanie

Stucky of a decision to terminate her employment due to an "unsatisfactory rating." (CROA 409 ¶ 5; CROA 438).

7. On May 12, 2009 the HSTA filed grievance number M09-17 contesting the discharge action against Ms. Stucky at step 2 of the grievance procedure. (CROA 409 ¶ 6; CROA 439). The grievance was received by DOE on May 12, 2009 by facsimile and by mail on May 14, 2009. (CROA 440). On July 6, 2009 a step 2 meeting was held. (CROA 409 ¶ 7; CROA 441). On July 13, 2009 a step 2 decision denying the grievance was filed by DOE. (CROA 441-50).

8. Article V.G of the unit 5 agreement authorizes the Association to submit a request for arbitration within ten (10) days after receipt of the answer at step 2. (CROA 423). On July 15, 2009 HSTA notified DOE of its intent to proceed to arbitration. (CROA 409 918; CROA 451).

9. On July 29, 2009 Ms. Stucky requested that the HSTA expedite grievance M09-17 to assure the "arbitration decision shall be rendered by the last day of December 2009[.]" (CROA 5).

10. The decision on whether "a case is going to arbitration" as indicated in Article V.G(2)(b) is reserved to the board of directors of the HSTA. (CROA 52-53 ¶9). The board of directors of HSTA authorized the arbitration on September 19, 2009. (CROA 53 ¶9; CROA 96). On September 25, 2009 HSTA notified the DOE of the approval by the Association of arbitration. (CROA 409 ¶8; CROA 452).

11. On November 2, 2009 the Association proposed the name of an individual to serve as the arbitrator and also requested the chairperson of the Hawaii Labor Relations Board for a list of five names from which an arbitrator could be selected. (CROA 53 ¶10; CROA 97-98). Frank Yap Jr. ("Yap") was selected by the parties as the arbitrator from a list provided by the HLRB in the arbitration of the HSTA grievance over Ms. Stucky's termination. (CROA 409 9¶, CROA 453-54, 456).

12. Hearings were held before the arbitrator beginning in May 2010. (CROA 409; CROA 457). Arbitrability was not raised as a defense by the Employer. (*See* CROA 441-50; CROA 473). On January 12, 2011 Arbitrator Yap issued his decision and award that sustained the termination. (CROA 409-10 ¶ 9; CROA 456-89, 489). Having sustained the termination, Arbitrator Yap awarded no remedy on behalf of Ms. Stucky. (CROA 410 ¶ 9; CROA 489).

13. On October 27, 2009 Ms. Stucky filed her complaint with the Hawaii Labor Relations Board. (CROA 1-14). She identified only herself as the complaining party. (CROA 1, 4). She alleged that HSTA beached the duty of fair representation owed to her in willful violation of Sections 89-13(b)(3), (4), and (5), by acting in "bad faith," that caused delay in having her arbitration hearing, causing her emotional distress damages. (CROA 5 ¶17, CROA 603).

14. On November 4, 2009 HSTA filed its first motion to dismiss, or alternatively for summary

judgment. (CROA 30-105, CROA 30-31; CROA 410 ¶11). On March 15, 2012 the Board issued Order No. 2834, Granting in Part and Denying in Part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009. (CROA 235-250, 250; CROA 410 ¶11). With respect to lack of jurisdiction, the Board found it was without jurisdiction to find violations under Chapter 89, HRS for any conduct by Respondents arising prior to July 29, 2009. (CROA 246 ¶12) ("the Board finds that the Complaint was filed on October 27, 2009 and the 90th day prior to the filing of the Complaint is July 29, 2009"). This meant that the Board lacked any jurisdiction over the allegations by Respondents related to Step 2 of the grievance as the Step 2 decision was made on July 13, 2009. (CROA 246 ¶12; CROA 441-50). Ms. Stucky did not timely appeal from Order No. 2834 and it is now final. (Ms. Stucky's opening brief at 2-3, 26).

15. What remained of Ms. Stucky's complaint after HLRB Order No. 2834, was whether HSTA failed to follow its internal complaint procedure and adhere to the contractual timelines after Step 2. (CROA 248-39; CROA 648).

16. On May 21, 2012 HSTA filed Respondents' Second Motion to Dismiss Complaint based on mootness and lack of standing since the arbitrator sustained the grievance and awarded no remedy favorable to Ms. Stucky. (CROA 388-565, 388-39, 391-92).

17. A hearing was held on June 5, 2012 on Respondents' Second Motion to Dismiss Complaint. (Tr.

6/5/12 at 1; CROA 648). On June 18, 2012 the Board issued its Order Granting Respondents' Second Motion to Dismiss Complaint in Order No. 2854. (CROA 647-655, 655).

