No. 25-

IN THE

Supreme Court of the United States

VALERIE ASATO,

Petitioner,

v.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION AND DEPARTMENT OF EDUCATION, STATE OF HAWAII,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI

SHAWN A. LUIZ
Counsel of Record
733 Bishop Street
Suite 1280
Honolulu, HI 96813
(808) 538-0500
attorneyluiz@gmail.com

Counsel for Petitioner

120719

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Hawaii Government Employees Association ("HGEA") breached its duty of fair representation under federal and state labor law by engaging in arbitrary, discriminatory, retaliatory, and bad-faith conduct during the grievance and arbitration process, including hostile actions against Petitioner for filing a prior prohibited practice complaint.

2. Whether the State of Hawaii Department of Education ("DOE") violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Hawaii Constitution by relying on evidence obtained through an unconstitutional and unauthorized search of Petitioner's work computer to justify her termination.

3. Whether the Hawaii Labor Relations Board, the Circuit Court of the First Circuit, and the Intermediate Court of Appeals erred in dismissing Petitioner's claims without addressing the constitutional violations and procedural errors central to this case, as required by Haw. Rev. Stat. § 91-14(g)(1).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner:

Valerie Asato, a former Office Assistant III employed by the Department of Education, State of Hawaii.

Respondents:

1. Hawaii Government Employees Association (HGEA), the exclusive bargaining representative for Bargaining Unit 3 employees.

2. Department of Education, State of Hawaii (DOE), the petitioner's former employer.

RELATED CASES

The following proceedings are directly related to this case:

1. ***Supreme Court of the State of Hawaii.*** *Order Rejecting Application for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii, dated July 18, 2025. The order is unreported and is reproduced in the Appendix at* ***Appendix F****.*

2. ***Intermediate Court of Appeals of the State of Hawaii.*** *Memorandum Opinion, dated February 14, 2025, affirming the judgment of the Circuit Court of the First Circuit. The opinion is unpublished and is reproduced in the Appendix at* ***Appendix A****.*

3. ***Intermediate Court of Appeals of the State of Hawaii.*** *Judgment on Appeal, dated March 18, 2025. The judgment is reproduced in the Appendix at* ***Appendix B****.*

4. ***Circuit Court of the First Circuit, State of Hawaii.*** *Findings of Fact, Conclusions of Law, and Order Denying Appellant Valerie Asato's Agency Appeal, dated April 18, 2022. The order is reproduced in the Appendix at* ***Appendix C****.*

5. ***Circuit Court of the First Circuit, State of Hawaii.*** *Final Judgment, dated May 13, 2022. The judgment is reproduced in the Appendix at* ***Appendix D****.*

6. ***Hawaii Labor Relations Board.*** *Findings of Fact, Conclusions of Law, Decision and Order, dated May 5, 2021. The decision is reproduced in the Appendix at* ***Appendix E****.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Valerie Asato ("Asato"), Complainant before the State of Hawaii Labor Relations Board, Plaintiff-Appellant before the Circuit Court of the First Circuit of the State of Hawaii, Complainant-Appellant/Appellant before the Intermediate Court of Appeals of the State of Hawaii, and Petitioner/Complainant-Appellant/Appellant, before the Supreme Court of the State of Hawaii, respectfully submits this petition for a Writ of Certiorari seeking review of the judgment rendered by the Supreme Court of the State of Hawaii in the present matter.

OPINIONS BELOW

The order of the Supreme Court of the State of Hawaii rejecting petitioner's application for a writ of certiorari to the Intermediate Court of Appeals, entered on July 18, 2025, is unreported and reproduced in the Appendix at **Appendix F**. The memorandum opinion of the Intermediate Court of Appeals of the State of Hawaii, entered on February 14, 2025, affirming the judgment of the Circuit Court of the First Circuit, is unpublished and reproduced in the Appendix at **Appendix A**. The judgment of the Intermediate Court of Appeals of the State of Hawaii, entered on March 18, 2025, is reproduced in the Appendix at **Appendix B**. The *Findings of Fact, Conclusions of Law, and Order Denying Appellant Valerie Asato's Agency Appeal* of the Circuit Court of the First Circuit, entered on April 18, 2022, is reproduced in the Appendix at **Appendix C**. The final judgment of the Circuit Court of the First Circuit, entered on May 13, 2022, is reproduced in the Appendix at **Appendix D**.

The Findings of Fact, Conclusions of Law, Decision and Order, of the ***Hawaii Labor Relations Board,*** *dated May 5, 2021, is reproduced in the Appendix at* ***Appendix E****.*

JURISDICTION

On July 18, 2025, the Supreme Court of the State of Hawaii entered its order denying Petitioner's Application for a Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii. Submission of the Petition to the Supreme Court will be considered timely if filed no later than October 16, 2025. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. Section 1257(a) and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourth Amendment to the United States Constitution

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Article I, Section 7 of the Hawaii Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects

against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."

3. Hawaii Revised Statutes 91-14(g)(1):

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency…

…(g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because

> the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;

4. **Haw. Rev. Stat. § 89-13(b)(1)**

> **§89-13 Prohibited practices; evidence of bad faith....**
>
> …(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; …

PRELIMINARY STATEMENT

This case presents fundamental constitutional and statutory questions about the scope of public employees' rights, the limits of governmental authority in workplace investigations, and the duty of labor organizations to fairly represent their members.

The courts below failed to address the unconstitutional search that precipitated Petitioner's termination, disregarded clear evidence of union misconduct, and declined to apply the mandatory judicial review standards required by state law. These failures erode core Fourth Amendment protections, undermine the integrity of the collective bargaining process, and, if left unreviewed, will leave millions of public employees

vulnerable to similar deprivations of their constitutional and statutory rights.

QUESTIONS PRESENTED

1. Whether the Hawaii Government Employees Association ("HGEA") breached its duty of fair representation under federal and state labor law by engaging in arbitrary, discriminatory, retaliatory, and bad-faith conduct during the grievance and arbitration process, including hostile actions against Petitioner for filing a prior prohibited practice complaint.

2. Whether the State of Hawaii Department of Education ("DOE") violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Hawaii Constitution by relying on evidence obtained through an unconstitutional and unauthorized search of Petitioner's work computer to justify her termination.

3. Whether the Hawaii Labor Relations Board, the Circuit Court of the First Circuit, and the Intermediate Court of Appeals erred in dismissing Petitioner's claims without addressing the constitutional violations and procedural errors central to this case, as required by Haw. Rev. Stat. § 91-14(g)(1).

REASONS WHY THE QUESTIONS PRESENTED ARE IMPORTANT

This case presents an urgent need for clarification of two recurring issues: The scope of the Fourth Amendment and the duty of fair representation under state and federal labor laws.

The lower courts failed to address Petitioner's Fourth Amendment claim, asserting that the Hawaii Labor Relations Board lacked jurisdiction to consider constitutional issues. This raises a critical question about the ability of state administrative bodies to adjudicate constitutional claims arising in the context of labor disputes.

The DOE relied on evidence obtained through an unconstitutional search of Petitioner's work computer to justify her termination. Under the Fourth Amendment, a search conducted without a warrant is presumptively unreasonable unless it falls within a recognized exception.

In this case:

- Petitioner's coworkers accessed her computer without her consent or authority and while Petitioner was absent from work that day.

- The DOE ratified this unconstitutional search by using the unlawfully obtained evidence in its termination decision.

The exclusionary rule, which serves to deter constitutional violations, must apply to employment termination proceedings to ensure that evidence obtained through unconstitutional means is inadmissible.

Moreover, lower courts and administrative bodies continue to improperly apply the holding in *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), in active cases throughout the country, making it virtually impossible for an employee

to prove a breach of the duty of fair representation despite sufficient evidence in the record supporting perfunctory and arbitrary actions of unions in processing union members' meritorious union grievances. The courts and administrative agency below improperly applied the standard for evaluating a union's duty of fair representation. The Ninth Circuit has held that a unions conduct is arbitrary when it lacks a rational basis and prejudices the employee's interests. See *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, (9th Cir. 1978).

STATEMENT OF THE CASE

I. Factual Background

Employment and Termination.

Petitioner Valerie Asato was employed as an Office Assistant III at Farrington High School under the State of Hawaii Department of Education ("DOE"). On August 16, 2012, without her knowledge or consent, and while she was absent from the workplace, coworkers accessed her work computer and discovered private email communications. Relying on this unlawfully obtained evidence, DOE terminated Petitioner's employment on December 28, 2012.

Unconstitutional Search and Use of Illegally Obtained Evidence.

The coworkers had neither actual nor apparent authority to access Petitioner's computer. The DOE subsequently ratified this unconstitutional intrusion by

relying on the evidence obtained to justify termination, an action presumptively unreasonable under the Fourth Amendment and Article I, Section 7 of the Hawaii Constitution.

Grievance and Arbitration.

Petitioner, a member of HGEA, filed a grievance under the collective bargaining agreement ("CBA"). HGEA's representation was marked by hostility, retaliation, and neglect. Its appointed attorney, Peter Trask, demeaned Petitioner, made threats ("I'll tear your ass apart on the stand"), belittled her case, and failed to raise fundamental constitutional objections. The arbitrator ultimately upheld DOE's termination decision in December 2018.

Prohibited Practice Complaints.

Petitioner filed two prohibited practice complaints with the Hawaii Labor Relations Board ("HLRB"), alleging HGEA breached its duty of fair representation and DOE violated her constitutional rights. The HLRB dismissed the complaints. The Circuit Court and the Intermediate Court of Appeals affirmed, and the Hawaii Supreme Court denied discretionary review on July 18, 2025.

