STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of DENNIS YAMAGUCHI, Complainant, and EDUARDO E. MALAPIT, Mayor of the County of Kauai, and UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO, Respondents.	Case Nos. CE-01-52 CU-01-35 Decision No. 145

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 11, 1979, Complainant Dennis Yamaguchi filed with this Board prohibited practice complaints against the above-named Respondents.

A prehearing conference was held on October 15, 1979. At that time, Respondent United Public Workers, Local 646, AFSCME, AFL-CIO (hereafter UPW), made an oral motion to dismiss contending that the Complainant failed to exhaust his remedies under the contractual grievance procedures, hence the Board is without jurisdiction in the case. After a protracted continuance due to the Unit 1 (nonsupervisory employees in blue collar positions) strike in 1979, a hearing was held on Kauai on March 31 and April 1, 1980. The two complaints were consolidated at the onset of the hearing and the Board entertained argument on the motion to dismiss. Said motion was denied and the Board proceeded with the hearing of the case.

Subsequently, Complainant filed an amended complaint to conform to the evidence presented at the hearing

followed by a particularization of the complaint. A hearing on the amended and particularized complaint was held on June 9 and 10, 1980.

The complaint, as amended, charges that Respondent Malapit (hereafter also referred to as Employer or County of Kauai) violated Subsections 89-13(a)(3), (7) and (8), Hawaii Revised Statutes (hereafter HRS), when the hiring of Complainant was overturned by a favorable grievance resolution for another employee. The complaint also charges that Respondent UPW violated Subsections 89-13(b)(3), (4) and (5) when it refused to process Complainant's grievance which arose from Complainant's discharge from the County.

The parties were given the opportunity to call and examine witnesses, submit evidence and brief the issues in this consolidated case.

FINDINGS OF FACT

Complainant Dennis Yamaguchi was, at all times relevant, a public employee as defined in Subsection 89-2(7), HRS. Although Complainant was a probationary employee, he was included in Unit 1 and paid service fees to the UPW.

Respondent Eduardo E. Malapit is a public employer as defined in Subsection 89-2(9), HRS.

Respondent UPW is the certified exclusive representative of Unit 1 as defined in Subsection 89-2(10), HRS.

Respondents Malapit and UPW were parties to the Unit 1 collective bargaining agreement which was in effect during the period from July 1, 1977 to June 30, 1979.

On or about August 31, 1978, Mr. Walter Briant, Director of the Department of Water of the County of Kauai (hereafter Department), submitted to the Kauai Department of Personnel Services (hereafter DPS) a request for certification

of eligibles for the vacant Auto Mechanic I position in the Department.

The procedure for filling vacant civil service positions is prescribed in Section 76-23, HRS. Section 76-23 reads, in pertinent part, as follows:

> [§76-23] Filling vacancy: All vacant civil service positions shall be filled in the manner prescribed in this part or in section 78-1.
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> Whenever there is a position to be filled, the appointing authority shall request the director of personnel services to submit a list of eligibles. The director shall thereupon certify a list of five or such fewer number as may be available, taken from eligible lists in the following order: first the promotional lists, second the recall lists, third the reemployment lists, and fourth the open-competitive lists; provided that laid-off regular employees shall be placed on an appropriate recall list; provided further that with respect to the eligibles under unskilled classes, the director shall certify all of the eligibles on such list. The director shall submit eligibles in the order that they appear on the eligible list before applying veterans preference.
>
> An appointing authority may fill a vacant position in his department by promoting any regular employee in the department without examination if the employee meets the minimum class qualifications of the position to which he is to be promoted, and if the position is in the same or related series as the position held by the employee; provided, that when there is no material difference between the qualifications of the employees concerned, the employee with the longest continuous civil service employment within the State or county granting the promotion shall receive first consideration for the promotion.

Pursuant to Section 76-23, HRS, Herbert Doi, DPS Director, conducted a survey of civil servants in the Department who might be eligible for a promotion to the Auto Mechanic I vacancy. The Auto Mechanic I position is a one-position class as there are no other mechanics in the Department. After the survey, Doi advised Briant that no one in the Department met the minimum qualifications for the Auto Mechanic class to

qualify for a promotion (Tr. I at 24). Doi did not make an inter-departmental investigation for interested applicants because all the auto mechanics in the Public Works Department (the only other department in the County with auto mechanics) were journeyman mechanics. There were no Auto Mechanic Helpers, the lower class in the mechanic series from which applications for promotion to Auto Mechanic I would be expected.

After having determined the absence of competition within the civil service and the requirements of the class (Tr. II at 39-40), Doi, in compliance with Section 76-20, HRS,[1] agreed with Briant's recommendation for an open-competitive examination announcement to fill the vacancy (Tr. I at 47, 121). Said announcement was published in The Garden Island issue of September 22, 1978 (Respondent UPW Ex. 2).

As a result of the open-competitive examination administered on November 25, 1978, a list of five names certified as eligible to fill the Auto Mechanic I vacancy was transmitted from DPS to Briant. Complainant Yamaguchi, who was second on the list, was selected by an interview committee of three persons from the Department to fill the vacancy beginning January 23, 1979.

Prior to Yamaguchi being informed of his selection, Gary Rodrigues, UPW Kauai Division Director, having heard that the vacancy was going to be filled by a person outside of the civil service, complained to Briant about the open-competitive

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[1] §76-20 Open-competitive examinations. Examinations shall be open-competitive whenever in the opinion of the director of personnel services they are for the best advantage of the public service. In making such determination, the director shall take into consideration the sufficiency of competition within civil service as well as the requirements of the class for which the examinations are to be conducted. Ample notice shall be given by the director of the fact that any open-competitive examination is to be conducted. The director may, if he deems it necessary or any other reason, extend the time for the filing of applications.

announcement. Rodrigues also indicated that there was a qualified County civil servant who had applied and who would grieve if he was not selected (Tr. I at 49-50, 167).

