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NO. CAAP-24-0000096

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAIʻI,
Respondent-Appellant-Appellant, v.
JONATHAN TAUM, Complainant-Appellee-Appellee, and
HAWAIʻI LABOR RELATIONS BOARD; DWIGHT TAKAMINE;
CLARK HIROTA; and STACY MONIZ, Agency-Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CCV-23-0000356)

MEMORANDUM OPINION
(By: Leonard, Presiding Judge, Hiraoka and Wadsworth, JJ.)

In this secondary appeal, the Department of Corrections and Rehabilitation, formerly known as the Department of Public Safety (**PSD**),[1] appeals from the *Final Judgment* for Jonathan **Taum** and the Hawaiʻi Labor Relations Board (**HLRB**) and its members[2] entered by the Circuit Court of the First Circuit.[3] PSD challenges HLRB's February 21, 2023 *Findings of Fact, Conclusions of Law,* [and] ***Decision and Order***.

We hold that HLRB violated constitutional provisions, exceeded its statutory authority, used unlawful procedure, made

[1] See 2022 Haw. Sess. Laws Act 278, § 20 at 780.

[2] Marcus R. Oshiro was the chair, and Sesnita A.D. Moepono and J.N. Musto were members, of HLRB during the proceedings underlying this appeal. Current chair Dwight Takamine and members Stacy Moniz and Clark Hirota are substituted as parties to this appeal under Hawaiʻi Rules of Appellate Procedure Rule 43(c)(1).

[3] The Honorable James H. Ashford presided over the primary agency appeal; the Honorable Shirley M. Kawamura signed the Final Judgment.

errors of law, and abused its discretion when it abrogated its role as neutral decision-maker and advised Taum how to amend his *Prohibited Practice Complaint* after having apparently prejudged his case against PSD. We reverse the Final Judgment, vacate the Decision and Order, and remand to HLRB with instructions to dismiss Taum's October 24, 2019 *Amended Prohibited Practice Complaint* with prejudice.

I. BACKGROUND

Taum worked for PSD as an Adult Corrections Officer (**ACO**) IV (Sergeant) at the Hawaiʻi Community Correctional Center (**HCCC**). On June 15, 2015, he was supervising ACOs Jason **Tagaloa**, Craig **Pinkney**, and Jordan **DeMattos**, who were moving inmate Chawn **Kaili** from HCCC's Waianuenue housing unit to the Punahele Complex. During the move, force was used, and Kaili was injured.

PSD's Investigation

ACO V (Lieutenant) Michael **Cravalho** investigated the incident for PSD. He reviewed incident reports and investigative questionnaires; Kaili's statement; Kaili's medical records with photographs; and a **Video** of the "July [sic] 15, 2015 takedown of Chawn Kaili." He wrote a 178-page **Report** dated December 7, 2015, which included the investigative material. The Report concluded:

> On Monday, June 15, 2014 [sic] force was used during the takedown of Chawn Kaili in the [Waianuenue] complex recreation yard. The [strikes] used on inmate . . . Chawn Kaili were not in compliance of any approved PSD self defensive Technique and/or within an approved PSD training criteria. Strikes consisted of kicks, closed hand strikes to the head area and back shoulder area as well as knee strikes to the upper [torso] of the inmate. ACO IV Jonathan Taum supervised the [escort] and take down of inmate Kaili also instructing the use of strikes applied to inmate Chawn Kaili. Ultimately he is responsible for seeing the use of through [sic], while controlling the actions of his subordinates.

By memorandum dated January 15, 2016, HCCC Warden Peter **Cabreros** informed PSD's then-director Nolan P. **Espinda** that he was referring the matter for a pre-disciplinary due process hearing. A copy of Cravalho's Report was attached. Espinda

reviewed all the investigative material, including the Video, and concurred with the referral.

A Pre-Disciplinary Hearing before hearings officer Penny **Young** was held on March 21, 2016.

J. Marte **Martinez**, PSD's Public Safety Training Officer, completed a seven-page ***Use of Force Review*** on July 19, 2016. It described what Martinez saw on the Video and stated that many of the ACOs' actions — such as striking Kaili's head and face with closed fists, placing a knee on Kaili's head and neck area, and kicking Kaili's head — exceeded what is taught in training. Martinez concluded — consistent with the Cravalho Report — that "Sgt. Taum failed to properly supervise the ACOs who used excessive force."

