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Case No. 2016-CU-10-341, CE-10-878**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

CHAD LOS BANOS,

Complainant,

and

DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAII, and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-
CIO,

Respondents.

CASE NOS. CU-10-341 and CE-10-878

ORDER NO. 3172

ORDER GRANTING (1) THE
DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAII'S (DPS) MOTION
FOR RECONSIDERATION OF
BOARD'S ORDER GRANTING IN
PART AND DENYING IN PART
RESPONDENT DEPARTMENT OF
PUBLIC SAFETY, STATE OF
HAWAII'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT
FILED MARCH 7, 2016, AND (2)
GRANTING THE UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646,
AFL-CIO'S (UPW) MOTION FOR
RECONSIDERATION OF UNION'S
MOTION TO DISMISS COMPLAINT
AND FOR DIRECTED VERDICT

ORDER GRANTING (1) THE DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII'S (DPS) MOTION FOR RECONSIDERATION OF BOARD'S ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED MARCH 7, 2016, AND (2) GRANTING THE UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S (UPW) MOTION FOR RECONSIDERATION OF UNION'S MOTION TO DISMISS COMPLAINT AND FOR DIRECTED VERDICT

The Hawaii Labor Relations Board (Board) issues this order granting both (1) the DEPARTMENT OF PUBLIC SAFETY, State of Hawaii's (DPS) Motion for Reconsideration of Board's Order Granting in Part and Denying in Part Respondent Department of Public Safety, State of Hawaii's Motion to Dismiss Prohibited Practice Complaint filed March 7, 2016 (2nd DPS Motion), and (2) the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO's (UPW)

Motion for Reconsideration of Union's Motion to Dismiss Complaint and for Directed Verdict (2nd UPW Motion).

I. Background.

This dispute arises out of DPS's June 15, 2015 acceptance of Complainant Chad Los Banos' (Complainant or Los Banos) resignation as an Adult Correctional Officer (ACO) pursuant to that certain Memorandum of Understanding by and between DPS and UPW dated July 30, 2010 (MOU). The MOU is a non-disciplinary, "no fault" approach to improve attendance (Attendance Program). Both DPS and UPW recognized that ACO attendance is a common problem, and rather than addressing absences as a disciplinary issue, it was agreed that the disciplinary approach taken in in Sections 37.17b.4.e and 38.11c.2 of the Unit 10 Collective Bargaining Agreement effective as of July 1, 2013 (Unit 10 CBA) would be modified in the MOU.¹

The MOU provides, among other things that²:

A. Except as provided in the MOU, the Attendance Program applies to "any absence from work without pay, with or without authorization." ¶ 1, MOU. Thus, "each day of leave without pay (authorized or unauthorized)," including any partial leave without pay day, "shall be considered as one (1)" leave without pay incident. ¶ 4.a, MOU.

B. For each leave without pay incident, there was a specific "required action" to be imposed. ¶ 4.b, MOU. Further, "once a determination is made that the Employee did not show up/report for work in accordance with the Required Action schedule [¶ 4.b], the remedy is to impose the next scheduled Required Action period per [leave without pay] day/incident, up to and including 15th, resignation with stipulation that Employee shall not seek re-employment with Department." ¶ 6, MOU.

C. The MOU also provides that "the schedule of incident/required action shall be counted continuously for a period of two (2) years from the date of the most current violation." ¶ 7, MOU.

D. The only exceptions to the Attendance Program were:

(1) Valid claims for federal and state benefits, including military leave, family and medical leave act, workers' compensation and TDI. ¶ 8, MOU.

¹ Los Banos is a member of Unit 10 and is represented by UPW. The parties do not dispute that the Unit 10 CBA was in effect at the time of his termination. The parties also do not dispute that the MOU was implemented on September 1, 2010, extended by mutual agreement between DPS and UPW and in effect at the time of Los Banos's resignation.

² See, Union Exhibit 21-2 through 22-13.

(2) Valid claims for leave without pay "resulting from catastrophic illness (e.g. cancer), injury (including serious medical procedures, e.g. surgery.) Critical/serious illness or impairment which renders an employee unable to perform one or more activities of daily living as noted in Section 38A.08i.1. through and including 38A.08i.7, or other illness or circumstances as determined by the Department head, or designee shall be exempt from the [Attendance Program]." ¶ 9, MOU.

Los Banos was absent without pay for 20 days in early 2015, i.e., January 4, 5, 12, 13, 15, 18, 20, 25, 27, February 1, 2, 8, 9, 10, 11, 15, 17, 19, 23, and March 3, 2015. By letter dated May 26, 2015, DPS informed Los Banos of the results of DPS's investigation of his absences without pay and notified him that pursuant to the MOU, his unexcused absences resulted in his "deemed" resignation from DPS effective June 15, 2015.