On January 23, 1979, a grievance was filed by the UPW on behalf of Lloyd Hamamura charging that the Department violated the Unit 1 agreement when it hired a person outside of the civil service instead of Hamamura who was a Sewage Treatment Plant Operator with the Department of Public Works.

There is no provision in the Unit 1 contract which guarantees a civil service employee the right to fill a vacancy if all other applicants are outside the civil service. Consequently, the basis for Hamamura's grievance was a violation of Sections 16.06a and 16.06b of the contract which reads as follows:

> 16.06
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> a. When making promotions, one of the following options shall be utilized:
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> 1. Non-competitive promotion
> 2. Intra-departmental competitive promotion
> 3. Inter-departmental competitive promotion
>
> b. For competitive promotions, the current policies on announcements shall remain in effect. For non-competitive promotions, all announcements to fill authorized vacancies shall be posted on appropriate bulletin boards for at least ten (10) calendar days prior to the closing date for receipt of application. A copy of all such announcements shall be transmitted to the Union. If the Employer does not post the announcements as provided in this section or in the personnel rules and regulations, the employee shall be entitled to submit a late application. An employee on an authorized leave of absence may submit a request to his department head that he be notified of announcements for promotional opportunities in his department for the class or classes of work that he wishes to apply for. Such request shall be in writing and must include his current mailing address so that he may be properly notified. An employee on authorized leave of absence who is on the promotional eligible list(s) or is seeking

> a promotion to a class or classes of work in his department may submit a written request to his department head so that he can attend interviews held for such promotional opportunity. In the event that a senior employee could not apply for a competitive promotional vacancy or could not attend an interview for good reason while he was on authorized leave of absence, he shall be permitted to (1) file a late application provided that the examination has not been administered, or (2) be given an interview (when such interview is normally held) provided that the employee is on the certified eligible list and the employee returns from the leave within ten (10) working days following the completion of interviews for the other employees on such certified list. In the event a vacancy is to be filled by a non-competitive promotion and a senior qualified employee on an authorized leave of absence could not apply for a promotional vacancy for which he had previously indicated he wishes to apply, for good reasons, he shall be permitted to apply for the promotion within 30 days following the date of announcement for the promotional opportunity.
>
> If an interview is scheduled when an employee is on duty, he shall be allowed to attend the interview without loss of pay or benefits.

Sections 16.06a and 16.06b clearly deal with promotions. There is no definition of promotion in the Unit 1 agreement. As such, the following definition in the "Rules and Regulations on Civil Service and Compensation, County of Kauai" (hereafter referred to as Kauai Civil Service Rules), was applied by DPS in this case:

> "Promotion" means the movement of a regular employee from one position to another position:
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> (1) In the same compensation schedule with a higher pay range, or
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> (2) To a class in a different compensation schedule assigned to a pay range whose highest pay rate exceeds the highest pay rate of the class from which the employee is moving by more than the dollar difference between the first and second steps of the pay range of the class from which the employee is moving.

Hamamura, as a Sewage Treatment Plant Operator, was assigned to the same wage board schedule, WB10, as the Auto

Mechanic I position but was not in the same or related class as an Auto Mechanic I (Tr. III at 36).

The Hamamura grievance was denied at Step 1 by the Department's Operations Chief, Ian Kagimoto, for the following reasons as stated in the grievance form:

> Section 16.06a and Section 16.06b of the Unit 1 contract refer to options that should be taken when making promotions. The Department of Water was recruiting to fill a vacancy to the entry level position of Automotive Mechanic I. The Grievant, Mr. Lloyd D. Hamamura, is presently a Sewage Treatment Plant Operator in the same class but different series as an Automotive Mechanic I.
>
> It is our opinion that the contract was not violated because as can readily be seen, no promotion would have occurred in this case. Therefore, I have no recourse but to deny your grievance. (Bd. Ex. 1)

On February 13, 1979, Hamamura's grievance was denied at Step 2 by Department head Walter Briant for the following reasons:

> In addition to our Operations Chief's reply to you on February 12, 1979, I wish to add the following:
>
> (1) The Department of Water could not resort to filling the vacant position of Automotive Mechanic I on a noncompetitive basis inasmuch as this is a one-position class and there are no Automotive Mechanic Helper(s) in the Department nor employees occupying positions in related classes.
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> (2) An intradepartmental promotional examination was not announced as our survey and investigation disclosed that there were no qualified personnel within the Department of Water.
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> Furthermore, since no employees of Unit 1, particularly those in the same or related classes in the Department of Public Works who felt they met or could meet the minimum qualification requirements of the class, Automotive Mechanic I, requested an interdepartmental transfer pursuant to Chapter 76-36, HRS, before the vacancy was announced, the best and most qualified applicant was hired from the certified list for the good of the public service. (Complainant's Ex. 1)

Finally, at Step 3 of the grievance procedure, Mayor Eduardo Malapit overturned the Steps 1 and 2 decisions and granted the Hamamura grievance. The mayor's action was explained in the following letter to Gary Rodrigues, dated March 19, 1979:

> Dear Mr. Rodrigues:
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> Re: Grievance of Lloyd K. Hamamura
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> Review of discussions presented by you for and on behalf of the grievant on March 16, 1979 as well as judicial examination and careful scrutinization of grievance documents, contractual provisions and applicable statutes, leads me to believe that the County of Kauai may have erred in exercising its discretion in interpreting certain statutory provisions governing appointments in the instant case.
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> The vacancy in this case was filled from an open-competitive list after an examination administered in accordance with Section 76-20, HRS. Said section provides as follows:
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> > "§76-20 Open-competitive examinations. Examinations shall be open-competitive whenever in the opinion of the director of personnel services they are for the best advantage of the public service. In making such determination, the director shall take into consideration the sufficiency of competition within civil service as well as the requirements of the class for which the examinations are to be conducted. Ample notice shall be given by the director of the fact that any open-competitive examination is to be conducted. The director may, if he deems it necessary because of lack of sufficient competition or any other reason, extend the time for the filing of applications."
>
> In my judgment in the instant case, an open-competitive examination was not for the best advantage of the public service, taking into consideration the sufficiency of competition within civil service as well as the requirements of the class for which the examination was conducted.
>
> My separate and independent investigation indicates that the grievant has had substantial work experience as he was previously employed as a machine shop mechanic for two years, a leadingman equipment mechanic for six and one-half years with the City and County of Honolulu before his appointment with the County of Kauai.

In my judgment, there were no unusual or exceptional duties and/or expectations described for the vacant class (Automotive Mechanic I) being advertised so that, in my estimation, the hiring authority had no logical or pragmatic reason to by-pass a tenured and qualified civil service employee from being appointed and/or promoted.

In many cases an open-competitive examination will be appropriate in order to provide the County with an opportunity to employ the very best and most highly qualified individual to fill a position. On the other hand, the County should also provide just opportunity for competent employees to be promoted from within the service. Each case must be viewed by the director and the appointing authority upon its own merits, rarely to be disturbed by the employer, and the decision of the employer herein is not intended as precedent of any sort.

Based on the foregoing, the action of the director and the appointing authority is hereby set aside, and it is ordered that the grievant , Lloyd H. Hamamura, be appointed to the vacant position of Automotive Mechanic I effective as of April 16, 1979.

Very truly yours,

/s/ Eduardo E. Malapit

Eduardo E. Malapit
Mayor, County of Kauai
(Bd. Ex. 1)

As a result of the Mayor's decision, on March 30, 1979, Complainant was informed at a meeting with Briant and Kagimoto that he would be replaced by Hamamura as of April 16, 1979 (Tr. II at 235). Complainant was also told to "hang loose" since they were requesting approval of an additional auto mechanic position at the Water Board meeting on April 12 (Tr. II at 235).

On April 2, 1979, Complainant contacted his union steward Andrew Ferrara for assistance. A meeting was then held on April 11, 1979 involving Complainant, Ferrara and Gary Rodrigues. At that meeting, Rodrigues informed Complainant that the UPW could not represent him in a grievance on this matter because it was already representing Hamamura

who was the senior person. Rodrigues claimed that the union is required, by the contract, to represent the senior employee in promotions (Tr. I at 160, 171-172; Tr. II at 230). Rodrigues also informed Complainant that even if the Water Board approved the additional auto mechanic position, there was no guarantee that Complainant would get the position since he had no seniority (Tr. I at 172; Tr. II at 239). Moreover, Rodrigues told Complainant that it would be futile for him to present Complainant's case to the Employer because a probationary employee can be fired for any or no reason and not be accorded appeal rights by the Employer (Tr. I at 175-176).

When Rodrigues decided to process the Hamamura grievance, he was aware that Yamaguchi would be terminated if the grievance was successful (Tr. I at 174). He did not inform Complainant of the Hamamura grievance; however, a notice of grievance was posted at the shop where Complainant worked (Tr. I at 175).

On April 12, 1979, the Water Board denied the request for an additional auto mechanic position. Consequently, on April 13, 1979, Complainant received his termination papers. The official reason for separation noted on Yamaguchi's payroll certification was "Employee displaced by grieving party (L. Hamamura)--a decision rendered under Step 3 of the grievance procedure by the Mayor" (Complainant's Ex. 13).

Hamamura's employment with the county has been officially recorded as a lateral transfer, not a promotion (Tr. II at 57-58, Resp. UPW Ex. 6). There is no provision in the Unit 1 agreement concerning such transfers. Pursuant

to Subsection 89-10(d), HRS,[2] in the absence of a contractual provision, the procedure for transfers is governed by Rules 7.1, 7.2, and 7.3 of the Kauai Civil Service Rules.[3] Hamamura

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[2]Subsection 89-10(d), HRS, provides:

> (d) All existing rules and regulations adopted by the employer, including civil service or other personnel regulations, which are not contrary to this chapter, shall remain applicable. If there is a conflict between the collective bargaining agreement and any of the rules and regulations, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

[3]7.1 Transfers

a. Tranfers may be initiated either by the employee or the appointing authority, and requests therefor shall be submitted in such form and manner as the Director may prescribe.

b. No employee shall be transferred to any position in another department for which an appropriate intra-departmental eligible list exists.

7.2 Transfers and Voluntary Demotions Within the County Government. A transfer or a voluntary demotion may be made within a department or from one department to another in the County with the approval of the Director and the appointing authorities concerned. A transfer or voluntary demotion may be made only if it is determined by the Director that the employee possesses the minimum qualifications and if the Director is satisfied that such a transfer or voluntary demotion is in the best interest of the service. The Director may require written examination or other evidence for the transfer or demotion.

