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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of NATHAN MAKINO, Complainant, and COUNTY OF HAWAII; AND UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO Respondents.	CASE NOS.: CE-01-856, CU-01-332 DECISION NO. 492 FINDINGS OF FACT; CONCLUSIONS OF LAW; AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW; DECISION AND ORDER

The Hawaii Labor Relations Board (Board) issues the following Decision and Order dismissing the Amended Complaint, filed on May 9, 2016.

Any conclusion of law that is designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

A. PROCEDURAL BACKGROUND

1. The Complaint and Amended Complaint

On April 20, 2015, Complainant NATHAN MAKINO (Complainant or Makino) filed a Prohibited Practice Complaint (Complaint) against Respondents COUNTY OF HAWAII (County or Employer) and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) (collectively Respondents) with the Board.

On May 9, 2016, Complainant filed a FIRST AMENDED PROHIBITED PRACTICE COMPLAINT (Amended Complaint). The Board initially notes that as discussed more fully below, the allegations set forth below are limited by the following circumstances: no Unit 1 collective bargaining agreement (BU 1 CBA or CBA) was introduced into the record at the hearing on the merits; Complainant did not present or argue any other authority for the UPW's duty to inform the Complainant that he could file and/or pursue the arbitration on his own or of the deadlines regarding the arbitration process; there was no evidence presented at the hearing on the merits that the co-worker, who had attacked the Complainant had previously tested positive for ingesting illegal drugs or that the co-worker who attacked the Complainant behaved erratically and was potentially violent, prior to the attack or of "a physical altercation occurring among other co-workers in the Hawaiian Beaches area on Manalo Street, County of Hawaii, State of Hawaii"; and on June 29, 2016, the Board issued Order No. 3173 dismissing the conspiracy and constitutional claims against Respondents, and the civil service violations of Hawaii Revised Statutes (HRS) Chapter 76 claims against UPW.

Taking into the consideration the above, the remaining allegations against the Respondents contained in the Amended Complaint are as follows.

The remaining allegations in the Factual Background as set forth in the Amended Complaint are summarized as follows and include but are not limited to:

- Complainant was employed by the County as a Laborer II;
- Complainant was later attacked from behind by one of the co-workers and forced to defend himself from physical harm;
- On or about March 14, 2015, Complainant was terminated from employment arising from the assault and defending himself;
- Respondent UPW filed a grievance with Respondent County on behalf of Complainant;
- From March 14, 2014 until March 19, 2015, Complainant believed that the Respondents were processing his grievance and engaging in negotiations to resolve his grievance;
- On or about December 15, 2014, Complainant was informed by the UPW Business Agent that an agreement had been reached between the County and UPW concerning his termination and that the County had agreed to reinstate him without back pay but with seniority;

- From December 15, 2014 through and including March 10, 2015, Complainant was in contact with the UPW Business Agent and told on numerous occasions that the agreement had been finalized, approved, and only waiting for Mayor Billy Kenoi's signature;
- From January 17, 2014 through and including March 10, 2015, Complainant made or responded to 110 calls to and from Alton Nosaka (Nosaka) and Nosaka made 28 calls to Complainant, three of which occurred on December 15-16, 2014, when Nosaka told the Complainant that an agreement was reached;
- From December 16, 2014 through and including March 19, 2015, Complainant was advised and/or told by Respondent UPW and believed that an agreement with the County existed;
- On or about March 20, 2015, Complainant received a letter from UPW informing him that his grievance was withdrawn;
- At no time did the UPW Business Agent inform or advise Complainant that UPW would not pursue the arbitration on his behalf, or that the UPW would not support its members, including Complainant in any grievance or refuse to take any case to arbitration concerning violence in the workplace despite "stop work meetings";
- Complainant was treated unfairly by UPW and the County because he was misled by the Union into believing that despite the UPW's statements that it didn't accept or process arbitrations arising from violence in the workplace, UPW decided to take Complainant's case to arbitration, making him believe that he did have good cause to challenge his termination and that an agreement had been reached with the County about his reinstatement so that he didn't have to find someone to represent him at the arbitration;
- If he had been told by UPW, including Nosaka, that they were not going to take his case to or represent him at arbitration, he would have been able to find someone to help or legally represent him;
- By the time Complainant received Mr. Nakanelua's (Nakanelua) letter that UPW was withdrawing his arbitration, he had no other options, including settling his termination or finding his own attorney to represent him in the underlying case;
- UPW and the County had extended the proceedings in Complainant's termination case so that Complainant would not have any choices or options in the end and his termination could not be challenged;
- At no time did the UPW Business Agent inform or advise the Complainant that the Union would not pursue his case until March 20, 2015; and
- Complainant was unfairly prejudiced in his rights under Chapter 89, HRS, by the UPW Business Agent and UPW because they failed to represent the Complainant fairly or competently in his grievance and/or arbitration, including but not limited to misrepresenting to Complainant that an agreement had been reached on or about December 15, 2014, in which Complainant would be reinstated, his seniority

restored but he would not receive back pay, or informing the Complainant that the UPW did not intend to pursue his arbitration.

A summary of the remaining allegations regarding prohibited practices against the County as set forth in the Amended Complaint include, but are not limited to, that at all relevant times, the County is an "employer" or "public employer" as defined in Section 89-2, HRS; the County was a party to the BU 1 CBA with the UPW; and the County lacked "just and proper cause" to terminate the Complainant.

The remaining allegations regarding prohibited practices against the UPW as set forth in the Amended Complaint are summarized as follows and include, but are not limited to, that at all relevant times:

- UPW is an "employee organization" pursuant to HRS § 89-2;
- UPW was a party to the BU 01 CBA with the County;
- UPW was aware that the County lacked "just and proper cause" to terminate Complainant and that the charges against Complainant involved the allegation of violence in the workplace;
- UPW chose to submit Complainant's wrongful termination to arbitration despite any alleged prior warnings to its membership that it would not file grievances or pursue arbitration of any disciplinary action involving violence in the workplace;
- UPW was aware that the Complainant was relying on the UPW's representations that his termination was made without "just and proper cause" and that the Union submitted his case to and pursue arbitration;
- UPW, by and through its Business Agent in Hilo, Hawaii, deliberately and intentionally misled and fraudulently misrepresented to Complainant that an agreement had been reached with the County that would result in the Complainant's reinstatement, when no such agreement had been reached;
- UPW failed to represent the Complainant and/or defend or assert Complainant's statutory rights and remedies under Chapter 89, HRS; and
- Complainant detrimentally relied on the deliberate, intentional, and/or fraudulent misrepresentation by UPW, by and through its Business Agent; UPW violated HRS § 89-13(b)(1) and (4).

In addition to the Board making certain findings as a matter of law, the Amended Complaint requested certain remedies, including immediate reinstatement of the Complainant without loss of seniority, fringe benefits and back pay from the date of his termination to the entry of the Order in this case; and awards of general and special damages in an amount to be shown at trial, compensatory damages, costs, attorney's fees, and pre and post judgment interest; and such other relief as it may deem just and proper.

2. Other Significant and Relevant Pleadings

On April 23, 2015, the Board issued NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; NOTICE OF PREHEARING/SETTLEMENT CONFERENCE AND NOTICE OF HEARING ON THE PROHIBITED PRACTICE COMPLAINT.

On April 30, 2015, the County filed RESPONDENT COUNTY OF HAWAI'I'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED APRIL 23, 2015. The County's Answer, among other things, denied that any violations have occurred and that Complainant is entitled to any relief and contained a general denial of all legal conclusions set forth in the Complaint and allegations in the Complaint not specifically admitted.

