STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of PAUL S. SAPLA, Complainant, and JOHN WAIHEE, Governor, State of Hawaii and DEPARTMENT OF TRANSPORTATION, State of Hawaii, Respondents.	CASE NO. CE-01-148 DECISION NO. 325 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
In the Matter of PAUL S. SAPLA, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, CLIFFORD UWAINE and ROBERT CHANG, Respondents.	CASE NO. CU-01-74

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 3, 1990, Complainant PAUL S. SAPLA (SAPLA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) in Case No. CE-01-148. Complainant SAPLA alleges that JOHN WAIHEE, Governor, State of Hawaii and the DEPARTMENT OF TRANSPORTATION, State of Hawaii (State, Employer, or DOT) violated Subsection 89-13(a)(8), Hawaii

Revised Statutes (HRS) by violating various provisions of the Unit 1 collective bargaining agreement (Agreement). Complainant further alleges that actions of the Employer resulted in the improper failure and refusal of his union to represent him in the matter and interfered with his right to fair representation under Subsection 89-8(a), HRS, thus violating Subsection 89-13(a)(1), HRS.

Complainant alleges that after an incident occurred that could have resulted in disciplinary action against him, the Employer entered into an agreement with the union to the effect that if discipline less than termination was imposed upon SAPLA, the union would not file a grievance. Complainant also alleges that oral reprimands by his supervisor were not done discreetly in violation of the Agreement. Complainant contends that he was not informed of the purpose for a meeting at which he was reprimanded and was denied a union representative of his choice. Complainant contends that his demotion was excessive and improper and not for just and proper cause, in effect eliminating seniority earned and restricting his opportunities for training and development. Complainant alleges that the department head's denial of Complainant's grievance violated the Agreement and his rights were violated when the Employer refused to supply him with information necessary to process his grievance.

Also on October 3, 1990, Complainant SAPLA filed a prohibited practice charge against the UNITED PUBLIC WORKERS,

AFSCME, LOCAL 646, AFL-CIO, CLIFFORD UWAINE and ROBERT CHANG (collectively UPW or Union) in Case No. CU-01-74, alleging that Respondents violated their duty of fair representation as provided for in Subsection 89-8(a), HRS, thus committing a prohibited practice under Subsection 89-13(b)(4), HRS.

Complainant alleges that the UPW failed or refused to file a grievance on his behalf arising out of his demotion; failed to represent him at Steps 1 and 3 of the grievance procedure and failed or refused to invoke the arbitration procedure on his behalf. Complainant alleges that such failure to represent him was the result of an agreement entered into between the Employer and the Union without his acquiescence or consent.

On November 13, 1990, the foregoing cases were consolidated for disposition in Order No. 812. Hearings on the case-in-chief were held on November 13, 26 and 27, 1990. On November 27, 1990, the UPW filed a Motion for Directed Verdict. Employer joined in the motion which was heard on November 27, 1990 and subsequently denied by the Board. Complainant filed his post-hearing brief on December 19, 1990 and the Employer filed its brief on December 20, 1990. No brief was filed by Respondent UPW.

Based upon a complete review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant SAPLA was, at all times relevant herein, employed as a Bridge Maintenance Worker II for the Highways Division of the State of Hawaii Department of Transportation and a member of bargaining unit 1.

Respondent WAIHEE was, at all times relevant herein, the Governor of the State of Hawaii, and a public employer within the meaning of Section 89-2, HRS.

Respondent UPW was, at all times relevant herein, the exclusive bargaining representative for employees of the state and counties included in bargaining unit 1.

Complainant SAPLA had been temporarily assigned to the Bridge Maintenance Supervisor I position almost continuously since 1988 because Harry Sumida, the incumbent in that position, was on industrial injury leave. Tr. 11/26/90, p. 30. As the Bridge Maintenance Supervisor I, Complainant was responsible for supervising crews doing repairs on bridges and major structures. Tr. 11/13/90, p. 16.