7.3 Transfers, Voluntary Demotions and Other Movements.

a. Transfers and voluntary demotions of an initial probationary or regular civil service employee may be made between Federal, State, or any County governments, under the following conditions:

(1) The employee shall be required to meet the minimum qualification requirements of the class to which he seeks movement.

(2) The movement shall be to a position in the same or closely related class.
(Continued on next page)

never filed a transfer request with either Briant or Doi as is required by said Rules (Tr. III at 64, 67, 117-118).

On April 26, 1979, Complainant with assistance from his attorney, Courtney Kahr, filed a grievance alleging that the Employer improperly terminated him (Bd. Ex. 1). Complainant's grievance was denied at both Steps 1 and 2 by Kagimoto and Briant, who indicated that they did not have the authority to resolve the grievance and grant the remedy requested (Comp. Ex. 14). At Step 3, the Mayor denied Complainant's grievance setting forth the reasons in a letter dated June 8, 1979 to Kahr as follows:

> The grievant's allegations that Sections 3.01, 12.02, 12.07, 13.02 and 14.01 of the Unit 1 Agreement were violated by the Employer were not substantiated by any basis of fact.
>
> My decision in the "Grievance of Lloyd Hamamura" was predicated on the following:
>
> (1) An open-competitive recruitment announcement for the Auto Mechanic I vacancy in the Department of Water was not for the best advantage of the public service, taking into consideration the sufficiency of competition

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Footnote continued

(3) The Director may require a non-competitive examination of an employee to determine his fitness and qualifications.

(4) An appropriate promotional eligible list does not exist in the jurisdiction to which the transfer is sought.

(5) Qualified persons are not available on the appropriate select priority list.

(6) The movement shall require the approvals of the two department heads and the two Directors concerned.

b. In the case of a movement of an employee to a class in a higher pay range, he shall be appointed from a certified eligible list established through open-competitive examination or open registration.

within the Civil Service as well as the requirements of the class for which the examination was conducted, and

(2) There were no unusual or exceptional duties and/or expectations described for the vacant class being advertised so that the hiring authority had no logical or pragmatic reason to bypass an eligible, tenured and qualified civil service employee from being appointed and/or promoted, and

(3) That Lloyd Hamamura, a regular civil service employee of this County, had related and substantial work experience as he was previously employed as a machine shop mechanic, leadingman welder and construction equipment mechanic, and

(4) That the County of Kauai should provide just opportunity for competent employees to be promoted from within the service.

While it is unfortunate that your client's appointment was set aside (termination) through no fault of his own, compelling reasons cited hereinabove leave me no choice but to deny this grievance as I am substaining [sic] the action of the Manager and Chief Engineer of the Department of Water. (Bd. Ex. 1)

Although Rodrigues told Complainant that he could not be helped because probationary employees could be fired at the employer's whim, Doi testified that a probationary employee can only be terminated for work-related cause (Tr. I at 175-176; Tr. III at 43-47). In all the Employer responses at Steps 1, 2 and 3, there was no mention of any work-related cause for Complainant's dismissal.

On July 11, 1979, Complainant filed the instant prohibited practice complaints with this Board.

CONCLUSIONS OF LAW

Procedural Issues

Two procedural matters were raised by Respondents as part of their defense: (1) that the amended complaint was improper and defective; and (2) that the Board is without

jurisdiction in this case since the Complainant failed to exhaust his contractual grievance remedies and the Board has no authority to review grievance decisions.

At the April 1st hearing in this case, Complainant's attorney moved to orally amend the complaint to conform to the evidence presented at the hearing. Respondents stated their objections with respect to proper notice and the opportunity to prepare responses to the amendment. In view of the objections, the Board ordered a written amendment and informed the parties that it intended to grant said motion to amend and would recess the hearing and allow the Respondents to prepare and make their objections at a hearing after the filing of the amended complaint.

Complainant then filed a motion for leave to amend as per the amended complaint which was attached to the motion. Following the Board's order granting said motion, Respondents filed answers, participated in hearings on June 9 and 10, and submitted briefs to present their defenses on the amend complaint.

On the first procedural issue, Respondents assert that the amendment was improper because (1) Respondents were denied due process when the Board granted Complainant's motion for leave to amend complaint without allowing Respondents to specifically oppose it or to be heard; (2) the Board did not follow its own Rule 1.08(g)(9)(b) which allows parties 5 days to submit answering affidavits to post-hearing motions; and (3) the granting of the motion violated constitutional and statutory due process because the case was tried on one theory and after the evidence was in Complainant revamped his theory and imposed a new one on Respondents. Moreover, Respondents contend that an amended complaint was never filed following the Board's order granting Complainant leave to amend.

The UPW's claims of an improper amendment and deprivation of due process are clearly without merit. In allowing the amendment to conform to the evidence adduced at the hearing, the Board was well within the scope of its discretionary authority under Rule 1.08(g)(17)[4] to allow amendment of documents anytime before the final order is issued and to require amendment of insufficient documents. Moreover, the Respondents were provided with notice of the amendment at the April 1st hearing and did in fact state their objections on the record and were afforded ample opportunity to prepare specific objections and to be heard when the hearing was continued on June 9.

The Board allowed the amendment in the instant case because, after having heard the evidence, it was apparent that the Complainant failed to cite the appropriate violations due to a misunderstanding of the applicability of Section 89-13, HRS. There was no change in the theory of the case as alleged by the UPW and the amended complaint was considered received and "filed" by the Board on the day Complainant filed the motion for leave to amend.