Taum's Pre-Disciplinary Hearing was continued on July 20, 2016. After proceedings were concluded, Young drafted a termination letter for Espinda's review. The draft letter included her findings. Espinda concurred with Young's findings and the recommendation to discharge Taum.

Termination of Taum's Employment

By letter dated November 29, 2016, Espinda informed Taum his employment would be terminated at the close of business on December 23, 2016. The letter stated:

> The Factual Findings are:
>
> On June 16 [sic],[4] 2015, in your capacity as the Security Sergeant (supervisor), you failed to manage a Use of Force incident, during the escort of inmate Chawn Kaili, to the Punahele Complex for rehousing. This resulted in injury to inmate Kaili.
>
> Supporting Facts and Conclusion:
>
> 1. On June 16, 2015, you served as the Security Sergeant (supervisor) on First Watch (2200-0600 hours). As the Security Sergeant, you are responsible for all inmate movements within the facility.
>
> 2. At approximately 0125 hours, Frank Baker, ACO III, notified you that inmate Chawn Kaili was acting strangely, and asking questions about being released. You stated that you informed Watch Commander

[4] The incident happened on June 15, but the letter stated the date of the incident was June 16 because of a typographical error.

Lieutenant John-Harry Waikiki of inmate Kaili's behavior. The decision was made to rehouse the inmate from the Waianuenue housing unit to the Punahele Complex. You stated that at this time, you did not have knowledge that inmate Kaili was "acting high" or under the influence of drugs.

3. According to Lt. John-Harry Waikiki, he stated that he was not aware and he never authorized you to deviate from procedures to move inmate Kaili without restraints to the Punahele Complex. According to ACO Craig Pinkney, he stated that he informed you that inmate Kaili appeared high or under the influence of drugs, prior to the inmate's move.

. . . .

6. Upon entering the Waianuenue Recreation Yard, you stated that ACO Tagaloa had control of inmate Kaili and saw inmate Kaili began to crouch and grunt, and push back into ACO Tagaloa. You stated that you directed ACO Tagaloa to take the inmate down.

7. You stated that during the take down, inmate Kaili became resistive and was kicking and moving his arms around. You stated that inmate Kaili was noncompliant to verbal directives such as: "stop resisting," "give us your hands," and "stop fighting."

8. Based on the video footage of the incident, inmate Kaili was not kicking or using his hands prior to his take down to the ground.

. . . .

10. In an attempt to gain control of inmate Kaili, you stated that you directed your subordinates to, "use your strikes." You stated that this command was in reference to only the approved strikes taught in BCT. You stated that you never gave a verbal command to your subordinates to, "kick him in the shoulder." The video does not indicate that you attempted to stop the inappropriate conduct of your subordinates.

. . . .

13. You stated that you did not see any of the ACOs involved in the take down kick or punch inmate Kaili in the face or head, or utilize any unapproved strikes to the inmate. This is contrary to the evidence in the video.

14. Based on the video footage, inmate Kaili was not kicking or using his hands prior to his take down to the ground. The video footage also showed that ACOs DeMattos, Pinkney and Tagaloa, delivered approximately 15 strikes and kicks to the inmate's face.

. . . .

22. According to the medical records, inmate Kaili sustained multiple abrasions to his entire face, two swollen and bruised (black and blue) eyes, and a fractured jaw.

. . . .

30. The video footage of the incident was reviewed by Marte Martinez, Training and Staff Development (TSD) Instructor. According to Ms. Martinez, your subordinates delivered approximately 45 strikes and kicks to inmate Kaili during the incident. Ms. Martinez stated that these strikes consisted of both authorized and unauthorized strikes. Ms. Martinez stated that although approved strikes such as the hammer fist and knee strike were applied to inmate Kaili, these strikes were applied to areas not consistent with official training (head, neck, and side of torso). In addition, the strikes utilized on inmate Kaili were not appropriate for the level of resistance inmate Kaili displayed, which Ms. Martinez described as passive and defensive.

31. Based on the video evidence, it appears that inmate Kaili's injuries were sustained during your subordinates' use of unnecessary, excessive, and improper use of force.

32. The video footage was evaluated by Sergeant Samuel Kaeo and Sergeant Pepe Ignacio Jr. (TSD staff and supervisors) who assisted in the training of PPCT (Pressure Point Control Tactics) for the BCT class ACOs DeMattos, Pinkney and Tagaloa attended. Both Sergeant Kaeo and Sergeant Ignacio Jr. stated that all of the kicks and strikes these ACOs utilized on inmate Kaili were not in compliance with official PPCT/BCT criteria.