On May 1, 2015, the UPW filed UNION RESPONDENT'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 20, 2015 and on May 4, 2015 filed UNION RESPONDENT'S FIRST AMENDED ANSWER TO PROHIBITED PRACTICE COMPLAINT. In the Answer, UPW, among other things, asserted the defense that the Union did not breach its duty of fair representation.

On June 9, 2015, the UPW filed a MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT (UPW Motion to Dismiss) on the grounds that the Employer did not breach the BU 1 CBA by dismissing Makino for violence, and that the Union did not breach its duty of fair representation by its decision not to arbitrate the Makino grievance, which was joined by the County and opposed by Complainant.

On January 4, 2016, the County filed COUNTY OF HAWAI'I'S MOTION TO DISMISS CONSPIRACY CLAIM (County Motion to Dismiss), which was opposed by Complainant.

On January 4, 2016, the UPW filed MOTION TO DISMISS FOR FAILURE TO ESTABLISH BREACH OF THE DUTY OF FAIR REPRESENTATION (UPW Second Motion to Dismiss) based on the record of proceedings, including the declarations, exhibits, and memorandum in support of the UPW Motion to Dismiss, which was opposed by Complainant.

On January 26, 2016, the Board held a hearing on the UPW's Second Motion to Dismiss and the County's Motion to Dismiss. At the motion hearing, Complainant orally requested leave to file a motion to amend his Complaint, which was granted by the Board. In addition, the Board granted the UPW and the County an opportunity to file an opposition to the Complainant's motion to amend.

On February 1, 2016, the Board issued ORDER NO. 3143 GRANTING LEAVE TO FILE A MOTION TO AMEND PROHIBITED PRACTICE COMPLAINT.

On February 2, 2016, Complainant filed COMPLAINANT'S MOTION TO AMEND COMPLAINANT'S PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 20, 2015 (Motion to Amend Complaint) seeking to incorporate the correct sections of the BU 1 CBA, clarify the issues based on discovery responses submitted by the Respondents and the affidavits and exhibits attached to the UPW Motion to Dismiss and the County Motion to Dismiss.

Respondents filed oppositions to the Motion to Amend Complaint.

On April 12, 2016, the Board issued ORDER NO. 3155 GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINANT'S PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 20, 2015.

On May 9, 2016, Complainant filed his FIRST AMENDED PROHIBITED PRACTICE COMPLAINT.

On May 13, 2016, the Board issued NOTICE TO RESPONDENTS OF FIRST AMENDED PROHIBITED PRACTICE COMPLAINT.

On May 19, 2016, UPW filed UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S ANSWER TO FIRST AMENDED PROHIBITED PRACTICE COMPLAINT and an Errata on May 20, 2016.

On May 23, 2016, the County filed RESPONDENT COUNTY OF HAWAI'I'S ANSWER TO COMPLAINANT'S FIRST AMENDED PROHIBITED PRACTICE COMPLAINT, FILED MAY 9, 2016.

On June 29, 2016, the Board issued ORDER NO. 3173 (1) GRANTING IN PART AND DENYING IN PART RESPONDENT UPW'S MOTION TO DISMISS FOR FAILURE TO ESTABLISH BREACH OF DUTY OF FAIR REPRESENTATION FILED ON JANUARY 4, 2016, AND (2) GRANTING RESPONDENT COUNTY OF HAWAII'S MOTION TO DISMISS CONSPIRACY CLAIM FILED ON JANUARY 4, 2016 (Order No. 3173). In the Order, the Board dismissed the Complainant's conspiracy and constitutional claims against the Respondents and the civil service claims against UPW. The Board further ruled that the focus of the hearing on the merits against the County would be whether Makino's termination from his job with the County was without "just and proper cause" in violation of the Unit 1 CBA and HRS § 89-13(a)(8); and against UPW whether Nosaka misrepresented and lied to Makino about the settlement discussions with the County and promised that the Mayor would sign the Last Chance Agreement (LCA).

On October 4, 5, and 6, 2016, the Board held hearings on the merits in this case. After the Complainant rested his case, the UPW made a motion for directed verdict, which was joined by the County, asserting that the Complainant failed to meet his burden of proof. The Board orally denied the motions and proceeded with the hearing on the merits. Complainant also made an oral motion to amend his Complaint to incorporate a violation of CBA § 17 for relying on and including disciplinary actions beyond two years as newly discovered evidence. The Board denied the oral motion to amend and told Complainant to file a written motion if he wanted to amend.

On December 29, 2016, the County submitted RESPONDENT COUNTY OF HAWAI'I'S POST-HEARING BRIEF and on December 30, 2016, UPW and Complainant filed POST HEARING BRIEF OF UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and COMPLAINANT'S POST-HEARING MEMORANDUM, respectively.

On September 11, 2017, the Complainant filed COMPLAINANT'S MOTION TO REOPEN HEARING (Motion to Reopen) based on newly discovered evidence that the Hawaii County Mayor Billy Kenoi's (BK, Kenoi, or the Mayor) Administration may have intentionally manipulated civil service laws and material misrepresentations made by the Respondents' counsel.

Respondents filed oppositions to the Motion to Reopen.

On September 26, 2017, Complainant filed DECLARATION OF TED H.S. HONG declaring that the Exhibit 3, an article entitled "'POI creates sticky situation for HR: Merit Appeals Board to take up critical audit," published by the Hawaii Tribune-Herald" as newly discovered evidence regarding the County's questionable personnel decisions involving recruitment.

B. FINDING OF FACTS

Complainant Nathan Makino was, for all relevant times, an "employee" or "public employee," as defined in HRS § 89-2,[i] of the Highways Division, County of Hawaii, and within bargaining unit 1 (nonsupervisory employees in blue collar positions) (BU 1).

Respondent County of Hawaii is, and was, for all relevant times, an "[e]mployer" or "public employer," as defined in HRS § 89-2.[ii]

Kenoi was, for all relevant times, the Mayor of the County of Hawaii.

Respondent UPW is, and was, for all relevant times, an "exclusive representative" as defined in HRS § 89-2[iii] for the employees in BU 1.

1. January 24, 2014 Incident

Makino was employed as a Laborer II with the County since April 17, 2000. Upon being employed, Makino received the Violence in the Workplace Policy (WPV). No fighting, harassment, intimidation of any employee, and no physical contact was also a discussion subject with employees.

On January 24, 2014, Makino was on temporary assignment as an EO II (truck driver) when he got involved in a physical altercation with another Laborer II employee Ivan Varize (Ivan or Varize) during a tree-trimming operation alongside Manolo Street in the Hawaiian Beaches Subdivision in Pahoa (January 24, 2014 incident).

2. Investigation and Report

County Department of Public Works (DPW) Deputy Director Brandon Gonzalez (Gonzalez) submitted an Investigation Report of the January 24, 2014 incident, dated February 28, 2014 (Investigation Report), to the County Director of DPW Warren H.W. Lee (Lee).

The investigation included Investigator Vince Kasarskis's (Kasarskis, Vince, or Investigator) interviews of Don Canda, Keola Kendrick, Leighton Ahnee, Anson Young, T'Jay Forsythe, Frank Degele, and Loren Bisel, interviews of Varize and Makino with the presence of UPW representative Nosaka, and consideration of a police report of the incident filed by Varize.

Makino denied choking, punching, or threatening Varize and blanking out, and made statements that he was acting in self-defense from Varize's attack during the incident.

The Investigator concluded that both Makino and Varize violated BU 1 CBA, § 46.01 Working Conditions and Safety providing in pertinent part that, "The Employer and the Union shall encourage Employees to observe applicable safety rules and regulations and will support appropriate efforts to provide a violence free workplace[]"

Kasarkis recommended termination based on the evidence contained in the investigation report and a finding that during the incident, Makino blanked out and choked Varize (based only on Varize's statement), a violent response to a fairly simple instigation.