18. Under the Findings of Fact, Order No. 2854 found that:

> 18. Simultaneous post-arbitration briefs were due on December 24, 2010 and on January 12, 2011, Arbitrator Yap issued his decision and award (Decision) affirming Employer's decision to terminate Stucky's employment based upon her overall unsatisfactory rating. Yap denied Stucky's grievance and remedies sought, thus awarding no remedy on behalf of Stucky. Yap found that counsel for Employer and the UniServ Directors representing HSTA and Stucky "fully and fairly represented their respective clients," and appropriately presented their respective positions at the arbitration hearing and in simultaneous post-arbitration memoranda. In the Decision, Yap noted that the parties "stipulated this matter is arbitrable, that the preliminary steps in the grievance process had either been met or mutually waived, and that this matter is properly before the Arbitrator for disposition. (Emphasis added).
>
> . . . .
>
> 23. Regarding mootness, the Board finds that it no longer has jurisdiction because the

> matter has been arbitrated and Complainant's termination sustained. The matter is now moot.
>
> 24. Assuming, *arguendo*, the issues before the Board are not moot, the Board also finds that Complainant lacks standing to pursue her Complaint after Board Order 2834, because the outcome of the arbitration of the grievance leaves her with no injury in fact. The grievance was submitted to arbitration and was heard by the arbitrator, who issued a decision and award. It is a hypothetical question whether any delay in the submission of the grievance to the arbitrator, as alleged by Stucky, resulted in the negative arbitration award, and a decision by the Board favorable to Stucky would provide no relief for Complainant's alleged injury.

(CROA 652-53). Appellant challenged Findings of Fact Nos. 23 and 24 (but not 18). Based on the record, the Court cannot state that the Board's Findings of Fact Nos. 23 and 24 challenged by Appellant were clearly erroneous.

19. On appeal, Appellant challenged Conclusions of Law Nos. 6, 8, 9, and 10 of Order No. 2854:

> 6. In the instant case, where the pace at which HSTA took the matter to arbitration is the remaining basis of Stucky's complaint, and where the parties proceeded to arbitration which resulted in an award by arbitrator Yap with no remedy or relief to

Complainant, the arbitration award rendered the dispute in this case academic and, therefore, deprives the Board of jurisdiction to hear Stucky's complaint

. . . .

8. In the matter before the Board, the grievance in question went to arbitration and was heard by the arbitrator, who rendered a decision awarding no remedy to Stucky. The arbitrator made no finding that any delay in proceeding from Step 2 of the grievance process to the arbitration prejudiced HSTA's case (in representing Stucky's interests). Instead, the arbitrator found that HSTA's representatives at arbitration were able to "fully and fairly" represent their client, and their position was "appropriately presented at the arbitration hearing." Assuming *arguendo*, the issues before the Board are not moot, the Board concludes that Stucky has failed to show that she sustained an actual or threatened injury as a result of any delay in proceeding to arbitration.

9. Regarding the second prong of the test for standing, the Board concludes that Stucky has not shown any direct injury caused by HSTA not expediting her grievance in the manner she alleges the Unit 05 Agreement requires.

10. The Board also concludes that Stucky does not satisfy the third prong of the test for standing. A decision by the Board

> favorable to Stucky's position would provide no relief for her alleged injury, as the arbitration of her grievance has already been concluded.

(CROA 654-55). The Board concluded that it lacked jurisdiction and granted Respondents' second motion to dismiss. (CROA 655).

20. Ms. Stucky filed a timely appeal to this Court from Order No. 2854.

21. The Board's Order No. 2854 was issued in conformance with Hawaii Revised Statues, Chapters 89, 91, and 377, and the applicable Board rules.

22. For administrative appeals, the applicable standard of review is set forth in HRS § 91-14(g) (2004). Under this section, "administrative findings of fact are reviewed under the clearly erroneous standard, which requires [the circuit court] to sustain its findings unless the court is left with a firm and definite conviction that a mistake has been made. Administrative conclusions of law, however, are reviewed under the de novo standard inasmuch as they are not binding on an appellate court. Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Aloha Care v. Ito*, 126 Hawai'i 326, 341, 271 P.3d 621, 636 (2012).