As to the issue of the Board's jurisdiction, Respondent UPW contends that the only exceptions to the exhaustion

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[4]Rule 1.08(g)(17) reads as follows:

(17) AMENDMENT OF DOCUMENTS.

a. TIME TO AMEND. Any document filed in a proceeding may be amended, in the discretion of the Board, at any time prior to the issuance of a final order thereon.
b. AMENDMENT OR DISMISSAL OF DOCUMENTS. If such document is not in substantial conformity with the applicable rules of the Board as to the contents thereof, or is otherwise insufficient, the Board, on its own motion, or on motion of any party, may strike or dismiss such document, or require its amendment.
c. EFFECTIVE DATE OF AMENDED DOCUMENT. If amended, the document shall be effective as of the date of the original filing, if it relates to the same proceeding.

of remedies rule are where (1) the employer's conduct amounts to a repudiation of the contractual procedures; or (2) the bargaining agent has breached its duty of fair representation in the wrongful handling of or refusal to process a grievance; but, that both exceptions are inapplicable in this case.

Complainant, however, contends that complete exhaustion of remedies was not possible in this case because the union breached its duty of fair representation. The Board, after reviewing the evidence, believes that such a breach did occur and consequently, the Board does have jurisdiction. The finding of said breach is discussed later in this decision.

The Complaint

Turning to the merits of the case, Complainant has alleged that Respondent Malapit committed prohibited practices under Subsections 89-13(a)(3), 89-13(a)(7), and 89-13(a)(8), HRS, and that Respondent UPW committed prohibited practices under Subsections 89-13(b)(3), 89-13(b)(4) and 89-13(b)(5),[5] HRS. Said subsections provide as follows:

> [§89-13] Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
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> * * *
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> (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
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> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; or

[5]In the amended complaint, the 89-13(b)(5) charge appears to have been inadvertently omitted. However, because it was clear in the Affidavit of counsel attached to Complainant's Motion for Leave to Amend (Bd. Ex. 22) that Complainant had no intention of dropping the Subsection 89-13(b)(5) charge, the Board is proceeding accordingly.

(8) Violate the terms of a collective bargaining agreement.

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

* * *

(3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

The record shows that Complainant failed to provide any explanation or evidence in support of the charges or violations under Subsections 89-13(a)(3) and 89-13(b)(3), HRS. Therefore, the Board summarily dismisses these charges.

As to the remaining charges, Complainant specifically alleges that Respondents Malapit and UPW committed prohibited practices under Subsections 89-13(a)(8) and 89-13(b)(5) by violating the Unit 1 contract when they processed an improper (Hamamura's) grievance. This contractual violation then led to two statutory violations under Subsections 89-13(a)(7) and 89-13(b)(4). The first violation involves Subsection 89-9(d) which prohibits the employer and union from agreeing to a proposal inconsistent with merit principles and the second violation involves Subsection 89-8(a), the duty of fair representation provision. The Board's analysis and ruling of each of these issues follow below.

Violation of the Contract

Complainant alleges that Respondents violated Sections 16.06a and 16.06b of the Unit 1 contract because these sections, which deal only with promotions, were

improperly used by the UPW and the Mayor as the basis for granting Hamamura's grievance.

The Hamamura grievance charged the employer with noncompliance of Sections 16.06a and 16.06b of the contract. According to the definition of promotion under the Kauai Civil Services Rules, since the vacant Auto Mechanic I position was an entry-level position in the same wage board but different class from Hamamura's Sewage Treatment Plant Operator position, no promotion could have been involved. The only way Hamamura could lay a claim to the job would be through a transfer request (Tr. I at 129; Tr. III at 64, 112). Instead of filing such a request, Hamamura applied to take the open-competitive examination. When a position is to be filled by open-competitive examination, seniority is not used as a preferential factor (Tr. III at 80, 103-104). Hamamura did not compete with the other applicants for a promotion. Therefore, he could not grieve his loss of a promotional bid.

The Unit 1 contract contains a grievance definition which clearly restricts the consideration of grievances to only those complaints involving a "specific provision" of the Agreement.[6] Sections 16.06a and 16.06b deal specifically with promotions. While the UPW asserted that under its interpretation of the contract, Hamamura's bid for the job is considered a promotion, the Kauai DPS Director denied that such an interpretation was the accepted practice (Tr. I at 129-130, 142-144; Tr. III at 33, 111). Absent a definition of promotion in the

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[6]The provision reads as follows:

> 15.02 The term grievance is used in this Agreement shall mean complaint filed by a bargaining unit employee covered hereunder, or on an employee's behalf by the Union, alleging a violation, misinterpretation, or misapplication of a specific provision of this Agreement occurring after its effective date. UPW contract effective July 1, 1977 to June 30, 1979. (Emphasis added)

Unit 1 contract or a demonstration of a past practice, the definition of promotion under the civil service rules and regulations controlled. Since no promotion could have been involved for Hamamura, there was no grievable matter as defined by the contract and the Hamamura grievance was appropriately denied at Steps 1 and 2 for lack of a contractual basis.

In United Rubber, Cork, Linoleum & Plastic Workers of America, Local 374 and Smith, 83 LRRM 1546 (1973), the NLRB found an unfair labor practice and set aside a grievance settlement which allowed an employee from one division to "bump" an employee from another division who had less seniority in the classification of mechanic. The union processed a grievance on behalf of Mr. Rudnick which resulted in his transfer to another division by dislodging the least senior employee, Mr. Smith. Smith later filed a grievance claiming that the "bump" violated the terms of the contract. When Smith's grievance was denied by the employer and the union chose not to appeal the employer's denial, Smith filed unfair labor practice charges.

