STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of JO desMARETS, Complainant, and JOHN WAIHEE, Governor, State of Hawaii and DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, Respondents.	CASE NO. CE-13-181 DECISION NO. 379 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
In the Matter of JO desMARETS, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-13-88

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 2, 1993, Complainant JO desMARETS filed a prohibited practice complaint against JOHN WAIHEE, Governor, State of Hawaii and the DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or Department) (collectively State or Employer) in Case No. CE-13-181 with the Hawaii Labor Relations Board (Board). Complainant alleged that the Employer engaged in a pattern of discrimination to deny her the Corrections Supervisor I (CS I) position at the Women's Community Correctional Center (WCCC), PSD.

Complainant contended that the Employer discriminated against her because of her sexual orientation and in retaliation for her filing grievances against the Department. Complainant also alleged that the Employer negotiated in bad faith when the parties entered into a Settlement Agreement on May 22, 1992 to transfer her into the subject CS I position. In addition, Complainant contended that she was subjected to harassment and intimidation because of the illegal discrimination and in retaliation for grieving against the Employer. Thus, Complainant alleged that the Employer violated Sections 89-13(a)(1), (4), (7), and (8), Hawaii Revised Statutes (HRS).

Also on that date, Complainant filed a prohibited practice complaint against the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) with the Board in Case No. CU-13-88. Complainant alleged that the HGEA failed to act in her best interests and represent her in complaints against the Employer.

The Board consolidated the cases by Order No. 925 issued on March 1, 1993. On July 7, 1993, the Employer filed a motion to dismiss the instant prohibited practice complaint with the Board. The Employer contended that the complaint was moot because of a recent Step 3 decision by the Department of Personnel Services (DPS) which returned Complainant to the CS I position without a probationary period and expunged her job performance ratings (JPRs). The Employer also contended that the Board lacked jurisdiction to consider Complainant's charges of discrimination

based upon sexual orientation and civil rights and civil service law violations.

Similarly on July 9, 1993, the HGEA filed a motion to dismiss the subject complaint. The HGEA contended that the complaint should be dismissed as untimely, for failure to state a claim, and because the complaint was moot. The Board conducted a hearing on the motions on July 12, 1993. During the hearing on the motions, Complainant orally amended her complaint against the Union to include violations of Sections 89-13(b)(3), (4), and (5), HRS. After hearing arguments on the motions, the Board held that as against the Employer, the Board would hear Complainant's allegations that the Employer breached the Settlement Agreement and that the Employer retaliated against Complainant because of her filing of grievances. The Board also held that it would not hear or decide the issue of whether Complainant was discriminated against because of her sexual preference since it does not fall within the purview of Chapter 89, HRS. With respect to the Union, the Board held that it would hear the allegations that the HGEA, subsequent to the Settlement Agreement, breached its duty of fair representation by refusing to assist her or pursue grievances on her behalf.

The Board conducted further hearings on July 12, 14 and 15, 1993. On July 15, 1993, the Board bifurcated the proceedings between the HGEA and the State and permitted Complainant and the HGEA, with the exception of Complainant's testimony, to present the remaining portions of their respective cases after the conclusion of the hearings between the Employer and the Complainant. The

Board conducted further hearings on Complainant's case against the Employer on July 22, 1993, August 30 and 31, 1993, September 1, 22, 23, and 24, 1993, October 25, 1993, November 24, 1993, February 25, 1994 and March 3, 1994.

At the close of the hearing held on March 3, 1994, the Employer objected to Complainant's reference to exhibits which were not admitted into evidence. The Board indicated that according to its review, Complainant had not admitted Exhibit (Ex.) Nos. 5, 8-17, 24, 25, 27, 28, 29, 37 and 45. The record was kept open in order to review the record and to permit the parties to stipulate the exhibits into evidence, if possible. On May 24, 1994, Complainant, by and through her attorney, filed a motion to reopen the record with the Board. Complainant moved the Board to reopen the record for the sole purpose of admitting into evidence Complainant's Exs. 1-38; with the exception of Exs. 24A and 24B and 27-29. On June 6, 1994, the Employer filed an opposition to Complainant's motion to reopen the record. The Employer opposed the reopening of the record because the Employer had presented its case based upon the evidence in the record and, in the interest of fairness, requested that the evidentiary record be closed.