33. According to the departmental Use of Force policy, COR.08.07.3.0.2; the department requires that, "When physical force is necessary, the level used shall be reasonable and appropriate to gain compliance and to maintain the security and custody of the facility." Your actions of permitting your subordinate staff to kick and strike inmate Kaili without intervention is contrary to policy, as the inmate displayed a low level of resistance.

34. In addition, based on the department's policy, COR.08.24: Use of Mechanical Restraints, "the use of mechanical restraints shall be placed on offenders as a precautionary measure, or when the freedom of movement may result in actual or imminent threat of bodily injury to the offender or others." Your description of inmate Kaili acting strangely and having an unknown state of mind warranted the use of mechanical restraints.

35. Based on a totality of the evidence, which included the video footage, documented evidence of inmate Kaili's injuries, and other correctional staff statements, it is evident that ACOs DeMattos, Pinkney and Tagaloa used unnecessary, improper, and excessive force on June 16, [sic] 2015, and you failed to intervent [sic] to have them cease their inappropriate conduct.

36. As a Sergeant (supervisor) for nine (9) years, and a public servant, you are entrusted with the custody and care of inmates. Your conduct and/or failure to act resulted in a physical assault on inmate Kaili that caused multiple abrasions to the face, black and blue eyes, and a fractured jaw. This is contrary to the

> mission of the department, "To uphold justice and public safety by providing correctional and law enforcement services to Hawaii's communities with professionalism, integrity and fairness," and the professional requirements of your position as an Adult Corrections Officer.
>
> . . . .
>
> Accordingly, you are being afforded an opportunity to contest this discharge action before the Departmental Hearing Officer, Laurie Nadamoto. . . .
>
> . . . .
>
> If you feel that this action is without just and proper cause, you have the right to process a grievance in accordance with the provisions of your Collective Bargaining Agreement.

A pre-discharge hearing was held on December 20, 2016, before hearings officer Laurie **Nadamoto**. Nadamoto watched the Video, heard Taum's testimony, and made an independent determination that termination was warranted. By letter dated January 4, 2017, Espinda notified Taum that "the evidence presented by you and your representative was insufficient to overturn the sanction imposed by the discharge letter dated November 29, 2016. Therefore, the discharge is sustained."

Taum's Grievance

United Public Workers (**UPW**) filed a Step 1 grievance for Taum. It alleged that PSD discharged Taum "without considering all the evidence presented at the December 20, 2016 Pre-Discharge Hearing." PSD found no violations of the collective bargaining agreement, and denied the grievance.

By letter dated May 15, 2017, UPW submitted Taum's grievance to arbitration. The arbitration hearing was scheduled for October 2017. In September 2017 the hearing was rescheduled to November. Then, by letter dated September 25, 2017, UPW informed Taum:

> Based on a review of the entire matter, including but not limited to the applicable provisions of the Collective Bargaining Agreement (CBA) and the evidence presented, the Union has decided not to pursue the grievance because there is insufficient proof that there is a violation of the CBA.

HLRB Contested Case

On December 20, 2017, Taum filed a *Prohibited Practice Complaint* against UPW and PSD with HLRB. It alleged that UPW breached its duty of fair representation because its State Director Dayton **Nakanelua** "had a personal grudge against [Taum] and used his influence to ensure [Taum] was discharged from [PSD] and would no longer be a member of the UPW." It also alleged that PSD violated UPW's collective bargaining agreement under Hawaii Revised Statutes (**HRS**) § 89-13(a)(8)[5] "because it lacked just and proper cause to terminate" Taum.

The HLRB contested case hearing began on April 11, 2018. PSD submitted the Cravalho Report, Martinez's Use of Force Review, and the Video to HLRB. The record contains over 4,500 pages of testimony in thirty volumes of transcripts. HLRB heard testimony from Taum, HCCC Warden Cabreros, PSD Director Espinda, Lieutenant Cravalho, Young, Nadamoto, and Martinez, among others.

Espinda testified on February 27, 2019. He had reviewed the entire investigation into Taum and watched the Video "maybe four or five times." Based on the Video, "it was very clear to me that the use of force policy was violated, yes." He testified that the Martinez Report was "an added layer to what Lieutenant [Cravalho] had done in the investigative process[.]" He agreed with Martinez's assessment of the level of Kaili's resistance and the disproportionate reaction of the ACOs. He stated that Lieutenant Cravalho's Report and the Video were "significant" factors in his decision to terminate Taum, and that Martinez's Report "strengthened and gave contextual support to what was uncovered via the investigative process, including the interview and reporting contained therein as well as what was observed on the video."