CONCLUSIONS OF LAW

1. Hawai'i courts and adjudicatory agencies are bound "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *See Mills v. Green*, 159 U.S. 651, 653 (1895); *Castle v. Irwin*, 25 Haw. 786, 792 (1921); *Queen Emma Found. v. Tatibouet*, 123 Hawai'i 500, 506, 236 P.3d 1236, 1242 (App. 2010) ("It is axiomatic that mootness is an issue of subject matter jurisdiction.") (*quoting Hamilton v. Lethem*, 119 Hawaii 1, 4-5, 193 P.3d 839, 842-43 (2008)); *Wong v. Board of Regents. University of Hawaii*, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980); *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987); *Thomas*, 73 Haw. 223, 22526, 832 P.2d 253, 254-55 (1992); *AIG Hawaii Ins. Co. v. Bateman*, 82 Hawaii 453, 923 P.2d 395 (1996). These principles are rooted in constitutional as well as prudential rules of judicial self-governance "founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490.498 (1975).

2. "[A] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal - adverse interest and effective remedy - have been compromised." *Carl Corp. v.*

State Dep't of Educ., 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000).

3. The issue that remained in Ms. Stucky's complaint was whether the pace at which HSTA took the matter to arbitration violated contractual provisions or breached HSTA's duty of fair representation to Appellant, that would be in violation of Section 89-13(b), HRS. The remedial power available to the Hawaii Labor Relations Board if it had found a violation by HSTA under Chapter 89, HRS, was in the nature of a make whole remedy, i.e., "back pay with interest, costs, and attorneys' fees." HRS § 3779 (d); *See also Int'l Bhd. Of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (fashioning the remedy on a breach of the duty of fair representation to compensate the member for the injuries caused by the breach) (decided under Railway Labor Act).

4. Ms. Stucky failed to describe what compensation was needed to "ensure full compensation," for HSTA's conduct. Any lost wages or economic loss to Ms. Stucky, would be in the form of back pay. The arbitrator, however, having sustained the termination, left Ms. Stucky with no basis on which to claim her injury from HSTA's conduct was the loss of back pay. Since the arbitrator found the matter was properly before him and HSTA had acted diligently in presenting its case, nothing in HSTA's conduct caused her the loss of back pay.

5. Appellant was not legally entitled to an award of punitive damages nor civil penalties on her allegations

of a breach of the duty of fair representation and violations under Section 89-13(b). *See* HRS § 377-9(d) (limiting civil penalties to willful or repeated prohibited practices conducted by employees or employers); *See Int'l Bhd. Of Electrical Workers v. Foust*, 442 U.S. at 52; *See also Wilson v. Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen and Helper of Am., AFL-CIO*, 83 F.3d 747, 754-55 (6th Cir. 1996) (*citing Foust, supra*); *Cantrell v. Int'l Bhd. Of Elec. Workers Local 2021*, 32 F.3d 465, 468 (10th Cir. 1994) (*citing Anspach v. Tomkins Industries, Inc.*, 817 F.Supp. 1499, 1516 (D. Kan. 1993). The limitation on damages related to a union's liability "reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." *Faust*, 442 U.S. at 50.

6. The scope of the Board's remedial powers does not include awarding damages for emotional distress. *See* HRS § 377-9(d). Furthermore, Complainant's claim that the complaint needs to be reinstated so she can prove damages for emotional distress was unsupported by the record.

7. The remaining cost to Ms. Stucky, litigating her complaint before the Board, does not create a controversy to avoid mootness. *See Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (refusing to decide the merits of an otherwise moot case simply because litigation costs might be present). *Id.* at 362. Although an older case, the Court's reasoning in *Heitmuller*, *supra*, continues to apply in analyzing whether any further relief

is possible from the court for purposes of deciding whether the case is moot. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994); *Bank of Marin v. England*, 385 U.S. 99, 101 (1966); *Ott v. Boston Edison Co.*, 602 N.E.2d 566, 568 (Mass. 1992) (finding potential for a claim for fees, standing alone, would not justify the court deciding an otherwise moot case).

8. Given the limited scope of remedy, the Board could have issued had it found a breach of the duty of fair representation and violations of Section 89-13(b), HRS, and the fact the matter was arbitrated and resulted in an award with no remedy or relief to the HSTA member, the dispute in this case was rendered academic and therefore deprived the Board of jurisdiction to proceed further in Ms. Stucky's complaint. *See Thomas*, 73 Haw. at 225-26. 832 P.2d at 255 (1992); Wong, 62 Haw. at 394, 616 P.2d at 203-04; *Kona Old Hawaiian Trails Group*, 69 Haw. at 87, 734 P.2d at 165; *Castle v. Irwin*, 25 Haw. 786, 792 (1921); *Ford Motor Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 364, 375 (1939) ("It is elementary that the court is not bound to determine questions which have become academic."). Appellant's case had "lost its character as a present, live controversy". *Kona Old Hawaiian Trails Group, supra*; *Wong*, 69 Haw. at 394, 395, 616 P.2d at 203-04 (To escape the mootness bar, an action "must remain alive throughout the course of litigation" as the court lacks jurisdiction to decide abstract propositions of law); *Carl Corp. v. State, Department of Education*, 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000) (agreeing with

the hearings officer's dismissal of the matter as moot, reasoning that the Library's termination of the subject contract rendered moot the issue of whether the subject contract should be terminated or ratified); *RT Communications, Inc. v. F.C.C.*, 201 F.3d 1264, 1267 (10th Cir. 2000) ("an agency has 'substantial discretion' to decide whether to hear issues which might be precluded by mootness.").