3. Communications Between Makino and Nosaka

At the hearing on the merits, Makino submitted a handwritten list of 137 phone calls, including dates and duration, with Nosaka or the UPW during the period from January 17, 2014

through March 10, 2015. The list showed 110 calls initiated by him, 23 by Nosaka, and four as call waiting.

Nosaka documented the communications and actions taken during his representation of Makino for the January 24, 2014 incident by written notes introduced into evidence, which with the oral testimony established the following facts:

a. Pre-Determination Hearing and Dismissal

During the period after the January 24, 2014 incident and before Makino's discharge, Nosaka provided Makino with assistance and reviewed the investigation report.

On January 28, 2014, Nosaka had a conversation with Makino, in which Nosaka noted: "He was concern of being term. Told him it was too early to think that way. We need to wait and see the outcome of the investigation. He said 'nobody seen nothing.'"

On January 29, 2014, Nosaka attended Kasarakis's investigative interview of Makino regarding the January 24, 2014 incident.

On that same day, Nosaka met with Makino and told him that "it did not look good. But we can go through the process. Step 1 & Step 2. Don't really know if we going to arb. We lost a lot of UPW cases for less violence. Just words, better leave before I hurt somebody or myself. He said 'wow,' but I was hurt."

By a February 28, 2014 letter, Lee issued a Notice of Pre-Determination Hearing informing Makino of the contemplated dismissal from his Laborer II employment, effective March 14, 2014; the grounds for the consideration of the dismissal arising out of the internal administrative investigation of the January 24, 2014 incident; notice of the March 5, 2014 pre-determination hearing providing him with an opportunity to provide any additional relevant information supporting his case or explain the reasons for his retention as a Laborer II; his right to submit a written statement by March 5, 2014 if unable to attend the hearing; and Lee's intent to proceed with the dismissal action, effective March 14, 2014, if Makino did not submit any statement by the deadline or attend the hearing.

On March 3, 2014, Makino informed Nosaka of the receipt of the pre-determination letter and his concerns about getting fired. Nosaka "told him that just go in the meeting and explain yourself, and you have to be serious." Makino said that he "get hard time explain so he might write an apology letter," and Nosaka "[t]old him up to him". Makino indicated that he would be preparing an apology letter. Regarding their conversation, Nosaka's noted:

> Asked how long the process would take. Grievance vary-depends. What about this kind? If they term you-could take anywhere from months to years. We need to wait & see our options. He said ok. The only person would fix this is BK. Makino said try talk to him. Ok. I'll try see.

On March 5, 2014, Lee held the pre-determination hearing attended by County officials Lee, Gonzalez, and Human Resources Program Specialist Michelle Simmons, and Makino with Nosaka. Makino read a statement prepared with the help of his wife apologizing for his actions; presented his family and financial situation, his employment history with the County, and his version of the incident; promised that there will not be any future incidents, and that he would "take any punishment besides termination;" and requested that his apology for the incident be accepted and reconsideration given to returning him to work. It was disputed whether Nosaka made him change the letter.

After the pre-determination hearing, Nosaka had a discussion with Makino, "[W]e need to really consider how far we going. In the investigation you said you didn't remember. Today you choked him. Makino said he grab me from the back. I told him I know, but if you stop when you clamped his arm you would be ok. But you choked him. They going term you. You like me try talk to BK. He said yes. I'll try give him a call and see if he willing to get involved."

Nosaka spoke with the Mayor to find out if the process could be stopped, and Makino could get his job back. On March 6, 2014, Nosaka informed Makino of the discussion. His note regarding the discussion, states in pertinent part:

> Conversation with Makino.
>
> Get a meeting w/BK. I'll let you know if they reconsider.
>
> March 6, 2014 spoke to BK about talking to his dept head regarding term. BK said he would consider but it's a serious incident. I could see if they were great
> workers, but one bully & druggie. Hard.
>
> But told him about the Hamakua issue with the fight couple months back.
>
> BK said, "I try talk to dept. head but no promises. I'll get back to you.

On March 10, 2014, Nosaka noted after speaking with the Mayor, who had consulted with his department heads:

> Spoke to BK. Told me that Dept. was upset Makino lied & spoke about investigation when was told not to. He just making it harder for me. Maybe give them some time to cool off. I'll try again later. BK asked why I like them guys come back? They have family and it's a hardship while they're out now.

By a March 11, 2014 letter from Lee, Makino was notified by the County of his dismissal from his employment as a Laborer II, effective March 14, 2014, and of his right to appeal the dismissal under the BU 1 CBA. The letter set forth the grounds for the dismissal:

> Your actions during this incident created an unsafe and hazardous environment for you, other employees working on a roadside tree-trimming project with dangerous equipment and traffic nearby, and the public. As such, I have determined that your actions were in violation of Section 46, Working Conditions and Safety, of the Unit 01 Agreement. The egregious disregard of workplace and public safety in this instant case warrants dismissal.

The letter further identified as aggravating factors: initiation of the incident; potential embarrassment to the County; lack of contrition; comparative severity with past actions taken by the County for workplace violence; and his employment disciplinary history.

On April 6, 2014, Nosaka called the Mayor, but there was no answer.

On April 22, 2014, after a follow up call to the Mayor, Nosaka noted, "No news yet. Still trying[.]"

On May 5, 2014, Nosaka made several notations regarding Makino's case. His first entry indicated that the status of the case had not changed. His second entry pertained to his communication of that status to Makino, who indicated his concern regarding his back pay:

> Talked to Makino. Told him BK said it's going to be tough bringing him back, but BK still trying. Still grumbling he was the victim and would take some back pay from the time he lost his job. Some suspension. Told him I can try ask for back pay, next time I talk to BK[.]

In his third entry, the Mayor responded to Nosaka in a conversation regarding back pay:

> Talked to BK about the back pay. He said this guy crazy. He admitted he choked the other guy. He lied from the beginning. BK was "pissed" if I convince the Dept. to bring him back we gotta really think about the back pay….Told BK about the Hamakua guys. He said it was different issues….

b. UPW Processing of Grievance at Steps 1 and 2

Nosaka participated and assisted Makino at the June 4, 2014 Step 1 grievance meeting and noted that Makino was willing to accept any discipline except termination. Makino apologized and asked for a second chance. He stated that he just needed to defend himself because: Ivan was the only person who said that he was choked 2-3 minutes; the incident could have been avoided because he reacted to Ivan grabbing him from the back; Puna is a very violent district; Makino thought that it was someone from the drug house across the street; and other employees in other districts actually fought and never got terminated in another district.

Nosaka participated, and represented Makino at the July 25, 2017 Step 2 grievance meeting. At this meeting, Makino defended his actions by stating that: he had over $5,000 in his back pocket when Ivan grabbed him from behind; they were working by a crack house that just got raided; he and Ivan were good friends and had no prior problems; he did not know that it was Ivan who grabbed him; and they fought and he was defending himself.

Immediately after the Step 2 grievance meeting, Nosaka communicated his concerns to Makino regarding whether this grievance would proceed to arbitration based on the Steps 1 and 2 meetings and the investigation. Nosaka noted that communication on July 25, 2014:

> After meeting told Makino, maybe should try settling before Arb. case. I really don't think they going reconsider. He said try talk to BK. I said okay. I'll try set up a meeting with BK and talk to him to talk to dept. W. Lee & B. Gonzales to reconsider.
>
> I really no think my bosses going to take this case to Arb. I can recommend but it's up to them.
>
> We lost too much case regarding WPV going try my best to work it out with BK. He's the only one can bring you back. Makino said to try.