On June 19, 2015, UPW, on behalf of Los Banos, filed Case #JS-15-03. Jonathan Sloan, a UPW business agent, was assigned to this matter. In addition to filing the grievance, UPW submitted a request for information to DPS.³ DPS provided the requested information which verified DPS's assertion that Los Banos had more than fifteen days of leave without pay. After the grievance meeting attended by Los Banos, Sloan and a DPS representative, the Step 1 grievance was denied in a written decision from DPS dated November 2, 2015.⁴

On January 21, 2016, UPW notified Los Banos that "it is submitting the [Grievance Case #JS-15-03] to arbitration. However, the decision to arbitrate is subject to further review that may result in the grievance being withdrawn from arbitration."⁵ UPW then advised the Director of the Department of Human Resources that it was "submitting [Grievance Case #JS-15-03] to arbitration."⁶ On February 1, 2016, Dayton Nakanelua (UPW State Director) made a final decision not to pursue arbitration in grievance JS-15-03 and notified Los Banos of his decision by a letter of the same date.⁷

On March 7, 2016, Los Banos filed a Prohibited Practice Complaint (Complaint) against both DPS and UPW. The Complaint is a "hybrid case" against DPS claiming that Los Banos was improperly terminated from his job as an ACO, and against UPW claiming that the union breached

³ See, Union Exhibit U-22-1.

⁴ See, Union Exhibit U-22-2.

⁵ See, Union Exhibit U-22-3.

⁶ See, Union Exhibit U-22-4.

⁷ See, Union Exhibit U-22-5.

its duty of fair representation by failing to take his grievance to arbitration. The specific theories of relief sought by Los Banos in the Complaint are as follows:

- A. UPW committed a breach of the duty to participate in good faith over mediation and interest arbitration under either Sections 89-13(a)(6) or 89-13(b)(3) of the HRS.
- B. Los Banos' rights under Chapter 76 were violated.
- C. DPS and UPW conspired to violate Los Banos' right under the Unit 10 CBA to take his grievance to arbitration with his own representative and not with UPW.
- D. The Attendance Program in the MOU violates Los Banos' constitutional right to due process and statutory rights by requiring Los Banos to voluntarily resign as a remedy for his unexcused absences. In essence, Los Banos argues that DPS and UPW should be judicially estopped from denying that the MOU is "constructive discipline" and that the "just and proper cause" principle must be applied to Los Banos' termination.
- E. DPS improperly applied his benefits under the Federal Family Medical Leave Act (FMLA)⁸ or Family Leave Act (FLA)⁹ to the attendance program set forth in Paragraph 8 of the MOU.
- F. DPS improperly denied him the relief of the attendance program as set forth in Paragraph 9 of the MOU.
- G. UPW breached its duty of fair representation by refusing to take his grievance through the arbitration stage.

The following motions were filed with the Board: (1) Respondent Department of Public Safety, State of Hawaii's Motion to Dismiss Prohibited Practice Complaint filed March 7, 2016, which was filed on March 30, 2016 (DPS Motion to Dismiss), and (2) UPW's Motion to Dismiss Complaint which was filed on March 30, 2016 (UPW Motion to Dismiss). On April 12, 2016, the Board conducted a hearing on both motions and issued an oral ruling as follows:

- A. The Board accepted Los Banos' withdrawal of his claim that DPS and UPW violated HRS Sections 89-13(a)(6) and 89-13(b)(3) regarding mediation and arbitration procedures. Thus, this claim is hereby deemed to be withdrawn.

⁸ 29 U.S.C. § 2601, et. seq.

⁹ Chapter 398, HRS.

- B. The Board accepted Los Banos' explanation that his allegations in the Complaint regarding his Chapter 76 rights were mere "embellishments" and are not legal claims being made against Respondents. Thus, claims, if any, based on alleged violations of Chapter 76 are hereby dismissed.
- C. Granted the DPS and UPW Motions regarding Los Banos' right (or lack thereof) to take his grievance to arbitration on his own and not through UPW. Although Los Banos raised novel arguments regarding his right to elect to arbitrate pursuant to the Unit 10 CBA, Hawaii law is to the contrary. While Los Banos or UPW could initiate a grievance with the employer, "only the union has the election to take the matter to arbitration (Step 5)." *Winslow v. State*, 2 Haw.App. 50, 55 (1981); and *Poe v. Haw. Labor Rels. Bd.*, 97 Hawaii 958, 538 ("the sole power to proceed to arbitration rested with the [union]"). Thus, claims based on any alleged right of an employee (as opposed to UPW) under the Unit 10 CBA to initiate a Step 3 arbitration pursuant to Section 15.16 of the Unit 10 CBA are hereby dismissed.
- D. Granted the DPS and UPW Motions regarding Los Banos' claim that the Attendance Program in the MOU is "constructive discipline" and that Respondents failed to establish a "just and proper cause" for his termination. Los Banos presented no evidence or argument to contest UPW and DPS' position that the MOU is a valid and properly negotiated collective bargaining agreement between the union and employer intended to improve work attendance. Furthermore, Los Banos did not address or challenge UPW's argument that Los Banos failed to timely challenge the MOU which was adopted and implemented in 2010.¹⁰ Thus, all claims challenging the adoption of the MOU are hereby dismissed, including any claim that the Attendance Program was, in fact, "constructive discipline" as being untimely.