Leo Jones, Maintenance Engineer, went to the Sand Island bridge job site on May 24, 1990, after lunch and learned that Complainant and Michael Escobar, a working foreman, had not been at the site that day. One member of the bridge crew complained to Jones that Complainant and Escobar were always riding around together and that they were not at the job site. Id. at 102. Later, Jones told SAPLA to rotate the men who

accompany him when he inspects other job sites and advised him that the other workers were grumbling about his close relationship with Escobar. Id. at 102-03; Tr. 11/27/90, p. 43. Complainant said okay and that he was sorry. Tr. 11/13/90, p. 104. On the afternoon of May 25, 1990, Jones learned that Complainant and Escobar were again not at the job site. Jones asked Alexis "Masa" Mizukami, Construction and Maintenance Superintendent VI, to have Complainant come to his office. The purpose of the meeting was to discuss the report that SAPLA and Escobar had been absent from the job site. Id. at 107. He also asked Mizukami to get Complainant Union representation. Mizukami called Anthony "Tony" Vasconcellos, UPW chief steward, who was in the yard, to represent Complainant at the meeting. Id. at 108. Jones asked for Vasconcellos because he wanted to talk to Complainant about Escobar. Id. at 111.

When Complainant arrived at the meeting with Escobar, Jones asked Complainant to come into his office without him. Complainant wanted Escobar to be his Union representative and refused to stay in the office without him. Tr. 11/26/90, p. 89. Escobar called the UPW and spoke to CLIFFORD UWAINE, UPW Oahu Division Director. Id. at 90. Jones also spoke to UWAINE and explained the circumstances to him. Tr. 11/13/90, p. 111. UWAINE did not object to Vasconcellos representing Complainant since he was the chief steward. Tr. 11/27/90, p. 111.

Jones ordered Complainant to come into his office several times before Complainant complied. Tr. 11/26/90, p. 90. Jones, Mizukami, Vasconcellos and Complainant were present at the meeting. Jones began the meeting by asking Complainant to explain what he did on the previous day, May 24, 1990. Complainant explained that he left Sand Island to take equipment for repairs, then went to Makaha to check on an accident report and later stopped at another bridge to check on repairs. Jones asked him if he had taken Escobar with him and why, since he had told him the day before to rotate the workers when he checked on the other jobs. Complainant explained that he took Escobar to the bathroom at the rental shop and received the Makaha accident report. Since it was too far to take Escobar back to Sand Island, he took Escobar to Makaha with him. Tr. 11/13/90, p. 116. In addition, Complainant mentioned that the reason he took Escobar was because he was the senior man. Id. at 117.

Mizukami also raised other instances in the past where Complainant exercised poor judgment and failed to follow instructions given to him from both his immediate supervisor and Jones. Jones then informed Complainant that he would be removed from the temporary assignment. Id. at 130. Complainant said Jones could do what he wanted to and he didn't care. Vasconcellos did not say anything during the meeting. Tr. 11/26/90, p. 94. Complainant then stood up and stormed out of Jones' office, slammed the door and, swearing, proceeded to the

men's restroom and kicked the door. Tr. 11/13/90, pp. 131-33; Tr. 11/26/90, p. 95. After leaving the men's room, Complainant grabbed a partition and pushed it on his way out of the building. He knocked down a computer table and several partitions; everything on the partitions and the desk, including equipment, was knocked to the floor and the equipment was damaged. He went out the door and hit the dumpster in the yard. He kicked a sign and threw a table in the air. Id. at 96.

The police were called and despite the urging of UWAINE who had arrived at the scene, Jones, who was concerned for the safety of the office workers, had Complainant arrested for criminal property damage. Tr. 11/27/90, pp. 62, 90. A meeting was arranged for the next working day, Tuesday May 29, 1990. Tr. 11/13/90, p. 46. UWAINE went to the police station to post bail for Complainant, but by the time that he arrived at the cellblock, SAPLA had posted his own bail. Tr. 11/27/90, pp. 62, 94.

UWAINE testified that SAPLA was concerned about being dismissed and the costs of the pending criminal charges. He assured SAPLA that he would represent him and they also talked about other possible disciplinary actions, including demotion. Id. at 96.

UWAINE spoke with Howard Mau, Oahu District Engineer, on Saturday or Monday afternoon. UWAINE called him at his home and asked about SAPLA being taken to the police department. He felt SAPLA was concerned about termination and asked whether

they would consider disciplinary actions less than termination. Mau told UWAINE that they would discuss it on Tuesday. Tr. 11/13/90, p. 47.