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[5] HRS § 89-13 (2012) provided:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> . . . .
>
> (8) Violate the terms of a collective bargaining agreement[.]

On April 18, 2019, Taum submitted his Exhibit 26, a Hawaii News Now article about Martinez "facing public scrutiny for allegedly being dishonest about her job qualifications." The HLRB contested case proceeding then degenerated into a fight between HLRB and PSD over access to Martinez's personnel files.

Taum requested, and HLRB approved, subpoenas for information about Martinez's educational qualifications. PSD produced a binder containing results of its 2016-17 investigation into Martinez's credentials, which HLRB reviewed in-camera. The binder contained information about Martinez's certifications and training and parts of Martinez's personnel records, but no information about her educational background.

Taum also requested, and HLRB approved, a subpoena to Martinez and two subpoenas to Southern Oregon University. Martinez (not PSD) moved to quash the Southern Oregon subpoenas.

On September 10, 2019, HLRB issued **Order 3557**. PSD was ordered to produce Martinez to answer "questions from the Board regarding her qualifications as presented in her January 8-9, 2019 testimony[.]" Even though HLRB had closed the parties' cases-in-chief on July 31, 2019, it ordered a further hearing on the merits. Martinez was ordered to bring "**certified copies** of any and all records regarding her qualifications as presented through her January 8-9, 2019 testimony[.]"

On September 19, 2019, HLRB issued **Order 3561**. PSD was ordered to produce documents "relating to Ms. Martinez's applications for employment for positions with PSD, including but not limited to the training positions that she has held or currently holds."

HLRB held a hearing on Order 3557 and Order 3561 on September 25, 2019. PSD again produced the binder of its 2016-17 investigation, which was filed under seal. HLRB questioned PSD's custodian of records, Colleen **Miyasato**, about records PSD had not produced, including Martinez's personnel file. Miyasato believed that Martinez applied to PSD through the State Department of Human Resources Development (**DHRD**) because she was hired from

outside PSD; thus DHRD, not PSD, would have screened Martinez's educational credentials.

Martinez did not appear on September 25, 2019 because of a family emergency. She later confirmed it was DHRD, not PSD, that had "cleared" her for minimum qualifications.

HLRB instructed Miyasato to start copying Martinez's personnel file. PSD's counsel objected, stating: "They are confidential personnel records. Ms. Martinez has not consented to the release of these records. They are her personal records. She's not a party to this action. She is a witness."

The Board issued **Order 3563** the next day. PSD was ordered to produce Martinez's personnel file at a hearing set for October 3, 2019. PSD filed an objection, arguing it could not produce Martinez's personnel file without a court order under the Hawaiʻi Uniform Information Practices Act.[6]

PSD appealed Order 3563, creating circuit court case no. 1CC191001552. PSD moved for a continuance of the October 3, 2019 continued hearing on the merits until the circuit court could resolve the appeal.

HLRB did not continue the October 3, 2019 hearing, which went forward as scheduled. PSD stated it "will not be producing Ms. Martinez's personnel files without a court order."

On October 7, 2019, HLRB issued **Order 3566A**. HLRB found PSD "did not act in good faith," disqualified Martinez as an expert witness, and drew an adverse inference from PSD's refusal to produce documents concerning Martinez. HLRB stated it would "weigh any of PSD's actions in this case that relied on Ms. Martinez's opinions and analysis in light of the weight given to her testimony, opinions, and analysis." HLRB's decision to weigh Martinez's credibility and give appropriate weight to her testimony, opinions, and analysis were within its authority as the trier of fact.