9. The Court concludes that neither exception to mootness apply in this case. The first exception arises when the question involved affects the public interest and an authoritative determination is desirable for the guidance of public officials, satisfying three criteria. *See Okada Trucking Co.. Ltd. v. Bd. Of Water Supply*, 99 Hawai'i 191, 196-97, 53 P.3d 799, 804-05 (2002) (i.e., (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question).

10. The complaint did not present a question of a public nature. While a public school teacher employed by the State of Hawaii Department of Education, Ms. Stucky's prohibited practice complaint alleged only violations by HSTA. The fact that HSTA represents public servants does not necessarily render the dispute public in nature. Any delay in getting the grievance to arbitration affected a private person, appellant, not the public at large.

Since HSTA is not staffed nor run by public officers, no "future guidance of public officers" would be

served by from the Board's further review of her complaint.

As to the third factor, Ms. Stucky showed no evidence that HSTA's actions were more than likely to reoccur claiming merely arguments unsupported by facts or evidence presented in the record. *See Funbus Sys., Inc. v. State of Cal. Publ. Utils. Comm'n*, 801 F.2d 1120, 1131 (9th Cir. 1986) (finding plaintiff had to show likelihood of recurrence to herself, not other persons who may file similar claims in the future). "That other persons may litigate a similar claim does not save a case from mootness." *Sample*, 771 F.2d at 1339. The HSTA may well have 13,000 active members but that does not mean that delays shall, as Appellant argues, undoubtedly occur again. Even if a delay happened again, there is nothing that would indicate there was a pattern or practice of HSTA. Any evidence of deadlines missed was not shown as willful violations, *see* HRS § 89-13(b), since something more had to be pointed out in the record beyond just the dates that were missed.

11. Ms. Stucky's complaint, given the posture of the complaint before HLRB after the arbitration award, did not come within the second exception to the mootness doctrine as the issues were not ones "capable of repetition, yet evading review" involving questions that affect the public interest. *See McCabe Hamilton & Renny, Co. Ltd.*, 98 Hawai'i 107, 117, 43 P.3d 244, 254 (App. 2002). The capable-of-repetition exception applies only in "exceptional situations." *Id.* at 118, 580 P.2d at 255. Ms. Stucky did not show a real likelihood that HSTA in the future would take the same amount

of time to conclude an arbitration. Her request for relief was specific that the "arbitration decision shall be rendered by the last day of December 2009[.]" (CROA 5). The nature of her claim as to future complaints is too speculative to come within the exception. *See McCabe Hamilton & Renny Co., Ltd.*, 98 Hawaii at 119, 43 P.3d at 256 ("Any contention that the precise factual situation underlying this dispute is likely to recur is 'too conjectural for appellate review[.]' ") (*quoting Thomas*, 73 Haw. at 228, 832 P.2d at 255).

When a complaint involves private parties, "the complaining party must show a reasonable expectation that *he* would again be subjected to the same action by the *same* defendant." *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (emphasis added); *Sample v. Johnson*, 771 F.2d 1335, 1339 (9th Cir. 1985) ("Where no class action has been instituted, the capable of repetition doctrine is applied only in exceptional situations where the plaintiff can reasonably show that he will again be subject to the same injury."), *cert. denied*, 475 U.S. 1019 (1986). Limited to proving she comes within the mootness exception specific to herself, Ms. Stucky has not shown in the future she would be subject to "the same action" by HSTA.

12. Therefore, given the totality of the record in this particular case and the arbitration that proceeded specifically, the Court cannot say that Board Conclusions of Law Nos. 6 and 8 were wrong under the right-wrong standard.

13. The Board also did not err in finding Appellant lacked standing under the present posture of the case. If a party lacks standing, "the court is without subject matter jurisdiction to determine the action. *Waters of Life Local School Bd. V. Charter School Review Panel,* 126 Hawai'i 183, 186, 268 P.3d 436, 439 (App. 2011). Similarly, lack of Complainant's standing left the Board without jurisdiction to hear the merits of the complaint.