Further, even if not untimely, Los Banos failed to properly support his claim that the MOU was, in fact, "constructive discipline." The MOU clearly states that Unit 10 CBA Section 38A.11, dealing with *unauthorized* leaves of absence, would be held "in abeyance."¹¹ In essence, the Unit 10 CBA treated absences as authorized or unauthorized, and for unauthorized leaves of absence, there were disciplinary consequences.¹² However, the MOU addresses "any absence from work without

¹⁰ The Complaint was filed on March 7, 2016, more than 5 and 1/2 years after the adoption and implementation of the MOU. Thus, the 90-day statute of limitation for prohibited practice complaints has been exceeded by Los Banos and this Board has no subject matter jurisdiction to hear any challenge to the "no fault" Attendance Program contained in the MOU.

¹¹ MOU, P. 1, attached as part of Exhibit 1 to Complaint.

¹² UPW CBA at Section 38A.11c.

pay, *with or without authorization*."¹³ Thus, the MOU does not treat absences as authorized or unauthorized. The mere fact an employee was absent without pay was sufficient to "trigger" the MOU. Thus, there were no disciplinary issues raised by the MOU. In fact, the MOU initiated a "no fault" approach to absences which had a "significant impact on staffing." Therefore, the MOU was not "constructive discipline" by its very terms and there were no termination issues.

In either situation, Los Banos cannot prevail on his "constructive discipline" claims, and the same are dismissed.

- E. Denied both the DPS and UPW Motions regarding the application of the FMLA and FLA benefits to Los Banos. The Board found that there are questions of fact as to how Los Banos' rights to excused leave from work under the FLMA and FLA were determined and whether it impacted his rights under Paragraph 8 of the MOU.
- F. Denied both the DPS and UPW Motions regarding the application of Paragraph 9 of the MOU to Los Banos. The Board found that there are questions of fact as to Los Banos' rights to excused leave from work under Paragraph 9 of the MOU.
- G. Denied both the DPS and UPW Motions regarding UPW's duty of fair representation in light of the questions of fact regarding UPW's decision to not take Los Banos' grievance to the arbitration stage.

Based on the foregoing, the only issues remaining before the Board at the hearing on the merits were the following:

- A. Did DPS comply with all of the terms of the MOU in terminating Los Banos from his job with DPS, including but not limited to Paragraphs 8 and 9 of the MOU?
- B. Did UPW breach its duty of fair representation to Los Banos when it failed to take his grievance to arbitration?

The Board proceeded to a hearing on the merits which was conducted on April 14 and 19, 2016. Los Banos presented his case to the Board by calling two witnesses (Warden Warren Cabrerros and himself). Documentary evidence was also submitted to the Board by all parties. At the conclusion of Los Banos' testimony, Los Banos "rested" his case and DPS and UPW advised the Board of their intention to file motions to dismiss or in the alternative for summary judgment or directed verdict. The parties agreed to a schedule for the filing and hearing of said motions.

¹³ MOU at Paragraph 1.

On May 18, 2016, UPW filed the 2nd UPW Motion, together with the Memorandum in Support of Motion. On May 19, 2016, DPS filed the 2nd DPS Motion, together with the Memorandum in Support of Motion, Declaration of Julian T. White and Exhibits G - H. On May 23, 2016, Los Banos filed Complainant's Memorandum in Opposition to Respondent UPW's Motion for Reconsideration of Union's Motion to Dismiss Complaint and for Directed Verdict Filed on May 18, 2016 (Memo in Opposition to 2nd UPW Motion). On May 24, 2016, Los Banos also filed Complainant's Memorandum in Opposition to Respondent Department of Public Safety, State of Hawaii's Motion for Reconsideration of Board's Order Granting in Part and Denying in Part Respondent Department of Public Safety, State of Hawaii's Motion to Dismiss Prohibited Practice Complaint filed March 7, 2016, Filed on May 19, 2016 (Memo in Opposition to 2nd DPS Motion). On June 2, 2016, the Board held a hearing on the 2nd UPW Motion and the 2nd DPS Motion.

Based on (1) all of the matters which are part of the record in this case (e.g., all transcripts, pleadings, declarations, exhibits, notices and orders filed with or by the Board), (2) all exhibits admitted into evidence at the Hearing on the Merits, (3) the testimony of each witness (whether elicited on direct, cross or redirect examination) and the Board's determination of the credibility, and the weight to be given to the testimony, of each witness, (4) the arguments of counsel (including the arguments made in their respective filings), and (5) such other matters which the Board is allowed to consider, including any matters which the Board is allowed to take notice of pursuant to HRS Chapters 89, 91 and 377,¹⁴ the Board adopts and enters the following Findings of Fact, Conclusions of Law and Decision (if it should be determined that any finding of fact should be considered as a conclusion of law or any conclusion as a finding or as mixed findings and conclusions, then they shall be deemed as such).

II. Hearing on the Merits and Findings of Fact.

A. Remaining claims against DPS. After the full presentation of the evidence by Los Banos and the conclusion of his case at the Hearing on the Merits, the Board found the following:

(1) The factual statements set forth in Section I, Background, are incorporated herein in this Section II as findings of fact.

(2) At all times relevant herein, DPS was the "employer" of Los Banos within the meaning of HRS § 89-2.

(3) UPW is, and was at all times relevant herein, (a) an employee organization within the meaning of HRS § 89-2, and (b) the duly certified exclusive bargaining representative of bargaining unit 10.

¹⁴ Pursuant to HRS § 91-10(4), the Board "may take notice of judicially recognized facts." The Board has not taken notice of any "generally recognized technical or scientific facts within [its] specialized knowledge," and therefore the notice requirement of HRS § 91-10(4) is not applicable.