However, also on October 7, 2019, HLRB issued its *Notice that Hawaiʻi Labor Relations Board Will Entertain a Motion*

[6] See HRS §§ 92F-13 (Government records; exceptions to general rule); 92F-14 (Significant privacy interest; examples); 92F-19 (Limitations on disclosure of government records to other agencies).

to Amend Prohibited Practice Complaint to Include Additional Allegations of Violations of Hawaiʻi Revised Statutes §§ 89-10.8, 89-13(a)(1) and 89-13(a)(7) (**Notice to Amend**). The Notice to Amend stated:

> the parties are hereby notified that the Board will entertain a motion for leave to amend the Complaint to conform to the evidence in this case to include additional allegations that PSD violated HRS §§ 89-10.8, 89-13(a)(1), and 89-13(a)(7) by relying on an investigation report as a basis for [Taum]'s discharge from his PSD position, which was incomplete and based on a use of force report rendered by Ms. Martinez, who was not shown to be qualified for the position that she held at PSD at the time she rendered that report; and by continuing to refuse to disclose and substantiate Ms. Martinez's qualifications for that position to [Taum] and his Union UPW during [Taum]'s disciplinary proceedings and grievance procedure and the prohibited practice case.

Unsurprisingly, Taum moved to amend his prohibited practice complaint on October 15, 2019 "as set out in the Board's Notice . . . to Amend[.]" PSD and UPW opposed the amendment. HLRB granted the motion.

Taum's *Amended Prohibited Practice Complaint* was filed on October 24, 2019. It contained the original claims, plus the additional claims suggested by HLRB, parroting the language in HLRB's Notice to Amend.

UPW moved to dismiss the Amended Prohibited Practice Complaint, or for summary judgment. PSD joined. The motion was heard on November 5, 2019. HLRB orally granted UPW's motion but denied PSD's joinder:

> The Board specifically dismisses the alleged violations of HRS 89-13(a)(8), 89-13(b)(1), 89-13(b)(4) and 89-13(b)(5) as well as the alleged breach of duty of fair representation.
>
> Accordingly, as all claims against Respondent UPW have been dismissed Board Case 17-CU-10-357 is hereby closed, and Respondent UPW is dismissed from any further proceedings in this case.
>
> The amended prohibited practice complaint will continue over the remaining allegations of violations of Chapter 89-13(a)(1), 89-13(a)(7) and 89-10.8. This ruling will be incorporated in the final decision and order in this matter.

HLRB conducted another hearing on the merits on December 11, 2019. Espinda testified. In response to a question about what he relied on to decide to fire Taum, he answered:

> In this particular case it was based on the findings of the assigned investigator [(Cravalho)]. It was based on the findings of the assigned hearings officer [(Young)], 37 I believe different points of evidence documented in this [termination] letter.
>
> I relied on the findings of the predismissal hearing officer [(Nadamoto)]. I relied on my over 35 years of correctional experience. 25 as a warden and 5 as a director. And I, of course, relied on multiple viewings of that very disturbing video of the incident itself.

He was asked: "If you did not have Ms. Martinez's statement and report would it have made any difference in your decision to terminate Mr. Taum?" He answered: "No. Not at all."

During a June 12, 2020 status conference, HLRB closed the record and ordered submission of post-hearing briefs.

On May 4, 2022, Taum moved to reopen the record to include the *Felony Information and Non-Felony Complaint* filed on April 6, 2022 in State v. Martinez, Case No. 1CPC-22-0000426, (Haw. Cir. Ct. Mar. 6, 2024). Two of the counts alleged that Martinez committed Perjury about her education while testifying before HLRB in Taum's case.

On July 12, 2022, PSD filed supplemental exhibits. They included the verdict form filed in United States v. Tagaloa, Case No. 1:20-cr-00044-LEK (D. Haw. July 8, 2022). On July 8, 2022, a federal jury found Taum, Tagaloa, and Pinkney guilty of violating Kaili's constitutional rights, conspiracy to obstruct justice, and obstruction by false report. On November 17, 2022, Taum was sentenced to 144 months in prison. Judgment in a Crim. Case at 3-4, Tagaloa, Case No. 1:20-cr-00044-LEK (D. Haw. Nov. 17, 2022), Dkt. No. 396.

PSD opposed Taum's motion. Taum objected to PSD's supplemental exhibits. HLRB denied Taum's motion and struck PSD's supplemental exhibits.

HLRB issued its 58-page Decision and Order on February 21, 2023 — three months after Taum was convicted and

sentenced by the federal court. HLRB first concluded "that Taum failed to carry the burden of showing that UPW breached its duty of fair representation." It therefore dismissed "the prohibited practice case against UPW for Taum's failure to carry his burden of proof to show a breach of the duty of fair representation and the prohibited practice claim against PSD for a violation of HRS § 89-13(a)(8) for lack of standing."