14. "[T]the crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's remedial powers on his or her behalf." *Fisher v. Grove Farm Co., Inc.*, 123 Hawai'i 82. 113, 230 P.3d 382, 413 (App. 2009) (*quoting Hanabusa v. Lingle*, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008). A party's standing is analyzed under a three part "injury in fact" test of whether: "(1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for a plaintiffs injury." *Keahole Defense Coalition. Inc. v. Bd. of Land and Nat. Resources*, 110 Hawaii 419, 434, 134 P.3d 595, 600 (2006); *See also Corboy v. Louie*, 128 Hawaii 89, 104, 283 P.3d 695, 710 (2011).

15. The Appellant failed to demonstrate that the "injury in fact," was raceable to the challenged action. *See Akan v. Olohana Corp*., 65 Haw. 383, 389, 652 P.2d 1130 (1982); *Mottl v. Miyahira*, 95 Hawai'i 381, 391, 23 P.3d 716, 726 (2001); *Sierra Club v. Hawaii Tourism*

Auth. Ex rel. Bd. Of Dirs., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002) (placing burden on plaintiff arguing for standing). Once the arbitrator sustained the termination and awarded no remedy to the employee, any injury to Ms. Stucky due to HSTA's conduct was hypothetical or abstract. *Corboy*, 128 Hawai'i at 104, 283 P.3d at 710. Stucky was not delayed in receiving any monetary remedy, the arbitrator having sustained the termination and awarded no monetary remedy. *See* CROA 489. The Appellant failed to show any direct injury traceable to HSTA even if it were shown that HSTA did not expedite the grievance. The arbitrator did not base his denial of the grievance on the time in which the matter was presented to him. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (finding mother's argument the failure to prosecute the father caused her to lose payment of support was speculative as remedy was jail time for the father).

16. The Appellant has not shown that any injury she sustained is due to the conduct of the HSTA in processing her grievance to arbitration. *See Kaapu v. Aloha Tower Development Corp.*, 74 Haw. 365, 846 P.2d 882 (1993) (finding complainant in part challenging an agency's selection method for a developer lacked standing in part because "there has been no showing that [alternative selection procedures] would have protected [the plaintiff]'s interests . . . to a greater extent than the RFP system actually utilized."); *Sierra Club*, 100 Hawaii at 256, 59 P.3d at 891 (*citing Kaapu*, 74 Haw. at 392-93, 846 P.2d at 893-94).

17. The Appellant failed to show that any ruling by the Board on the merits of her prohibited practice complaint could have provided her some form of cognizable relief. Appellant suggests that because the HSTA did not follow the procedures set forth in the collective bargaining agreement, some consequence must follow by way of action from the Board not only as an admonition but also an injunction prohibiting HSTA from ever engaging in this type of delay again. Appellant does not cite any specific law that would warrant the Court in finding that the Board wrongly interpreted the law as it applies to this case. Appellant seeks broad statements from the Court and demands actions, none of which stem from any specific injury that she suffered or any damage that she sustained. Section 89-14, HRS, gives the Board exclusive jurisdiction to prohibit willful violations of the collective bargaining agreements, subject to Court review. The Court defers to the agency in these maters, and the agency, with full knowledge of all the facts and the law, including what had specifically occurred in this case, found no need to admonish or enjoin the HSTA.

18. Therefore, the Court cannot say the Board erred as a matter of law in its Conclusions of Law Nos. 9 and 10.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that

the Board Decision No. 2854 is affirmed and the appeal of Ms. Stucky dismissed.

DATED: Wailuku, Hawaii, MAR 25 2013

/S/ PETER T. CAHILL (SEAL)
Judge of the above-entitled Court

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of STEPHANIE C. STUCKY, Complainant, and DWIGHT TAKENO, HSTA, Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director; ERIC NAGAMINE, HSTA UniServ Director; DAVID FORREST, HSTA UniServ Director; and HAWAII STATE TEACHERS ASSOCIATION, Respondents.	CASE NO. CU-05-283 ORDER NO. 2854 ORDER GRANTING RESPONDENTS' SECOND MOTION TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENTS'
SECOND MOTION TO DISMISS COMPLAINT

On October 27, 2009, Complainant STEPHANIE. C. STUCKY (Complainant or Stucky), *pro se*, filed a prohibited practice complaint (Complaint) against the above-named Respondents DWIGHT TAKENO, HSTA, Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA UniServ Director and HAWAII STATE TEACHERS ASSOCIATION (collectively Respondents, HSTA, or Association) with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that Respondents failed to

follow the strict guidelines in the bargaining unit (Unit) 05 collective bargaining agreement (CBA or Agreement) and the union's internal process guidelines for the submission of grievances through to arbitration and thereby breached the duty of fair representation in wilful violation of Hawaii Revised Statutes (HRS) § 89-13(b)(3), (4), and (5) in the handling of her termination grievance.