According to Nosaka, "bosses," referred to the UPW State Director Nakanelua, the final authority regarding the decision whether a case proceeds to arbitration.

On or about August 14, 2014, Nosaka spoke with Makino and reiterated that with the history of losses, the Union was not going to arbitration and that the best chance was prior to arbitration. Nosaka told Makino that the best option was to work something out with the Mayor, and Makino responded, "[O]k."

On August 27, 2014, Makino called Nosaka to express his concerns for "it taking so long." Nosaka told Makino that the storm messed up the meeting and that, "if BK no agree we not going Arb. BK is our last hope/ok."

c. Last Chance Agreement (LCA)

On August 22, 2014, Nosaka spoke with the Mayor, who proposed and inquired whether the Union might be interested in an LCA (last chance agreement). Nosaka's response was that he would check because he didn't know what his bosses would say. The Mayor further inquired regarding the case status, and Nosaka responded that the case was being processed for arbitration. After inquiring whether the case could be "pulled back," and receiving Nosaka's assurance that, "[Y]es, anytime, he can pull it back," the Mayor told Nosaka to process the arbitration.

On August 25, 2014, Nosaka told Makino that he spoke to Kenoi, who asked if an LCA would work. Nosaka asked Makino whether the Mayor's question regarding an LCA was worth exploring, and Makino's response was "anything but term." Nosaka said that he would need approval from his bosses and get back to Makino.

On October 10, 2014, Nosaka informed Makino that there was "[n]o word yet from BK. Will let him know as soon as I hear anything."

Nosaka did talk to his "bosses" about an LCA. and obtained approval to draft and submit the LCA to the Mayor. UPW Division Director Loyna Kamakeeaina and Nakanelua reviewed and approved the LCA.

On or about December 15, 2014, Nosaka spoke with Makino to get approval to submit the LCA to the Mayor requiring Makino to concede the back pay. Nosaka said that Makino had to consult with his wife, and his wife agreed. Nosaka noted:

> [D]raft done. Waiting for a meeting with Billy. Without pay okay? he spoke to wife; she agree. No guarantee I told him. Not going to win in arb.

What you going on your hands & knees beg for my job.

Makino testified that Nosaka said that he was going to get a letter printed up that the Mayor needed to sign, so Makino could have his job back with no back pay but seniority intact. Makino further testified that he asked the question, "What you going on your hand & knees beg for my job[]" because he was willing to go on his hands and knees to beg for his job back. Nosaka, on the other hand, disputed that Makino told him that Makino was going on his hands and knees to beg for his job and that his statement "not going win in arb" was made because of the history of cases that the Union had lost in arbitration with less violence than what occurred on that day.

On December 15, 2014, Nosaka met with and presented a proposed draft of the LCA for Makino to the Mayor and Gonzales. The Mayor did not indicate agreement to the proposal but stated that he would have HR and the corporation counsel review the LCA and get back to Nosaka. Nosaka noted:

> Met with Billy Kenoi & B. Gonzales about Makino & Varize draft of their LCA. Billy said this is a very hard case to reconsider. B. Gonzales was silent.
>
> After reviewing the LCA BK said he has to have HR look at it & corp counsel. But no promises. I told BK would be a great XMAS gift if he brought them back. They get families and they would really appreciate the reconsideration & second chance.
>
> He said he'll get back to me.

Nosaka notified Makino of his meeting with the Mayor. Makino knew that the Union was proposing the LCA to get his job back and that the Mayor had to make the decision. However, Makino testified that he thought that a response would be given by 3:00 p.m. that day, and there was an agreement, which just required that the proposed LCA be signed by the Mayor by the following Friday. Nosaka denied ever telling Makino that the County agreed to the LCA or promising that the Mayor would sign the LCA.

On February 3, 2015, February 9 and 10, 2015, and March 4, 2015, Makino called Nosaka without leaving a message.

On March 6, 2015, Nosaka again met with the Mayor to discuss Makino's case. Nosaka noted that the Mayor preferred that Makino and Varize resign rather than be terminated or "like a pardon" when the Mayor left office:

> Talked to Billy about Makino's case & Varize. He said the dept. no like bring them back but, what if I bring them back before I leave office. Just like a pardon? or I could let them resign, clear their records so no more nothing inside.
>
> Told BK I had to check with Dayton. I don't know if he like wait that long. He so [sic] pardon or resign?
>
> I told him I rather have them pardon. He said you would.

Nosaka believed that the Mayor would pardon Makino before leaving office, which would also require agreement by his "bosses", so Makino could be reemployed by the County.

On March 10, 2015, Makino called Nosaka, who documented the conversation as follows:

> Nathan Makino called.
> Still trying to resolve case.
> Billy looking at other options. He still has LCA.

Makino then sent a March 10, 2015 letter to Nosaka, which stated:

> I want to thank you for all your help in my case. But I have been out of work since January 24, 2014. You offered me and my family some hope by telling me that the County agreed that I could go back to work if I did not request back pay. I agreed because of our financial hardship and that we have just been blessed with a newborn. I need to take care of my family.
>
> But you told me that over three months ago. I called you last week and you told me the same thing you've been telling me over the past few months. that the agreement is sitting on the Mayor's desk. And there is no end in sight. I have worked for the County for sixteen years and I am very frustrated by how I am being treated. The needs of my family force me to do something.
>
> At this point. I simply don't have any other choice and I request that my case be sent to arbitration. If the union is not willing to support my request, I need to see that in writing. My understanding is that at the most I should have been suspended not terminated and I have

> been treated unfairly. I am asking for the union's help to take this matter to arbitration as soon as possible because of union's duty of fair representation.
>
> The only settlement that I will consider is that I be reinstated immediately and given full back pay with interest, from January 24, 2014 to the present. You can tell the County that I am taking this position because of the way I've been treated by the County. I hope and request that you. [sic] and my union support me on this.
>
> I've had a very good record with the County. I was the one who was attacked. I was defending myself. What the County is telling me is that I should have been beaten up and filed a workers' compensation claim, which the County would deny anyway.
>
> I am desperate and frustrated and I need the union to help me as it would any other member. Please contact me as soon as possible about this. If the union is going to deny my arbitration request, I need to see that in writing to explain it to my wife. I cannot believe I've been forced into this position.

(Emphasis added)

Makino testified that his purpose in writing the letter was to provide the Union with leverage to persuade the Mayor to sign the proposed LCA.

Subsequently, the UPW State Director notified Makino that the Union would not be pursuing the arbitration. The Union withdrew Makino's grievance without communicating or notifying with Nosaka.

II. APPLICABLE LEGAL STANDARDS

A. BURDEN OF PROOF

HRS § 91-10(5) states:

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

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

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

See also: Hawaii Gov't Emp. Ass'n,, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005); United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (Waihee). The preponderance of the evidence is defined as "proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its existence." Minnich v. Admin. Dir. of the Courts, 109 Hawaii 220, 228 (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawaii 197, 202-03 (1997) (*citing* Strong, *McCormick on Evidence* § 339, at 439 (4th ed. 1992)). Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." Waihee, 4 HLRB at 750.

The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson). *See also*: State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-63, Decision No. 162, 3 HPERB 47, 65 (1982); Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Sasano, Board Case Nos. CE-03-222a, Decision No. 361, 5 HLRB 410, 421 (1994) (*citing* SHOPO v. Fasi, 3 HPERB 25, 46 (1982)).

