

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

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| In the Matter of |) | |
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| DAVID SANTOS, |) | Case No. <u>CE-01-24</u> |
| |) | |
| Complainant, |) | Decision No. <u>76</u> |
| |) | |
| and |) | |
| |) | |
| STATE OF HAWAII, DEPARTMENT |) | |
| OF TRANSPORTATION, KAUAI |) | |
| DIVISION, |) | |
| |) | |
| Respondent. |) | |

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| In the Matter of |) | |
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| DAVID SANTOS, |) | Case No. <u>CU-01-14</u> |
| |) | |
| Complainant, |) | Decision No. <u>76</u> |
| |) | |
| and |) | |
| |) | |
| UNITED PUBLIC WORKERS, |) | |
| LOCAL 646, AFSCME, AFL-CIO, |) | |
| |) | |
| Respondent. |) | |

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

These prohibited practice charges against respondents State of Hawaii, Department of Transportation, Kauai Division (hereafter State or DOT), and United Public Workers, Local 646 (hereafter UPW), were filed with this Board on February 25, 1976, by petitioner David Santos. On March 12, 1976, petitioner refiled his complaints on forms provided by the Board.

After due notice, hearings in the above-captioned cases were held June 21-24, 1976, in Conference Rooms A and B of the State Building, in Lihue, Kauai. Immediately prior to the commencement of the hearings, the Board orally ordered the cases consolidated.

On September 17, 1976, a final hearing was held at the Board's hearing room in Honolulu.

Upon a full review of all exhibits, testimony presented at the hearings, and arguments made orally and in writing, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Petitioner David Santos is a public employee pursuant to §89-2(7), Hawaii Revised Statutes (hereafter HRS), and is included in Unit 1 (nonsupervisory blue collar employees).

2. Respondent State is a public employer as defined in §89-2(9), HRS.

3. Respondent United Public Workers is an employee organization certified as the exclusive bargaining representative of employees in Unit 1.

4. The UPW and the State are parties to the Unit 1 collective bargaining agreement. An agreement, executed July 20, 1972, was in effect during the period from July 1, 1972 to June 30, 1974. A second agreement, dated March 20, 1974, was in effect from July 1, 1974 to June 30, 1976.

5. Santos was a member of the UPW during the mid-1960's (Tr. 574-575). However, sometime between 1966 and 1970, he resigned from the union after disagreeing with the position of then UPW Business Agent, Gary Rodrigues, during a negotiation meeting between employees and management of the Kauai District, Highways Division of the DOT (Tr. 712-714).

6. In December, 1973, John Kaauwai, a fellow employee of the Highways Division, and at that time a UPW steward, sought to have Santos reinstated into the union. He testified that

Rodrigues (who had subsequently been promoted to Kauai Division Director of the UPW) told him that the union membership would have to vote on the reinstatement (Tr. 665).

7. After a meeting in which the UPW members in the Highways Division rejected David Santos' application for reinstatement, Kaauwai reported the results to Rodrigues, "and the matter was dropped" (Tr. 667).

8. Rodrigues never informed Kaauwai that the UPW constitution provides for reinstatement into the union upon approval by the UPW's Division Executive Board, and that the membership's vote was a "courtesy" (Tr. 665-667, 728-729); nor did he inform Santos of the correct procedure even though he knew that Santos was seeking reinstatement (Tr. 860-863).

9. Promotion procedures utilized by the DOT, as established in Director's Memorandum No. 54, dated May 10, 1967 (State Ex. 7), require the following steps:

a. Applications for a position are sent to the Departmental Personnel Officer for an initial determination of each applicant's eligibility, or to the Department of Personnel Services if there are any questions over eligibility. The Departmental Personnel Officer is also charged with determining and recommending the criteria to be used in evaluating qualifications of the applicants.

b. Following the return of the applications to the Kauai District office, an Evaluation Board is established to review applicants' qualifications (including exam results, pertinent work experiences, present and potential abilities, education and training),

conduct oral interviews and make recommendations on its selections.