After considering Complainant's motion and the arguments presented, the Board hereby grants Complainant's motion to reopen the record. In this regard, the Board notes that it received extensive testimony and evidence in this matter during hearings which continued from month-to-month and extended over a year. In addition, the Board is mindful that the technical rules of evidence do not apply in administrative proceedings and that there was

testimony in the record regarding the exhibits at issue to authenticate them. Thus, the Board will reopen the record to receive the instant exhibits over the Employer's objections because we believe that it would be unduly harsh and unjust to deny Complainant's motion where counsel's omission appeared to be an oversight.

With respect to the case against the Union, the Board conducted hearings on August 24, and 31, 1994.

The parties had full opportunity to present evidence and argument to the Board. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

JO desMARETS is an employee within the meaning of Section 89-2, HRS, of the DEPARTMENT OF PUBLIC SAFETY, State of Hawaii and is included in bargaining unit 13, as defined in Section 89-6, HRS.

JOHN WAIHEE was at all relevant times, the Governor of the State of Hawaii and an employer within the meaning of Section 89-2, HRS.

Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 142, AFL-CIO (HGEA) is an employee organization and the certified exclusive representative, as defined in Section 89-2, HRS, of employees included in bargaining unit 13.

In 1991, Complainant desMARETS was employed by PSD as a Social Worker V, SR-24, Position No. 25732, Volunteer Services Administrator (VOLINCOR). On March 1, 1991, Complainant applied

for the CS I position at WCCC, Position No. 30874. Complainant was not selected for the position and filed a grievance on May 23, 1991, pursuant to the Unit 13 collective bargaining agreement. Complainant alleged that PSD had not followed proper selection procedures in filling the vacancy.

Also on August 26, 1991, Complainant filed a prohibited practice complaint with the Board in Case No. CE-13-160. Complainant alleged that PSD violated Chapter 76, HRS, and provisions of the collective bargaining agreement and failed to properly select internal applicants. On November 12, 1991, Complainant also filed a complaint against the Union with the Board. Thereafter, the parties entered into a stipulation to dismiss both prohibited practice complaints without prejudice pending resolution of a Step 3 grievance investigation and decision. Complainant filed the Step 3 grievance on January 10, 1992. Walter Harrington from the Labor Relations Division, DPS, was assigned to investigate the grievance. Ms. desMARETS met with Harrington several times and also met with George Sumner, PSD Director. No Union representatives were present during these meetings.

On April 14, 1992, Complainant met with Sumner and Harrington. Sumner had previously met with Harrington to discuss the problems with desMARETS' non-selection. Sumner demanded proof that PSD was in error in not selecting desMARETS. Harrington pointed out the problems with the case and advised Sumner that DPS' decision would favor Complainant. Harrington recommended that the grievance be settled. At the meeting, Sumner admitted to desMARETS

that he had made a public statement that "no homosexuals will be hired at the Women's Prison." The parties finalized negotiations on the settlement of Complainant's grievance and the prohibited practice complaint in Case No. CE-13-160. Waylan Toma, HGEA business agent, took copies of the proposed Settlement Agreement to Randy Perreira, another HGEA staff member, for signature. Perreira notified Harrington that he refused to sign the Agreement. Harrington told Perreira that DPS would not execute the Settlement Agreement if the Union did not sign the Agreement. After approximately one week, Perreira signed the Settlement Agreement. Pursuant to the Settlement Agreement, dated May 22, 1992, Complainant would be transferred to the CS I position, effective July 1, 1992.

Three days after the meeting, the Honolulu Star-Bulletin reported:

> Sumner said he is increasing the number of female guards at the women's prison from about half to at least two-thirds, although he acknowledged that also can cause problems if the women are homosexual.
>
> He said he plans to put uniforms on the female inmates to remind guards that they are prisoners and is trying to create an atmosphere to prevent homosexual activities.

Complainant's (C's) Ex. 9, Attachment B.

After the matter was resolved, Sumner requested that Complainant assume the CS I position earlier than July 1, 1992. Thus, Complainant reported to WCCC on May 26, 1992.

Ms. desMARETS' movement to the CS I position was a lateral transfer from one SR-24 position to another. The Employer, however, attached a six-month probationary period to the transfer.

According to Harrington, the Director may, in his or her discretion, attach a probationary period to the transfer. Complainant contends, however, that she did not learn of the probationary period until three months later.[1] According to desMARETS, she would not have agreed to settle her previous claims if she had known that she would have to serve a probationary period on her transfer.