(4) Los Banos stipulated that he was absent without pay from work for 20 days in early 2015, i.e., January 4, 5, 12, 13, 15, 18, 20, 25, 27, February 1, 2, 8, 9, 10, 11, 15, 17, 19, 23, and March 3, 2015.

(5) By letter dated May 26, 2015, DPS informed Los Banos of the results of DPS' investigation of his absences and notified him that pursuant to the MOU his absences without pay (whether authorized or not) resulted in his "deemed" resignation from DPS effective June 15, 2015.

(6) Los Banos did not qualify for any benefits under FLMA or FLA during the period from January 4 through March 3, 2015.¹⁵ Los Banos stipulated at the Hearing on the Merits that his FLMA benefits only started from March 16, 2105 and therefore did not qualify for the exceptions listed in ¶ 8 of the MOU. Los Banos also stipulated at the Hearing on the Merits that any "excused" absences under FLMA did not apply to him during the period in question.¹⁶

(7) Los Banos did not have any sick leave benefits that could be used to "excuse" his absences from work during the period from January 4 through March 3, 2015 pursuant to ¶ 9 of the MOU because:

(a) Los Banos did not have a catastrophic illness or injury during the period from January 4 through March 3, 2015 that would excuse his absence from work;¹⁷ and

(b) Los Banos did not have a critical/serious illness or impairment which renders an employee unable to perform one or more activities of daily living as noted in Section 38A.08i.1. through and including 38A.08i.7, or other illness or circumstances.¹⁸

¹⁵ Although Los Banos argues in the Memo in Opposition to the 2nd DPS Motion (*see* Section II.B. *at* pages 6 - 9) that Los Banos was medically qualified for FMLA leave, there is no evidence that Los Banos qualified for FLMA or FLA **benefits** during the period of time that he had his 20 days of unexcused absence (from January 4 through March 3, 2015). Thus, Los Banos was not entitled to sick leave benefits under FLMA to excuse any of his 20 days of absence from work.

¹⁶ Transcript at page 283, line 22 through page 284, line 13.

¹⁷ Los Banos testified that he did not know if his condition was catastrophic. He also said he was unclear if his problems amounted to an injury. He said, "I consider the – my impairment to have been serious, yes." However, Los Banos did not support his statement with any detail to explain or argue for his conclusion that he was seriously impaired. Transcript at page 311, line 1 through page 313, line 13.

¹⁸ Los Banos' treating physician, Dr. Roy Koga, referred Los Banos to see Dr. Don Hashimoto, a clinical psychologist. The Board takes notice that Dr. Hashimoto treated Los Banos from April 13, 2015 and not during the relevant period (January 4 through March 3, 2015). *See*, Exhibit U-19 at page 3. Furthermore, Los Banos admits that there is nothing in the medical reports to indicate that Los Banos was unable to perform the physical activities listed in 38A.081.1 through 38A.081.7 in the relevant period. (*See*, Transcript at page 351, line 9 through 353, line 12.) Lastly, neither Dr. Koga nor Dr. Hashimoto were called as witnesses to testify at the Hearing on the Merits to explain in greater detail the treatment provided to Los Banos and their diagnosis of his condition.

(8) Pursuant to Paragraph 11 of the MOU and the testimony of the witnesses at the Hearing on the Merits, it was Los Banos' responsibility to account for his individual leave balance for each request for leave of absence. Thus, it was Los Banos' responsibility to keep track of the levels of "LWOP Day/Incident" that are set forth in Paragraph 4.b. of the MOU.¹⁹

(9) DPS conducted an investigation in accordance with Paragraph 6 of the MOU of Los Banos' absences from work for the period from January 4 through March 3, 2015. Said investigation confirmed DPS' determination that Los Banos did not show up/report for work in accordance with the Required Action schedule and that his unexcused absences resulted in his resignation from DPS effective June 15, 2015. DPS performed all of the required actions as set forth in the MOU, including all notice requirements to Los Banos of his required resignation from his ACO position with DPS and his stipulation to not seek re-employment with DPS.

B. Remaining claims against UPW. After the full presentation of the evidence by Los Banos and the conclusion of his case at the Hearing on the Merits, the Board found the following:

(1) The Board recites and incorporates the findings of fact set forth in Section II.A.above.

(2) UPW properly represented Los Banos in the grievance process. UPW investigated the facts and circumstances surrounding Los Banos termination in a responsible and timely fashion, including its request for information from DPS and meeting with DPS at Step 1 of the grievance process.

(3) UPW did not perfunctorily perform its duties in representing Los Banos in the grievance process. UPW acted without bad faith, discrimination or arbitrariness in deciding to not to take Los Banos' grievance to arbitration. Los Banos admitted at the Hearing on the Merits that attempts were made by UPW to negotiate a settlement with DPS to get his job back by offering his return to work on a probationary basis with one-half back pay for the days that he missed work as a result of his termination. The specific terms of the settlement offer made by UPW for Los Banos were with the approval and at the instruction of Los Banos himself. DPS' response to UPW was to "mind your own business."²⁰

¹⁹ Although Los Banos argues at page 17 of the Memo in Opposition to the 2nd DPS Motion that DPS "had a 'past practice' of notifying ACOs as soon as possible concerning violations of the MOU and LWOP," Los Banos assumes that this "past practice" shifts the responsibility to account for his individual leave balance from him to DPS. Los Banos presented no credible evidence at the Hearing on the Merit that Paragraph 11 of the MOU did not control the question as to whose responsibility it was to account for his individual leave balance.