The Board consists of "three or more persons selected by the division chief or staff officer with the approval of the Director. In any event, the membership of the board will be an odd number and will in all instances include the immediate supervisor of the vacant position."

c. Upon receipt of the recommendations of the Evaluation Board, the division chief or staff officer then endorses the Board's recommendation or submits his own recommendation to the Director.

d. The Director makes the final selection and forwards it to the DOT Personnel Officer for processing.

10. Petitioner commenced his employment with the Kauai District, Highways Division of the DOT in December, 1957, and has been an Equipment Operator III (hereafter E.O. III) since April, 1971.

11. On September 15, 1975, he applied for an Equipment Operator IV (hereafter E.O. IV) position in the Kauai District, Highways Division of the DOT. On the same date, Jacintho Duarte, John Kaauwai and John Pundyke also applied for the position (State Ex. 3-6).

12. On September 26, 1975, applicants Pundyke and Kaauwai were notified that they did not meet the minimum qualifications for the E.O. IV position, which require a year's

experience in operating at least two types of motorized equipment representative of the E.O. IV class (Pet. Ex. 1). Both applicants had listed insufficient experience on their applications (State Ex. 6, 14).

13. On October 1, 1975, the UPW, through Rodrigues, notified the DOT that information supplementing Kaauwai's application form revealed that Kaauwai did meet the minimum requirements for the E.O. IV position. Upon receipt of the additional information indicating the amount of E.O. IV equipment experience which Kaauwai had, the DOT informed Kaauwai that he did qualify for the position and would be contacted for an interview (State Ex. 15).

14. No questions regarding the remaining applicants' qualifications arose during this preliminary step of the selection process. The application of Jacintho Duarte contained substantially greater detail than those of any of the other applicants.

15. On October 21, 1975, an Evaluation Board comprised of Assistant District Engineer, Masami Murakami (Chairman), District Construction Engineer, Donald Nagamine, and Highway Construction and Maintenance Supervisor I, Ernest Duarte, interviewed the three applicants. Murakami was a last-minute replacement for another member of the Board who had disqualified himself.

16. Ernest Duarte, the immediate supervisor of the E.O. IV position, is applicant Jacintho Duarte's brother; however, it did not occur to him to disqualify himself from the review panel because he considered himself a "fair and just man in all [his] tasks" (Tr. 291).

17. Kauai District Engineer and Branch Head, Edwin Nakano, likewise did not question the propriety of Ernest Duarte's placement on the Evaluation Board insofar as it was

"standard operational procedure" for the immediate supervisor of the vacant position to be included on the board (Tr. 195). He also felt that the requirement of a three-member board took care of "instances of this nature" (Tr. 197, 226).

18. Board Chairman Murakami stated that Ernest Duarte asked most of the questions regarding work experience during the interviews (Tr. 241, 242).

19. Ernest Duarte testified that one of his main concerns was preventive maintenance, and he asked each of the three applicants, "what is preventive maintenance?" Of the three responses, Jacintho Duarte's was the most accurate (Tr. 343-344). However, Ernest Duarte said that he had not discussed the importance of preventive maintenance with his brother previously (Tr. 338-339, 345).

20. Jacintho Duarte listed as part of his duties, "[p]erforms preventive maintenance on all equipment before, during and after operation," ten times on his application form (State Ex. 3). None of the other applicants interviewed discussed preventive maintenance in their applications.

21. The applicants were evaluated on the basis of six personality factors during the oral interviews. Out of a possible total of 36 points (6 was the highest score for each factor), the applicants received the following scores:

| <u>Applicants</u> | <u>Graders</u> | | | <u>Average Score</u> |
|-------------------|-----------------|-----------------|------------------|----------------------|
| | <u>Murakami</u> | <u>Nagamine</u> | <u>E. Duarte</u> | |
| Jacintho Duarte | 24 | 28 | 34 | 28.7 |
| John Kaauwai | 23 | 26 | 28 | 25.7 |
| David Santos | 22 | 24 | 26 | 24.0 |

22. Immediately after the oral interviews, the Evaluation Board ranked the three applicants in the following order, based "on the interview and experience as a heavy equipment operator" (State Ex. 9):

- "1. Jacintho Duarte: Applicant ranked no. 1 was selected as being the best qualified for the position based on oral interview and his past experiences and performance as a heavy equipment operator.
2. John Kaauwai: Applicant ranked no. 2 was selected on the basis of his oral interview rating.
3. David Santos: Applicant ranked no. 3 was selected on the basis of his oral interview rating."