B. RELEVANT STATUTORY PROVISIONS

HRS § 89-13(a) provides in relevant part:

> **§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:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> ***

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

***

(7) Refuse or fail to comply with any provision of this chapter; [or]

(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:

***

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

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

III. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

A. DIRECTED VERDICT

As stated above, Respondents orally moved for directed verdicts after Complainant rested his case. UPW argued in support of its motion that: Complainant had not met his burden of proof by his failure to present any documentary evidence, including the CBA; without the CBA, there can be no showing of wilfull breach of the CBA and no establishment of the prima facie case on just cause; and Complainant, as a party in interest, made two factual admissions regarding issues referenced in Order No. 3173 (Makino knew and consented to Nosaka's recommendation to change his position and authorize a concession by giving up back pay as "the best deal I going to get", and that Makino knew that everything was contingent upon the Mayor's approval by signing a letter referencing the LCA). In support of its motion, the County asserted that while HRS § 89-13(a)(8) was specifically tailored to a CBA violation, there was no evidence of the CBA, Nosaka's specific union association, or his fiduciary duty to Makino. The County further noted that an investigation was done; Makino was given the opportunity to review, correct, and add to the investigation; credibility regarding his forms was a key issue; and the investigation here was not subject to the same review as that of an arbitrator. The County concluded by arguing that the issues are whether the County behaved wilfully to commit a prohibited practice, the procedures were followed, and a decision made on the facts. Complainant opposed the motions on the basis that: the Board has no rules providing for a motion for directed verdict; and the directed verdict standard is to consider all the evidence in the light most favorable to the nonmoving party. Complainant responded on the merits of the UPW's duty of fair representation that the UPW lied to Complainant regarding the done deal just needing the Mayor's signature; and of the County's breach of the CBA that there was no just cause for Complainant's termination based on self-defense.

The Complainant is correct regarding the applicable standard for directed verdicts that, "In deciding a motion for directed verdict…, the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the non-moving party and [the] motion may be granted only where there can be but one reasonable conclusion as to the proper judgment." Richardson v. Sport Shinko, 76 Hawai'i 494, 502, 880 P.2d 169, 177 (1994) (*citing* Mehau, 76 Haw. at 112, 869 P.2d at 1331 and Taugawa, 56 Haw. at 71, 527 P. 2d at 1292).

After hearing oral argument and recessing, the Board denied the motions for several reasons. The Board notes that when the motions for directed verdict were made, only the Complainant had presented his case. However, Complainant supported his allegation that UPW breached its duty of fair representation by his testimony regarding his understanding that Nosaka told him that agreement on the LCA had been reached and all that remained was for the Mayor to sign the LCA. Further, regarding the January 24, 2014 incident, Makino denied choking, punching, or threatening Varize and testified that his actions were in self-defense against Varize's attack. Based on this showing, the Board concluded that viewing the evidence and inferences in the light most favorable to the Complainant that reasonable persons may reach different conclusions upon these issues and that the motion should be denied.

B. MOTION TO REOPEN HEARING

After the close of the hearing on the merits and submission of Post-Hearing Briefs, Complainant filed a Motion to Reopen based on newly discovered evidence of a County Auditor's report indicating that the Kenoi Administration may have intentionally manipulated civil service laws. In support, Complainant asserts that: a news article reported that the report found that the County may have been giving preferential treatment to other individuals; and this information is relevant to his theory of the case that Respondents treated the co-worker involved in the January 24, 2014 incident in a preferential manner; and that Nosaka, instead of representing the Complainant, may have received preferential treatment in his hiring by the County under the Kenoi Administration as a reward for his collusion with the County. Further, Complainant contends that the County and the UPW legal representatives may have or should have had actual knowledge of the County's violation of applicable civil service laws and personnel procedures and misrepresented the nature and scope of the County's misconduct to the Board and the UPW's former business agent's cooperation with the County in exchange for a County job. Therefore, Complainant requests that the Board consider debarring the Office of the Corporation Counsel and the UPW's counsel for deliberate and intentional misrepresentations for presenting evidence at the hearing that they knew was false.

In its Opposition to the Motion to Reopen, which was joined by the County, the UPW argues that there is no merit to the Motion because: Makino limited the witnesses and exhibits introduced at the hearing, was afforded a full and fair opportunity to cross examine Lee and Nosaka

on the material and relevant issues, and decided to forego calling the Mayor or Varize as witnesses about the County's hiring practices; HAR § 12-42-8(g)(8)(B) requires the Board to exclude irrelevant, immaterial, or unduly repetitious evidence, and the audit and further examination of Nosaka and Lee falls in these categories; and neither the statutes or applicable rules authorize the Board to reopen a hearing after all parties have rested, presented post hearing briefs, and before a final decision is rendered under HRS § 377-9(d).

In its separate Opposition to the Motion to Reopen, the County contends that: there is no supporting factual or legal basis for reopening the hearing; the legislative audit is irrelevant and immaterial; and Complainant's counsel's claims of malfeasance against Respondents' counsel is without merit and insulting.

In his Reply, Complainant responds that: the Board has the discretion and no rule or regulation needs to be promulgated or adopted by the Board; it would be an abuse of discretion to not allow Complainant to reopen his case and compel Respondents to produce evidence verifying that Complainant's co-worker received favorable consideration from the County from his hiring to after his termination to confirm Complainant's theory of the case that the UPW's former business agent was hired as a reward for his intentional mishandling of the Complainant's grievance and arbitration; the Auditor's Report is newly discovered evidence; and due process requires reopening. Complainant also submitted: Declaration of Ted H.S. Hong, filed September 19, 2017, with an attached Exhibit 2 consisting of excerpts from the Auditor's Report; and Declaration of Ted H.S. Hong, filed on September 26, 2017, declaring that the attached Exhibit 3, a Hawaii Tribune Herald article, is newly discovered relevant evidence regarding the County's questionable personnel decisions involving recruitment.

"As a general matter, permitting a party to reopen its case for submission of additional evidence is within the discretion of the trial court and is subject to review under the abuse of discretion standard." Pelosi v. Wailea Ranch Estates, 91 Hawai'i 478, 487, 985 P.2d 1045, 1054 (1999).

In its discretion, the Board denies the Motion to Reopen for the following reasons. First, the Board agrees with Respondents that the statute and the Board's administrative rules do not provide for motions to reopen. Although not specifically citing to Hawaii Rules of Civil Procedure (HRCP), the Complainant bases the Motion on grounds set forth in HRCP Rule 60(b) (Rule 60(b)) (i.e. newly discovered evidence and the fraud, misrepresentation, or other misconduct of an adverse party) and takes the position that no rule or regulation is required for the Board, in its discretion, to reopen for newly discovered evidence. The Board notes that this position is somewhat disingenuous given its direct contradiction with Complainant's counsel's position taken in opposition to the directed verdict motions discussed above and in a previous case Los Banos v. Hawaii Labor Rels. Bd., Civil No. 16-1-0274 (5/19/17) (Los Banos). In Los Banos, an appeal

taken from an order in a prior Board case, Complainant's counsel maintained that the Board's adoption and application of HRCP rules to allow for motions for reconsideration and directed verdict violate HRS Chapter 91 and constitute unlawful rule making. The Third Circuit Court, State of Hawaii, in remanding and vacating the Board's order, sustained that position and ruled that to apply an HRCP rule in addressing the issues before it, the Board is required to provide notice in a timely manner, such as by expressly adopting the HRCP rule by rulemaking. *Id.* at *6-8. Based on the Third Circuit's decision in Los Banos, the Board will refrain from applying Rule 60(b) in the absence of rulemaking adopting this rule or other prior notice in this case and deny the Motion.