SUMMARY OF ARGUMENT

This case presents urgent and recurring constitutional and statutory questions that demand this Court's review. At its core, the State of Hawaii terminated Petitioner's employment based on evidence obtained through an unauthorized, warrantless search of her workplace

computer, a clear violation of the Fourth Amendment and Article I, Section 7 of the Hawaii Constitution. Instead of addressing this foundational constitutional question, state administrative bodies and courts refused even to consider it, holding that they lacked jurisdiction. This abdication of judicial responsibility directly conflicts with Haw. Rev. Stat. § 91-14(g)(1), which mandates review of administrative actions that violate constitutional provisions.

Equally troubling, the union charged with representing Petitioner, the Hawaii Government Employees Association (HGEA), breached its duty of fair representation through conduct that was arbitrary, retaliatory, and in bad faith. HGEA's appointed counsel demeaned Petitioner, undermined her case, failed to raise critical constitutional defenses, and exhibited open hostility toward her for asserting her rights. The courts below failed to apply this Court's binding precedents, including *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), which make clear that such conduct violates the statutory duty of fair representation. See also *Margetta* v. *Pam Pam Corp.,* 501 F. 2d 179, 180 (9th Cir. 1974): "To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trial to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation."

These errors are not confined to the facts of this case. They implicate questions of nationwide significance regarding the balance between employee privacy and government power in the digital workplace, the role of

state agencies and courts in safeguarding constitutional rights, and the extent of union accountability under federal and state labor law. If left unreviewed, the decisions below will embolden public employers to rely on illegally obtained evidence, allow unions to escape scrutiny for retaliatory conduct, and deprive employees of the judicial protection that both the Constitution and state law guarantee.

This Court's intervention is necessary to resolve these conflicts, vindicate fundamental constitutional protections, and reaffirm the principles of fairness, due process, and accountability that lie at the heart of both the Fourth Amendment and the duty of fair representation.

REASONS FOR GRANTING THE WRIT

This case squarely presents fundamental constitutional and statutory issues of exceptional national importance that have been left unresolved by the lower courts. It involves the government's reliance on illegally obtained evidence to terminate a public employee, the abdication of judicial responsibility to review constitutional violations as required by state law, and the erosion of the duty of fair representation owed by unions to their members. Each of these issues independently warrants this Court's review. Taken together, they reveal a systemic breakdown in the protections designed to safeguard individual liberty, workplace privacy, and collective bargaining integrity.

The decision below permits state employers to circumvent the Fourth Amendment by adopting the fruits of unauthorized private searches, empowers unions to retaliate against their own members without meaningful accountability, and allows state courts to sidestep their

statutory duty to review agency actions that violate constitutional rights. If left uncorrected, these rulings will set a dangerous precedent with sweeping implications for public employees, constitutional governance, and labor relations nationwide. Supreme Court review is essential to restore the proper balance between governmental power and individual rights and to reaffirm the bedrock constitutional principles at stake.

I. The DOE's Reliance on Evidence from an Unconstitutional Search Presents a Critical Fourth Amendment Question of National Importance.

The Fourth Amendment's prohibition against unreasonable searches and seizures is a cornerstone of American liberty. This Court has repeatedly held that warrantless searches are presumptively unreasonable absent a recognized exception. *Katz v. United States*, 389 U.S. 347 (1967); *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987)("On the basis of this undisputed evidence, we accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets[]"), citing *Gillard* v. *Schmidt*, 579 F.2d 825, 829 (3rd Cir. 1978); *United States* v. *Speights*, 557 F.2d 362 (3rd Cir. 1977); *United States* v. *Blok*, 88 U. S. App. D. C. 326, 188 F.2d 1019 (1951).

Here, Petitioner's coworkers conducted a private search without authority and while Petitioner was absent from the workplace, and the DOE, a state actor, adopted and relied upon the fruits of that unlawful search to terminate her. This case implicates a question of national importance: whether public employers may constitutionally sanction employees based on unlawfully obtained evidence from private parties acting without authority.

The decision below effectively sanctions government ratification of unconstitutional conduct and erodes established privacy protections in the digital workplace. Review is urgently needed to reaffirm that public employers cannot circumvent constitutional constraints by exploiting the misconduct of private actors.

II. The Lower Courts' Refusal to Address the Constitutional Claims Conflicts with Statutory Mandates and Due Process Principles.

Haw. Rev. Stat. § 91-14(g)(1) requires courts reviewing agency actions to reverse or modify decisions that violate constitutional provisions. Despite this clear statutory directive, every tribunal below, the HLRB, Circuit Court, and ICA, refused to address the central Fourth Amendment issue to this case, claiming lack of jurisdiction. This abdication of judicial responsibility conflicts with fundamental due process principles and the plain text of the statute.

This abdication of judicial responsibility conflicts with fundamental due process principles and the plain text of the statute. Such avoidance creates a dangerous precedent: constitutional violations in administrative proceedings could go unremedied simply because an agency declines to adjudicate them. This Court's review is necessary to restore the proper balance of judicial review and ensure that state courts do not insulate constitutional violations from scrutiny.

The refusal of state administrative bodies and courts to address constitutional violations despite statutory mandates creates a systemic problem that undermines

the rule of law. This case presents an urgent need for clarification regarding the ability of state administrative bodies to adjudicate constitutional claims arising in the context of labor disputes.

III. HGEA's Conduct Breached Its Duty of Fair Representation Under Federal Labor Law Precedents.

A union breaches its duty of fair representation when its conduct toward a member is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

HGEA's conduct meets this standard in every respect. Its counsel demeaned and threatened Petitioner, sabotaged her confidence, ignored critical constitutional defenses, and processed her grievance in a perfunctory manner. Such conduct, far from being a mere error in judgment, reflects reckless disregard for Petitioner's rights, conduct courts have consistently held to be arbitrary. *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975).

HGEA's conduct during the arbitration process demonstrates a clear breach of its duty of fair representation. Attorney Peter Trask's demeaning comments to Asato, including statements undermining her case and personal attacks, constitute arbitrary conduct that lacks any rational basis.

Arbitrary conduct is not limited to intentional misconduct. Acts of omission by union officials may

be arbitrary if they reflect "reckless disregard for the rights of the individual employee" and "severely prejudice the injured employee". Trask's failure to raise critical constitutional arguments, particularly the Fourth Amendment violation, despite their clear relevance to Asato's defense, demonstrates such reckless disregard.

The lower courts' cursory treatment of these claims conflicts with *Vaca* and its progeny, effectively insulating unions from accountability for hostile and retaliatory behavior. Review is warranted to reaffirm that union representation must be faithful, competent, and free from discrimination or retaliation.

The failure to adequately prepare for arbitration and the hostile treatment of Asato during the process prejudiced her ability to present her case effectively. This conduct falls well below the minimum standards of fairness required under the duty of fair representation.

The record demonstrates that HGEA's conduct toward Petitioner was arbitrary, discriminatory, and in bad faith. HGEA's appointed attorney demeaned Petitioner, made threats against her, belittled her case, and failed to raise fundamental constitutional objections during the arbitration process. This conduct falls squarely within the prohibited categories established by federal precedent.

The union's hostile actions against Petitioner for filing a prior prohibited practice complaint constitute retaliatory conduct that violates the statutory obligation to serve the interests of all members without hostility or discrimination. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). Such conduct demonstrates a failure to

exercise discretion with complete good faith and honesty, constituting arbitrary conduct prohibited under federal labor law.

The lower courts' cursory treatment of the duty of fair representation claims conflicts with established federal precedent and effectively insulates unions from accountability for hostile and retaliatory behavior. This misapplication of federal labor law standards creates uncertainty for employees and unions nationwide.

IV. The Questions Presented Have Broad National Significance.

This case transcends a single employment dispute. It concerns the constitutional rights of millions of public employees, the limits of governmental surveillance and search in the digital age, and the fundamental obligations of labor organizations.

Left undisturbed, the decisions below will embolden public employers to exploit unlawfully obtained evidence, weaken judicial oversight of constitutional violations, and lower the standards of union accountability. Only this Court's intervention can ensure that constitutional protections remain robust in the modern workplace and that unions remain faithful stewards of their members' rights.

The decisions below undermine fundamental Fourth Amendment protections, misapply federal labor law standards, and create dangerous precedents that threaten the constitutional rights of public employees nationwide. The government's reliance on unlawfully obtained

evidence, combined with a union's breach of its duty of fair representation and the judiciary's refusal to address clear constitutional violations, represents a systemic failure that demands this Court's intervention.

V. This Case Presents an Important Question Warranting Supreme Court Review.

This case raises questions of exceptional importance. The lower court's rulings undermine the validity of the Fourth Amendment in Government Employee cases, misapplies this Court's precedent and creates uncertainty for employees and unions alike. Only this Court can provide the clarity necessary to ensure unform application of the law nationwide.

This case presents critical questions about constitutional protections in public employment and union accountability that warrant this Court's review.

CONCLUSION

This case presents far more than a dispute over one employee's termination. It strikes at the heart of fundamental constitutional protections and exposes dangerous gaps in the legal framework meant to safeguard them. The government's reliance on unlawfully obtained evidence, the judiciary's refusal to address clear constitutional violations, and a union's betrayal of its duty of fair representation together represent a systemic failure that undermines the rule of law, chills the exercise of constitutional rights, and threatens the integrity of collective bargaining nationwide.