23. Murakami and Duarte both testified that heavy equipment experience weighed more heavily than the oral interview in their determination of the applicants' ranking (Tr. 257-258, 347, 351). However, the Evaluation Board had no uniform standard for the proportionate weight of equipment experience over the interview rating (Tr. 224-225, 244), nor did it have specific criteria for comparing applicants' work experiences. The only scores appearing in the Board's report were those for the oral interviews.

24. The recommendations of the Evaluation Board were then submitted to Branch Head Nakano, who conducted an independent evaluation of the applicants because "the applicant recommended has the least baseyard seniority" (State Ex. 10).

25. At the time of application, the subject applicants had accrued the following baseyard seniority:

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| David Santos | 12/02/57 | (approx. 17 yrs. 9 mos.) |
| John Kaauwai | 9/16/70 | (approx. 5 yrs.) |
| Jacintho Duarte | 4/28/71 | (approx. 4 yrs. 5 mos.) |

26. "Baseyard seniority" is defined in Section 16.02(d) of the Unit 1 collective bargaining agreement as "an employee's continuous length of service within a Baseyard or Workplace of a Department..." Under Section 16.06(c) of the contract, baseyard seniority is a factor in promotions under the following circumstances:

"Whenever the qualifications between the qualified applicants are relatively equal, the employee with the greatest length of Baseyard, Workplace or Institution Workplace seniority shall receive the promotion."

27. On November 6, 1975, after considering such factors as each applicant's years of experience in operating E.O. IV equipment, oral interview rating, efficiency rating, and sick leave credits (State Ex. 10, p. 2), Nakano concluded that Jacintho Duarte's qualifications were "head and shoulders above the other two applicants;" and between the remaining two, baseyard seniority governed because their qualifications were relatively equal. He therefore ranked Jacintho Duarte first, David Santos second, and John Kaauwai third.

28. Nakano's evaluation form stated that the years of experience in operating equipment representative of the E.O. IV class was to be based on operation of "two or more types of motorized equipment such as graders, truck tractors with trailer used to transport construction equipment, and D-6, D-7, D-8, TD-14, TD-20 and TD-24 tractors with bulldozer blade attachments" (State Ex. 10, p. 2). This information was obtained from each applicant's application form (Tr. 210).

29. Since Santos' application form indicated that he had operated a grader and a truck tractor with trailer on temporary assignment (hereafter T.A.) while employed as an E.O. III, Nakano credited Santos with 4 years, and 2 months of E.O. IV equipment experience on T.A. time. The figure coincided with the number of years during which Santos had been employed as an E.O. III, and did not represent the actual amount of time that Santos operated E.O. IV-type equipment. Nakano explained that the equipment experience with which Santos was credited instead reflected "the period during which temporary assignments could have been given" (Tr. 873, 899-900).

30. Jacintho Duarte had stated in his application that he operated a grader, a D-8 bulldozer, and a truck tractor on T.A. as an E.O. IV while employed as an E.O. III with the DOT. Nakano credited him with 1 year and 2 months of T.A. E.O. IV experience; this figure also represented the entire period during which Jacintho Duarte was employed as an E.O. III by the DOT.

31. Duarte further stated in his application that he had operated a crane (30% of his time), a grader (25% of his time), and a D-8H tractor (20% of his time) while employed as an E.O. II with the State's Department of Land and Natural Resources, State Parks Division (hereafter DLNR). In the remaining 25% of the time in which he worked for the DLNR, he said that he operated a backhoe, payloaders, roller and heavy trucks. Here Nakano credited him with 8 years and 8 months of E.O. IV equipment experience on regular assignment; this figure constituted the entire period during which Duarte was employed at the DLNR.