The Board further finds that even if the Motion is considered based on the grounds asserted by Complainant, denial of the Motion would still be warranted based on UPW's contention that the evidence is irrelevant and immaterial. In addition to the grounds noted by the UPW, the Board must point out that there are other grounds for finding the evidence irrelevant and immaterial. There is no collusion allegation in the Amended Complaint in this case against any of the Respondents, their counsel, or Nosaka. Moreover, Order No. 3173 dismissed the allegations regarding civil service violations and conspiracy for suppression of Complainant's exercise of his employment rights under the CBA and HRS Chapter 89 in the processing of his grievance contained in the Amended Complaint. Also significant is that Complainant's newly discovered evidence are newspaper articles reporting on an auditor's report of preferential hiring by the County and the Auditor's Report or excerpts therefrom. The Board finds that a newspaper article is not newly discovered "evidence" but at best, a report that the evidence may exist. Commonwealth v. Castro, 625 Pa. 582, 594-96, 93 A.3d 818, 825-27 (2014). The excerpts from the Auditor's Report submitted by Complainant consist of a cover sheet for Report No. 2017-03, dated September 7, 2017, and a transmittal letter from Legislative Auditor Bonnie S. Nims, CGAP, to County Council Chairperson Valerie T. Pointdexter and the Members of the County Council, setting forth the purpose of the audit; and their findings that there were numerous questionable hiring practices, fear of retaliation, inappropriate involvement by the Staffing Review Committee established by the Mayor and the Department of Human Resources, and recommendations regarding improvements in the procedures for hiring.

Based on its review of this "newly discovered evidence", the Board further rejects Complainant's assertions that the reopening is warranted because such evidence may show that Respondents treated the co-worker involved in the incident or Nosaka in a preferential manner for several reasons. First, as indicated by the UPW, these excerpts are very general in their scope, and there is no specific reference to the co-worker or Nosaka. Complainant's contentions that this evidence shows that the County "may have" been giving preferential treatment, from which Respondents or their representatives "may have" received or had knowledge of is simply insufficient to justify a reopening. Second, regarding the co-worker's reinstatement, Complainant is conflating and analogizing a civil service hiring with reinstatement of an employee under the

BU 1 CBA. The reinstatement of the co-worker was not a hiring under civil service procedures, but rather, an action taken in accordance with the BU 1 CBA. Hiring practices under civil service have no relevance to the reinstatement under the CBA. The Board further notes that during the hearing on the merits, no evidence was presented regarding the circumstances surrounding the reinstatement of the co-worker nor argument alleging preferential treatment or discrimination between the Complainant and the co-worker. If the reinstatement of the co-worker in violation of HRS Chapter 89 was a viable issue, the evidence thereon should have been presented prior to the conclusion of the hearing on the merits. Third, for the newly discovered evidence to be relevant to the alleged preferential hiring of Nosaka, this evidence must not only be specific to him but further show that Nosaka mishandled Complainant's case and was then hired by the County without compliance with civil service requirements. During and at the time of the hearing on the merits, Nosaka had already been hired and employed by the County and his conduct regarding Makino's grievance and the LCA was fully addressed. Therefore, any HRS Chapter 89 issue regarding his County hiring and employment should have been addressed prior to the close of the hearing on the merits. Most importantly, as discussed fully below, there was no evidence at the hearing on the merits that Nosaka breached the duty of fair representation. Lastly, contrary to Complainant's contention that the Board should reopen and compel Respondents to produce the evidence confirming his theory of the case, it is Complainant's burden to both justify the reopening and his theory of the case. The Board finds that Complainant has not carried either burden.

For these reasons, the Board denies the Motion to Reopen. In addition, given the denial of the Motion to Reopen, the Board denies the request to debar Respondents' attorneys as moot.

C. MERITS

Before addressing the merits of the case, the Board is required to narrow the allegations of the Amended Complaint based on prior orders and the evidence presented at the hearing on the merits. Pursuant to Order No. 3173, the conspiracy allegations against the County and the UPW are dismissed from this case. In addition, the BU 1 CBA was not received in evidence; and accordingly, the allegations in the Amended Complaint specifically referencing or requiring reference to the Unit 1 CBA §§ 11 Discipline and 15 Grievance Procedure must be dismissed because these provisions are not in evidence. Based on the evidence presented at the hearing on the merits, however, there appears to be no dispute that there was a grievance procedure with Steps 1 and 2 and arbitration as the final step and a safe work place provision as a basic condition of work for BU 1 employees. Therefore, the Board will consider those other allegations in the Amended Complaint, which reference the grievance and arbitration procedure and the safe work place provision but do not specifically rely on a specific CBA provision for the alleged violation.

Addressing the merits, this case involves a classic "hybrid" case. Poe v. Hawaii Labor Rels. Bd., 105 Hawai'i 97, 102, 94 P.3d 652, 657 (2005) (Poe II), is the controlling Hawaii decision

for a "hybrid" case consisting of two separate prohibited practice claims, a claim against the employer for breach of the collective bargaining agreement and a claim against the union for breach of the duty of fair representation. In Poe II, the Hawaii Supreme Court (Court) clarified the relationship of the two claims and articulated the employee's requisite burden of proof in such hybrid cases as follows:

> The two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

(Citations omitted) The Court further held that if an employee fails to demonstrate that his union breached the duty of fair representation, he lacks standing to pursue his claim before the Board. *Id.* at 104, 94 P.3d at 659. Accordingly, the Board is compelled to initially determine whether the UPW has breached the duty of fair representation in this case.

1. Duty of Fair Representation

HRS§ 89-8(a) provides that a union, as an exclusive representative, "shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." As the exclusive bargaining representative for a bargaining unit, the union has an obligation pursuant to HRS § 89-8(a) to represent the interests of all employees in the bargaining unit. Therefore, the breach of the duty of fair representation violates HRS § 89-8(a) and constitutes a prohibited practice under HRS § 89-13(b)(4). Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'i 317, 324, 260 P.3d 1135, 1142 (Haw. Ct. App. 2011). To establish the union's breach of its duty of fair representation, an employee alleging wrongful termination must do more than show that he has been wrongfully terminated. "A union breaches its duty of fair representation 'only when [the] union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" *Id.* at 322, 260 P.3d at 1139 (*citing* Vaca, 386 U.S. at 190; Poe II, 105 Hawai'i at 104, 94 P.3d at 369).

The specific allegations regarding the UPW's breach of the duty of fair representation in violation of HRS § 89-13(b)(1) and (4) in this case are that: the UPW deliberately and intentionally misled and fraudulently misrepresented to the Complainant that an agreement had been reached with the County that would result in the Complainant's reinstatement, when no such agreement had been reached; the UPW failed to represent the Complainant and/or defend or assert the

Complainant's case under HRS Chapter 89; and the Complainant detrimentally relied on the deliberate, intentional, and/or fraudulent misrepresentation by the UPW.

In his Post-Hearing Brief, Complainant argues that: lying, and more specifically lying about the status of a grievance, breaches the duty of fair representation; generally, unintentional conduct not designed to harm union members may violate a union's duty of fair representation if "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary;" UPW's dishonesty in representing Mr. Makino constituted "bad faith" in violation of the breach of duty of fair representation; and the UPW's decision to withdraw its Notice of Arbitration was retaliatory because the Complainant proved that UPW intentionally lied to him that the LCA had been reached with the County, pushed to have the UPW Business Agent resolve his case, and that the UPW lied to him about the arbitration.

The Board applies the criteria set forth above to the factual findings regarding the UPW's alleged conduct and holds that Complainant failed to carry his burden of demonstrating that the UPW breached its duty of fair representation in this case for the following reasons.

a. The "Arbitrary" Standard

A union's actions are arbitrary "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991) (O'Neill);[iv] Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, Board Case No. CU-03-328, Order No. 3028, at *13 (October 27, 2014) (Emura Order). "Arbitrary conduct" has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests.'" Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (Johnson) (*citing* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978) (Robesky)). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003).