On May 29, 1990, the meeting was held at the Honolulu District Office. Complainant was represented by UWAINE, BOB CHANG, and Escobar, but only UWAINE spoke. Mau, Jones, and Mizukami, represented the Employer.

There is a dispute in the testimony as to whether there was an agreement to accept any disciplinary action short of termination without grieving the discipline. UWAINE testified that he told Mau that Complainant was remorseful over what occurred on May 25, 1990 and promised to make restitution for the damages incurred. According to UWAINE he proposed that the Employer not press criminal charges and that SAPLA would accept disciplinary action short of termination. Tr. 11/17/90, pp. 101-02. UWAINE stated that after he explained the proposal to Mau he asked SAPLA if he understood what was explained and if he agreed; SAPLA allegedly agreed. Id. at 102. UWAINE stated that immediately after the meeting, the Union representatives went on the stairway to talk about the settlement and at that time SAPLA seemed pleased that the criminal charges would be dismissed and that the Employer would not fire him. Id. at 103.

Mau stated that UWAINE, CHANG and SAPLA went outside of the room during the meeting to discuss the matter. When they returned, he believes UWAINE stated that if the Employer imposed a discipline less than termination, the Union would not

grieve. Mau states that he asked SAPLA if he agreed with that and UWAINE asked SAPLA whether he agreed. SAPLA replied yes. Mau said they would consider it and would inform the Union and the employee. Tr. 11/13/90, pp. 58-59.

SAPLA testified that UWAINE and MAU did all of the talking; they did not ask him whether he would take any discipline as long as it wasn't termination. Tr. 11/26/90, pp. 102-03. SAPLA testified that he did not agree to take a demotion. Id. at 103. However, on cross examination, SAPLA admitted that he didn't object to anything UWAINE said at the meeting. Tr. 11/13/90, p. 190; Tr. 11/27/90, p. 29.

Escobar testified that UWAINE said that as long as there was no termination, they would accept the discipline. According to Escobar, Complainant did not object to any statements made by UWAINE. Tr. 11/13/90, p. 190.

Jones appeared at District Court twice to try to get the criminal charges against the Complainant dismissed. Tr. 11/27/90, p. 55. Thereafter, Mau wrote to Deputy Prosecuting Attorney Michael Kam informing him that the matter could be resolved through the employee-employer relationship and that the Employer did not wish to press charges. Complainant's (Comp.) Exhibit (Ex.) A-1. The matter was subsequently dismissed.

By letter dated July 6, 1990, Complainant was notified by Edward Hirata, then Director of Transportation, that he would be demoted to Bridge Maintenance Worker I,

effective July 13, 1990. The letter states that SAPLA was demoted because he lost control of himself after being informed that he was being removed from the temporary assignment. The letter further specifically provides, "You have the right to appeal this action in accordance with Section 15 of the BU-01 Agreement." Comp. Ex. A-5.

Complainant was upset by the demotion and wanted to file a grievance contesting the demotion. Tr. 11/26/90, p. 104. SAPLA called UWAINE to ask him to represent him to contest the demotion. UWAINE testified that he explained to SAPLA that he had made an agreement to accept any disciplinary action short of termination and for him to change his mind after the criminal charges were dropped would be breaking his word and violating the collective bargaining agreement. Tr. 11/27/90, p. 124. SAPLA also spoke to CHANG, who told him to pick up the grievance forms but the Union would not sign it. UWAINE told SAPLA he would have to proceed on his own. Tr. 11/26/90, pp. 105-06.

SAPLA filed a grievance challenging his demotion on July 23, 1990. Comp. Ex. B-1. UWAINE received a copy of the cover letter to Mau from SAPLA's attorney, Thomas Gill, but did not respond to it. UWAINE did not reply to SAPLA's request for assistance, dated July 23, 1990, because he had told SAPLA that he had settled the grievance on the 29th of May. Tr. 11/27/90, p. 108. Mau later contacted UWAINE to ask him whether Gill was representing SAPLA. Id. at 110. The grievance was heard by

Mau on August 24, 1990. Mau did not directly supply any documents which were requested by Gill; the request for information was referred to the DOT personnel office. Tr. 11/13/90, pp. 38-39. In a letter denying the grievance dated August 31, 1990, Mau stated, "You have the right to appeal this action to Step 2 as provided in Section 15 of the BU-01 Agreement."Comp. Ex. B-4. Mau testified that the statement of appeal rights contained in the letter is inaccurate. Tr. 11/13/90, p. 36.