²⁰ Los Banos argues at page 9 of the Memo in Opposition to 2nd UPW Motion that "UPW had committed to arbitrate Complainant's case" and that Nakanelua's letter of January 21, 2016 stated that "the Union is informing you that it is submitting the above-cited grievance to arbitration." (See, Exhibit C-6.) However, Los Banos ignores the following sentence in that letter which states as follows: "However, the decision to arbitrate is subject to further review that may result in the grievance being withdrawn from arbitration."

(4) During oral arguments held on June 2, 2016 (after the close of Los Banos' case in chief), Los Banos for the first time raised the factual argument that UPW promised it would get his job back. His argument was based on his testimony that in his discussions with Kamakeeaina regarding the ongoing settlement negotiations with DPS, "I got a pretty good response from her she had raised her voice and said, like, oh, no, no, no, no, don't worry Chad, just -- I'm going to get you back to work soon."²¹ Los Banos argued that this was sufficient to raise at least an issue as to whether UPW promised to get his job back.

Unlike a motion to dismiss, when considering a motion for directed verdict (whether pursuant to Hawaii Rules of Civil Procedure (HRCPP) Rule 41(b) or Rule 52(c) (as discussed in more detail below), the Board is entitled to adopt findings of fact so long as they are "plausible in light of the record" and the Board is not required to weigh and evaluate the evidence in a light favoring Los Banos.

In light of the foregoing and Los Banos' burden to prove each and every element of his claims by a preponderance of the evidence, the Board finds that his latest argument has no merit because:

(a) UPW and DPS were in "back-and-forth" negotiations over his reinstatement. Los Banos then instructed Kamakeeaina to negotiate with DPS Director Nolan Espinda to get back not only his job, but also back pay. Per Los Banos, Kamakeeaina then told Los Banos "that the director won't budge, and that he changed his mind to entertain any proposals whatsoever to get me reinstated. And when [Kamakeeaina] asked [Espinda] why, why is that [Espinda] said none of her business."²² In effect, DPS was considering reinstating Los Banos, and it was his insistence on getting back pay that, in effect, caused DPS to change its mind, and refuse to "entertain any proposals whatsoever to get [Los Banos] reinstated." In other words, even if there was a promise (which the Board finds there was not), Los Banos added terms (i.e., back pay) and no agreement could be reached. Hence, there is no credible evidence supporting Los Banos's "promise" argument.

(b) Further, the Board finds that Kamakeeaina's statements to Los Banos were words of encouragement, and not a promise. Los Banos testified that:

"Q. Yeah. And you felt that she [Kamakeeaina] was very sympathetic, considerate, and said she would review the record and *try* to settle the case, correct? You said all that.

²¹ Transcript of Proceedings (TR) 161, Lines (L) 2-6.

²² TR 329, L 20-TR 330, L 4.

A. Correct."²³

Based on the foregoing, Los Banos understood that UPW was to try to settle his case, and that there was no promise made by UPW that he would be reinstated. In addition, Los Banos himself insisted on terms (i.e., back pay) which caused DPS to refuse to negotiate any further.

Based on the foregoing, the Board finds that (1) no promise was made by UPW to Los Banos that he would be reinstated, (2) Los Banos instructed UPW to ask for back pay as part of any settlement, (3) UPW followed Los Banos's instructions, and (4) DPS, at that point, cut off negotiations. Therefore, there is no credible evidence supporting Los Banos's "promise" argument.

(5) Los Banos did not provide any credible evidence to support his claim of UPW's conspiracy with DPS to terminate him from his ACO position.

III. Standards of Review.

Although the Board's rules are silent with respect to a motions to dismiss, reconsideration and directed verdict, the "Board has previously relied on the HRCP (Hawaii Rules of Civil Procedure) to assist in resolving ambiguities in its rules or procedures." *See Order No. 2014, United Public Workers and Benjamin J. Cayetano, et al., Case Nos. Ce-01-378a, CE-03-378b, CE-10-378c and CE-13-378d, at page 6.* Furthermore, Rule 81(b)(12) of the HRCP specifically extends the application of the HRCP to proceedings before the Board provided that there are no statutes or rules that contradict the HRCP provision that is being applied by the Board. Rule 81(b)(12) states as follows:

"These rules shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:

(12) Proceedings under: . . . chapters 89 and 380, relating to collective bargaining and labor disputes"

A. Motion to Dismiss.

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

²³ TR 326, L 9-13; italics added.