32. John Kaauwai's application form, as amended (State Ex. 15, p. 3), indicated that he had operated a grader and a truck tractor for 6 months, respectively. He was credited with 1 year of experience on T.A. time.

33. Nakano's evaluation of each candidate's E.O. IV equipment experience resulted in Jacintho Duarte's being credited with a total of 9 years and 10 months, John Kaauwai with 1 year, and David Santos with 4 years and 2 months of equipment operation experience.

34. William Correia, Jacintho Duarte's immediate supervisor in the DOT (1971-1975), stated that sometime in 1974 he became aware of a new DOT rule which required the possession of a Type 6 driver's license for truck tractor operation (Tr. 158,

390). Jacintho Duarte did not obtain a Type 6 license until January 6, 1976; between April 30, 1975 and January 6, 1976, he possessed a permit for the Type 6 license (Tr. 34-38, Bd. Ex. 12 in CE case) rather than the Type 6 license indicated on his application (State Ex. 3). Consequently, after 1974, Correia did not authorize Duarte to operate the truck tractor alone (Tr. 390-391); and Duarte should not have been credited with truck tractor operating experience for the period between July, 1974 and September, 1975.

35. George Niitani, Parks Superintendent for the DLNR, testified that Jacintho Duarte had not been employed as an E.O. II for the entire 8 year and 8 month period in which he worked for the DLNR. Instead, Duarte was initially hired as a General Laborer II on exempt CIP status (temporary employment) in August, 1962; and he was reallocated to a permanent E.O. II position in 1965 (Tr. 465-467). Niitani conceded, however, that Duarte's job duties and equipment experience had not been confined to the E.O. II class (Tr. 468, 497-498).

36. Niitani had also prepared weekly CIP status reports on all Parks Division construction projects during the period 1962-1971 (Tr. 495-497, 507). In preparing these reports, Niitani routinely discussed the percentage of time during which employees had operated particular equipment with his field supervisor (Tr. 496-497). Niitani estimated that between 1965-68, Duarte spent less than 50% of his total working time in operating heavy equipment. Between 1968-1971, approximately 30% of Duarte's time was spent in operating heavy equipment (Tr. 469-470, 519).

37. During 1965-68, while Jacintho Duarte operated equipment less than 50% of the time, Niitani stated that the bulk of this time was spent in operating a crane (Tr. 471), with approximately 5-10% of the time spent on the grader (Tr. 472),

an insubstantial amount of time on the D-8H tractor (Tr. 472-473), and less than 15% of the time on the backhoe (Tr. 473-474). Consequently, Jacintho Duarte could not have been operating the equipment listed on his application for 100% of the time he was employed by the DLNR.

38. Stanley Fujiyama, Staff Services Officer, Highways Division, DOT, subsequently reviewed Nakano's recommendations and questioned the amount of T.A. time credited the applicants for the E.O. IV position (Tr. 872-873). After having his personnel officer check this area, and after receiving Nakano's explanation of the liberal T.A. credit, Fujiyama concluded that even if he discounted the length of experience credited, there was no reason to disturb Nakano's recommendation (Tr. 873-874).

39. Fujiyama's evaluation was based on (1) whether the minimum qualifications (MQ's) of the class had been met, and (2) whether the length and quality of one applicant's experiences was superior to that of the other applicants (Tr. 878). He considered Jacintho Duarte the best qualified applicant on the basis of the types of equipment Duarte had operated, particularly the crane (Tr. 892, 895).

40. Since each of the three applicants had operated the grader and the truck tractor with trailer, the quality of their overall heavy equipment experience was apparently determined by the ability to operate such additional equipment as cranes and bulldozers in the E.O. IV class. Kauai District of DOT's Highways Division does not own either of these latter two classes of equipment (Tr. 204-205). However, both Nakano and Fujiyama emphasized the desirability of crane experience because they were considering obtaining a crane through a State rotation system (Tr. 205, 897).