At the time of desMARETS' transfer, Renee M. Coester was the branch administrator (BA) of WCCC. In early June 1992, Complainant heard rumors that Marian Tsuji, PSD Substance Abuse Services Officer, would be appointed as the acting BA during Coester's vacation in August. Also in June, Coester was instructed to begin training Tsuji as her replacement. Coester thus told desMARETS and Malcolm Lee, WCCC Chief of Security, to set aside one-half of a day each week to train Tsuji to prepare for her temporary assignment to the BA position. Tsuji officially moved to the WCCC on July 1, 1992. Tsuji told desMARETS that she would be temporarily assigned as BA during Coester's August 1992 vacation.

On July 8, 1992, Complainant filed a Step 1 departmental grievance with Coester challenging the temporary assignment of Tsuji as the BA (de facto BA grievance). As a remedy, Complainant requested that she be temporarily assigned as the acting BA while Coester was on vacation.

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[1]The record indicates, however, that Ellena Young met with Complainant on or about July 14, 1992 and informed her that she would not be temporarily assigned as the BA in Coester's absence in part because she was on probation.

Ms. desMARETS met informally with Ellena Young, Community Correctional Centers Division Administrator, on July 14, 1992 and learned that she would be denied the temporary assignment to BA during Coester's absence. Young refused to temporarily assign desMARETS to Coester's position based upon Halawa Correctional Facility's practice and desMARETS' status as a probationary employee.

Complainant did not receive a response from Coester on the Step 1 grievance and on July 20, 1992, she filed a Step 2 departmental grievance with Deputy Director Eric Penarosa who referred the matter to Ellena Young. Young issued a Step 2 decision on July 27, 1992, finding that Complainant's concerns were premature since no assignment had been made and that no violations of the collective bargaining agreement had occurred.

By memorandum dated July 27, 1992, Young informed all concerned that Malcolm Lee would be temporarily assigned as BA and Tsuji, who was temporarily assigned to Young's office, would assist Lee. Tsuji would report to WCCC effective August 3, 1992. Thereafter, by memorandum dated July 28, 1992, Coester indicated that effective August 3, 1992, Malcolm Lee would serve as the acting BA while she was on vacation.

Previously, Lee had been appointed as an acting captain, Chief of Security, Adult Corrections Officer (ACO) VI, SR-23, at WCCC in June 1991. Lee was temporarily assigned as the acting BA in August 1992. Thereafter, during August 1992, Lee cleared a four-year backlog of JPRs for WCCC personnel by rating each employee as satisfactory. Lee testified that he has never given a

subordinate a less-than-satisfactory JPR. On August 4, 1992, Lee, however, delivered a two-month probationary JPR prepared by Coester covering the period between May 26, 1992 and July 25, 1992 to desMARETS. According to desMARETS, Lee tossed the JPR on desMARETS' desk, announcing, "Incoming SCUD!" According to the evaluation, Coester determined that Complainant's job performance was "not quite satisfactory." Although Lee knew that Coester had given desMARETS a less-than-satisfactory rating before she left, he failed to counsel desMARETS on her work performance in August.

On August 9, 1992, Complainant submitted a rebuttal memorandum addressing Coester's JPR to the PSD Personnel Office for inclusion into her personnel file.

According to desMARETS, she worked overtime to handle her workload and cover three vacancies in her six-person staff, which included two permanent social worker positions, in addition to discharging her administrative responsibilities. Previously, Jane Donohoe, who held the CS I position, was the second person in charge at WCCC. The Chief of Security was the third in the chain of command.

On August 16, 1992, Complainant filed a Step 1 departmental grievance with Penarosa alleging she was being retaliated against by way of Coester's negative JPR. Ms. desMARETS contended that Coester should not have evaluated her work performance because desMARETS had filed a civil rights complaint against Coester and she was biased against Complainant. As a remedy, Complainant requested that the Employer waive her CS I

probationary period and make her employment in the CS I position permanent retroactive to May 1, 1991.

On August 27, 1992, Complainant filed a Step 3 departmental grievance on the de facto BA grievance with Sumner's office alleging that Tsuji was the de facto BA of WCCC even though she was assigned to Young's office. Complainant also delivered a copy of the grievance to Sharon Miyashiro, DPS Director.