In responding to an HRCP Rule 12(b) motion to dismiss based on lack of subject matter jurisdiction, “a party who seeks to invoke the jurisdiction of the court has the burden of proving the actual existence of subject matter jurisdiction.” Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996); Trentacosta v. Frontier Pac. Aircraft Indus. Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). The question of jurisdiction is a question of law which is reviewed de novo under the right/wrong standard. Lingle v. Hawai’i Gov’t Employees Ass’n, 107 Hawai’i 178, 182, 111 P.3d 587, 591 (2005). In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

B. Motion for Reconsideration.

HRCP Rule 59(e) is the basis for motion for reconsideration. The purpose of Rule 59(e) is to ensure that the court has “properly considered all relevant information in rendering its decision.” Armster v. United States Dist. Court, 806 F.2d 1347, 1356 (9th Cir. 1986). Also, reconsideration under Rule 59(e) is appropriate in situations where controlling authority or some other matter material to the decision may have been overlooked in a prior decision. Yoshizaki v. Hilo Hospital, 50 Haw. 40, 41 (1967).

C. Motion for Directed Verdict.

Rule 52(c) of the HRCP provides as follows:

“(c) **Judgment on partial findings.** If during a trial without a jury *a party has been fully heard on an issue and the court finds against the party on that issue*, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.” (Emphasis in italics)

In Furuya v. Ass'n of Apt. Owners of Pac. Monarch, Inc., ___ Hawaii ___, 2016 HAW. LEXIS 96 at *35-*36 (SCWC-30485 May 2, 2016), the Court held that:

"The ICA concluded in its order for temporary remand to the circuit that although the circuit court dismissed several of the Furuyas' claims pursuant to HRCP Rule 41(b), the ruling should be considered made pursuant to HRCP 52(c). The parties do not dispute the ICA's determination.

As the ICA determined, 'where we have patterned a rule of procedure after an equivalent rule within the FRCP [Federal Rules of Civil Procedure], interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court.' Furuya mem.op. at 10 (quoting Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 251-52, 948 P.2d 1055, 1092-93 (1997)). HRCP Rule 52(c) was modeled after FRCP Rule 52(c). See Hawai'i Rules Committee, Proposed Red-Line Rules and Commentary to the Hawai'i Rules of Civil Procedure, Rules Committee Notes to Rule 41 and 52 (July 23, 1997). The United States Court of Appeals for the Ninth Circuit has held that '[i]n reviewing the district court's judgment entered under Rule 52(c), we review its findings of fact for clear error and its conclusions of law *de novo*.' United Steel Works Int'l, 728 F.3d 1107, 1114 (9th Cir. 2013). The court also noted that 'in the context of a bench trial ... '[i]f the district court's account of the evidence is plausible in light of the record reviewed in its entirety, [we] may not reverse even though convinced that had [we] been sitting as the trial of fact, [we] would have weighed the evidence differently.' Id. (alteration in original) (citation omitted)."

Thus, when ruling on a HRCP Rule 52(c) motion for directed verdict, the Board adopts the position taken by the Court in the Furuya case, i.e., the Board is entitled to adopt findings of fact so long as they are "plausible in light of the record," and the Board is not required to weigh and evaluate the evidence in a light favoring the complainant.²⁴

D. Burden of Proof

HRS § 91-10(5) states:

²⁴ This is similar to the position adopted by the Court when addressing motions for directed verdict at the close of a plaintiff's case in a nonjury trial prior to the adoption of HRCP Rule 52(c). The Court treated such motions as motions to dismiss brought pursuant to HRCP Rule 41(b). See, Kim v. State, 62 Haw. 483 (1980) (Kim Case). In the Kim Case, the Court held that a defendant in a non-jury trial may move, pursuant to HRCP Rule 41(b) for a dismissal of the case at the close of plaintiff's evidence on the grounds that plaintiff has shown no right to relief upon the facts and the applicable law. The Hawaii Supreme Court stated that "when the motion is interposed at what ordinarily is a trial's midpoint, the court may determine the facts and award judgment to defendant at this juncture." Id. at 487. In distinguishing a motion for dismissal under Rule 41(b) versus a motion for directed verdict in a jury trial, it was held in the Kim Case that "Rule 41(b), H.R.C.P., indeed vests trial courts with the power to *weigh and evaluate the evidence without special inferences favoring plaintiff, to resolve conflicts in the evidence, to determine where the preponderance of evidence lies, and to award judgment on the merits where appropriate.* (Italics added.)" Id. at 490.

"(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) of the Board's rules states:

"(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence."

Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." Waihee, 4 HLRB at 750. The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson Case).

In this case, Los Banos had the burden of proving every element of his claims by a preponderance of the evidence. Thus, he was required to "produce sufficient evidence" and "support that evidence with arguments applying the relevant legal principles."

IV. Conclusions of Law.

Based on the legal standards addressed in Part III above (which is incorporated herein by reference), if it should be determined that any of findings of fact or conclusions of law should have been set forth as conclusions of law or findings of fact, respectively, then they are be deemed to be such.

A. The Complaint as a "hybrid" action.

In Lee v. United Public Workers, AFSCME, Local 646, AFL-CIO, 125 Hawaii 317, 321 (Haw.App. 2011) (Lee Case), the Intermediate Court of Appeals (ICA) stated that "[s]uch an action, known as a 'hybrid 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. (Cites omitted.)"

As succinctly stated in DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-165 (1983) (cited in Poe II, 105 Hawaii at 102), "[t]o prevail against either the company or the Union [in a hybrid action], 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 but not the other; but the case he must prove is the same whether he sues one, the other, or both."