If left undisturbed, the decisions below will embolden public employers to bypass constitutional constraints, allow unions to act with impunity against their own members, and signal to lower courts that they may sidestep their duty to review violations of the most basic constitutional guarantees. This Court's intervention is essential to restore the proper limits of government power, vindicate individual rights, and reaffirm the constitutional principles that protect every American worker.

For these reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari, vacate the judgment of the Supreme Court of the State of Hawaii, and remand the case for further proceedings consistent with this Court's decision.

Respectfully submitted,

Shawn A. Luiz
Counsel of Record
733 Bishop Street
Suite 1280
Honolulu, HI 96813
(808) 538-0500
attorneyluiz@gmail.com

Counsel for Petitioner

October 16, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OPINION OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I, FILED FEBRUARY 14, 2025

INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

NO. CAAP-22-0000339

IN THE MATTER OF VALERIE ASATO,

Complainant-Appellant/Appellant,

v.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION AND DEPARTMENT OF EDUCATION, STATE OF HAWAI'I,

Respondents-Appellees/Appellees.

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(CIVIL NO. 1CCV-21-0000736)

Filed February 14, 2025

MEMORANDUM OPINION

Complainant-Appellant-Appellant Valerie Asato (**Asato**) appeals from the May 13, 2022 Final Judgment (**Judgment**), entered by the Circuit Court of the First

Circuit (**Circuit Court**).[1] Asato also challenges the April 18, 2022 Findings of Fact, Conclusions of Law, and Order Denying [Asato's] Agency Appeal, Filed on June 4, 2021 (**Order Denying Agency Appeal**).

I. BACKGROUND

Asato was a member of Hawaii Government Employees Association (**HGEA**), Bargaining Unit (**BU**) 03. The initial grievance underlying this appeal concerned Asato's termination from her employment by the State of Hawai'i, Department of Education (**DOE**), as an Office Assistant III at Farrington High School. On August 16, 2012, Asato's coworkers discovered emails on Asato's work computer containing discriminatory remarks about her coworkers based on race and sexual orientation, as well as comments wishing death on other employees and a student. On August 20, 2012, an administrative investigation was initiated. On December 17, 2012, upon the conclusion of the investigation, Asato was notified that she would be discharged from her position.

On January 14, 2013, HGEA filed with the Hawai'i Labor Relations Board (the **Board** or **HLRB**) a Step 1 Grievance pursuant to the grievance procedure set forth in Article 11 of the BU 03 Collective Bargaining Agreement (**CBA**).[2] HGEA challenged Asato's termination

1. The Honorable James H. Ashford presided.

2. Article 11(G) of the CBA provides:

> G. Step 3. Arbitration. If the grievance is not resolved at Step 2 and the Union desires to proceed

with arbitration, it shall serve written notice on the Employer or the Employer's representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 2. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter. If agreement on an Arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the [HLRB] to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator. No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds that the Arbitrator has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

The Arbitrator shall render an award in writing no later than thirty (30) calendar days after the conclusion of the hearings or if oral hearings are waived then thirty (30) calendar days from the date statements and proofs were submitted to the Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:

as a violation of Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), 8 (Discipline), and 17 (Personal Rights and Representation) of the Unit 03 CBA. On February 12, 2013, HGEA presented a Step 2 Grievance challenging Asato's termination. On June 30, 2015, a Step 2 meeting was conducted, and on September 24, 2015, the DOE denied the Step 2 Grievance. On October 14, 2015, the union filed a Notice to Arbitrate.

On July 6, 2017, Asato filed a Prohibited Practice Complaint (**2017 PPC**) against HGEA alleging "dereliction

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1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.

2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 2.

4. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty.

The fees of the Arbitrator, the cost of transcription, and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of any transcript that it requests.

of duty" because four-and-a-half-years had passed since her termination, and her grievance had not yet gone to arbitration. On July 19, 2017, HGEA notified Asato that it was withdrawing the Notice of Intent to Arbitrate. Asato then amended the 2017 PPC. On May 2, 2018, the parties reached a settlement wherein HGEA agreed to arbitrate Asato's grievance and Asato agreed to a stipulated dismissal of the 2017 PPC.

HGEA took Asato's grievance to arbitration and selected Peter Trask, Esq. (**Trask**) to serve as its attorney for arbitration. On December 10, 2018, Trask met with Asato and Sanford Chun (**Chun**), the HGEA executive assistant for field services, to prepare for the arbitration.

The disciplinary grievance went to arbitration in December of 2018. Trask drove Asato to and from the arbitration proceedings. During these car rides, Trask made comments to Asato, *inter alia*: (1) that her previous HGEA agent was "lazy" and did things "half-assed;" (2) that sometimes the union "does stupid things," and Trask has to clean up the union's mess; (3) questioning Asato on whether she was continuing to pay union dues during the arbitration; (4) that if the case had been brought to Trask six years ago, he would have rejected the case and recommended no arbitration based on the merits; (5) that the chances of winning were low; (6) that Trask was not Asato's private attorney; (7) that he would not answer Asato's legal questions on what can she do in actions unrelated to the arbitration; and (8) that she should not give him scenarios or ask general questions unrelated to the arbitration. Asato later asserted that she found these comments to be "demeaning" and "belittling."

The DOE called eleven witnesses, including Asato. Four of DOE's exhibits and twenty-five of HGEA's exhibits were received into evidence for consideration by the arbitrator. Trask did not make an argument brought to his attention by Asato regarding a possible violation of Fourth Amendment protections against unreasonable searches and seizures.

At the conclusion of the arbitration proceedings, the arbitrator stated:

> I want to thank counsel for the parties at this time, Miriam on behalf of the Employer, and [Trask] on behalf of the Union and [Asato], and my gratitude is based upon the civility that you both exercised throughout the hearing, and the hard work that you've done in preparing exhibits, all of which benefit the Arbitrator in understanding the positions and presentations of each party.

The arbitrator issued the June 21, 2019 Arbitrator Decision and Award (**Arbitrator Decision**). The Arbitrator Decision stated:

> The parties were afforded a full and fair opportunity to present evidence and examine witnesses at the hearing, and to submit written arguments after the hearing. The Arbitrator commends Mr. Trask and Ms. Loui for their superior representation of their respective clients.

The arbitrator found and concluded that (1) DOE did not violate the terms of the CBA when it terminated Asato and (2) Asato was terminated for proper cause. Accordingly, the arbitrator dismissed the grievance and sustained Asato's termination.

On July 9, 2019, HGEA sent the Arbitrator Decision to Asato. HGEA did not move to vacate the Arbitrator Decision.

On October 4, 2019, Asato filed a second Prohibited Practices Complaint (**2019 PPC**) against the HGEA and the DOE. Asato asserted that HGEA violated Hawaii Revised Statutes (**HRS**) § 89–13(b)(1), (4), and (5) (2012) by treating Asato with contempt and retaliating against her for bringing her prior 2017 PPC against HGEA. Asato alleged that HGEA subverted the arbitration process, *i.e.*, "threw the fight," in bad faith. Asato pointed to her treatment during the arbitration preparation, the arbitration result, HGEA's failure to move to set aside the arbitration, and Trask's comments made to her during the car rides and from the arbitration proceedings. Asato alleged an HRS § 89–13(a)(8) claim against the DOE for willful and wrongful discharge without good cause. Asato sought reinstatement, backpay, and interest from the DOE and consequential damages from HGEA.

The Board held an evidentiary hearing on the 2019 PPC on November 13, 2019, and November 20, 2019. Asato called five witnesses, including herself, Trask, Chun, and Calvin Nomiyama (**Nomiyama**), who was the superintendent who terminated Asato and one of DOE's

witnesses in the arbitration. During the 2019 PPC hearing, Nomiyama did not remember Trask's name or recall the questions asked of him during the arbitration. Nomiyama explained that he did not know Trask's name because Trask did not introduce himself before cross-examining Nomiyama. Asato's counsel attempted to have Nomiyama identify Trask's photograph, but HGEA's counsel objected. Nomiyama was later excused without identifying Trask's photo.

Chun testified in direct examination that he "didn't see anything out of the ordinary" in the interactions between Trask and Asato during the December 10, 2018 arbitration preparation meeting. On cross-examination, Chun further testified he had sat in numerous arbitrations in his 30-plus years and that there was nothing unusual about Asato's representation.

Asato testified regarding her interactions with Trask, notably including his statements during their car rides to and from arbitration.

Regarding HGEA's failure to move to vacate the arbitration award, Trask testified that there was no grounds for vacating an arbitration award. Trask further testified that if he had filed a frivolous motion to vacate the arbitration award, he could have "exposed [his] client to fees, along with going to the ODC [himself]."

Regarding the decision to not call witnesses at the arbitration, Trask explained:

> We always consider witnesses. The problem is, at the arbitration stage just about everything has been decided by the Union already. An action is taken, a grievant has filed, then go through Step 1, Step 2, wherever it is, a lot of information has exchanged and disclosed and it is almost in concrete by the time I get the case. So while I may have considered if there was no tangential reason or relationship to the file and HGEA didn't notice anybody, I might be hard pressed to call a new witness, but I consider it.

Regarding Trask's comments to Asato, Trask explained that he was attempting to use the car rides to prepare Asato for cross-examination:

> Okay. These rides became imperative for my preparation in that Ms. Asato was in denial. When I asked her, there are 14 months of DOE e-mails that are racist, in my opinion, too, how is she going to answer all of those in cross-examination, because I was very worried about cross-examination.
>
> Arbitrators love to hear from the grievant, and the exposure is, is once I put them on, they're now subject to cross-examination, and that part I'm not in control of. So I was constantly worried how she would answer if someone went through the 14, 16 months of e-mails one by one, what would be her answer.