Penarosa failed to respond to Complainant's two-month JPR grievance at Step 1. On August 28, 1992, Complainant filed a Step 2 departmental grievance on the alleged retaliatory JPR with Sumner. On September 5, 1992, the HGEA filed a Step 1 contractual grievance on Complainant's behalf alleging that the Coester JPR was in violation of Articles 8 (Discipline) and 3 (Maintenance of Rights and Benefits) of the collective bargaining agreement. HGEA requested that the narrative portion of the JPR be rescinded and expunged from Complainant's personnel file.

In November 1992, Lee delegated desMARETS' counseling to Tsuji. He directed Tsuji to document the failings in desMARETS' performance.

On November 18, 1992, Young met with Toma, Complainant's HGEA representative, on the JPR grievance. After discussion, the Employer agreed with the remedy sought and accordingly rescinded the narrative portion of Coester's JPR and expunged it from Complainant's personnel file. All other portions of the evaluation remained. This resolution was confirmed by letter from Young to Toma, dated November 25, 1992.

On November 20, 1992, Tsuji, under Lee's direction, completed a six-month JPR on desMARETS covering the period from May 26, 1992 to November 25, 1992. Lee rated Complainant as not quite satisfactory. Lee's six-page evaluation requested a three-month extension of probation from November 25, 1992 to February 25, 1993 and assigned Tsuji to assist desMARETS. Complainant received this evaluation on or about November 25, 1992. By letter dated November 25, 1992, Sumner extended desMARETS' probationary period for an additional three months, from November 26, 1992 through February 25, 1993. Also, by letter dated November 25, 1992, Young informed Toma that the Employer considered the narrative in Coester's JPR to be disciplinary in content and thus, rescinded the narrative from Complainant's personnel file.

By letter dated December 2, 1992, desMARETS informed Toma that she was not satisfied with the above grievance resolution since Coester's negative rating remained without an explanatory narrative. Ms. desMARETS also informed Toma that she had filed a Step 1 departmental grievance challenging the six-month JPR with Deputy Penarosa. Complainant alleged that PSD was using the job performance evaluations as a basis to remove her from the CS I position. Complainant further charged that the Employer's actions were retaliatory, harassing, intimidating, and discriminatory. She requested that the Employer waive her probationary period; make her appointment to the CS I position retroactive to May 1, 1991; fairly and fully evaluate her work in future evaluations; cease and desist from all discriminatory, retaliatory, and intimidating actions against her; and remove all three JPRs from her personnel file.

Within a few days after Complainant's receipt of the six-month JPR, the Employer provided Complainant with a work performance improvement plan (WPIP). Tsuji was assigned to work with Complainant to address her alleged deficiencies.

Penarosa did not respond to the Step 1 grievance. On December 18, 1992, Complainant filed a Step 2 grievance with Sumner also contending that the WPIP was identical to the sample WPIP attached to the Director's memo concerning remedial actions for less-than-satisfactory employees. On December 21, 1992, Penarosa forwarded the Step 1 grievance to Young for action and so informed Complainant. Sumner forwarded the Step 2 appeal to Young. Sumner wrote on the cover letter, "Ellena: We cannot play around with this one. Immediate response for my signature. George"

Young responded to Sumner informing him, inter alia, that she would meet with Complainant to discuss the grievance.

On or about December 28, 1992, Sumner wrote to desMARETS complaining about her Toys for Keikis project.

Also, by letter dated December 28, 1992, Randy Perreira informed desMARETS that the HGEA would represent her in her grievance regarding the extension of her probationary period.

By letter dated January 4, 1993, desMARETS refuted Sumner's allegations about the Toys for Keikis project.

Young scheduled a Step 2 meeting on the six-month JPR grievance with Complainant for January 8, 1993. At the close of business on January 7, 1993, Toma informed Complainant that he could not attend the Step 2 meeting scheduled with Young on the next day. Ms. desMARETS attempted to find an alternate Union

official to represent her but was unable to replace Toma. Complainant thus chose to be accompanied by an acquaintance and the Employer refused to convene a meeting that would be observed by desMARETS' representative. Apparently, Young had a number of concerns. First, Young wanted clarification as to whether the grievance was a departmental or a contractual grievance. Second, Young objected to the presence of Ian Lind, a political or investigative writer for a newspaper, and not a person identified as Complainant's representative. Young allegedly was concerned with the confidentiality of the grievance and did not allow Lind to participate therein. Complainant indicated that she needed to first confer with HGEA representatives and requested that the Employer provide supplemental information. The meeting was postponed and Complainant agreed to contact Young within a week to reschedule the meeting.