Therefore, to prevail against DPS and/or UPW, Los Banos must prove his case against both. If he cannot prove his case against one, then neither is culpable. *See*, Lee Case, 125 Hawaii at 321.

B. Motions Treated as Rule 52(c) Motions.

Given the filing of the 2nd DPS Motion and the 2nd UPW Motion at the close of Los Banos' case in chief, and the discussions regarding the filing of a motion for directed verdict, the Board will treat each motion as a Rule 52(c) motion. Thus, the Board may make appropriate findings of fact after weighing the evidence adduced at the Hearings on the Merits.

C. 2nd DPS Motion.

In order to prevail against DPS, Los Banos must prove that DPS willfully and improperly terminated him from his ACO position. He cannot do so because:

(1) The undisputed facts show that Los Banos was absent without pay for 20 days in early 2015, which specific days were January 4, 5, 12, 13, 15, 18, 20, 25, 27, February 1, 2, 8, 9, 10, 11, 15, 17, 19, 23, and March 3, 2015. As such, pursuant to the MOU, Los Banos was deemed to have resigned from his position without the ability to seek re-employment. In other words, because the MOU set up a "no fault" system of enforcing work attendance, Los Banos failed to show up for work for more than the fifteen days provided in the MOU. Thus, Los Banos cannot sustain his burden of demonstrating that DPS violated the MOU and/or the Unit 10 CBA.

(2) DPS conducted a proper investigation of Los Banos' absences from work and properly informed him that his unexcused absences resulted in his resignation from DPS effective June 15, 2015.

(3) DPS properly determined that Los Banos (a) did not have any sick leave benefits that could be used to "excuse" his absences from work during the period from January 4 through March 3, 2015, (b) did not qualify for any benefits under FLMA or FLA during the period from January 4 through March 3, 2015, and (c) did not have a catastrophic illness or injury during the period from January 4 through March 3, 2015 that would excuse his absence from work and did not have a critical/serious illness or impairment which renders an employee unable to perform one or more activities of daily living as noted in Section 38A.08i.1. through and including

38A.08i.7, or other illness or circumstances. As such, the Board concludes that Los Banos was not entitled to “excused” leave under Paragraphs 8 and 9 of the MOU.

(4) Contrary to Los Banos’ argument that DPS should have notified him of his days of “unexcused” absences in early 2015, the Board concludes that under Paragraph 11 of the MOU, Los Banos (and not DPS) is responsible for keeping "track" of his individual leave balance when he submits a request for leave of absence without pay. Thus, it was Los Banos’ responsibility to keep track of the levels of “LWOP Day/Incident” that are set forth in Paragraph 4.b. of the MOU, and he cannot blame DPS for his failure to keep track of the number of “unexcused” absences. The Board also takes notice that Los Banos expected UPW to “squash” his problem of his unexcused absences in early 2015 because UPW was able to “squash” similar problems he had regarding his unexcused absences back in 2013 and 2014.²⁵ It seems that Los Banos failed to show up for work and expected UPW to "protect" his job by “squashing” his problems. As was shown, the intent of the MOU was to implement the Attendance Program to rectify the problem of chronic absenteeism, and create a situation where employees, like Los Banos, were made responsible for their own actions.

(5) There was no showing that DPS acted in a willful manner. To constitute a prohibited practice, an employer must “willfully” engage in one or more of the prohibited activities list in HRS § 89-13(a). Even if, for example, the evidence adduced by Los Banos demonstrated a violation of the Unit 10 CBA (§ 89-13(a)(8)), there was no evidence that DPS engaged in willful conduct. Therefore, Los Banos cannot prevail on a prohibited practice claim against DPS.

(6) Lastly, as is discussed below, the Board also finds and concludes that Los Banos cannot prevail against UPW in his claim that UPW breached its duty of fair representation. Since Los Banos cannot prevail against UPW, he cannot prevail against DPS.

D. 2nd UPW Motion.

Since the Board found and determined that Los Banos did not prove that DPS engaged in any prohibited practice against Los Banos when he was terminated from his ACO position, he also cannot prevail against UPW. *See, Lee Case, 125 Hawaii at 321.*

Alternatively, Los Banos failed to provide by a preponderance of the evidence that UPW breached its duty of fair representation to him when it chose not to take his grievance to arbitration.

"Merely settling a grievance short of the arbitration process, *without more*, fails to establish a breach of the duty of fair representation." Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97 at 104 (2004) (Poe II Case). Thus, in this case, merely because UPW did not elect to

²⁵ Transcript at page 368, line 21 through page 369, line 5.

arbitrate Los Banos' grievance against DPS, did not mean that UPW breached its duty of fair representation. As stated by the United States Supreme Court in the Vaca Case:

"Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual plaintiff has an absolute right to have his grievance taken to arbitration regarding of the provisions of the applicable collective bargaining agreement... If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly great number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. (Cites omitted; italics added)"²⁶

Additionally, merely because Los Banos' claim may be supported by sufficient evidence such that a court or even the Board would have upheld his claim against DPS is not the proper standard for determining whether UPW breached its duty of fair representation by declining to arbitrate Los Banos' grievance with DPS. As stated in the Vaca Case:

"For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievance short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by providing him with recourse against both the employer (in a Section 301 suit) and the union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Thus, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owen's claims that he had been wrongfully discharged. (Italics added.)"²⁷

²⁶ Vaca Case, 386 U.S. at 191-192.