The disposition of both grievances were based on a "clarification" between the union and the employer of a contract provision which neither directly nor indirectly dealt with such bumping rights. The NLRB ruled that an unfair labor practice was committed "In view of the open hostility against Smith harbored by certain union officials, the admitted absence of any past occasions in which production employees have been permitted to bump into the skilled trades division, and the lack of a reasonable contractual basis for the [Rudnick's] grievance." Emphasis added.

In the instant case, there is no evidence of open hostility; however, the Respondents did not establish a past

practice of their purported application of Sections 16.06a and 16.06b and, in view of the restrictive grievance definition of the Unit 1 contract, there was no reasonable basis for the Hamamura grievance. Thus, the Board can only conclude that the Respondents in granting the Hamamura grievance improperly applied Sections 16.06a and 16.06b and, in so doing, wilfully violated the contract. This violation constitutes a prohibited practice under Subsections 89-13(a)(8) and 89-13(b)(5).

Agreement Inconsistent With Merit Principles

With respect to the prohibited practice charges under Subsections 89-13(a)(7) and 89-13(b)(4), HRS, Complainant contends that Respondents violated Subsections 89-1(3), 89-9(d), and 89-10(d) because their cooperative actions which led to Complainant's discharge were inconsistent with merit principles stated in said subsections.

Subsection 89-1(3) is part of the policy statement of the collective bargaining law which declares that to effectuate the public policy of promoting harmonious relationships between government and its employees, among other things, ". . .merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31 and 77-33" must be maintained.

Subsection 89-9(d) further provides that "The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principles of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31 and 77-33."

Respondent UPW contends that the prohibition in Subsection 89-9(d), HRS, applies only to contract proposals, not grievance proposals. While it is true that Subsection 89-9(d), HRS, comes under the scope of negotiations section of our law, the Board finds the UPW's position untenable

because collective bargaining is a continuous process and the grievance procedure is part of that process.[7] A grievance resolution decision should be considered as an extension of the contract. Hence, what is illegal as a contract provision should also be illegal as a grievance resolution decision.

Proceeding with the Board's interpretation of the applicability of Subsection 89-9(d), notice is taken of Subsection 89-10(d), HRS, which provides:

> All existing rules and regulations adopted by the employer, including civil service or other personnel regulations, which are not contrary to this chapter, shall remain applicable. If there is a conflict between the collective bargaining agreement and any of the rules and regulations, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

The Board has already established that there was no reasonable contractual basis for the Hamamura grievance and that the granting of the grievance was in violation of the contract. Hamamura's bid to fill the vacancy should have been in the form of a transfer since he could not be promoted to the vacancy. He should not have participated in the open-competitive exam without first requesting a transfer. Since there was no provision in the contract regarding the filling of entry-level vacancies, the procedures under civil service law and rules and regulations had to control. The DPS Director, Doi, admitted that the appointment of Yamaguchi was made in accordance with established procedures for filling

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[7]Collective bargaining is not limited to negotiation of an agreement under which the parties will operate. In some instances bargaining can and must be carried on during the term of an existing agreement. In the words of the Supreme Court, "Collective bargaining is a continuing process" involving among other things day-to-day adjustments in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract. C. J. Morris, The Developing Labor Law, p. 340 (1971). (Footnotes omitted)

entry-level vacancies under the civil service law and rules and regulations (Tr. I at 124, 132-133, 145; Tr. III at 96-98), yet it was overturned because in the Mayor's "judgment" it was done in error.

The Mayor cited Section 76-20, HRS, as the authority behind his decision; however, he completely ignored other relevant parts of the law such as Section 76-23, HRS, which spells out the procedure for filling vacancies and the definition of promotion under the Rules and Regulations on Civil Service and Compensation, County of Kauai. It is a well-established rule of statutory construction that all sections of a law should be considered together and the separate effect of each section should be made consistent with the whole. 2A, C. D. Sands, Sutherland Statutory Construction, Sec. 47.06 (4th ed. 1975). In the hiring of Yamaguchi, Doi had complied with all relevant sections of the civil service law including Section 76-20, HRS.

The Board submits that the Mayor cannot substitute applicable civil service laws with his judgment of what constitutes sufficiency of competition or his incomplete interpretation and application of the civil service law. Contrary to what Respondents would have the Board believe, classified government employees are not, ipso facto, entitled to any public-sector vacancy over someone outside the civil service regardless of qualifications. Surely, civil servants must be accorded a certain amount of preferential treatment; however, government employment is based on the principle of merit. Our civil service law serves to balance these elements of service and merit and, as such, must be adhered to strictly. The Board can only conclude, therefore, that the agreement between the union and the Mayor at Step 3 to grant the Hamamura grievance and overturn the appointment of Yamaguchi was improper and inconsistent with merit principles and in wilful violation of Subsections 89-9(d) and 89-10(d), HRS. Such violation constitutes a

prohibited practice under Subsections 89-13a(7) and 89-13b(4), HRS.

Duty of Fair Representation

Complainant also alleged that Respondent UPW committed a prohibited practice under Subsection 89-13(b)(4) by violating Subsection 89-8(a), which provides in pertinent part:

> . . .As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for the interests of all such employees without discrimination and without regard to employee organization membership.

A violation of this subsection is a breach of the union's duty of fair representation.

The development of case law over the years concerning the union's duty of fair representation demonstrates that the standards for finding breach seek to achieve a balance between the individual employee's interest and the union's collective interest. While the union must be allowed flexibility in representing its employees, its discretionary powers cannot go unchecked.

The Supreme Court stated in Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953), that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Subsequently, in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the Supreme Court tempered the union's flexibility by requiring the union to serve its members without hostility or discrimination, to exercise its discretion with complete good faith and to avoid arbitrary conduct.