On March 15, 2012, the Board issued Order No. 2834, Granting in Part and Denying in Part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009. The Board concluded that it lacked jurisdiction over alleged prohibited practices occurring before July 29, 2009, and accordingly the Board dismissed Complainant's allegations regarding Step 2 of the grievance process. The Board also concluded that Complainant failed to state a claim for relief for a FIRS § 89-13(b)(3) violation.

Complainant's remaining allegation after Order No. 2834 in this matter was her allegation of prohibited practices regarding her request for arbitration. The remaining issue was whether HSTA failed to follow its internal complaint procedure and adhere to the contractual timelines after Step 2 of the grievance process.

On May 21, 2012, Respondents filed Respondents' Second Motion to Dismiss Complaint, moving to dismiss the Complaint for mootness, and, alternatively, for lack of standing.

On May 24, 2012, Complainant filed Complainant's Memorandum in Opposition to Respondents' Second Motion to Dismiss Complaint filed May 21, 2012.

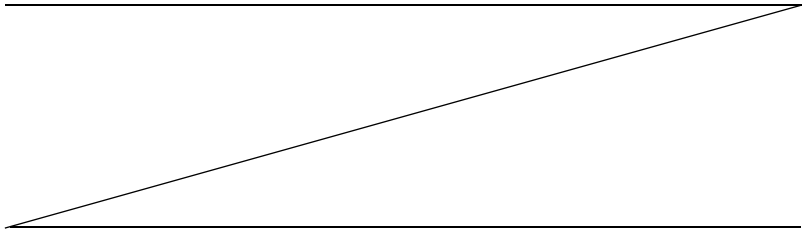
On May 24, 2012, the Board issued a Notice of Hearing on Respondents' Second Motion to Dismiss Complaint filed May 21, 2012, notifying the parties that the Board had scheduled a hearing for June 5, 2012 at 9:00 a.m.

On June 5, 2012, the Board held a hearing on Respondents' Second Motion to Dismiss Complaint filed on May 21, 2012, in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), with Complainant appearing by telephone.

After careful consideration of the arguments, record, and filings in this case, the Board grants Respondents' Second Motion to Dismiss Complaint.

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.



1. At all relevant times, Complainant Stucky was a teacher and a public employee within the meaning of HRS § 89-2[1] and a member of BU 05[2] and Respondent HSTA.

2. At all relevant times, Respondent HSTA was an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2[3], of employees included in BU 05.

3. At all relevant times, Respondent DWIGHT TAKENO (Takeno) was the Interim Executive Director of HSTA.

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[1] HRS § 89-2, as amended, provides in pertinent part:

> "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)].

[2] Pursuant to HRS § 89-6(a), governing appropriate bargaining units, bargaining unit (BU) 05 consists of "[t]eachers 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[.]

[3] HRS § 89-2 provides in part as follows:

> "Employee organization" means any organization of any kind in which public employees participate and which exist for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

4. At all relevant times, Respondent RAY CAMACHO (Camacho) was the Deputy Executive Director of HSTA.

5. At all relevant times, Respondent ERIC NAGAMINE (Nagamine) was the Maui UniServ Director of HSTA.

6. At all relevant times, Respondent DAVID REST (Forrest) was a UniServ Director of HSTA.

7. HSTA and the Department of Education State of Hawaii (DOE or Employer) have been parties to at least 15 successive collective bargaining agreements. In the present case, the relevant agreement covers the period July 1, 2007 to June 30, 2009.

8. On or about May 1, 2009, DOE, Complainant's employer, notified Complainant of its decision to terminate her employment due to an "unsatisfactory rating."

9. On May 12, 2009, HSTA filed a grievance contesting the discharge action against Stucky at Step 2 of the grievance procedure under the CBA.[4]

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[4] Article V(M) of the CBA states in pertinent part:

> Disciplinary actions taken against any teacher shall be for proper cause and shall be subject to the grievance procedure. An expedited grievance procedure shall be used for suspensions or termination of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

10. On July 6, 2009, a Step 2 meeting was held, and on July 13, 2009 a Step 2 decision denying the grievance and finding Stucky was properly discharged from employment was filed by DOE.

11. On July 15, 2009, HSTA notified DOE of its intent to proceed to arbitration.

12. Article V(G) of the 2007-2009 CBA authorizes HSTA to request mediation or arbitration as follows:

MEDIATION/ARBITRATION

If a claim by the Association or teacher that there has been a violation, misinterpretation or misapplication of this Agreement is not satisfactorily resolved at Step 2, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2.

However, a grievance may be submitted to mediation after the Association has submitted its request to Arbitration.

* * *

2. ARBITRATION

Should the parties not agree to mediation, or if the mediated grievance was not resolved, the grievance timeline shall be reinstated.

a. 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 that the Hawaii Labor Relations Board provide 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.