²⁷ Vaca Case, 386 U.S. at 192-194.

In order to prevail in his claim against UPW for a breach of its duty of fair representation, in addition to prevailing in his claim against DPS, Los Banos must prove arbitrary, discriminatory or bad faith conduct on the part of UPW in deciding to not arbitrate his grievance. He cannot do so because:

(1) UPW properly processed his grievance through Step 1, and the Board finds that there has been no showing that his union representative, Jonathan Sloan, did not vigorously advocate his position regarding his termination. Through Sloan's efforts, information from DPS regarding the termination of Los Banos was obtained and Sloan further investigated the possibility of receiving "excused" leave under the FLMA. When it was subsequently learned that Los Banos was not entitled to FLMA leave until March 16, 2015 (which did not benefit Los Banos since his termination was based on his absences from January 4 through March 3, 2015), UPW attempted to negotiate a settlement with DPS that would allow Los Banos to retain his ACO position on a probationary basis. Los Banos was informed of this change in strategy, he agreed with the alternative approach and instructed UPW to proceed with settlement talks with DPS, but DPS rejected the idea of having Los Banos return to work. Based on these events, UPW decided not to arbitrate Los Banos' grievance.

(2) There is no showing that UPW ignored Los Banos' grievance or processed it in a perfunctory fashion. In fact, UPW vigorously pursued his claim at Step 1 with Sloan, and then allowed his grievance to be addressed by Ms. Loyna Kamakeeaina (UPW Division Director) and who negotiated with DPS Director Nolan Espinda in an attempt to strike a "deal" to get Los Banos' job back. This was not merely a perfunctory review by union personnel -- UPW took the extra step of having its "upper level" leadership attempt to save Los Banos' job through negotiation with the "top" leader of DPS. There is no showing that Kamakeeaina's effort was either perfunctory or done in bad faith, and during the Hearing on the Merits, Los Banos spoke highly of Kamakeeaina and her actions taken on his behalf. It was only after DPS Director Nolan Espinda rejected the suggestion that DPS give back to Los Banos his ACO job that UPW decided not to pursue the matter any further. The Board finds and concludes that there was no credible evidence that any of UPW acts were hostile toward Los Banos or that UPW acted in bad faith or that Los Banos was given discriminatory treatment by UPW. Also glaring is Los Banos' failure to call Sloan, Kamakeeaina or Nakanelua as witnesses in this case despite his allegation that UPW's staff willfully failed to represent his interest properly. Thus, the Board finds that UPW did not engage in arbitrary, discriminatory or bad faith conduct in deciding not to arbitrate Los Banos' grievance.

(3) Furthermore, since Los Banos had no absolute right to have his grievance arbitrated under the Unit 10 CBA and a breach of UPW's duty of fair representation cannot be established, the Board concludes that UPW did not breach its duty of fair representation.

Based on the foregoing, the Board concludes that Los Banos failed to prove by a preponderance of the evidence that (1) DPS engaged in any prohibited practice, including violating

the terms of the Unit 10 CBA and/or the MOU, (2) that DPS acted willfully, and (3) UPW breached its duty of fair representation. Therefore, Los Banos cannot prevail against either UPW or DPS, and thus, each of his claims must be, and hereby are, dismissed.

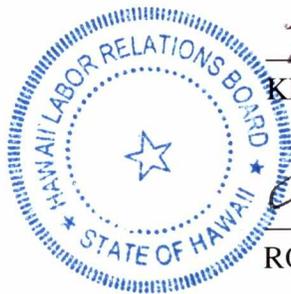
V. Order.

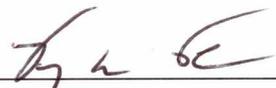
For each the reasons set forth above, the Board hereby grants the 2nd DPS Motion with respect to all of Los Banos' claims, and all of said claims are hereby dismissed.²⁸ Based on the foregoing, this case is deemed to be closed as to Los Banos' claims against DPS.

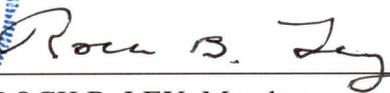
For each the reasons set forth above, the Board hereby grants the 2nd UPW Motion with respect to all of Los Banos' claims, and all of said claims are hereby dismissed.²⁹ Based on the foregoing, this case is deemed to be closed as to Los Banos' claims against UPW.

DATED: Honolulu, Hawaii, June 28, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


ROCK B. LEY, Member

²⁸ To the extent that facts and/or evidence was considered by the Board, the dismissal of Los Banos' claims against DPS shall be treated as the granting of DPS' Motion to Dismiss Prohibited Practice Complaint Filed March 7, 2016.

²⁹ To the extent that facts and/or evidence were considered by the Board, the dismissal of Los Banos' claims against UPW shall be treated as the granting of UPW's Motion for Reconsideration of Union's Motion to Dismiss Complaint and for Directed Verdict.

CHAD LOS BANOS v. DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, et al.
CASE NOS. CU-10-341, CE-10-878

Ms. Moepono's dissent to follow.

I do not concur with this process and I reserve my right to submit my dissent as a separate document on a later date.

Susnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

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