41. At none of the levels of the selection process was any independent verification of the information on the application forms ever conducted (Tr. 212-213, 288-289, 349, 357, 882, 886).

42. Throughout the selection process, there were numerous discrepancies as to consideration of work experiences obtained outside state employment (Tr. 186, 207, 236-237, 347-348, 910).

43. On November 12, 1975, Fujiyama concurred with Nakano's recommendations in the statement of Action Attending Review of Certified Eligibles (State Ex. 11).

44. Following final approval of the selection by the Director of the DOT (State Ex. 11), David Santos was notified of the selection of Jacintho Duarte for the E.O. IV position on December 1, 1975 (Pet. Ex. 2).

45. On December 10, 1975, Santos contacted attorney E. Courtney Kahr for legal assistance regarding the promotion because he believed that the UPW would not assist him in the matter (Tr. 46). His belief was based on Rodrigues' statement to bargaining unit members in March, 1973, that unit members who paid service fees but were not union members would not be entitled to union representation (Tr. 579-580, 651).

46. The belief that non-union members were not entitled to union representation was shared by UPW members John Kaauwai (Tr. 668-669, 703) and John Pundyke (Tr. 539, 568-569).

47. Rodrigues denied having made the statement that non-union members would not receive union representation (Tr. 733, 735). He said that he had discussed non-union members only in the context of voting on union matters, holding union offices, or participating in union meetings (Tr. 823-825).

48. Rodrigues further testified that he could not have made the statement regarding union representation because in August, 1974, he had attempted to process a request for extended sick leave on Santos' behalf; this matter was subsequently dropped by Santos (Tr. 826-828; UPW Ex. 6). However, Santos did not know that he had been assisted in his sick leave request by the UPW; he thought that Ernest Duarte had been handling the matter for him (Tr. 588-589).

49. At the December 10th meeting with attorney Kahr, Santos signed an affidavit stating that he was not a member of the UPW and "not entitled to representation by them." He further stated that his only remedy for appealing the promotion of Jacintho Duarte was through the Civil Service Commission (Pet. Ex. 3B). Attorney Kahr also asked Santos to obtain a copy of the 1974-1976 Unit 1 contract at this time.

50. In a letter dated December 17, 1975, and addressed to the Civil Service Commission, Ms. Kahr appealed the E.O. IV promotion on Santos' behalf, raising the following points as grounds for review:

- a. Failure to disqualify Ernest Duarte from the Evaluation Board for conflict of interest due to his sibling relationship with Jacintho Duarte;
- b. Comparison of Santos' 6 years experience as an E.O. III with Duarte's 1 year in that classification; and
- c. Duarte's failure to meet all of the requirements of the E.O. IV class specifications (Pet. Ex. 3A).

The December 17, 1975 letter also contained the following statement:

"Enclosed please find a statement from Mr. Santos authorizing me to represent him in this appeal, and informing this body that he has no right to the union grievance procedure, and in any event,

hereby elects this administrative process as his remedy for the wrong done."

51. Santos obtained the 1974-1976 Unit 1 contract from Kaauwai, who gave Santos his personal copy in the latter part of December, 1975, or early in January, 1976 (Tr. 134-135, 642).

52. Section 15 of the 1974-1976 contract, covering procedures for processing grievances, contains no reference to Civil Service Commission appeals (UPW Ex. 5); however, appeals to the Civil Service Commission were permitted under Section 15.04 of the prior Unit 1 contract effective July 1, 1972 to June 30, 1974 (UPW Ex. 4).

53. On January 20, 1976, the Civil Service Commission (hereafter CSC) notified Ms. Kahr of its decision to defer action on Santos' appeal of the E.O. IV promotion until a determination of the Commission's jurisdiction over the appeal had been made (Pet. Ex. 5).

54. On February 18, 1976, the CSC informed Ms. Kahr of its decision that it lacked authority to hear the appeal (Pet. Ex. 7B).

55. On February 24, 1976, Ms. Kahr wrote to the Hawaii Public Employment Relations Board, stating as follows:

"Members of the Board:

Enclosed herewith please find copies of our appeal to the Civil Service Commission, their denial of jurisdiction and a letter of grievance to the United Public Workers.