On January 12, 1993, Complainant filed another departmental Step 1 grievance with Deputy Penarosa alleging continued retaliation. She alleged that the Employer engaged in a pattern of impermissible gender-based discrimination based on her sexual orientation against her and other women administrators at the WCCC facility. The remedy sought was similar to the remedy sought in the previous grievance and included retroactivity of her CS I employment to May 1, 1991; fair and full evaluation of her work in future JPRs; reinstatement of the CS I position to second position in command at WCCC; and desisting from discriminatory activity based upon sex and sexual orientation. Complainant contended that Lee had effectively downgraded her CS I position

from second to fourth in the WCCC chain of command; that the Employer's harassment of her had undermined her authority in the facility; and that Employer's routine breaches of the chain of command had detrimentally impacted the WCCC hierarchy. Ms. desMARETS complained that her office was staffed with half of the authorized positions; there was also documentation that there were eight attempts to fill the three vacancies.

By letter dated January 19, 1993, Young notified Complainant that she considered the Step 2 grievance to be withdrawn since she had received no response from Complainant to reschedule the meeting by January 11, 1993, as previously agreed.

Also by letter dated January 19, 1993, Toma wrote to Sumner regarding the above Step 2 grievance indicating that Complainant had not received a response from the Employer to her Step 1 grievance which she had filed. Toma also indicated that the grievant had selected her own representative but that the Department had objected to her representative. As such, the HGEA indicated that it would represent her in the grievance. Accordingly, Toma requested relevant information pursuant to the contract.

By letter dated January 28, 1993, Complainant informed Young that she had not withdrawn her Step 2 grievance and clarified that the meeting scheduled on January 8, 1993 had not taken place because Young did not want to meet with Complainant and her representative, Ian Lind. Complainant also indicated that Toma had contacted Young and a meeting was scheduled on February 11, 1993.

On or about February 10, 1993, Complainant filed a Step 3 grievance on continued harassment.

By letter dated February 11, 1993, Toma informed Complainant that the HGEA would not represent her in her Step 2 grievance because Complainant had retained an attorney. Toma also indicated that if she desired any documents on file with the HGEA, she could request them in writing. In the meantime, Young received a letter from Toma, dated February 12, 1993, which formally notified her that HGEA would not represent her in her grievance because Complainant had retained Reinette Cooper, Esq., to represent her. Thus, Toma left prior to the meeting scheduled on February 11, 1993, and did not advise Complainant of any strategy he had intended to use nor did he turn over any documents which he received from the Employer two days earlier.

At the meeting, PSD requested additional time in order to fully investigate the Step 2 grievance and a further meeting was scheduled on February 25, 1993.

Thereafter, Tsuji completed an "extension of probation" JPR, dated February 24, 1993, covering the period from November 26, 1992 to February 25, 1993. The extensive document, consisting of a forty-four page narrative with attachments, describes desMARETS' work performance as unsatisfactory despite many attempts to provide her with guidance necessary to aid in her work performance.

On February 25, 1993, the Step 2 hearing was held on desMARETS' six-month JPR grievance. Complainant, Young and Hara attended that meeting. The parties again discussed and clarified Complainant's allegations of violations. The Employer agreed to

respond to Complainant by March 5, 1993. Also on that date, Young notified Complainant that effective at the close of business on that day, she was to return to her previous position at VOLINCOR.

On March 5, 1993, Young wrote to Complainant requesting a two-week extension in which to respond to her grievance because PSD was unable to comply with the fourteen-day deadline. However, Complainant refused to agree to an extension.

On March 7, 1993, desMARETS filed a Step 3 departmental grievance on the six-month JPR. She also sought the removal of documents related to the creation of the JPRs from her personnel file; reinstatement of the CS I position to "second-in-charge" at WCCC; the removal of "off the Table of Organization" personnel at that facility; and immediate restoration of the WCCC CS I position to second in command.

By letter dated March 19, 1993, the Employer provided Complainant with two Step 2 responses, one for the grievance filed by HGEA on her behalf regarding her six-month JPR and the three-month extension of her probationary period and the other for her departmental grievance regarding her probationary period and JPRs. With respect to the HGEA's grievance, Sumner informed Complainant that JPRs are not grievable and therefore the remedy sought could not be granted. The Employer, however, indicated that Complainant could pursue the matter to Step 3.

Complainant then informed the Employer that although she acknowledged receipt of the two Step 2 responses, the Employer was untimely and therefore, she was appealing to Step 3.