By mutual agreement, the parties may select a permanent umpire to serve on all cases.

13. In a Declaration filed in this matter dated November 3, 2009, HSTA President Wilfred Okabe stated that in accordance with internal HSTA procedure, the board of directors (BOD) of the Association must approve the arbitration of grievances, and the BOD acts on the basis of a recommendation from the executive director.

14. A recommendation to arbitrate was submitted to the Association's BOD by the executive director and approved at a BOD meeting on September 19, 2009.

15. By letter dated September 25, 2009, Respondent Camacho informed Susan La Vine, Labor Relations, DOE, that HSTA's BOD approved Complainant's grievance M-09-17 for arbitration.

16. On October 27, 2009, Stucky filed the instant complaint with the Board, alleging, *inter alia*,

that HSTA breached the "duty of fair representation" by acting in "bad faith" in the implementation of Article V of the CBA, specifically regarding the process of taking a grievance through Step 2, and to Arbitration. Complainant contended that by not following the strict guidelines in the CBA and internal process guidelines for the submission of grievances through to arbitration, HSTA had committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5).

17. In a declaration dated June 1, 2010, Nagamine stated that the parties selected Frank Yap Jr. (Yap) as the arbitrator for Stucky's grievance over her termination, and hearings were held beginning May 12, 2010.

18. Simultaneous post-arbitration briefs were due on December 24, 2010, and on January 12, 2011, Arbitrator Yap issued his decision and award (Decision) affirming Employer's decision to terminate Stucky's employment based upon her overall unsatisfactory rating. Yap denied Stucky's grievance and remedies sought, thus awarding no remedy on behalf of Stucky. Yap found that counsel for Employer and the UniServ Directors representing HSTA and Stucky "fully and fairly represented their clients" and appropriately presented their respective positions at the arbitration hearing and in simultaneous post-arbitration memoranda. In the Decision, Yap noted that the parties "stipulated this matter is arbitrable, that the preliminary steps in the grievance process had either been met or mutually waived, and

that this matter is properly before the Arbitrator for disposition."

19. On or about January 18, 2011, Stucky was notified of the Decision, and on or about January 22, 2011, a copy of the Decision was provided to Stucky.

20. On November 4, 2009, HSTA filed a motion to dismiss or alternatively for summary judgment of Stucky's October 27, 2009 Complaint.

21. On March 15, 2012, the Board issued Order No. 2834, Granting in Part and Denying in Part Respondents' Motion to Dismiss Complaint and in the Alternative for Summary Judgment, filed on November 4, 2009. In the Order, the Board concluded that it lacked jurisdiction over alleged prohibited practices occurring prior to July 29, 2009 and, accordingly, dismissed Complainant's allegations regarding Step 2 of the grievance. Complainant's allegation of prohibited practices regarding her request for arbitration remained, as the Board found that there are issues of material fact regarding HSTA's internal complaint procedure and adherence to contractual timelines.

22. On May 21, 2012, on the remaining issue of whether HSTA followed its procedures to secure an expedited arbitration after the DOE's Step 2 denial of the grievance, HSTA filed Respondents' Second Motion to Dismiss Complaint, moving to dismiss Stucky's Complaint for mootness and alternatively, for lack of standing.

23. Regarding mootness, the Board finds that it no longer has jurisdiction because the matter has been arbitrated and Complainant's termination sustained. The matter is now moot.

24. Assuming *arguendo*, the issues before the Board are not moot, the Board also finds that Complainant lacks standing to pursue her Complaint after Board Order 2834, because the outcome of the arbitration of the grievance leaves her with no injury in fact. The grievance was submitted to arbitration and was heard by the arbitrator, who issued a decision and award. It is a hypothetical question whether any delay in the submission of the grievance to the arbitrator, as alleged by Stucky, resulted in the negative arbitration award, and a decision by the Board favorable to Stucky would provide no relief for Complainant's alleged injury.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. The Board has jurisdiction over the instant complaint pursuant to HRS § 895 and 8944.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears

beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. *See Yamane v. Pohlson*, 111 Hawaii. 74, 81, 137 P.3d 980, 987 (2006) (citing *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

3. However, when considering a motion to dismiss pursuant to Hawaii Rules of Civil Procedure, Rule 12(b)(1) the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual issues concerning the existence of jurisdiction. *Id.* (citing *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & Miller, *Federal Practice and Procedure* § 1350, at 213 (1990).