> And her answers to me, and the many times I tried that, was to talk about something else, a distraction. Can I file suit against them, can I sue them for this, can I sue them -- constant denial, deviation from what I -- so I probably told her you ought to get a law degree, go learn it, go learn this stuff, I'm not your private attorney for that.

Regarding the decision to forego making a Fourth Amendment constitutional argument, Trask stated, "I considered it, but this is not the place to raise -- a grievance arbitration before an arbitrator's not the place to raise an issue of constitutionality." Trask further explained that he did not brief the Fourth Amendment issue because "the grievance defines my issues, the grievance. I cannot modify the grievance six years after it's been filed."

On November 20, 2019, Asato rested her case-in-chief. HGEA moved for a directed verdict; Asato filed an opposition. On May 5, 2021, the Board filed its Decision No. 504 Findings of Fact, Conclusions of Law, Decision and Order (**Decision No. 504**), which granted HGEA's motion based on "Asato's failure to meet her burden of proof after the conclusion of her case-in-chief."

On June 4, 2021, Asato appealed Decision No. 504 to the Circuit Court. After briefing, the Circuit Court held oral arguments on December 17, 2021. On April 18, 2022, the Circuit Court entered the Order Denying Agency Appeal. The Circuit Court made Findings of Fact (**FOFs**), including now challenged FOFs:

> 24. Ms. Asato raised a Fourth Amendment issue. The Board has no jurisdiction to render a decision on constitutional issues. Further, constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints.
>
> 25. The Board properly dismissed Ms. Asato's HRS § 89–13(a)(8) claim against DOE prior to a hearing on the merits, because the Board lacked jurisdiction.

The Circuit Court's challenged Conclusions of Law (**COLs**) are as follows:

> 8. Ms. Asato was terminated for proper cause in accordance with the Unit 3 CBA.
>
> 9. Following a hearing on the merits, the Board properly dismissed Ms. Asato's HRS § 89–13(a)(8) claim against DOE for lack of standing.
>
> 10. The Board was not required to address Ms. Asato's constitutional claims because the Board lacked jurisdiction.
>
> 11. The Board properly dismissed Ms. Asato's HRS § 89–13(b)(5) claim because HGEA did not breach its duty of fair representation.

12. The Board properly dismissed Ms. Asato's HRS § 89–13(b)(1) claim because HGEA did not breach its duty of fair representation.

13. The Board properly dismissed Ms. Asato's HRS § 89–13(b)(1) claim because HGEA's conduct toward her was not arbitrary, discriminatory, or in bad faith.

14. The Board correctly granted HGEA's motion for a directed verdict because Ms. Asato failed to meet her burden.

15. Ms. Asato failed to meet her burden of proving a willful violation of HRS § 89–13(a)(8) as to DOE.

16. Ms. Asato failed to meet her burden of proving a willful violation of HRS §§ 89–13(b)(1) and (5) as to HGEA.

On May 13, 2022, the Circuit Court entered the Judgment. On May 17, 2022, Asato filed a Notice of Appeal.

II. POINTS OF ERROR

Asato asserts three points of error in this appeal, contending that the Circuit Court erred in: (1) affirming Decision No. 504 because the Board incorrectly granted HGEA's Motion for Directed Verdict; (2) entering FOFs 24 and 25;[3] and (3) entering COLs 8 to 16, inclusive.

3. A circuit court reviewing an agency's final decision and order "does not make findings of fact; it determines whether the

III. APPLICABLE STANDARD OF REVIEW

"Review of a decision made by [a] circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91–14(g) [1993] to the agency's decision." *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai'i 114, 120, 424 P.3d 469, 475 (2018) (citing *Paul's Elec. Serv., Inc. v. Befitel*, 104 Hawai'i 412, 416, 91 P.3d 494, 498 (2004) (brackets in original)). Pursuant to HRS § 91–14(g) (Supp. 2023),[4] an agency's

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agency's findings of fact were clearly erroneous in view of the reliable, probative, and substantial evidence in the record." *Sierra Club v. Bd. of Land & Nat. Res.*, 154 Hawai'i 264, 284, 550 P.3d 230, 250 (App. 2024), cert. granted, SCWC-22-0000516, 2024 Haw. LEXIS 108, 2024 WL 3378462 (Haw. July 11, 2024) (citing HRS § 91–14(g)(5); *Diamond v. Dobbin*, 132 Hawai'i 9, 24, 319 P.3d 1017, 1032 (2014)). However, the Circuit Court's FOFs here are limited to describing the procedural facts of the Board proceedings. Accordingly, any such error is harmless. Hawai'i Rules of Civil Procedure Rule 61.

4. HRS § 91–14(g) provides:

> **§ 91–14 Judicial review of contested cases.**
>
> . . . .
>
> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

conclusions of law are reviewed *de novo*, while under HRS § 91–14(g)(5), an agency's factual findings are reviewed for clear error. *Paul's Elec. Serv.*, 104 Hawai'i at 420, 91 P.3d at 502 (internal citation omitted).

IV. DISCUSSION[5]

A. Asato's HRS § 89–13(b)(5) Claim

HRS § 89–13(b)(5) provides: "It shall be a prohibited practice for . . . an employee organization or its designated agent wilfully to . . . [v]iolate the terms of a collective bargaining agreement." Asato's claims against HGEA centered around the preparation and conduct of the grievance arbitration. Article 11(G) of the CBA provides for Step 3 Arbitration of the HGEA grievance procedure. The Board dismissed Asato's HRS § 89–13(b)(5) claim

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(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

5. The Argument section of Asato's opening brief only loosely follows her points of error.

because (1) Article 11(G) procedures "are not procedures that involve employees, as arbitration is a matter between the union and the employer," and (2) "there is nothing in Article 11 that speaks to discrimination or retaliation." Asato does not challenge either of the Board's reasons for dismissal, but rather asserts that the Board should not have dismissed her HRS § 89–13(b)(5) because the Board acknowledged HGEA's duty of fair representation.

Article 11 of the CBA itself does not address or provide HGEA's duty of fair representation. Accordingly, Asato's arguments regarding HGEA's alleged breach of the duty of fair representation fall under her HRS § 89–13(b)(1) claim, not her HRS § 89–13(b)(5) claim, and are addressed below.

B. Asato's HRS § 89–13(b)(1) Claim

HRS § 89–13(b)(1) provides: "It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to . . . [i]nterfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter[.]" Asato framed her HRS § 89–13(b)(1) claim primarily as a breach of the duty of fair representation claim, and the Board conducted its analysis accordingly.

The Hawai'i Supreme Court has held:

> [A]n employee who is prevented from exhausting his or her contractual remedies may bring an action against an employer for

> breach of a collective bargaining agreement "provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca v. Sipes*, 386 U.S. 171 at 186, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).
>
> A union breaches its duty of good faith when its conduct towards a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998); *DelCostello v. Int'l Bhd. Of Teamsters*, 462 U.S. at 164; *Vaca*, 386 U.S. at 190.

Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 103–04, 94 P.3d 652, 658–59 (2004) (cleaned up).

The Board adopted the Ninth Circuit's two-step analysis for its breach of the duty of fair representation analysis.[6] In *Moore v. Bechtel Power Corp.*, the Ninth Circuit held:

> Unions have broad discretion to act in what they perceive to be their members' best interests. This court has construed the unfair representation doctrine in a manner designed

6. The supreme court has stated, "[t]his court has used federal precedent to guide its interpretation of state public employment law." *Poe*, 105 Hawai'i at 101, 94 P.3d at 656.

> to protect that discretion. In our application of this doctrine, we ask first whether the act in question involved the union's judgment, or whether it was "procedural or ministerial." If it is a union's judgment that is in question, as it is in this case, the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling.

840 F.2d 634, 636 (9th Cir. 1988) (citations omitted).

"Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation." *Simo v. Union of Needletrades, Indus. & Textile Emps.*, 322 F.3d 602, 617 (9th Cir. 2003) (citation omitted).

Asato argues that HGEA's conduct was arbitrary because HGEA lacked a rational basis to treat her with contempt as it proceeded through the arbitration process; and that HGEA subverted the arbitration process, acting in bad faith by "throwing the fight."

The Ninth Circuit has discussed examples of when a union acts arbitrarily, including when a union fails to:

> (1) disclose to an employee its decision not to submit her grievance to arbitration when the

> employee was attempting to determine whether to accept or reject a settlement offer from her employer; (2) file a timely grievance after it had decided that the grievance was meritorious and should be filed; (3) consider individually the grievances of particular employees where the factual and legal differences among them were significant; or (4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration.

Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985) (cleaned up). A union does not act in an arbitrary manner when the union's challenged conduct involves the union's judgment as to how best to handle a grievance. *Id.* A union's conduct is not arbitrary simply because it erred "in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing." *Id.*

Here, the Board determined that HGEA's challenged conduct did not "fall under the umbrella of procedural or ministerial actions" because "[t]he way that a union chooses to approach an arbitration is a matter of judgment." On appeal, Asato does not dispute the Board's conclusion that the challenged conduct was not procedural or ministerial but rather involved the union's judgment. Asato merely reasserts that HGEA's conduct was arbitrary because it lacked a rational basis for treating Asato with contempt, it subverted the arbitration process, and it retaliated against

Asato. However, if a union's judgment is in question, "[a]rbitrariness alone would not be enough" for a plaintiff to prevail in their breach of duty of fair representation claim. *See Moore*, 840 F.2d at 636. Rather, "the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith." *Id.* Accordingly, the Board did not render a separate determination as to whether HGEA's conduct was arbitrary. Instead, the Board stated that it would address the substance of Asato's claim in its discussion of HGEA's alleged bad faith.