The grievance was pursued to Step 2 (Comp. Ex. B-5) and Hirata's Step 2 decision, issued without a hearing on September 12, 1990, asserts the alleged "agreement" as grounds for denying the grievance. Comp. Ex. B-6. Hirata testified that staff member Casupang informed him about the agreement with the Union and that the right to appeal to Step 1 was mistakenly inserted into the letter denying the grievance. Tr. 11/27/90, pp. 8, 13. SAPLA pursued the matter to Step 3, filing a letter of appeal to Alfred Lardizabal, Director of Personnel Services, on September 20, 1990. Comp. Ex. B-7. On September 27, 1990, Lardizabal responded that he would not override the agreement made in good faith between DOT and the UPW, with SAPLA's concurrence. Comp. Ex. B-8.

Gary Rodrigues, State Director of UPW, testified that under Section 14-15-5 of the State of Hawaii Personnel Rules and Regulations, SAPLA could only be demoted for a maximum period of six months. Comp. Ex. 2. During that time he would

lose $768 rather than $2230 for a one-month suspension. Tr. 11/27/90, pp. 132-33. Rodrigues testified that he never told SAPLA's attorney this information because his policy is that once another attorney is involved in the case, they no longer talk to that member. Id. at 141.

Complainant has not reported to work since May 31, 1990. Id. at 35. On June 4, 1990, Harry Sumida, Bridge Maintenance Supervisor, returned from his industrial injury leave. Tr. 11/26/90, p. 53.

Previously in 1989, Complainant called the police to report that Jones had cut the lock to an enclosure to remove materials. Complainant had been told that Jones had the authority to do this. When the police officer arrived, he attempted to arrest Jones. Jones testified that he was "pissed" at this and when SAPLA tried to explain his actions at a meeting in Mau's office, Jones walked out. Later, when SAPLA attempted to apologize to Jones for the unnecessary embarrassment, Jones swore at him. SAPLA feels that the bad feelings with Jones started with this incident. SAPLA was removed from his temporary assignment for two weeks because of that incident. Tr. 11/13/90, pp. 90-94; 11/26/90. pp. 70-76.

DISCUSSION

With respect to the case against the Union, Complainant contends that the UPW failed or refused to file a grievance on his behalf arising out of his demotion; failed to represent

him at Steps 1 and 3 of the grievance procedure and failed or refused to invoke the arbitration procedure on his behalf. SAPLA alleges that he was denied adequate representation at the disciplinary meeting held on May 25, 1990, when Jones chose Vasconcellos to be SAPLA's Union representative instead of Escobar. Also, Complainant alleges that he was not properly informed by UWAINE as to what UWAINE and the Employer had agreed to prior to the meeting on May 29, 1990, and not so informed during or after the meeting. Complainant also claims that the Union's refusal to represent him with his ensuing grievance was a breach of its duty to represent him. Moreover, Complainant argues that the Union concocted its defense that there was an agreement to the undisclosed disciplinary action with the Employer after the grievance was filed. Lastly, the Complainant maintains that the Union's argument that it did not need to represent the Complainant because the demotion was a "disciplinary demotion" under Section 14-15-5(b) of the Department of Personnel Services Rules and Regulations was an afterthought and a charade.

Subsection 89-13(b)(4), HRS, provides:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (4) Refuse or fail to comply with any provision of this chapter; . . .

Subsection 89-8(a), HRS, provides:

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

As in previous cases, the Board relies on the United States Supreme Court's decision regarding the duty of fair representation in Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, 857, 64 LRRM 2369, 2376 (1967). There, the Court cited the Fourth Circuit's discussion of the arbitrary conduct which would constitute a breach of the union's duty. The Court stated:

> "Arbitrary" is defined as "perfunctory." (cite omitted.) This standard was discussed by the Fourth Circuit in Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183, 81 LRRM 2485, 2486 (4th Cir. 1972):
>
> > . . .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.