Complainant filed the grievances at Step 3 and the grievances were resolved in Complainant's favor on July 7, 1993. All of Complainant's JPRs were expunged from her personnel file and Complainant was reinstated into the CS I position at WCCC and converted to permanent status on November 26, 1992.

DISCUSSION

Complainant contends that the Employer arbitrarily enforced its regulations against her, discriminated against her, and retaliated against her because she filed grievances and prohibited practice complaints before the Board. Ms. desMARETS also contends that the Employer harassed and discriminated against her because of her sexual orientation. Ms. desMARETS contends that the Employer therefore violated Sections 89-13(a)(1), (4), (7) and (8), HRS.

In accordance with the Board's oral ruling on July 12, 1993, the Board will consider whether the Employer breached the Settlement Agreement and retaliated against Complainant because of her filing of grievances.

Sections 89-13(a)(1), (4), (7), and (8), HRS, provide in pertinent part:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
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> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
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> * * *
>
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an

> affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
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> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
>
> (8) Violate the terms of a collective bargaining agreement; . . . .

Complainant contends that the Employer, specifically Sumner, knew that she was a lesbian and did not want her at WCCC in order to prevent homosexual activities at the facility. However, in response to her grievance and prohibited practice complaints on her initial non-selection to the CS I position, Sumner reluctantly agreed to settle the claims by transferring Complainant into the CS I position at WCCC. Although the personnel action was a lateral transfer from one SR-24 position to another, the Employer attached a six-month probationary period to the movement without Complainant's knowledge. According to Complainant, she would not have agreed to the settlement had she known that she would have to serve a probationary period.

Thus, Complainant contends that Sumner entered into the Settlement Agreement in bad faith, never intended to honor the terms of the Agreement, developed a plan to remove Complainant from WCCC and carried out such plan through his employees.

Based upon the record before the Board, the Board finds that the Employer entered into the Settlement Agreement at DPS' suggestion to resolve the Complainant's existing claims and thereafter engaged in a pattern of harassment and discrimination

against the Complainant. The Employer frustrated the Complainant by not permitting her to function as the second in command at the facility and by changing her working conditions and imposing a probationary period upon her transfer. The Employer thereafter criticized her work performance through the outrageous use of JPRs, culminating in a forty-four page document, which was intended to document Complainant's unsuitability for the CS I position and which would constitute grounds for her return to her former position.

During this time period, Complainant filed a number of grievances, some through the contractual grievance process and some through the departmental grievance process. The record also shows that the Employer failed to respond at most steps of the grievance process within the time periods prescribed by the contract thereby violating the specific contractual provisions relating to the grievance procedure. Thus, even if the departmental grievance process was inappropriate for the particular claims or the claims were unmeritorious, there was no feedback to Complainant by way of an Employer response at Step 1 of the grievance procedures.

In addition, when Complainant was transferred to WCCC, the entire organizational structure at WCCC was modified. The evidence strongly suggests that the Employer intended to have Tsuji temporarily assigned as the BA when Coester went on vacation in August 1992. However, desMARETS filed a grievance and Malcolm Lee, who was temporarily assigned as the Chief of Security, was temporarily assigned to the BA position.

Lee's temporary assignment to the BA position, however, appears to be contrary to the departmental organization chart since the CS I position is the second in command at the facility. Prior to desMARETS' arrival at WCCC, Jane Donohoe, the previous CS I, was second in the chain of command under the BA. At that time, the Chief of Security was the third in the chain of command. Thus, Lee would have been the third in command at the facility below the CS I.[2]

Initially, Lee and desMARETS had a good working relationship when she arrived at the facility. Lee testified that he felt that Complainant did a better job than her predecessor. However, on July 1, 1992, Tsuji was assigned to assist Lee in administrative matters and to review Complainant's work performance which, judging by the quantity of paper submitted to the Board, consumed a great deal of time and energy on Tsuji's as well as Complainant's part.

Although JPRs are completed after three and six months, Coester evaluated Complainant's performance as less-than-satisfactory after two months on the job. The narrative was later expunged pursuant to Complainant's grievance. However, with respect to Complainant's JPRs, the Board finds that the record supports a finding that the JPRs were used as a tool to document the Employer's dissatisfaction with her work performance in an extraordinary fashion. Lee testified that in his 21 years with

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[2]Also, Lee testified that he received a permanent promotion to captain in October 1992, while he was temporarily assigned as the acting BA. Thus, it appears that he was serving some kind of probationary period much like desMARETS when he was temporarily assigned as the BA.