Asato also argues that she was entitled to non-discriminatory/non-retaliatory union representation. Discriminatory conduct can be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). A union's discrimination on the basis of union membership can serve as the basis for a breach of the duty of fair representation claim. *Simo*, 322 F.3d at 619. A union's discriminatory conduct may be established with evidence that the union sought to grant benefits to some members of the bargaining unit that it denied to others, treated similarly situated individuals differently, or sought to punish workers who brought a lawsuit against the union. *Id.*

Here, the Board determined that Asato had not presented any evidence demonstrating discrimination on the part of HGEA, noting that Asato did not specifically allege any discrimination on the part of HGEA beyond

asserting that she was entitled to "non-discriminatory/non-retaliatory union representation." Similarly, on appeal, Asato restates her entitlement to non-discriminatory/non-retaliatory union representation and provides the legal standard for discriminatory conduct, but Asato points to no evidence and makes no specific arguments supporting her assertion of discriminatory conduct. We cannot conclude that the Board clearly erred in determining that Asato failed to demonstrate discrimination.

In addition, Asato argues that the Board erred in not finding that HGEA acted in bad faith by retaliating against her for exercising her collective bargaining rights.

"To establish that the union's exercise of judgment was in bad faith, the plaintiff must show 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck v. United Food & Com. Workers Union, Loc. 99*, 506 F.3d 874, 880 (9th Cir. 2007) (quoting *Lockridge*, 403 U.S. at 299). "[M]ere negligence and erroneous judgment calls cannot, by themselves, support an inference of bad faith." *Demetris v. Transp. Workers Union of Am., AFL-CIO*, 862 F.3d 799, 808 (9th Cir. 2017) (citation omitted). Courts should afford substantial deference to the union's decisions regarding whether and to what extent to pursue a particular grievance. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983). A disagreement between a union and an employee over a grievance does not alone constitute evidence of bad faith, even when the union is ultimately shown to be mistaken. *Moore*, 840 F.2d at 637.

Here, the Board found that Asato had not proven that HGEA's judgment calls show substantial evidence of fraud, deceit, or dishonest conduct. On appeal, Asato argues that the Board erred in this finding because she had presented sufficient facts to prove that HGEA acted in bad faith in the exercise of its judgment. Asato points to the result of the arbitration and HGEA's failure to move or set aside the arbitration award as evidence that HGEA retaliated against her in bad faith. Asato cites to no authority supporting the proposition that the loss of a grievance arbitration constitutes bad faith and she fails to identify any grounds on which HGEA should have moved to vacate the arbitration award. We conclude this argument is without merit.

Asato also argues that Trask's decision not to call witnesses at the arbitration hearing is evidence of bad faith. However, in light of Trask's testimony concerning his rationale, and other actions in preparation for and conduct of the arbitration hearing, we cannot conclude that the Board clearly erred in rejecting this argument.

In addition, Asato argues that the Board should have found that she received a sham hearing because Nomiyama, one of the DOE's witnesses in the arbitration, did not recognize Trask, remember Trask's name, or recall questions asked during arbitration. This argument is without merit.

Finally, Asato argues that Trask's comments to her during arbitration preparation was evidence of bad faith because Trask treated her with contempt. However,

the Board expressly addressed this issue, stating, "[s]ometimes, parties may fall short of the level the Board would expect or hope for; however, falling short of that level of decorum and civility is not enough to sustain a breach of the duty of fair representation." The Board further reasoned:

> Trask's conduct during the preparation for the arbitration while, perhaps, not the most civil, was not dishonest and did not show evidence of fraud or deceit. Some of Trask's answers to Asato and positions that Trask took may have been disappointing or frustrating to Asato. However, that does not mean that his conduct rose to the level of a breach of the duty of fair representation.

We conclude that the evidence supported the Board's finding that Trask's comments did not establish fraud or deceit, rising to the level of a breach of the duty of fair representation. Therefore, we further conclude the Board did not clearly err in rejecting Asato's claim that HGEA acted in bad faith.

C. Asato's Constitutional Claims

Asato argues, variously, that her contention that her Fourth Amendments rights were violated should have been determined by the Board. These arguments are without merit. The supreme court has expressly held that the Board lacks jurisdiction to consider constitutional issues. *See Hawaii Gov't Emps. Ass'n v. Lingle*, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010).

D. Asato's Other Arguments

Asato challenges the Circuit Court's FOFs 24 and 25, and COLs 8 to 16. Most of Asato's arguments are addressed above and will not be repeated here.

Asato further argues that she met her burden of proving that she was not terminated for proper cause in accordance with the BU 03 CBA. However, the determination that Asato was terminated for proper cause was made in the Arbitrator Decision, which is not properly before us in this appeal.

Asato also argues that she met her burden of proving that the Board improperly dismissed her HRS § 89–13(a)(8)[7] claim against the DOE because she did not lack standing and the Board did not lack jurisdiction. The supreme court has explained that when a union has breached its duty of fair representation, an employee may bring an action against their employer:

> [S]uch an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation. *DelCostello*, 462 U.S. at 164.
>
> > [T]he two claims are inextricably interdependent. To prevail against

7. HRS § 89–13(a)(8) provides, "It shall be a prohibited practice for a public employer or its designated representative wilfully to . . . [v]iolate the terms of a collective bargaining agreement[.]"

> either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.
>
> *Id.* at 164–65; *see also DiGuilio v. Rhode Island Bhd. of Corr. Officers*, 819 A.2d 1271, 1273 (R.I. 2003) (***without a showing that the union breached its duty of fair representation, the employee does not have any standing to contest the merits of his contract claim against the employer in court***).

Poe, 105 Hawai'i at 102, 94 P.3d at 657 (emphasis added) (cleaned up).

Here, the Board concluded that because it determined that Asato did not prove HGEA's breach of its duty of fair representation, she lacked standing to pursue her claim against the DOE. As discussed above, the Board did not err in its determination that Asato failed to establish that HGEA breached its duty of fair representation. Accordingly, the Board did not err in concluding that Asato could not further prosecute her HRS § 89–13(a)(8) claim against the DOE. *See Poe*, 105 Hawai'i at 102, 94 P.3d at 657. Therefore, the Circuit Court did not err in affirming the Board's dismissal of Asato's claim against the DOE.

V. CONCLUSION

For these reasons, the Circuit Court's May 13, 2022 Judgment is affirmed.

DATED: Honolulu, Hawai'i, February 14, 2025.

/s/ Katherine G. Leonard
Acting Chief Judge

/s/ Karen T. Nakasone
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge

APPENDIX B — JUDGMENT ON APPEAL OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAIʻI, FILED MARCH 18, 2025

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIʻI

CAAP-22-0000339

IN THE MATTER OF VALERIE ASATO,

Complainant-Appellant/Appellant,

v.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION AND DEPARTMENT OF EDUCATION, STATE OF HAWAIʻI,

Respondents-Appellees/Appellees

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(CIVIL NO. 1CCV-21-0000736)

JUDGMENT ON APPEAL

(By: Leonard, Acting Chief Judge, for the court)[1]

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals entered on February 14, 2025, the Circuit Court of the First Circuit's May 13, 2022

1. Leonard, Acting Chief Judge, Nakasone and McCullen, JJ.

Appendix B

Final Judgment is affirmed. Judgment is hereby entered in this appeal.

DATED: Honolulu, Hawai‘i, March 18, 2025.

FOR THE COURT:

/s/ Katherine G. Leonard
Acting Chief Judge

APPENDIX C — FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII, FILED JUNE 4, 2021

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL No. 1CCV-21-0000736 (Agency Appeal)

CASE NOS. 20-CU-06-379, 20-CE-06-940

IN THE MATTER OF VALERIE ASATO,

Complainant-Appellant,

vs.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION AND DEPARTMENT OF EDUCATION, STATE OF HAWAII,

Respondents-Appellees.

Filed June 4, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING APPELLANT VALERIE ASATO'S AGENCY APPEAL

Hearing
Date: December 17, 2021
Time: 1:30 p.m.
Judge: Honorable James H. Ashford

Appendix C

Respondent-Appellee STATE OF HAWAII, DEPARTMENT OF EDUCATION ("DOE"), by and through its attorneys, Holly T. Shikada, Attorney General, State of Hawaii, and Deputy Attorneys General James E. Halvorson and Miriam P. Loui, hereby submits the Findings of Fact, Conclusions of Law, and Order Denying Appeal, pursuant to the Court's order denying appeal, on December 17, 2021.

FINDINGS OF FACT

1. To the extent that any of these Findings of Fact are Conclusions of Law, they are to be so construed.

2. DOE employed Complainant-Appellant Valerie Asato ("Ms. Asato") as an Office Assistant III until her termination on December 28, 2012.

3. DOE was an "employer" within the meaning of Hawaii Revised Statutes ("HRS") § 89-2.

4. Ms. Asato was an "employee" within the meaning of HRS § 89-2.

5. Ms. Asato was a member of BU 3.

6. Respondent-Appellee Hawaii Government Employees Association ("HGEA") was the exclusive representative for bargaining unit 3 ("BU 3") within the meaning of HRS § 89- 2.