In Decision No. 196, Caldeira, 3 HPERB 196 (1984), the Board discussed the duty of fair representation with respect to the grievance procedure and stated:

> Implicit in the ruling of Vaca v. Sipes, supra, and its line of cases is the presumption that the union does not have to be involved at any step of the procedure if it opts out for reasons other than those arrived at in a manner that is arbitrary, discriminatory, or in bad faith.

Id. at 548.

Thus, if a nonarbitary and nondiscriminatory reason is cited by the Union as its reason for not pursuing a grievance, its decision would not be actionable.

The crux of the instant decision focuses on the issue of the credibility of witnesses regarding whether there was an agreement entered into between the Employer and the Union with SAPLA's acquiescence or consent. UWAINE and Mau testified that at the meeting, SAPLA was remorseful and UWAINE asked the Employer to drop the criminal charges and not terminate SAPLA. SAPLA agreed to pay restitution for the damaged equipment. UWAINE was the only person who spoke on behalf of the Union and SAPLA at the meeting and stated that they would accept disciplinary action short of termination without grieving. UWAINE and Mau both testified that UWAINE turned to SAPLA and asked him if he understood and agreed with the proposal. UWAINE and Mau testified that SAPLA agreed. On the other hand, SAPLA denies that he was asked whether he would accept any discipline short of termination. But, on cross examination, he admitted

that he did not object to anything UWAINE said at the meeting. Escobar, SAPLA's close friend who was present at the meeting on the 29th, testified that UWAINE said that as long as there was no termination, they would accept the discipline. Escobar confirmed that SAPLA did not object to any statements made by UWAINE.

Based upon the evidence in the record, the Board concludes that SAPLA failed to object to UWAINE's statement that they would not file a grievance if the criminal charges were dropped and SAPLA was not terminated. It appeared to Respondents State and Union that SAPLA agreed with this statement. The Employer followed through on its part to dismiss the criminal charges filed against SAPLA. Complainant cannot now complain that the Union breached its duty to represent him fairly by not pressing a grievance for him or that the Employer improperly demoted him.

It appears that an underlying problem of this case was the Union's inability to communicate with or convince the Complainant of its position at the time of the demotion; Rodrigues' analysis of the demotion vs. suspension was never explained to Complainant. Although the Union representative was responsive to Complainant in the early stages of this case and diligent in ensuring that the criminal charges were dropped, he was unresponsive to Complainant and his legal counsel when approached to file a grievance on SAPLA's behalf. No assistance or advice was provided. It appears that the

entire episode could have been avoided had there been a written memorandum of understanding executed between the parties evidencing an agreement. However, based upon the evidence in the record, the Board concludes that the Union, with SAPLA's consent, entered into an agreement with the Employer to make restitution for the damaged equipment, and not to grieve a discipline imposed if it was less than termination, if the criminal charges were dropped. Thus, Complainant has failed to prove that the Union committed a prohibited practice by failing to pursue his grievance.

In addition, Complainant claims that Chapter 89, HRS, was violated because he feels he was denied a Union representative of his choice. Complainant claims that Vasconcellos was already at the office on May 25 when SAPLA and Escobar arrived. Complainant alleges that if he had been afforded effective representation (by Escobar) his outburst may not have occurred. This is merely speculative on Complainant's part and at this point, wishful thinking.

In NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the Supreme Court held that employee insistence upon union representation at an investigatory interview, which the employee reasonably believes will result in disciplinary action against him is considered protected activity. Disciplining or discharging employees for their refusal to cooperate in such an investigatory interview without union representation is a violation of the National Labor Relations Act.

Complainant fails to cite any legal authority which stands for the proposition that the employee is entitled to have a Union representative of his choice and the Employer's failure to provide that representative constitutes an unlawful interference with his rights. The Employer, in this instance, allowed a Union steward to represent SAPLA during the March 25, 1990 meeting. Nothing in the record before us indicates that Vasconcellos was incompetent or unable to represent Complainant. Moreover, there is no evidence of animus or bias on the part of Vasconcellos in his representation of Complainant. It appears, rather, that Complainant lost his temper and abruptly left the meeting prior to its intended conclusion. His claim at this stage that Vasconcellos was ineffective at the meeting is without merit.