HLRB found:

> Following the Incident, Cabreros assigned Carvalho [sic, should be Cravalho] to investigate the alleged SOC [(standards of conduct)] violation counts against Taum for the Incident. These alleged SOC violations included, among other things, issues of unnecessary and excessive use of force and supervision of employees.
>
> During the investigation, Carvalho [sic] reviewed videos of the Incident (PSD video), reports from the ACOs involved and other HCCC staff, investigative questionnaires from the ACOs involved and training instructors Kaeo and Uemura, medical records with photographs, the investigators' review of the video, the use of force policy, and the inmate's statement.
>
> Carvalho [sic] submitted his investigation report (Carvalho [sic] Report) with findings and conclusions based on all the evidence. The Carvalho [sic] Report found evidence of excessive use of force based on the PSD video.
>
> Carvalho [sic] determined that Taum was ultimately responsible for the use of force employed during the Incident because he was the supervisor of the escort and subsequent takedown of the inmate, and he was responsible for instructions to and controlling the actions of his subordinates. Therefore, Carvalho [sic] concluded that Taum violated all SOC violation counts contained in the investigation.
>
> . . . .
>
> Espinda reviewed the completed Carvalho [sic] Report, including the PSD video. Based on his review of the Carvalho [sic] Report, Espinda found sufficient evidence of just and proper cause to proceed to a disciplinary hearing process and approved Cabreros' request to process the Taum investigation to a Pre-Disciplinary due process hearing.
>
> . . . .
>
> Prior to signing the Nadamoto Discharge Letter, Espinda received the administrative file, which contained information that Nadamoto gathered by email or at the [pre-discharge] hearing, including the Carvalho [sic] Report, the Pre-Disciplinary and Pre-Discharge proceedings information, and the letters and emails with Martinez.
>
> After reviewing the administrative file and performing his independent assessment, Espinda signed the Nadamoto Discharge Letter notifying Taum that the discharge was

> sustained and advising him to consult with the Union if he felt there was no just and proper cause for the action.
>
> In sustaining the discharge, Espinda relied on the Martinez Report and agreed with her analysis.
>
> . . . .
>
> . . . . The Board credits Nadamoto's testimony to the extent that she reviewed evidence gathered by Carvalho [sic] and Young in recommending that the discharge be sustained.
>
> The Board found Espinda's testimony, part credible, and part not credible. . . . Further, the Board did not find Espinda credible regarding his knowledge of the facts regarding Martinez, her applications, and qualifications. . . . Finally, some of Espinda's responses were exaggerated and self-serving to PSD and himself, such as the lack of weight he gave to the Martinez Report.
>
> . . . .
>
> Carvalho [sic] had a clear and detailed recollection of the procedures followed and the reasons for his findings and conclusions regarding the Taum investigation. At the time of the Taum investigation, he was a PSD employee. By the time of his testimony, he was retired from his PSD position. After having the opportunity to review and rely on the Carvalho [sic] Report, Carvalho [sic] provided credible testimony without much equivocation on the steps that he took in performing the investigation and the reasons for his decisions during the process.

HLRB concluded that PSD:

> committed a prohibited practice under HRS § 89-13(a)(1) by interfering with Taum's HRS § 89-3 rights during the disciplinary and grievance processes by interfering with Taum's right to a meaningful, full, and effective representation by his Union under HRS § 89-8(a).
>
> The Board further holds that PSD committed a prohibited practice under HRS § 89-13(a)(1) by interfering with Taum's right under HRS § 89-3 to a full and fair process in challenging his discharge ***by relying on Martinez, her use of force review and assessment, and the Martinez Report*** while refusing, failing, and inhibiting the disclosure that Martinez was unqualified for her PSD FTSP [(Firearms Training Specialist Position)].

(emphasis added).

HLRB ordered that PSD, among other things:

> 1. Cease and desist from using and relying on Martinez as a use of force specialist and any of her use of force reviews, assessments, or reports for purposes of determining whether an employee should be disciplined for a failure to use appropriate use of force under the PSD policies;
>
> . . . .

> 3. Within 30 days of this Order, reinstate Jonathan Taum to his former position as an ACO IV at HCCC without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed. Or, if Taum does not choose to or is unable to be reinstated, PSD shall provide him compensation him [sic] in lieu of reinstatement, including front pay to compensate for future lost earnings, which shall consist of wages and benefits that he would have earned for the length of time the employment with PSD was reasonably certain to continue;
>
> 4. Make Jonathan Taum whole, including back pay with interest and other benefits suffered from PSD's misconduct taken against him; [and]
>
> 5. Within 30 days from the date of his [sic] Order, remove from its files any reference to the unlawful discharge of Jonathan Taum, and within three days after the removal, notify him in writing that this has been done and that the discharge will not be used against him in any way[.]