In Griffin v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW,

469 F.2d 181, 81 LRRM 2485 (4th Cir. 1972), the U.S. Court of Appeals expanded on the standards in Vaca by noting that:

> . . .Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge--the industrial equivalent of capital punishment. (Emphasis added)

When the above standards are applied to the facts in the instant case, the Board can only conclude that the Union's processing of the Hamamura grievance on an erroneous but good faith application of its seniority principle in combination with its imprudent disregard for Complainant's rights was so unreasonable and arbitrary that it constituted a breach of the duty of fair representation.

If a union is faced with a grievance involving conflict between its members, the union must choose its position in a non-arbitrary manner by affording each employee notice and a fair opportunity to be heard at the earliest stage of the grievance. Only after this can the union make a good faith judgment. In a Rhode Island Supreme Court case, Belanger v. Matteson, 115 R.I. 332, 346, A.2d 124, 91 LRRM 2003 (1975), cert. denied, 424 U.S. 968 (1976), the Warwick Teachers Union, Local 915, filed a grievance on behalf of the senior employee, Matteson, who lost to Belanger in a promotional bid. Matteson's grievance went to arbitration and resulted in a rescinding of Belanger's promotion and a promotion for Matteson. When Belanger requested the union's assistance to file a grievance on his behalf, the union refused reasoning that his grievance would require a remedy that amounted to a reversal of Matteson's binding arbitration award. Belanger then took his case to the

Superior Court, which ruled that the union breached its duty of fair representation. The Supreme Court in upholding the Superior Court ruling noted:

> It is true, in a very simplistic sense, that Matteson, being the only member of the bargaining unit with "a grievance," is therefore the only individual in need of Union support. But one would require blinders to accept this view. It should have been apparent to the Union that Matteson's grievance, although theoretically against the School Committee, was in reality against Belanger. Any action the Union took on Matteson's behalf threatened Belanger's job.
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> . . . the Union never offered Belanger an opportunity to present his case to them. It never recognized its duty to independently determine whether Matteson or Belanger was entitled to the job. It seems to us that the only fair procedure in this type of a conflict is for the Union, at the earliest stages of the grievance procedure, to investigate the case for both sides, to give both contestants an opportunity to be heard.

Respondent UPW contends that the union's refusal to file and process Complainant's grievance on the basis of conflict with the Hamamura grievance was reasonable, logical and nondiscriminatory since it was upholding its seniority principle. Moreover, Respondent UPW maintains that Complainant was allowed to process his own grievance, but in doing so had abandoned his grievance by failing to request the UPW for arbitration at the final step where only the union can act. Consequently, Complainant could not now turn around and charge the union with breach of the duty of fair representation. The Board finds this defense unacceptable.

At the very beginning, when Hamamura requested the UPW to file his grievance, the UPW had a duty to at least inform Complainant of the grievance which directly affected his job status. Although Complainant was a probationary employee subject to dismissal at any time by the employer, he

was a service fee paying member of Unit 1 possessing contractual rights which the union had a fiduciary duty to protect. Hence, the UPW's claim that nothing could be done for Complainant because of a contractual obligation to represent the senior person and because Complainant as a probationary employee had no appeal rights, is viewed by this Board as a "perfunctory dismissal" of the interests and rights of Complainant. The UPW not only abandoned Complainant but took an adversary position toward him in choosing to proceed with the Hamamura grievance. See Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980), 103 LRRM 2321. In light of this, it is impossible to accept the UPW's claim that Complainant had to at least "attempt" to request the UPW's for this requirement would only have amounted to a hollow formality. Accordingly, the Board holds that the UPW violated Subsection 89-8(a), HRS, when it breached its duty of fair representation to Complainant and such violation constitutes a prohibited practice under Subsection 89-13(b)(4), HRS.

This case was a difficult case for the Board to rule on because of the unusual and complex nature of the legal issues involving the interplay of the rights of a probationary employee, civil servant, union and employer in the matrix of Chapter 89, the civil service law and the Unit 1 contract. As the rulings herein may have far-reaching implications in the future, it should be noted that the overriding influential factor in arriving at a decision in this case was that the entire matter appeared to have been handled by both the UPW and the Mayor with a cavalier attitude toward the law, the Unit 1 contract and the rights of a probationary employee. Surely, when the Legislature stated in Chapter 89 "that joint decision-making is the modern way of administering government," it did not intend to encourage and sanction mutual agreements between

the union and employer that are contrary to existing laws or that are made at the expense of an employee's rights.

The Remedy

As a remedy for the prohibited practices committed against him, Complainant has requested (1) reinstatement to the Auto Mechanic I position with back pay; (2) reimbursement for service fees paid to the UPW; and (3) reimbursement for attorney's fees and costs of litigating this case before the Board.

The Board's remedial authority stems from Subsection 377-9(d), HRS, which provides as follows:

> (d) After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the determination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require the person to make reports from time to time showing the extent to which he has complied with the order.

While the Board has broad discretion in fashioning remedies, the remedy must be restricted to undoing the effects of the prohibited practices committed and can only be extraordinary when the violations are unusually flagrant.

In the instant case, the Board has found a breach of the duty of fair representation which triggered the statutory and contractual violations which in turn resulted in Complainant's discharge. There were strong overtones in the record of collusion between Respondents UPW and Malapit to

effectuate the displacement of Complainant with Hamamura. Respondents used the authority vested in them to implement the contract but without proper regard for the limits of their discretion under the law. The Board is of the opinion that such action not only constitutes a flagrant violation of Chapter 89 and the Unit 1 agreement, but also seriously undermines the collective bargaining process where honesty and good faith conduct by the union and employer to make just and proper decisions on behalf of their employees are essential to maintain the integrity of the process.