To prove arbitrary or bad faith conduct constituting a breach of the duty of fair representation, there must be "substantial evidence of fraud, deceitful action or dishonest conduct." Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. v. Lockridge, 403 U.S. 274, 299 (1971) (*citing* Humphrey v. Moore, *infra* at, 348).

The Board acknowledges Complainant's cases that lying regarding the status of and reneging on a promise to take a grievance may constitute sufficient arbitrariness to breach a union's duty of the duty of fair representation. The Board also notes but disagrees with Complainant's arguments

that the facts indicate that the UPW Business Agent intentionally misled Complainant into believing that there was an agreement regarding the LCA; and that Complainant relied on that agreement and the UPW's Business Agent's representations that the UPW would support him in his arbitration hearing against the County and reassured him that he would get his job back. The Board is simply unable to find that Complainant presented "substantial evidence of fraud, deceitful action or dishonest conduct" regarding the Union's handling of his grievance. To the contrary, the evidence in the record fails to support any of these factual assertions made by the Complainant.

Based on the evidence presented, the Board agrees with the UPW that the Business Agent Nosaka did not mislead Makino into believing that the Union would proceed with arbitration over the grievance. Makino admits in his Post-Hearing Brief that on July 25, 2014, the UPW Business Agent told him that the decision to go to arbitration was his "bosses" decision and not his and that "he didn't think his 'bosses' would take his case to arbitration"; that on or about August 14, 2014, the UPW Business Agent conveyed his doubts about going to arbitration; and that on August 27, 2014, the UPW Business Agent told Complainant that if the County doesn't agree to settle his case, "we not going Arb (arbitration)".

Further, the record shows that as early as January 29, 2014, Nosaka told Makino that "it did not look good. But we can go through the process. Step 1 & Step 2. Don't know if we going to arb[]" because "We lost a lot of UPW cases for less violence." On May 5, 2014, Nosaka told Makino that "BK said it's going to be tough bringing him back[.]" Nosaka participated and assisted Makino at the Step 1 and 2 grievance meetings, held on June 4, 2014 and July 25, 2014 respectively. Immediately after the Step 2 grievance on July 25, 2014, Nosaka communicated his concerns regarding whether the grievance would proceed to arbitration and told him that "maybe should try settling before Arb. Case" because of Nosaka's belief that "no think my bosses going to take this case to Arb. I can recommend but it's up to them." Mr. Makino obviously understood Nosaka's position that settlement should be pursued rather than arbitration based on his response to "try and talk to BK [Billy Kenoi]." Nosaka then replied that he was going to try and work it out with Kenoi because "We lost too much case[s] regarding WPV [work place violence][]" and further emphasized that "He's [Kenoi] is the only one can bring you back[.]" Complainant again demonstrated his understanding by his response "to try." The August 14, 2014 conversation between Nosaka and Makino is, however, the most persuasive evidence for the UPW's position because Nosaka "told him [Makino] that the way it looks, and the history of losses we was [sic] not going Arb. The best chance is before Arb. I talk to Billy. He said 'ok.'" On August 27, 2014, Nosaka explicitly told Makino that, "if BK no agree [to the LCA] we not going to [arbitration]. BK is our last hope." The March 10, 2015 letter to Nosaka documented Makino's knowledge that the UPW had not committed to proceeding to arbitration because not only did Makino make an arbitration request, but he reiterated twice that if the union was going to deny his arbitration request, he "needed to see that in writing." The Board finds that if Complainant believed that the

UPW had committed to proceeding to arbitration, he would not have made the requests that the Union proceed to arbitration and render a written decision.

The Board further rejects Complainant's assertion that the UPW's filing for arbitration created a reasonable reliance on the part of Complainant demonstrating that the UPW reneged on a promise to take his grievance to arbitration. The Board finds that the Union provided sufficient explanation that the Union's processing of the grievance to arbitration was to comply with a request from Kenoi but with the understanding that the request for arbitration could be pulled back at any time. Further, the timely filing of the request for arbitration was necessary to preserve the Union's right to proceed to arbitration while the negotiations regarding the LCA were pending.

The Board further finds that the facts prove that no agreement was reached between the UPW and the County on the LCA, and most significantly, belied the allegation that Nosaka intentionally misled the Complainant into believing that there was an agreement regarding the LCA. On August 22, 2014, Nosaka spoke with the Mayor, who proposed the LCA, and Nosaka agreed to talk to his bosses. On August 25, 2014, when Nosaka asked Makino about an LCA, Makino responded, "anything but [termination]". Makino's own testimony confirms that Nosaka informed him that the Mayor had to sign the LCA, and the record substantiated that on December 15, 2014, when Nosaka sought approval from Makino to submit the LCA to Kenoi, he specifically cautioned Makino that there was "no guarantee." Makino admitted that he knew the Union was proposing the LCA to get his job back and the Mayor had to make the decision. Regardless of the dispute over who made or what was intended by the statement "going on your hands & knees beg for my job" during the December 15, 2014 conversation between Makino and Nosaka, this statement verified Makino's knowledge that he did not have his job back and that no agreement had been reached on the LCA. At the March 6, 2015 meeting with Nosaka, the Mayor discussed various options for Makino and Varize, including resignation or being "like a pardon", so their records could be cleared, or bringing the employees back before the Mayor leaves office. Nosaka stated a preference for a pardon but told Kenoi that agreement by his UPW "bosses" would be required. On March 10, 2015, when Makino called, Nosaka informed him that they were "still trying to resolve case" and that "Billy looking at other options. He still has the LCA." On that same date, Makino sent the letter to Nosaka describing his knowledge that "the agreement is sitting on the Mayor's desk. And there is no end in sight[,]" withdrawing his authority for the LCA, and providing notice that he would only consider a settlement that included immediate reinstatement with full back pay and interest from January 24, 2015 to the present. Makino's testimony that his purpose in writing the letter was to provide the Union with leverage to get the Mayor to sign the LCA evidences his knowledge at the time of writing the letter that there was no final agreement by the Mayor to sign the LCA.

The Board determines that Complainant's contention that Nosaka told him "on multiple occasions that he would get his job back[,]" and that the LCA was a "done deal" misstates the

testimony. Makino testified that on December 14, 2014, in response to his question whether the LCA was a "done deal", Nosaka's response was, "[O]h I didn't end up going to meet him. By Friday you'll have the signature and you'll be all good." Based on this testimony, Nosaka was informing Complainant that there was no "done deal" because Kenoi had not signed. Finally, the March 10, 2015 letter substantiates that Makino knew that the LCA had not been finalized because he withdrew the LCA. If there was a "done deal", Complainant would not have withdrawn his authority for the LCA. By his withdrawal and taking the position that he wanted reinstatement with full back pay and interest from January 24, 2015 to the present, it was Makino himself, not the UPW, who rejected the LCA and foreclosed the option of reinstatement without back pay.

Finally, assuming the significant lie alleged as the basis for Union's breach of duty of fair representation was that the Mayor was going to sign the LCA, the Board notes that the fact is in dispute. Moreover, even if Nosaka did make what Makino interpreted as a promise, the Board is unable to conclude that this statement constitutes union behavior "so far outside a 'wide range of reasonableness' as to be irrational" or "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis'" to satisfy the arbitrary standard. The Board would be unable to conclude that such conduct by Nosaka making a "promise" regarding a decision that he admitted on numerous occasions to Makino was not within his control or authority did not constitute an "egregious" or "reckless" disregard for Makino's right as a union member or a wilfull violation of HRS § 89-13(b)(1) or (4). Finally, contrary to Complainant's argument, the Board finds that his belief that a valid and binding agreement existed was not reasonable given that Makino was informed and demonstrated his awareness that the Mayor's signature was required for the LCA and had not been given. Accordingly, for the reasons set forth above, the Board holds that Complainant failed to carry his burden of arbitrary conduct constituting a breach of the duty of fair representation.

b. "Discriminatory" Standard

"Whereas the arbitrariness analysis looks to the objective adequacy of Union's conduct, the discrimination and bad faith analyses look to the subjective motivation of Union officials." Simo, 322 F.3d at 618.