PSD's Primary Appeal

PSD appealed HLRB's Decision and Order to the circuit court. The circuit court entered an *Order Denying Respondent-Appellant's Notice of Appeal Filed on March 16, 2023 [Dkt. 3]* on January 23, 2024. The Final Judgment was also entered on January 23, 2024. This secondary appeal followed.

II. POINTS OF ERROR

PSD's opening brief states four points of error: (1) HLRB erred by advising Taum to file an amended prohibited practice complaint containing factual allegations and legal claims suggested by HLRB; (2) HLRB erred by granting Taum's motion to amend his complaint to include claims for conduct that happened outside the statute of limitations; (3) HLRB erred by finding that PSD committed prohibited practices; and (4) HLRB abused its discretion in ordering Taum's reinstatement or, alternatively, that Taum be provided compensation in lieu of reinstatement.

III. STANDARDS OF REVIEW

Our review of a circuit court decision on an appeal from an administrative agency's decision is a secondary appeal; we apply the standards in HRS § 91-14(g) to the agency's decision

to determine whether the circuit court was right or wrong. Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawaiʻi 505, 515–16, 364 P.3d 213, 223–24 (2015).

Under HRS § 91-14(g) (2012 & Supp. 2022), we may affirm the decision of the agency; remand the case with instructions for further proceedings; or reverse or modify the decision and order if the substantial rights of the appellant were prejudiced because the agency's findings, conclusions, decision, or order: (1) violate provisions of the constitution or a statute; (2) exceed the agency's statutory authority or jurisdiction; (3) were made on unlawful procedure; (4) were affected by other error of law; (5) were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) were arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

We review an agency's conclusions of law *de novo*, and its factual findings for *clear error*. Sierra Club, 136 Hawaiʻi at 516, 364 P.3d at 224. An agency's determination of a mixed question of fact and law is reviewed for *clear error* because it depends on the facts and circumstances of the particular case. In re Kuamoʻo, 142 Hawaiʻi 492, 496, 421 P.3d 1262, 1266 (2018).

A finding of fact or mixed finding and conclusion is clearly erroneous when, despite some evidence to support it, we are left with the definite and firm conviction after reviewing the entire record that a mistake has been made. See Cowan v. Exclusive Resorts PBL1, LLC, 156 Hawaiʻi 268, 272, 574 P.3d 288, 292 (2025).

An agency abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party before it. See Cowan, 156 Hawaiʻi at 272, 574 P.3d at 292.

IV. DISCUSSION

HLRB violated constitutional provisions, exceeded its statutory authority, used unlawful procedure, made errors of law, and abused its discretion when it issued the October 7, 2019 Notice to Amend; in so doing, HLRB abrogated its statutory role

as neutral decision-maker and became Taum's advocate after apparently prejudging his case against PSD. HRS § 91-14(g)(1), (2), (3), (4) and (6).

HLRB was created in 1970 as the Hawaiʻi Public Employment Relations Board (**HPERB**). 1970 Haw. Sess. Laws Act 171, § 5 at 311-13. Its name was changed to the Hawaiʻi Labor Relations Board effective January 1, 1986. 1985 Haw. Sess. Laws Act 251, § 4 at 476, § 30 at 487. HRS § 89-5(i) (2012) authorized HLRB to:

> (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper; [and]
>
> (5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions[.]

HLRB members thus perform a "quasi-judicial role." Jordan v. Hawaii Government Employees' Association, Local 152, 472 F. Supp. 1123, 1128 (D. Haw. 1979).

> [S]tate administrative law requires that HPERB utilize many of the same safeguards that are available in the judicial process. Contested cases are adversarial in nature; a party is entitled to present his case by oral or documentary evidence; the testimony and exhibits together with the pleadings constitute the exclusive record for decision; and the parties are entitled to a written decision with separately stated findings of fact and conclusions of law.

Id. (footnotes omitted) (citing HRS §§ 91-10(3), 91-9(c) & (e), 91-12, and 89-5(a)); see also, Fasi v. Haw. Pub. Emp. Rels. Bd., 60 Haw. 436, 442, 591 P.2d 113, 117 (1979) (stating that an HPERB "decision is rendered in a quasi-judicial proceeding").