7. HRS § 89-6(a)(3) defines BU 3 as "Nonsupervisory employees in white collar positions."

8. DOE and HGEA were parties to the Unit 3 Contract ("BU 3 CBA").

9. On January 14, 2013, HGEA filed a step 1 grievance challenging Ms. Asato's termination as a violation of Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes, 8 (Discipline), and 17 (Personal Rights and Representation).

10. Article 8 – Discipline provides in relevant part that "Regular employees shall not be disciplined without proper cause."

11. On February 12, 2013, HGEA filed a step 2 grievance challenging Ms. Asato's termination. A step 2 hearing was conducted on June 30, 2015. On September 4, 2015, DOE denied the step 2 grievance.

12. On October 14, 2015, HGEA filed a Notice of Intent to Arbitrate Ms. Asato's grievance.

13. On July 6, 2017, Ms. Asato filed a prohibited practices complaint with the Hawaii Labor Relations Board ("Board") in Board Case No. 17-CU-03-352 ("352").

14. On July 19, 2017, HGEA notified Ms. Asato that HGEA was withdrawing its Notice of Intent to Arbitrate with respect to her grievance.

15. Ms. Asato amended her prohibited practices complaint in 352; however, the parties thereafter reached a settlement whereby HGEA agreed to arbitrate Ms.

Asato's grievance. On May 2, 2018, HGEA and Ms. Asato stipulated to dismiss her complaint in 352.

16. HGEA took Asato's grievance to arbitration, where Peter Trask, Esq. ("Trask") represented HGEA. Following the arbitration, Asato claimed that HGEA "threw the fight" in bad faith due to Trask's treatment of Asato during arbitration preparation, the arbitration result, and HGEA's failure to move aside the arbitration. Mr. Trask took the position that HGEA was his client, not Ms. Asato. During arbitration, Mr. Trask made comments that Ms. Asato found inappropriate.

17. On June 21, 2019, the arbitrator issued his 81-page decision, stating in relevant part that the "parties were afforded a full and fair opportunity to present evidence and examine witnesses at the hearing, and to submit written arguments after the hearing. The arbitrator commends Mr. Trask and Ms. Loui for their superior representation of their respective clients." In the end, the arbitrator found that DOE did not violate Articles 3, 4, 8, or 17 of the Unit 3 CBA when it terminated Ms. Asato effective December 28, 2012 and Ms. Asato was terminated for proper cause. As a result, the arbitrator dismissed the grievance and sustained Ms. Asato's termination.

18. On July 9, 2019, HGEA sent the arbitrator's decision to Ms. Asato.

19. On October 4, 2019, Ms. Asato filed a prohibited practices complaint in Case Nos. 19-CU-03-375 and 19-CE-03-934.

20. The 90-day period began on July 11, 2019, when Ms. Asato received the arbitrator's decision.

21. July 11, 2019 marks the beginning of the period when Ms. Asato knew or should have known that her rights were allegedly violated.

22. Ms. Asato's allegation that HGEA's July 19, 2017 letter constituted a prohibited practice in violation of HRS § 89-13(b)(1), was not timely.

23. July 19, 2017 falls outside of the relevant time period.

24. Ms. Asato raised a Fourth Amendment issue. The Board has no jurisdiction to render a decision on constitutional issues. Further, constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints.

25. The Board properly dismissed Ms. Asato's HRS § 13(a)(8) claim against DOE prior to a hearing on the merits, because the Board lacked jurisdiction.

CONCLUSIONS OF LAW

1. To the extent that any of these Conclusions of Law are Findings of Fact, they are to be so construed.

2. With respect to the appeal of an administrative decision, HRS § 91-14(g) (Supp. 2019) provides that upon review of the record, the court may affirm the decision of

the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: in violation of constitutional or statutory provisions; in excess of the statutory authority or jurisdiction of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3. A circuit court's review of an administrative order is "qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Konno v. County of Kauai, 85 Hawaii 61, 77, 937 P.2d 397, 413 (1997).

4. The Board lacked jurisdiction to vacate the arbitrator's decision.

5. The arbitration decision was final and binding on Ms. Asato.

6. Ms. Asato was bound by the terms of the Unit 3 CBA.

7. Ms. Asato lacked standing to challenge the arbitration decision because she was not party to the Unit 3 CBA.

8. Ms. Asato was terminated for proper cause in accordance with the Unit 3 CBA.

9. Following a hearing on the merits, the Board properly dismissed Ms. Asato's HRS § 13(a)(8) claim against DOE for lack of standing.

10. The Board was not required to address Ms. Asato's constitutional claims because the Board lacked jurisdiction.

11. The Board properly dismissed Ms. Asato's HRS § 89-13(b)(5) claim because HGEA did not breach its duty of fair representation.

12. The Board properly dismissed Ms. Asato's HRS § 89-13(b)(1) claim because HGEA did not breach its duty of fair representation.

13. The Board properly dismissed Ms. Asato's HRS § 89-13(b)(1) claim because HGEA's conduct toward her was not arbitrary, discriminatory, or in bad faith.

14. The Board correctly granted HGEA's motion for a directed verdict because Ms. Asato failed to meet her burden.

15. Ms. Asato failed to meet her burden of proving a willful violation of HRS § 89- 13(a)(8) as to DOE.

16. Ms. Asato failed to meet her burden of proving a willful violation of HRS §§ 89- 13(b)(1) and (5) as to HGEA.

Appendix C

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Appellant Valerie Asato's Agency Appeal, filed on June 4, 2021, is denied. IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 18, 2022.

/s/ James H. Ashford
JUDGE OF THE
ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/
SHAWN A. LUIZ
Attorney for Appellant
VALERIE ASATO

APPENDIX D — FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII, FILED MAY 13, 2022

IN THE CIRCUIT COURT
OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL No. 1CCV-21-0000736
(Agency Appeal)
CASE NOS. 20-CU-06-379
20-CE-06-940

IN THE MATTER OF VALERIE ASATO,

Complainant-Appellant,

v.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION AND DEPARTMENT OF EDUCATION, STATE OF HAWAII,

Respondents-Appellees.

Filed May 13, 2022

FINAL JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law, and Order Denying Complainant-Appellant Valerie Asato's Agency Appeal, filed on June 4, 2021, and Rules 58 and 72 of the Hawaii Rules of Civil Procedure,

Appendix D

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That final judgment is hereby entered in favor of Respondents-Appellees HAWAII GOVERNMENT EMPLOYEES ASSOCIATION and DEPARTMENT OF EDUCATION, STATE OF HAWAII.

This Final Judgment is entered as to all claims asserted by Complainant-Appellant. Any remaining claims are dismissed with prejudice. There are no remaining claims or parties.

DATED: Honolulu, Hawaii, May 13, 2022

/s/ James H. Ashford
JUDGE OF THE ABOVE-
ENTITLED COURT

APPENDIX E — FINDINGS OF FACT OF THE STATE OF HAWAI'I, HAWAI'I LABOR RELATIONS BOARD, FILED JUNE 4, 2021

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

CASE NO(S). 19-CU-03-375
19-CE-03-934
DECISION NO. 504

IN THE MATTER OF VALERIE ASATO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION; AND DEPARTMENT OF EDUCATION, STATE OF HAWAI'I,

Respondent(s).

Filed June 4, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. ***Introduction and Statement of the Case***

Complainant VALERIE ASATO (Complainant or Asato) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging Respondents HAWAII GOVERNMENT EMPLOYEES

Appendix E

ASSOCIATION (HGEA) and DEPARTMENT OF EDUCATION, State of Hawai'i (DOE and, collectively with HGEA, Respondents) committed prohibited practices against her.

Asato's Complaint stems from a prior case, Board Case No. 17-CU-03-352, which the parties settled. After settling the case, HGEA took Asato's grievance to arbitration, where Peter Trask, Esq. (Trask) represented HGEA. The arbitrator determined that the DOE did not violate the collective bargaining agreement when it terminated Asato and that DOE had proper cause to terminate Asato.

Asato's claims in this case arise from Trask's behavior before and during the arbitration. Asato argues that HGEA "threw the fight" in bad faith due to Trask's treatment of Asato during arbitration preparation, the arbitration result, and HGEA's failure to move to set aside the arbitration.

After hearing but not ruling on a Motion to Dismiss or in the Alternative, Motion for Summary Disposition (MTD), the Board held hearings on the merits (HOMs) on November 13 and 20, 2019. Asato called several witnesses, including both Asato and Trask. On the second day of the HOMs, Asato rested her case-in-chief. HGEA then moved for a directed verdict, and the Board gave Asato time to submit her opposition in writing, which she did.

Based on the full record and for the reasons set forth below, the Board GRANTS the HGEA's Motion for

Directed Verdict, finding that Asato failed to carry the burden of proof necessary to sustain the Complaint. Based on the granting of the Motion for Directed Verdict, the Board dismisses the MTD as moot.

2. *Background and Findings of Fact*

Until December 28, 2012, DOE[1] employed Asato[2] as an Office Assistant III, a member of bargaining unit 3[3]

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1. DOE is an "employer" or "public employer" within the definition found in HRS § 89-2, which defines such as:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

2. In this role, Asato was an "employee" or "public employee" within the definition found in HRS § 89-2, which defines such as:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

3. HRS § 89-6 defines bargaining unit 3 as "Nonsupervisory employees in white collar positions".

(BU 3). Asato's grievance regarding her termination went through the Step 1 and Step 2 processes found in the BU 3 collective bargaining agreement (CBA). Nearly three years after Asato's termination, in October 2015, HGEA, the exclusive representative[4] for BU 3, filed a Notice of Intent to Arbitrate Asato's grievance with DOE.