4. Mootness is an issue of subject matter jurisdiction. *Queen Emma Foundation v. Tatibouet*, 123 Hawai'i 500, 506, 236 P.3d 1236, 1242 (App. 2010) (quoting *Hamilton v. Lethem*, 119 Hawaii 1, 4-5, 193 P.3d 839, 84243 (2008)), and "courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so." *Id.*

5. In *Last v. United Public Workers, AFSCME, Local 646, AFL-CIO*, Order No. 1318 at 3, CU-01-117 (Apr. 11, 1996) (App. 2) (stating the doctrine applies to quasi-judicial tribunals), the Board held as follow:

> [A] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where

"events . . . have so affected the relations between the parties that the two conditions of justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.

6. In the instant case, where the pace at which HSTA took the matter to arbitration is the remaining basis of Stucky's complaint, and where the parties proceeded to arbitration which resulted in an award by arbitrator Yap with no remedy or relief to Complainant, the arbitration award rendered the dispute in this case academic and, therefore, deprives the Board of jurisdiction to hear Stucky's complaint. Stucky's case is moot, as it has "lost its character as a present, live controversy." *See Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987). The two conditions of justiciability, which are adverse interest and remedy, no longer exist. In addition, the Board finds no evidence that the factual situation between Stucky and HSTA will arise again to warrant a future review by the Board of the mootness issue, as the arbitrator has already heard and decided this case.

7. A party seeking relief for the Board must have standing to bring a complaint on which basis he or she seeks relief. Whether a party has standing is analyzed under a three part "injury in fact" test: "(1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and

3) a favorable decision would likely provide relief for a plaintiffs injury." *See Keahole Defense Coalition, Inc. v. Bd. of Land and Natural Resources*, 110 Hawaii 419, 434, 134 P.3d 595, 600 (2006). The party seeking the standing must satisfy all three prongs of the standing test.

8. In the matter before the Board, the grievance in question went to arbitration and was heard by the arbitrator, who rendered a decision awarding no remedy to Stucky. The arbitrator made no finding that any delay in proceeding from Step 2 of the grievance process to the arbitration prejudiced HSTA's case (in representing Stucky's interests). instead, the arbitrator found that HSTA's representatives at arbitration were able to "fully and fairly" represent their client, and their position was "appropriately represented at the arbitration hearing." Assuming *arguendo*, the issues before the Board are not moot, the Board concludes that Stucky has failed to show that she sustained an actual or threatened injury as a result of any delay in proceeding to arbitration.

9. Regarding the second prong of the test for standing, the Board concludes that Stucky has not shown any direct injury caused by HSTA not expediting her grievance in the manner she alleges the Unit 05 Agreement requires.

10. The Board also concludes that Stucky does not satisfy the third prong of the test for standing. A decision by the Board favorable to

Stucky's position would provide no relief for her alleged injury, as the arbitration of her grievance has already been concluded.

11. Based on the foregoing and construing Complainant's allegations in the light most favorable to her, the Board concludes that it lacks jurisdiction and therefore grants Respondents' Second Motion to Dismiss Complaint.

ORDER

For the reasons discussed above, the Board hereby grants Respondents' Second Motion to Dismiss Complaint filed on May 21, 2012.

DATED: Honolulu, Hawaii, June 18, 2012 .

HAWAII LABOR
RELATIONS BOARD

/s/ James B. Nicholson
JAMES B. NICHOLSON, Chair

/s/ Sesnita A. D. Moepono
SESNITA A. D. MOEPONO, Member

/s/ Rock B. Ley
ROCK B. LEY, Member

Copies sent to:

Stephanie C. Stucky
Herbert R. Takahashi, Esq.

SCWC-14-0001019

IN THE SUPREME COURT
OF THE STATE OF HAWAIʻI

IN THE MATTER OF STEPHANIE C. STUCKY,
Petitioner/Complainant-Appellant,

v.

DWIGHT TAKENO, HSTA Interim Executive Director, RAY CAMACHO, HSTA Deputy Executive Director, ERIC NAGAMINE, HSTA UniServ Director, DAVID FORREST, HSTA UniServ Director, and HAWAIʻI STATE TEACHERS ASSOCIATION,
Respondents/Respondents-Appellees

and

HAWAIʻI LABOR RELATIONS BOARD,
State of Hawaiʻi,
Respondent/Intervenor-Agency Appellee.

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CAAP-l4-0001019; CIVIL NO. 12-1-0704(2))

ORDER REJECTING APPLICATION
FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Petitioner/Complainant-Applicant Stephanie C. Stucky's application for writ of certiorari filed on October 17, 2018, is hereby rejected.

DATED: Honolulu, Hawai‘i, November 26, 2018.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna [SEAL]

/s/ Richard W. Pollack

/s/ Michael D. Wilson

Constitution of United States of America, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of United States of America, Amendment XIV provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