Complainant cites Griffin v. UAW, supra, for the proposition that the union violates its duty of fair representation by filing a grievance with a supervisor who was hostile to the grievant. The Court in that case noted that there was evidence that the union officers were trying to find as many reasons as they could not to help the grievant, and that the supervisor had a history of difficulties in supervising men under him. There, the insistence by the union to file a grievance with the hostile supervisor was considered arbitrary or perfunctory conduct. Complainant submits that UWAINE's behavior in this case had similar flaws. The Board finds that Complainant has failed to establish facts to substantiate such

flaws. Nothing in the record before us indicates that the matter was handled in a way similar to the Griffin case.

Complainant contends that he still had a right to grieve when the actual discipline was imposed even if he should have understood the implications of accepting discipline short of termination. The Board agrees with the Complainant's interpretation of Section 11.03 of the Agreement which states:

> When the Employer takes action under this section which either the employee or the Union believes is improper or unjustified, he or it shall have the right to process a grievance through the grievance procedure as provided under Section 15, GRIEVANCE PROCEDURE, hereunder.

Under the foregoing provision, a grievance is properly filed when the employer takes disciplinary action. However, in the continuing collective bargaining process, the parties operate under a duty to bargain in good faith. Damas, 3 HPERB 12 (1982). The Board is well aware that informal settlements are consummated at all stages of the process. Section 15.10 of the Agreement specifically recognizes that if matters are not settled on an informal basis, the grieving party may institute a formal grievance on the appropriate form. The facts of this case establish that there was, in fact, an informal settlement between the parties on March 29, 1990. However, upon receipt of the letter imposing the demotion, it appears that SAPLA became disenchanted with the discipline. In the Board's view, since the matter was already settled, Complainant cannot relitigate the issues underlying the agreement.

With respect to the Employer, Complainant claims that the meeting of May 25, 1990 was improperly called with the compliance of Union representatives UWAINE and Vasconcellos, but also motivated by Jones' desire to punish Complainant for past actions by removing him from his temporary supervisory position. SAPLA also claims that the meeting held on May 29, 1990 was based on an agreement between the Employer and Union representative UWAINE to which Complainant was not a party and to which he did not consent, i.e., Complainant would accept any discipline short of termination and not grieve. Complainant claims that the discipline imposed by Hirata's letter was excessive, degrading and not warranted given his training and job performance and violated the just and proper cause requirements of Section 11.01 of the Agreement. Complainant also requests a determination of the proper amount of restitution to be paid which would exclude damages to the restroom sink and exclude costs incurred because the equipment was subsequently dropped. Further, Complainant alleges that the refusal of the Employer to supply the information requested by him pursuant to Section 15.09 of the Agreement was a clear violation of that section, and the subsequent position taken that no information need be supplied to "investigate and process a grievance," because there was no grievance in the first place, is spurious.

At the outset, the Board considers the allegations of contractual violations occurring prior to the settlement to be

waived. At the March 29, 1990 meeting, allegations of procedural irregularities with the March 25, 1990 meeting could have been raised but understandably were of secondary importance to Complainant since his concerns about his job and the pending criminal charges were paramount. Moreover, even if the alleged irregularities were upheld as contractual violations, this would still not absolve Complainant of the ramifications of his violent outburst.

In any case, the Board finds Complainant's arguments to be without merit. Complainant argues that Jones' repeated attempts to call SAPLA into the meeting, done within the hearing of other employees in the office, embarrassed SAPLA and constituted a violation of Section 11.01 of the Agreement. That section provides that "when an employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the employee." SAPLA also contends that he was not informed of the purpose of the meeting and he was not represented by a union representative of his choice. The Employer responds that any allegations arising from the May 25, 1990, meeting are beyond the Board's jurisdiction because the applicable contractual limitations period is fourteen days from the date of the alleged violation as provided in Section 15.11 of the Agreement.

We do not agree with the Employer's position. The Board's prohibited practice jurisdiction established by Section 377-9(1), HRS, extends ninety days from the date of the occurrence. The complaint in this case was filed October 3, 1990. The Employer's letter demoting SAPLA was dated July 6, 1990 to be effective July 13, 1990. We find that the discipline and events leading up to the imposition of discipline are within the Board's jurisdiction.