Consequently, the Board agrees with Complainant that full reinstatement of Complainant with back pay is in order. As the UPW's actions contributed the Complainant's discharge, it shall be jointly and severally liable with the Employer for any loss of earnings and benefits suffered by Complainant.

With respect to Complainant's request for reimbursement of service fees paid to the UPW, the Board holds that this is not an appropriate remedy as such reimbursement would not serve to undo any violation. The Board also notes that Complainant's payment of service fees entitled him to bring this action before this Board and to receive the remedy ordered herein.

Complainant's final remedial request is the reimbursement of attorney's fees and costs for litigating this case before the Board.

Attorney's fees have been awarded by the NLRB in duty of fair representation cases where the NLRB ordered the union to arbitrate the grievance and provide the grievant with reasonable fees to obtain counsel for the arbitration proceedings. In NLRB v. Teamsters Local 396 (United Parcel Service), 509 F.2d 1075, 88 LRRM 2589 (9th Cir. 1975), the court upheld the Board's order for payment of attorney's fees by noting

that the broad remedial discretion of the NLRB includes the granting or denial of litigation expenses and attorney's fees. The instant case is to be distinguished from the UPS case in that the requested attorney's fees are for litigating the case before this Board. However, the Board believes that the rationale behind the award in the UPS case is applicable to the instant case. The 9th Circuit in upholding this novel NLRB remedy stated that:

> One of the policies of the Act is to undo the effects of unfair labor practices by bringing about "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." If the Union had not violated its duty of fair representation by its discriminatory refusal to process the grievances, the issues would have been resolved by litigation or arbitration in which the aggrieved employees would have enjoyed vigorous representation at no added cost to themselves. They cannot be restored to that position unless they are relieved of the expenses they will incur in securing the independent representation to which they are concededly entitled. (cites and footnotes omitted)

In the instant case, because the breach of the duty of fair representation was colored with a flagrantly illegal agreement between the employer and union, Complainant cannot be restored to the situation prior to his discharge unless he is relieved of the expenses he incurred to vindicate his rights under Chapter 89, HRS.

The Board recognizes that an award of attorney's fees and litigation costs is an extraordinary remedy. Nevertheless, as remedies must be fashioned on a case-by-case basis, it believes that the serious and unusual nature of the violations in this case warrants the extraordinary remedy and this award should not be construed as a precedent for similar claims in the future. The Board's policy with respect to retrospective attorney's fees and litigation costs is to deny such awards

unless the violations are so flagrant or unusual that traditional remedies prove to be inadequate. Furthermore, there must be a direct nexus between the violation and such awards.

ORDER

In view of the foregoing, the Board hereby orders and directs the following:

(1) The prohibited practice charge alleging the violation of Subsections 89-13(a)(3) and 89-13(b)(3), HRS, shall be dismissed;

(2) The County of Kauai shall reinstate Complainant forthwith to the position of Auto Mechanic I in the Water Department from which he was discharged and restore his seniority and other rights and benefits he possessed prior to his discharge;

(3) Respondents UPW and Malapit shall reimburse Complainant for the net loss of earnings and benefits between his discharge effective April 16, 1979 and his reinstatement date. The reimbursement liability shall be divided equally between the Respondents and the amount of liability shall be determined by order of this Board following the filing of a request by Complainant required in item (4) below;

(4) The loss of earnings and benefits shall be calculated by Complainant on the basis of what Complainant would have earned had he not been discharged and mitigated by what he did in fact earn or receive through jobs and unemployment compensation during the period between April 16, 1979 and his reinstatement date. The Employer shall provide Complainant with information he might require to compute his losses. Complainant shall file with this Board a written request for reimbursement for loss of earnings and benefits

supported by an affidavit. Said request must be specific in justifying the amounts requested;

(5) Respondents UPW and Malapit shall reimburse Complainant for a reasonable amount of attorney's fees and costs incurred in litigating this case before the Board. The reimbursement liability shall be divided equally between the Respondents and the reasonable amount of liability shall be determined by order of this Board following the filing of a request by Complainant required in item (6) below;

(6) Complainant shall file with this Board a request for attorney's fees and costs for litigation supported by an affidavit. Said request must be specific in justifying the amounts requested;

(7) The Respondent Malapit shall post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in conspicuous places at all worksites in the County of Kauai where employees of Unit 1 customarily assemble, notices of this Decision to be provided by this Board;

(8) Because this decision concerns the rights of all Unit 1 employees, all other employers of Unit 1 employees as defined in Subsection 89-2(9), HRS, shall post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in conspicuous places at all worksites throughout the State where employees of Unit 1 customarily assemble, notices of this Decision to be provided by this Board; and

(9) The UPW and all employers of Unit 1 employees shall insure that copies of this Decision are made available for review by any Unit 1 employee at the UPW headquarters of each county, the Department of Personnel Services of the State and the Counties of Kauai and Maui, the Department of Civil

Service of the County of Hawaii and the City and County of Honolulu, and the Personnel Offices of the University of Hawaii and the Department of Education. Said copies of this Decision which will be provided by this Board shall be available for review for a period of sixty (60) consecutive days from the date of posting of the notice of this Decision.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

/s/ Mack H. Hamada
Mack H. Hamada, Chairman

/s/ James K. Clark
James K. Clark, Board Member

/s/ John F. Milligan
John F. Milligan, Board Member

Dated: February 19, 1981
Honolulu, Hawaii