PSD, he had never given a subordinate a less-than-satisfactory JPR. In fact, in August 1992, Lee caught up on a four-year backlog of JPRs for WCCC personnel totaling hundreds of reports. He stated that he rated everyone satisfactory so everyone could start fresh. This, however, was not the case with desMARETS. Moreover, after viewing Lee's demeanor and his responses regarding the substance of Complainant's JPRs, the Board finds it highly unlikely that desMARETS failed to live up to Lee's standards. Tsuji actually wrote desMARETS' six-month probationary and three-month extension evaluations purportedly under Lee's direction.

With respect to grievances filed, Complainant used the contractual and departmental grievance procedures to pursue her numerous and complex claims. In each case, Complainant contended that she was being unfairly treated and discriminated against. In most, if not all of the grievances, the Employer never responded at Step 1. Complainant thereafter pursued the claims to the higher levels. While the Board recognizes that the two grievance tracks exist to dispose of cases within the proper forum, the Board finds that the Employer failed to timely respond to the grievances at various steps of the grievances and thereby violated the contract.

As a remedy in this case, Complainant seeks an order from the Board that the CS I position is second in command at WCCC. In addition, Complainant seeks an award of attorney's fees and an order that PSD must follow its grievance procedures, and a posting of a notice that the Employer will not tolerate discrimination on the basis of sexual orientation.

Under the test enunciated by the court in NLRB v. Wright Line, A Division of Wright Line, Inc., 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981),[3] Complainant must make a prima facie showing that her grievances were a motivating factor in the Employer's decision to retaliate against her.

Based upon the record, the Board finds that the Employer retaliated against Complainant because of the grievances and complaints she filed which consequently placed her into a position which displeased the Employer. It seems clear that Sumner never wanted desMARETS at the women's facility and the Employer undertook a campaign to ensure that she would be removed. The Employer has not convinced the Board that desMARETS would have been treated in the same manner had she not filed the grievances and complaints under this chapter. If Complainant had not been targeted by the Employer, she would have received the same satisfactory JPR which the other WCCC employees received. The Board concludes that the

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[3]The Board adopted the Wright Line analysis in Decision No. 286, United Food & Commercial Workers Union (October 28, 1988) in considering violations of Section 377-6(3), HRS. Section 377-6(3), HRS, provides that discrimination on the basis of union activity is an unfair labor practice. The Board there stated, at p. 47:

> Under the Wright Line test, the proponent initially must demonstrate that anti-union animus contributed to the decision to discharge the employee. If this burden is satisfied, the Employer must then show by a preponderance of the evidence that the employee would have been discharged even if he had not been engaged in protected activity.

The Board finds the foregoing analysis applicable in the instant case where the employee contends that the Employer discriminated against her for filing grievances and complaints under this chapter.

Employer thus violated Sections 89-13(a)(1), (a)(4) and (a)(8), HRS, by interfering with Complainant's rights guaranteed under Chapter 89, HRS, i.e., to file grievances to seek redress, and likewise violated the contractual provisions which set forth the grievance procedures. On this record, the Board finds that the Employer committed these violations wilfully as the deprivation of desMARETS' rights was the natural consequence of the Employer's actions.

As a remedy, the Board orders that the Employer pay the Complainant's attorneys' fees. In Dennis Yamaguchi, 2 HPERB 656 (1981), the Board ordered the parties to pay the employee's attorneys' fees because of the egregious nature of the prohibited practices committed. Here, the evidence establishes that the Employer deliberately and wilfully sought to destroy the spirit and reputation of one of its employees without any justification for the actions nor remorse on its part. The Board is of the opinion that the Employer's actions in this case constitute flagrant violations of Chapter 89, HRS, and retaliation against the Complainant. Therefore, the Board agrees with Complainant that full reimbursement of attorney's fees for litigating this case before the Board is warranted. Again, the Board recognizes that an award of fees is an extraordinary remedy. However, as remedies are fashioned on a case-by-case basis, the Board believes that the nature of the violations in this case warrants the granting of fees. The Board will conduct further hearings upon the proper motion being filed to consider the appropriate amounts to be awarded.