We appeal to your body within a ninety day statute of limitations to exercise jurisdiction over this matter."

Enclosed with this letter were copies of (1) a February 24, 1976 letter to the UPW, registering Santos' grievance over the E.O. IV promotion, (2) a February 24, 1976 letter to the CSC,

requesting the grounds upon which the Commission's denial of jurisdiction had been based, (3) the December 17, 1975 letter to the CSC setting forth Santos' reasons for appealing the promotion, and (4) the February 18, 1976 letter from the CSC to Ms. Kahr denying jurisdiction (Pet. Ex. 7).

56. Ms. Kahr's letter was received by the Board on February 25, 1976.

57. On March 2, 1976, the Board's hearings officer mailed prohibited practice forms to Ms. Kahr (Pet. Ex. 8).

58. The completed prohibited practice forms were received by the Board on March 12, 1976. In Case No. CE-01-24, Santos alleged that the State's promotion of Jacintho Duarte violated the Unit 1 contract and §89-13(a), HRS. In Case No. CU-01-14, he further alleged that the UPW had failed to represent him, in violation of §89-13(b)(1), (3), and (5), HRS (Bd. Ex. 1, CU & CE cases).

59. In the meantime, Santos was notified by the DOT on March 3, 1976, that he would be suspended on March 10-11, 1976, for threatening his supervisor, Ernest Duarte (UPW Ex. 6). The suspension followed a February, 1976 request by Rodrigues that the DOT investigate morale problems at the baseyard caused by Santos (Tr. 746-749, 750-752).

60. On March 12, 1976, Santos notified Rodrigues that he was submitting a grievance over the disciplinary suspension; the grievance was sent to the UPW in letter form because the proper grievance forms were at that time unavailable on Kauai (Tr. 590-591, 753; Pet. Ex. 9).

61. On March 15, 1976, Rodrigues sent Santos a grievance form (UPW Ex. 2), which Santos filled out in the same manner as the March 12, 1976 letter prepared by attorney Kahr. He then submitted it to Ed Carveiro, UPW shop steward,

on March 17, 1976 (UPW Ex. 1). Carveiro wanted to know what Santos wanted the union to do with the grievance, since the form was incorrectly addressed to Gary Rodrigues, Kauai Division Director of the UPW, rather than to the appropriate DOT Division Head. Santos stated, however, that Carveiro did not tell him that anything was wrong with the form (Tr. 613-621, 649-650). The union thereafter did not process the grievance or inform Santos of the error because Rodrigues assumed Santos did not want his assistance, and he knew that Santos had retained attorney Kahr (Tr. 775-777, 858-860).

62. On March 23, 1976, the Board granted a Motion for Particularization of the Complaint filed by the UPW (Bd. Ex. 3, 4 in CU case).

63. On March 31, 1976, the State filed its answer to the prohibited practice charges in Case CE-01-24 (Bd. Ex. 4 in CE case).

64. On April 1, 1976, petitioner amended his complaint in Case No. CU-01-14 by filing an answer to the Motion for Particularization (Bd. Ex. 5 in CU case).

65. On April 6, 1976, the UPW filed its answer to the charges in Case No. CU-01-14.

66. A prehearing conference on both cases was held in the Board's hearing room on April 13, 1976. At this conference, petitioner requested a change of venue to Kauai, and respondent UPW requested leave to amend its answer to include the defense of the statute of limitations.

67. On April 26, 1976, the UPW amended its answer to include the statute of limitations in its defenses to the prohibited practice charges (Bd. Ex. 12 in CU case).

68. On June 18, 1976, the State amended its Answer to include the defense of the statute of limitations (Bd. Ex. 11 in CE case).

69. On June 21-24, 1976, the Board held hearings in Lihue, Kauai in both cases, which were consolidated just prior to the commencement of the hearing.

70. Post-hearing briefs were filed by the parties on September 15, 1976, with oral arguments held in the Board's hearing room on September 17, 1976. The Board received the final transcript for these cases on December 9, 1976.