However, notwithstanding the foregoing finding that these arguments were waived, the Board further finds based on the evidence in the record that the Employer did not commit any prohibited practices with respect to the May 25, 1990 meeting. The Board finds that the meeting was called to gather facts, perhaps for future disciplinary action. The purpose for the meeting was not for the administration of discipline, per se. Moreover, the meeting would have been conducted behind closed doors, but for SAPLA's refusal to enter the meeting and his subsequent outburst. These charges against the Employer are dismissed. Any embarrassment suffered by the Complainant was due to his own actions.

Complainant further argues that he properly chose to take Escobar with him on his inspections. While the record tends to establish that there may have been bad blood between Jones and SAPLA, the record clearly establishes that SAPLA was insubordinate and refused to follow orders prior to his out-

burst. SAPLA was demoted because of his emotional outburst and the resulting damages. Moreover, as stated above, the evidence in the record indicates that SAPLA acquiesced in the representation that no grievance would be filed if a discipline less than termination was imposed. Hence, as to the Employer, the waiver by the Union is a waiver by the employee. To hold otherwise, would obstruct the Union's ability to represent its members and would create uncertainty in the minds of Employer's representatives who would be unable to take the Union agent's word as being binding.

Complainant also alleges that his rights were violated when the Employer refused to supply him with information to process his grievance. On August 29, 1990, Complainant requested information from Mau in order to process his grievance. Comp. Ex. C-1. According to Mau's testimony, the letter was referred to the DOT personnel office. There is no evidence to indicate whether these materials were ever provided.

Section 15.09 of the Agreement provides:

> Any information in the possession of the Employer which is needed by the grieving party to investigate and process a grievance, shall be photocopied and given to the grieving party within five (5) working days of the grieving party's request for such information, provided that the Employer shall have the option to (a) photocopy and give the material requested to the grieving party within the 5-working day period, or (b) make the material requested available to the grieving party within the 5-working day period for the purpose of photocopying or review by the grieving party for three

> (3) working days on the condition that the grieving party agrees to sign out and be fully responsible for the material until it is returned.

Under this provision it is clear that the Employer must provide a grievant with information requested within five working days. Based upon the evidence in the record, we find that the Employer failed to comply with this provision of the contract. There was no reason given for such noncompliance; the Employer at Step 2 was aware that Gill represented SAPLA but refused without explanation to forward the information to him. In an ordinary case, the Employer's refusal to fulfill its contractual obligation to supply information for a grievance would constitute a prohibited practice. However, in this case, we find that the matter was settled prior to the institution of the grievance by Gill. Therefore, we conclude that there was no obligation to provide the information and no violation of the contract.

As to the issue of the amount of restitution which SAPLA should make, we are unable to discern from the record before us what the actual damages are. There is conflicting testimony and representations as to the extent of damages and who should be responsible for the damages. As Complainant has stated his willingness to pay for the actual damages done, this matter must be resolved by the parties to settle by agreement or in another forum as suggested by Complainant in his post-hearing brief.

CONCLUSIONS OF LAW

In accordance with Sections 89-5 and 89-13, HRS, the Board has jurisdiction over these complaints.

A Union breaches its duty of fair representation when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.

Complainant failed to prove by a preponderance of evidence that the Union breached its duty of fair representation by failing to represent him in contesting his demotion. The evidence indicates that SAPLA acquiesced in the Union's proposal to accept discipline less than termination without grieving which culminated in an agreement with the Employer.

The Employer's wilful violation of collective bargaining agreement provisions constitutes a prohibited practice under Subsection 89-13(a)(8), HRS.

Complainant failed to prove violations of the cited contractual provisions.

ORDER

The prohibited practice charges contained in consolidated Case Nos. CE-01-148 and CU-01-74 are hereby dismissed.

DATED: Honolulu, Hawaii, March 20, 1992.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

PAUL S. SAPLA v. JOHN WAIHEE, Governor, State of Hawaii and DEPARTMENT OF TRANSPORTATION, State of Hawaii; CASE NO. CE-01-148 and PAUL S. SAPLA v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, CLIFFORD UWAINE and ROBERT CHANG; CASE NO. CU-01-74
DECISION NO. 325
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

GERALD K. MACHIDA, Board Member

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