The Hawaiʻi Constitution provides, "No person shall be deprived of life, liberty or property without due process of law[.]" Haw. Const. art. I, § 5. "The requirements of due process are flexible and depend on many factors, but there are certain fundamentals of just procedure which are the same for

every type of tribunal and every type of proceeding, including those before administrative agencies." Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawaiʻi 376, 389, 363 P.3d 224, 237 (2015) (cleaned up).

"In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, *prohibits decision-makers from prejudging matters* ***and the appearance of having prejudged matters***." Id. (emphases added).

In an analogous case, the supreme court stated:

> When criminal contempt is charged, it signifies that the accuser believes the defendant's conduct was contemptuous. A procedure whereby the trial, if any, upon the charge shall be by the judge who lodged it, without a jury, denies the accused due process[.]

State v. Brown, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989) (cleaned up).

HLRB's Decision and Order stated it was authorized by former Hawaii Administrative Rules § 12-42-8(g)(3)(C) and (10) "to allow any document to be amended before a final order is issued." But Taum never moved to amend his Prohibited Practice Complaint. HLRB went beyond granting a request to amend. Its Notice to Amend all but told Taum and PSD it had prejudged that PSD had

> violated HRS §§ 89-10.8, 89-13(a)(1), and 89-13(a)(7) by relying on an investigation report as a basis for [Taum]'s discharge from his PSD position, which was incomplete and based on a use of force report rendered by Ms. Martinez, who was not shown to be qualified for the position that she held at PSD at the time she rendered that report; and by continuing to refuse to disclose and substantiate Ms. Martinez's qualifications for that position to [Taum] and his Union UPW during [Taum]'s disciplinary proceedings and grievance procedure and the prohibited practice case.

Taum's original prohibited practice complaint alleged: (1) UPW breached its duty of fair representation; and (2) PSD breached UPW's collective bargaining agreement. The HLRB proceeding was thus a "hybrid action." See Lee v. United Public Workers, AFSCME, Local 646, 125 Hawaiʻi 317, 321, 260 P.3d 1135, 1139 (App. 2011).

> [A]n employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such 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.
>
> > The two claims are inextricably interdependent. To prevail against 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.
> >
> > . . . .
> >
> > Based on analogous federal cases previously cited by this court and the policy considerations articulated in them, we hold that an 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.

Poe v. Haw. Lab. Rels. Bd., 105 Hawaiʻi 97, 102-04, 94 P.3d 652, 657-59 (2004) (cleaned up).

The HLRB determined that UPW did not breach its duty of fair representation. No one challenges that determination. HLRB correctly dismissed Taum's original claim that PSD breached UPW's collective bargaining agreement. Poe, 105 Hawaiʻi at 104, 94 P.3d at 659; Lee, 125 Hawaiʻi at 321, 260 P.3d at 1139.

But HLRB then proceeded to rule on the additional claims against PSD — the claims it urged Taum to assert when it issued the Notice to Amend. In so doing, HLRB was no longer acting as a neutral decision-maker. The Decision and Order confirmed that HLRB had prejudged the new claims it urged Taum to assert against PSD; it ignored overwhelming evidence in the record — most notably the Video and the Cravalho Report; Cabreros's referral for a pre-disciplinary due-process hearing; and Espinda's concurrence, all of which happened months before Martinez submitted her Use of Force Review — supporting PSD's decision to terminate Taum's employment. That evidence was more than sufficient to validate Taum's employment termination, even

if Martinez's Use of Force Review and testimony before HLRB was completely disregarded.

HLRB's issuance of the Notice to Amend and its later Decision and Order showed that HLRB had abrogated its statutory role as neutral decision-maker in the quasi-judicial proceeding. After reviewing the entire record, we are left with the definite and firm conviction that HLRB made legal errors and abused its discretion. Cowan, 156 Hawaiʻi at 272, 574 P.3d at 292; HRS § 91-14(g)(1), (2), (3), (4) and (6).

V. CONCLUSION

The circuit court's January 23, 2024 *Final Judgment* is reversed, and HLRB's February 21, 2023 *Findings of Fact, Conclusions of Law, Decision and Order* is vacated.

This case is remanded to HLRB. On remand, HLRB is to dismiss Taum's October 24, 2019 *Amended Prohibited Practice Complaint* with prejudice.

DATED: Honolulu, Hawaiʻi, November 20, 2026.

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/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Clyde J. Wadsworth
Associate Judge