With respect to the Union, Complainant contends that the HGEA failed to represent her in her grievances; failed to ensure that the Employer complied with contractual requirements to respond to the grievances; failed to represent her during negotiations surrounding settlement of the Step 3 grievance regarding her non-selection to the CS I position; failed or refused to advise her concerning the deficiency in the Settlement Agreement; and abandoned her during the grievance procedure. The Board ruled at the hearing on July 12, 1993 that with respect to the Union, the Board would consider allegations subsequent to the Settlement Agreement as to whether the Union breached its duty of fair representation by refusing to assist her or pursue grievances on her behalf. Thus, the Board will not consider allegations of violations arising prior to or during the 1992 settlement of Complainant's claims.

With respect to the merits of the de facto BA grievance, Toma concluded that the grievance was weak because Complainant was on probation. The HGEA thus declined to represent desMARETS on the grievance. However, after Complainant filed her departmental grievance with the Employer, the Employer assigned Lee as the BA during Coester's absence.

The Union filed a grievance on Complainant's behalf regarding her two-month JPR and succeeded in having the narrative expunged. Complainant was nevertheless dissatisfied with the resolution since the negative JPR still remained in her personnel file. The Employer, however, later expunged all of the negative

JPRs from desMARETS' files after the intercession by DPS at Step 3 of her grievance.

Ms. desMARETS testified that she faxed or delivered copies of her grievances to the Union when she filed them at Step 1. The record is clear, however, that Complainant did not specifically request HGEA's assistance in filing or pursuing each grievance.

On February 11, 1993, Complainant contends that the Union abandoned desMARETS at a Step 2 hearing because she chose to have an attorney present. Complainant claims that Toma left without sharing the documents he had received from the Employer nor the arguments which he intended to present.

A Union breaches its duty of fair representation when the exclusive representative's conduct towards its member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). "Arbitrary" means "perfunctory." 5 HLRB at 191. This standard was discussed by the Fourth Circuit:

> 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.

Dennis Yamaguchi, 2 HPERB 656, 675, citing Griffin v. International Union, 469 F.2d 181, 183 (4th Cir. 1972).

Based upon the evidence before the Board, the Board concludes that Complainant failed to prove that the HGEA breached its duty of fair representation. Although desMARETS gave Toma

copies of the grievances after she filed them, the record does not indicate that desMARETS requested that the Union file the grievances on her behalf. Without requesting assistance or representation from the Union, merely informing the Union that grievances were being filed does not invoke the Union's duty of fair representation.

In addition, desMARETS contends that the Union abandoned her prior to her Step 2 grievance meeting because she wanted to have an attorney present. The Board finds however, that Complainant failed to establish that the Union's conduct was perfunctory and arbitrary. Toma's response reflected the HGEA's practice of permitting the employee to proceed with the grievance with a representative of his or her choice without the Union's assistance.

Accordingly, the Board finds that the HGEA was not arbitrary or perfunctory in its treatment of desMARETS' grievances. Thus, the Board concludes that the Union did not breach its duty of fair representation and hereby dismisses the instant complaint as to the Union.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant complaints pursuant to Sections 89-5 and 89-13, HRS.

The Employer unlawfully interfered with Complainant's rights and retaliated against her for filing grievances against the Employer in violation of Sections 89-13(a)(1) and (4), HRS.

The Employer sought to undermine the May 1992 Settlement Agreement by engaging in a campaign to harass and discriminate against Complainant in violation of Section 89-13(a)(8), HRS.

The Employer violated contractual provisions relating to the grievance procedures by failing to timely respond to the grievances submitted by Complainant. The Employer thus violated Section 89-13(a)(8), HRS.

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

Complainant failed to establish that the HGEA breached its duty of fair representation in the handling of her grievances.

ORDER

Based on the foregoing, the Board orders the following:

(1) The prohibited practice complaint against the HGEA alleging violations of the breach of duty of fair representation is dismissed;

(2) Respondent Employer shall cease and desist from harassing, discriminating, and retaliating against Complainant because of her filing of complaints and grievances against the Employer;

(3) Respondent Employer shall cease and desist from failing or refusing to respond to grievances filed by the Complainant within the time limits provided for in the applicable contract;

(4) Respondent Employer shall reimburse Complainant for reasonable attorney's fees incurred in litigating this case before the Board upon proper motion;

(5) The Employer shall, within thirty (30) days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where Unit 13 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting; and

(6) The Employer shall notify the Board within thirty (30) days of the receipt of this decision of the steps taken by the Employer to comply herewith.

DATED: Honolulu, Hawaii, July 26, 1996.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

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