On July 6, 2017, Asato filed a prohibited practice complaint with the Board against HGEA in Board Case No. 17-CU-03-352 (352). On July 19, 2017, HGEA notified Asato that HGEA was withdrawing its Notice of Intent to Arbitrate in her case. Asato then amended her prohibited practice complaint in 352, and the parties reached a settlement and stipulated to dismiss this case on May 2, 2018.

HGEA proceeded to arbitrate Asato's grievance in December of 2018 and selected Trask to serve as its attorney for the arbitration. During the preparation for the arbitration, Trask took the position that HGEA was his client, not Asato, and he made comments that Asato found inappropriate.

After the conclusion of the arbitration, the arbitrator

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4. HRS § 89-2 defines "exclusive representative" as:

> "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

issued his decision, which HGEA sent to Asato on July 9, 2019. In the decision, the arbitrator found, among other things, that DOE did not violate the CBA when it terminated Asato and that DOE terminated Asato for proper cause.

3. *Analysis and Conclusions of Law*

3.1. *Jurisdiction and Scope of the Case*

3.1.1. *Timeliness*

Although Respondents did not raise the issue of timeliness in the MTD or the substantive joinders, Asato brought up the issue herself. Accordingly, the Board will address its jurisdiction to hear the case in terms of the timeliness of the matter.

Contrary to Asato's assertions, the seminal cases dealing with timeliness in HRS Chapter 89 cases are those found in Hawai'i law, not in federal law. Federal law does not govern HRS Chapter 89 cases, as Hawai'i Revised Statutes (HRS) Chapter 89 is a state statute, not a federal one. Therefore, while federal law may, occasionally, be instructive to considering prohibited practice cases, the only cases that are actually relevant are those which specifically deal with HRS Chapter 89, those found in decisions issued by Hawai'i state courts and by this Board itself.

The HRS and the courts have defined the Board's procedural jurisdiction, in part, based on HRS § 377-9.

See, HRS § 89-14; *Aio v. Hamada*, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983) (*Aio*). These limits are jurisdictional and provided by statute, neither the Board nor the parties may waive this ninety-day 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).

The Board's approach to the 90-day timeline has been to follow the principles that require the Board to strictly follow the timelines and that, even if the complainant misses the deadline by a single day, the Board cannot waive that ninety-day requirement. *Fitzgerald v. Ariyoshi*, 3 HPERB 186, 198-199 (1983). The Board has further followed the principle that this 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. 443, 6 HLRB 319, 330 (2003).

Asato filed the Complaint on October 4, 2019. Accordingly, the 90-day period began on July 6, 2019. Asato received the arbitration decision on July 11, 2019. Her allegations stem from the conduct of HGEA's preparation for and at the arbitration. Therefore, the decision marks the beginning of the period when Asato knew or should have known that her rights were allegedly violated. Accordingly, the majority of this case is timely.

However, what is not timely is Asato's allegation that HGEA's July 19, 2017 letter constituted a prohibited practice in violation of HRS § 89-13(b)(1). There is no

question that July 19, 2017 falls far outside of the relevant period.

3.1.2. *Constitutional Questions*

In her filings, among other things, Asato raises a question regarding the Fourth Amendment of the United States Constitution. The Board has no jurisdiction to render a decision on constitutional issues. *See*, *e.g.*, *Hawaii Gov't Emp. Ass'n, AFSCME Local 152 v. Lingle*, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010) (*Lingle*). Further, constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints. *Id.* at 207, 239 P.3d at 11.

Accordingly, the Board will not address any of the constitutional issues raised by Asato.

3.2. ***Relevant Legal Standards***

3.2.1. *Motion for Directed Verdict*

The Board is permitted to hear motions for directed verdict, as long as the party opposing the motion is given a full and fair opportunity to be heard on the motion and the rules applicable to the Board are not otherwise violated. *Parker v. UPW and PSD*, Board Case Nos. 18-CU-10-370; 19-CE-10-923, Decision No. 502, *42 (2021). Asato had a full and fair opportunity to be heard through filing a written opposition to the motion within the time allowed by the Board, which was greater than the amount of time typically permitted under Hawai'i Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii).

In deciding a motion for directed verdict, the Board must consider the evidence and the inferences fairly drawn from the evidence in the light most favorable to the non-moving party, and the motion cannot be granted unless there is only one reasonable conclusion as to the proper judgment. *Makino v. County of Hawaii and UPW*, Board Case Nos. CE-01-856, CU-01-332, Decision No. 492, *19 (2017).

3.2.2. *Burden of Proof*

Under both HRS § 91-10(5) and HAR § 12-42-8(g)(16), Asato bears the burden of proof. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be met by a preponderance of the evidence. HRS § 91-10(5). Therefore, for Asato's claims to survive a motion for directed verdict, in her case-in-chief, with the evidence and inferences viewed in the light most favorable to Asato, she must have shown that Respondents committed prohibited practices through evidence and argument. *United Public Workers, AFSCME, Local 646 v. Waihee*, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990).

If, in her case-in-chief, Asato has not presented sufficient evidence and legal arguments with respect to an issue, the Board will find that she failed to carry her burden of proof and dispose of the issue accordingly. *Mamuad v. Nakanelua*, Board Case No. CU-10-331, Order No. 3337F, *25 (2018) (*Mamuad*).

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3.3. *HRS § 89-13(b)(4) and (5) Allegations*

The Board first dispenses with Asato's HRS § 89-13(b)(4) allegation because she did not plead a statutory violation independent of HRS § 89-13. The Board has long held that statutory violations under HRS § 89-13(b)(4) must specify additional violations of HRS Chapter 89 outside of HRS § 89-13. *See Souza v. Honolulu Fire Department et al.*, Board Case Nos. CE-11-759, CU-11-293, Order No. 2759, *13 (2011). Accordingly, the Board must dismiss Asato's HRS § 89-13(b)(4) claim.

Next, the Board turns to Asato's HRS § 89-13(b)(5) claim. Asato argues that HGEA violated Article 11, Grievance Procedure, of the CBA because Asato was entitled to "non-discriminatory/non-retaliatory union representation". While the Board does not disagree that HGEA has a duty to fairly represent all employees in its bargaining units, none of Asato's evidence points to HGEA violating Article 11 against Asato.

Asato's claims in this case all center around the preparation for and actual arbitration of her grievance. Article 11(G), Step 3. Arbitration, provides the procedures for HGEA to proceed with arbitration. These procedures are not procedures that involve employees, as arbitration is a matter between the union and the employer. Further, there is nothing in Article 11 that speaks to discrimination or retaliation. Accordingly, the Board must dismiss Asato's HRS § 89-13(b)(5) claim.

3.4. *The Arbitration of Asato's Grievance; The Duty of Fair Representation*

Turning to Asato's surviving claim that HGEA violated HRS § 89-13(b)(1)[5] and breached the duty of fair representation, the Board considers this claim based on the evidence presented. As Asato frames her claim that HGEA violated HRS § 89-13(b)(1) primarily as a breach of the duty of fair representation; the Board will analyze the claim accordingly.

As the exclusive bargaining representative for BU 3, HGEA has a duty to fairly represent all of the employees in BU 3, both in collective bargaining and in the enforcement of the resulting CBA. *Poe v. Hawaii Labor Relations Board*, 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (*Poe*). However, HGEA must retain the discretion to act in what it perceives to be their members' best interest; therefore, the duty of fair representation must be narrowly construed. *Campos v. University of Hawai'i at Mānoa et al.*, Board Case Nos. 18-CE-07-917; 18-CU-07-362, Order No. 3455A,

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5. HRS § 89-13 states in relevant part:

> ***
>
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wailfully to:
>
> > (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
> >
> > ***

at *11 (2019); *Tupola v. University of Hawaii Professional Assembly et al.*, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *27 (2015) (*Tupola*). Accordingly, any substantive examination of HGEA's performance must be deferential. *Tupola*, at *27.

More specifically, the Board can find a breach of the duty of fair representation only if HGEA's conduct towards Asato was arbitrary, discriminatory, or in bad faith. *Poe*, 105 Hawai'i at 104, 94 P.3d at 659. The Board must perform separate analyses for each of these elements because each represents a distinct and separate obligation, *Tupola*, at *27. To determine which of these three elements apply, the Board has adopted a two-step analysis, first looking at whether the alleged union misconduct involved the union's judgment or whether it was 'procedural or ministerial.' *Mamuad*, at *31.

Of the three ways that the duty of fair representation can be violated, arbitrariness applies only if the alleged misconduct is "procedural or ministerial". *Id.* Arbitrariness is controlling only when the challenged conduct is procedural or ministerial, and mere negligence does not rise to the level of arbitrariness. *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988). For alleged misconduct to be arbitrary, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the union's conduct; the action must have been in reckless disregard of the employee's rights; and it must prejudice a strong interest of the employee. *Id.* Further, the way that the grievance is presented at an arbitration hearing is not an arbitrary decision. *Tupola*, at *28.

Decisions as to how to pursue a particular grievance, including how to present a grievance at the arbitration stage, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. *Id.*

Asato argues that HGEA's conduct was arbitrary because HGEA "lack[s] a rational basis to treat the employee with contempt as it proceeds through the arbitration process"; and that HGEA subverted the arbitration process, acting in bad faith by "thr[owing] the fight.". Asato does not specifically allege discriminatory conduct on HGEA's behalf.