CONCLUSIONS OF LAW

The numerous conflicting events in the cases against the union and the employer have not lent themselves to a speedy disposition of petitioner's charges. However, after long and painstaking deliberation, this Board has concluded that the State committed a prohibited practice in violation of §89-13(a)(8), HRS, whereas no prohibited practice was committed by the UPW. The reasons for the Board's decision are set forth in the following discussion.

Initially, the Board had to determine whether the prohibited practice charges were timely filed under the statute of limitations of §377-9(1), HRS (as incorporated by §89-14, HRS), and Rule 3.02(a), HPERB Rules and Regulations. The foregoing provide that a prohibited practice charge must be filed within ninety days of the alleged violation. Here the primary event culminating in the filing of prohibited practice charges was the December 1, 1975 notification of Jacintho Duarte's promotion to the vacant E.O. IV position; Santos would therefore have had to file prohibited practice charges by March 1, 1976, in order to fall within the 90-day period. Although Santos did not file the prohibited practice charges on forms provided by the Board until March 12, 1975, the Board considers his

February 25, 1976 communication to HPERB to be an adequate filing of charges pursuant to §89-14, HRS, and §377-9(k), HRS, which states:

"A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the decisions and orders of the board, and they shall not be declared inoperative, illegal, or void for any non-prejudicial irregularity in respect thereof." (emphasis added)

See also AFL-CIO Laundry and Dry Cleaning Int'l. Union, Local 3008 v. Buckley Laundry Co., Decision No. 8943-B, Wisconsin Employment Relations Commission (July 28, 1970). More specifically, the Board finds that petitioner's invocation of the Board's jurisdiction, and attachment of copies of letters containing information on actions allegedly constituting prohibited practices, in the February 25, 1976 letter (in light of the fact that Board forms were unavailable on Kauai), did "substantially comply" with the filing requirements of §377-9(b), HRS, and Rule 3.02(b), HPERB Rules and Regulations. As such, the March 12, 1976 filing of charges on prohibited practice forms constituted a refiling of the charges alleged in the February letter.

Of course, the December 1, 1975 notification regarding the E.O. IV promotion was an action taken by the State, who was responsible for making the challenged decision. The Board was unable to find proof of improper UPW interference with the State's decision to promote Jacintho Duarte, notwithstanding petitioner's inferences of possible union influence over individuals employed by the State. Petitioner also failed to establish that the UPW discriminated against him or breached its duty of fair representation through any of its actions in early 1976 relating to Santos' March, 1976 disciplinary suspension. We therefore hold that the UPW committed no prohibited practices during the period

between December 1, 1975 and March 1, 1976; and consideration of events prior to December 1, 1975 is barred by the statute of limitations.

The Board now turns to the prohibited practice charge against the State. Petitioner contends that the State's promotion of Jacintho Duarte violated Section 16.06 and 16.07 of the Unit 1 contract, and thereby violated §89-13(a)(8), HRS, which makes violation of a collective bargaining agreement a prohibited practice as well.

Sections 16.06 and 16.07 of the 1974-1976 contract provide:

- "a. When making promotions, one of following options shall be utilized:
 - 1. Non-competitive promotion
 - 2. Intra-departmental competitive promotion
 - 3. Inter-departmental competitive promotion
- b. For non-competitive promotions, all notices to fill authorized vacancies shall be posted on appropriate bulletin boards for at least ten (10) calendar days prior to the closing date for receipt of applications. If the Employer does not post the notices for the specified number of days as provided in this section or in the personnel rules and regulations, the employee shall be entitled to submit a late application.
- c. Whenever the qualifications between the qualified applicants are relatively equal, the employee with the greatest length of Baseyard, Workplace or Institution Workplace seniority shall receive the promotion (emphasis added).
- d. In the event a senior employee applies for a promotion and is denied the promotion, if he so requests, he shall be given a written statement of the reasons for denial.

With respect to tests and/or examination used for promotional purposes, the Employer assures the Union that continuing efforts will be made to devise such test and/or examinations that directly relate the tests and/or examination to the skills, abilities, and qualifications actually required for the class."