Discriminatory conduct may be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Lockridge, 403 U.S. at 301.

In Simo, the Ninth Circuit acknowledged that the U.S Supreme Court and the Ninth Circuit have provided little guidance regarding what constitutes discrimination in the duty of fair representation context. The Simo court noted that the O'Neill U.S. Supreme Court decision suggested that only "invidious" discrimination is prohibited by the duty of fair representation. After citing the Tenth Circuit's explanation that "discrimination is invidious if based upon impermissible or immutable classifications such as race or other constitutionally protected

categories, or arises from prejudice or animus," the Ninth Circuit deemed these grounds too restrictive, noting that they have held for example, that a union may not "discriminate on the basis of union membership." 322 F.3d at 618. The Ninth Circuit then concluded that there was no evidence of discriminatory intent in that case.

Complainant does not appear to assert that the UPW discriminated against him, and there is no evidence in the record of discrimination, let alone, discrimination that is "intentional, severe, and unrelated to legitimate union objectives." The Board, therefore, rules that there was no showing that the Union committed a breach of duty of fair representation based on discriminatory conduct.

c. Bad Faith

Rather than discrimination, Complainant relies on an allegation of "bad faith" conduct by the UPW. In support, Complainant contends that: no rational basis or explanation was given for the decision to withdraw the Complainant's arbitration demand; the Union lied to him regarding the reaching of an agreement on the LCA; and the Union's decision to withdraw arbitration and lying to him regarding the reaching of an agreement on the LCA were in retaliation for his pushing the UPW Business Agent to resolve his case.

"Whether or not a union's actions are…in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. Bare assertions of the state of mind required for the claim—here 'bad faith' –must be supported with subsidiary facts." Yeftich v. Navistar, 722 F.3d 911 916 (7th Cir. 2013). (Citations omitted); Emura Order, at *15. For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct." Humphrey v. Moore, 375 U.S. 335, 348 (1964); Lockridge, 403 U.S.at 299. To show bad faith, the plaintiff must provide subjective evidence that the union official's decisions were improperly motivated. Truhlar v. United States Postal Serv., 600 F.3d 888, 893 (7th Cir. 2010) (Truhlar). Moreover, the structure of the duty is that bad faith is required to show a breach; it is not simply that good faith is a defense to liability. The burden is on the worker to produce evidence of bad faith. Simo, 322 F.3d at 618. Based on Truhlar, this Board has noted, "[O]ur [Board's] role is not "to decide with the benefit of hindsight whether [the union representative] made the right calls- we ask only whether his decisions were made rationally and in good faith." Emura Order No. 3028, at *15-16 (*citing* Truhlar, 600 F.3d at 893).

Complainant implies, but did not plead improper motive, based on his assertion of retaliation[v] for pushing the resolution of his case and that no rational basis or explanation was given for the withdrawal of the arbitration demand. The Board concurs with the UPW in this case that there was no proof of an improper motive by the Union in this case. As fully discussed above, there was no evidence that Nosaka and the Union lied to Makino regarding the status of the LCA.

Further, as also fully discussed above, there was more than sufficient evidence that Nosaka informed Complainant from the beginning of the grievance process that it was doubtful that the Union would proceed to the arbitration step; and accordingly, an LCA was the preferable approach. The Board also finds adequate proof in the record that the reasons for the Union's decision not to proceed to arbitration, which were communicated to Makino, were because of the UPW's history of losing work place violence cases and concerns regarding Makino's inconsistent statements made during the investigation and grievance process. In short, Complainant has failed to demonstrate that this alleged conduct by the UPW constituted "fraud, deceitful action, or dishonest conduct." Hence, the Board holds that there is no merit to Complainant's position there was a breach of duty of fair representation based on the "bad faith" conduct of the UPW.

For the reasons set forth above, Complainant has failed to prove that the UPW breached its duty of fair representation, thereby wilfully violating HRS § 89-13(b)(1) and (4). Based on Poe, Makino's failure to prove that the UPW breached its duty of fair representation means that he lacks standing to pursue his prohibited practice claim before the Board against the County for lack of just and proper cause for his discharge. 105 Hawai'i at 104, 94 P.3d at 659. However, even if Complainant did have standing to pursue his claim, the Board concludes that there is another obstacle rendering Complainant unable to prove that the County breached the BU 1 CBA in violation of HRS § 89-13(a)(8).

2. Violation of the CBA

The UPW has pointed out in its Motion for Directed Verdict and in its Post Hearing Brief, the BU 1 CBA was not received in evidence at the hearing on the merits. The Board notes, however, that excerpts from the BU 1 CBA are in the record as Exhibit 3 attached to the UPW's Motion to Dismiss and/or for Summary Judgment, filed on June 9, 2015, and as Exhibits A and B to County of Hawai'i's Memorandum in Opposition to Complainant's Motion to Amend Complainant's Prohibited Practice Complaint Filed on April 20, 2015 (Filed February 2, 2016). The Third Circuit held in Los Banos, however, that declarations, which were attached to previously filed motions to dismiss but not received in evidence at the hearing on the merits, do not constitute substantial evidence. In that case, the circuit court found that two declarations regarding the extension of an MOU (memorandum of understanding) in the record as attachments to previously filed motions to dismiss did not constitute substantial evidence that the MOU had been validly extended because these declarations were not received in evidence for the purposes of the hearing on the merits. Los Banos, at *5. Accordingly, without the BU 1 CBA in evidence at the hearing on the merits and in light of the Los Banos ruling, the BU 1 CBA excerpts attached to the motions to dismiss not received in evidence do not provide substantial evidence of the CBA provisions. Therefore, the Board is compelled to agree with UPW that Complainant cannot prove that his discharge was not for just and proper cause in violation of the CBA constituting a prohibited practice by the County.

For these reasons, Complainant is unable to prove the second part of the Poe II hybrid analysis that the County breached the BU 1 CBA in violation of HRS § 89-13(a)(8). Consequently, Complainant has failed to make the required showing under the Poe hybrid analysis that the Union breached the duty of fair representation; and the County's discharge breached the BU 1 CBA in violation of HRS § 89-13(a)(8).

ORDER

For the reasons set forth above, the Board dismisses and denies the Amended Complaint in its entirety. This case is closed.

DATED: Honolulu, Hawaii, Oct. 19, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A. D. Moepono

SESNITA A. D. MOEPONO, MEMBER

J N. MUSTO, MEMBER

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[i] HRS § 89-2 Definitions. states in relevant part:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

[ii] HRS § 89-2 Definitions. states in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[iii] HRS § 89-2 Definitions. states in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[iv] In Poe, 105 Hawaii 97, 100, 94 P.3d 652, 655 (2004) (*citing* Hokama v. Univ. of Hawai'i, 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999)), the Court noted its use of federal precedent to guide its interpretation of state public employment law.

[v] In Hawaii Gov't Emp. Ass'n. v. Cayetano, Board Case No. CE-13-518, Decision No. 444, 6 HLRB 336, 350 (2003), the Board articulated the appropriate analysis for determining whether an employer has retaliated against an employee in violation of HRS § 89-13(a)(4). First, the complainant must demonstrate that anti-union animus contributed to the adverse decision. If the burden is satisfied, then the burden shifts to the employer to show that the action would have been taken in any event, i.e., that there were legitimate, nondiscriminatory reasons for the adverse action. The burden then shifts back to the complainant to show that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.