3.4.1. *The Arbitrary Element*

Asato first argues that "HGEA's actions lack a rational basis to treat the employee with contempt as it proceeds through the arbitration process."

There is no evidence in the record that HGEA failed to perform a procedural or ministerial act, and Asato's argument does not fall under the umbrella of procedural or ministerial actions. The Board has previously referenced the Ninth Circuit's examples of a union acting arbitrarily, including where a union failed to:

> 1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer; 2) file a timely grievance after it

> decided that the grievance was meritorious and should be filed; 3) consider individually the grievances of particular employees where the factual and legal differences among them were significant; or 4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration.

Tupola, at *28.

Asato's arbitrariness argument resembles none of these examples. The way that a union chooses to approach an arbitration is a matter of judgment, not a procedural or ministerial action. Accordingly, Asato's claims of a breach of the duty of fair representation must fail as to arbitrariness. However, the Board will address the substance of the claim in its discussion of HGEA's alleged bad faith as well, given that the Board must consider inferences in the light most favorable to Asato.

3.4.2. *The Discriminatory Element*

Asato does not specifically allege any discrimination on the part of HGEA. The closest argument that Asato makes to an argument as to the discriminatory element is where she argues that she was entitled to "non-discriminatory/non-retaliatory union representation". However, while Asato references the discriminatory element, she has no clear argument as to on what basis HGEA discriminated against her.

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Discriminatory conduct can be established by substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. *Mamuad*, at *37. The Board has not adopted a strict standard for discrimination in the context of a breach of the duty of fair representation, but the Board has noted that the element of discrimination is not restricted by impermissible or immutable classifications like race or other constitutionally protected categories. *Tupola*, at *33. In addition to those constitutionally protected categories, a union cannot discriminate against an employee on the basis of union membership or if discrimination comes from prejudice or animus. *Id.*

However, despite this expanded view of discrimination, the complainant must demonstrate some evidence of discrimination for a claim of the breach of the duty of fair representation to succeed. *Tupola*, at *33. Evidence that could be used to demonstrate discrimination may include proving that the union granted benefits to some members of the bargaining unit but not to others or treated similarly situated individuals differently in deciding whether to take their case to arbitration. *Id.*

Here, Asato has not presented any such evidence. Based on the applicable standard and the lack of sufficient facts or evidence, any claim of discrimination must fail.

3.4.3. *The Bad Faith Element*

The bad faith element requires the Board to make a subjective inquiry and requires the complainant to provide

proof that the union acted (or failed to act) due to an improper motive. *Tupola*, at *34. Because assertions of the state of mind required for the claim must be corroborated by subsidiary facts, and must show substantial evidence of fraud, deceit, or dishonest conduct. *Id.*

Because Asato bears the burden of proof, she must produce evidence of bad faith to prove this element. *Mamuad*, at *37-38. The Board is not considering whether HGEA made the right decision; rather, the Board asks whether HGEA made its decision rationally and in good faith. *Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152*, CU-03-328, Order No. 3028, at *15-16 (2014).

Asato argues that HGEA subverted the arbitration process, acting in bad faith by "thr[owing] the fight". As evidence, Asato submits that Trask's actions during arbitration preparation, the result of arbitration, and the failure to move to vacate or set aside the arbitration all add up to HGEA "thr[owing] the fight".

As previously noted, HGEA's decision as to how to pursue a particular grievance, including at arbitration, is a matter of judgment, and the Board must give HGEA a wide degree of deference when considering a potential breach of the duty of fair representation based on a question of HGEA's judgment. *Tupola*, at *28-29. Further, HGEA has broad discretion in its decision as to how to pursue an employee's grievance against the employer. *Id.*, at *28.

The Board expects all parties to act with a level of decorum and civility in interacting with one another.

Sometimes, parties may fall short of the level the Board would expect or hope for; however, falling short of that level of decorum and civility is not enough to sustain a breach of the duty of fair representation.

The selection of the attorney to represent the union at an arbitration hearing and the strategy employed at an arbitration hearing—including decisions about steps to take after the arbitration decision is issued—are questions of HGEA's judgment. Although Asato may have wanted HGEA to pursue a different strategy or prepare for the arbitration differently, HGEA has the right to make judgment calls on these matters. The Board cannot substitute its judgment for HGEA's.

Therefore, the Board must consider whether Asato has presented sufficient facts to prove that HGEA's judgment calls show substantial evidence of fraud, deceit, or dishonest conduct. Based on the record, the Board cannot find any of these.

Trask's conduct during the preparation for the arbitration while, perhaps, not the most civil, was not dishonest and did not show evidence of fraud or deceit. Some of Trask's answers to Asato and positions that Trask took may have been disappointing or frustrating to Asato. However, that does not mean that his conduct rose to the level of a breach of the duty of fair representation[6].

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6. To the lay person, the following remarks may be offensive, demeaning, and certainly unbecoming to an attorney and officer of the court:

Appendix E

HGEA hired Trask to represent HGEA at the arbitration hearing. While the underlying grievance involved Asato, the union has the exclusive right to

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> "Does this have anything to do with the case? I don't have time for stupid questions or general questions. Don't give me scenarios. I'm not your private attorney. I work for the union. If you want to learn the law, go to law school. I'm trying to plan and strategize the case. I don't want to give the DOE ammunition for their case. Only ask me things that are relevant to my case only."
>
> "Why you sue the union for? You're stupid to sue the union. You wanted this arbitration. I know if you lose this case, you're going to sue and blame the union, and when you do, I'm going to tear your ass apart on the witness stand."
>
> "Kevin is a fuck up, screw up, wimp. He does things half-assed. He's lazy. Well, sometimes the union does stupid things, and I have to go and clean up their mess."
>
> "Do you pay dues? Because this case is going to cost the union $40,000.00 and even if you get your job back, I don't think you could pay it back in dues. You know, 6 years ago, I wouldn't have even taken your case. If Sanford brought this case to me, I would have rejected it right there. I give this case a 30% chance of winning. Not even that, maybe a 20% chance."

These remarks are, however, insufficient to support a finding of a breach of the duty of fair representation in the instant case. The law, and not sensitive ears or thin skin, must prevail. Still, Respondent's counsel may have merely dodged the bullet and should take heed that these same words may, in other circumstances, be fairly construed as evidence to find a violation of an employee's right to fair representation and/or a prohibited practice.

arbitration under the CBA. This means that, at the arbitration stage, that grievance belongs to HGEA, not to Asato. HGEA, not Asato, makes the judgment calls as to how to proceed at this stage, and even if HGEA made the "wrong" call, that does not constitute a breach of the duty of fair representation.

Accordingly, the Board cannot find that HGEA violated its duty of fair representation to Asato by acting in bad faith.

3.5. *Other Claims*

Asato's remaining HRS § 89-13(a)(8) claim and the claim of a breach of the duty of fair representation are inextricably interdependent. *Poe*, 105 Hawai'i at 102, 94 P.3d at 657. If Asato does not prove HGEA breached its duty of fair representation, she lacks standing to pursue her claim against the employer. *Poe*, 105 Hawai'i at 104, 94 P.3d at 659. To put it another way, Asato's failure to prove that HGEA breached its duty of fair representation means that her HRS § 89-13(a)(8) claim against DOE must also fail. *Tupola*, at *39

Based on the Board's findings above, the Board must also dismiss the HRS § 89-13(a)(8) claim.

4. *Order*

For all of the foregoing reasons, the Board hereby grants HGEA's Motion for Directed Verdict because

of Asato's failure to meet her burden of proof after the conclusion of her case-in-chief. This case is closed.

DATED: Honolulu, Hawai'i, May 5, 2021.

HAWAI'I LABOR RELATIONS BOARD

/s/ Marcus R. Oshiro
MARCUS R. OSHIRO, Chair

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

/s/ J N. Musto
J N. MUSTO, Member

Copies sent to:

Shawn A. Luiz, Esq.
Stacy Moniz, HGEA
James Halvorson, Deputy Attorney General

APPENDIX F — ORDER OF THE SUPREME COURT OF THE STATE OF HAWAI'I, FILED JULY 18, 2025

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

SCWC-22-0000339

IN THE MATTER OF VALERIE ASATO,

Petitioner/Complainant-Appellant/Appellant,

vs.

HAWAII GOVERNMENT EMPLOYESS ASSOSCIATION; AND DEPARTMENT OF EDUCATION, STATE OF HAWAI'I,

Respondents/Respondents-Appellees/Appellees.

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CAAP-22-0000339; CASE. NO. 1CCV-21-0000736)

ORDER REJECTING APPLICATION
FOR WRIT OF CERTIORARI
(By: Recktenwald, C.J., McKenna, Eddins, and Ginoza, JJ., and Circuit Judge Castagnetti in place of Devens, J., recused)

Petitioner Valerie Asato's Application for Writ of Certiorari, filed on May 19, 2025, is hereby rejected.

Appendix F

DATED: Honolulu, Hawai‘i, July 18, 2025.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Lisa M. Ginoza

/s/ Jeannette H. Castagnetti

APPENDIX G — ADDENDUM

1. Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Article I, Section 7 of the Hawaii Constitution:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."

3. Hawaii Revised Statutes 91-14(g)(1):

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the

right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term «person aggrieved» shall include an agency that is a party to a contested case proceeding before that agency or another agency…

…(g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions;

4. **Haw. Rev. Stat. § 89-13(b)(1):**

§89-13 Prohibited practices; evidence of bad faith….

…(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; …