In its defense, the State has argued that the Board should decline to exercise jurisdiction over the charge insofar as promotions are referable to the contractual grievance-arbitration procedure; and that the promotion was proper because Jacintho Duarte had more substantial qualifications for the E.O. IV position than did petitioner Santos.

With respect to the State's argument for deferral to arbitration, we note that it has been our policy, in carrying out the requirements of Chapter 89, to "require parties to utilize negotiated grievance arbitration procedures when and to the extent appropriate." (emphasis added) HPERB Case No. CE-05-4, Decision 22 (1972). We find that deferral would not be appropriate here because of the apparent conflict between the interests of petitioner, on the one hand, and the interests of the union and the employer, on the other.

In these types of situations, the National Labor Relations Board has refused to defer to arbitration because the policies of the federal Act would not be effectuated by relegating an employee to an arbitral process administered by parties whose interests were hostile to his own. Anaconda Wire & Cable Co., 201 NLRB No. 125, 82 LRRM 1419 (1973); Kansas City Meat Packers, 198 NLRB No. 2, 80 LRRM 1743 (1972). The employers in these cases were found guilty of violating the Labor Management Relations Act, but it was the divergence of the union's interests from those of the individual employees which was significant in determining whether deferral to arbitration was appropriate.

In Anaconda Wire & Cable Co., supra, a disciplinary layoff was imposed on Sparks, an employee who had filed a grievance (processed by the union through the first two steps). Following a meeting between Sparks, management, and union representatives, at which management refused to discuss the disciplinary layoff, Sparks picketed the plant. Subsequently, union representatives informed Sparks that management would not impose further discipline upon him if he did not grieve the layoff. They also told him that he could be discharged if the employer chose to act on his picketing. These events led the Board to conclude that deferral was unwarranted:

"Thus, it is clear that neither the Respondent nor the union were interested at this point in utilizing the grievance procedure to resolve the dispute. Indeed, it is evident that they were determined to avoid using the process...Although overt friction between Sparks and his union representative was not present in this case, there was sufficient divergence of their respective positions so as to preclude any assumption that their interests were 'in substantial harmony.'" (emphasis added) 82 LRRM at 1422.

In the Meat Packers case, two employees were discriminatorily discharged after registering numerous safety grievances with the employer and the union. Friction over safety issues was generated between the employees, on one hand, and the union's business representative, and their supervisors, on the other. Because of this fact, and the union's failure to investigate the discharges and file a grievance or unfair labor practice charges based on the action, the NLRB found that it would "not be consonant with statutory policy to defer to arbitration... as the interests of the charging parties...are in apparent conflict with the interests of the union and certain of its

officials, as well as with the interests of Respondent." 80 LRRM at 1746. See also T.I.M.E.-DC, Inc. v. NLRB, 504 F.2d 294, 87 LRRM 2853, 2860 (5th Cir. 1974); Standard Fruit and Steamship Co., 211 NLRB No. 21, 87 LRRM 1134 (1974); Machinists, Lodge 68 (West Winds, Inc.), 205 NLRB No. 26, 84 LRRM 1031 (1973), vacated on other grounds, 503 F.2d 1044, 88 LRRM 2385 (9th Cir. 1975); Laborers' Int'l. Union of North America, Local No. 207, AFL-CIO, and James Mancil, 206 NLRB No. 128, 84 LRRM 1475 (1973); and Jack Watkins and Int'l. Assoc. of Machinists and Aerospace Workers, Local 1484, 203 NLRB No. 98, 83 LRRM 1295 (1973).

Similarly, under the facts in this case, we do not believe that the purposes of Chapter 89 would be effectuated by deferral of the charges to arbitration, since the UPW's interests do not appear to be the same as those of petitioner Santos. While no overt hostility to Santos has been demonstrated, there is sufficient divergence between the views held by the union and those held by Santos to conclude that their respective interests are not in harmony. Petitioner and other DOT employees believed that he was not entitled to union representation; and the union, through Rodrigues, has done little to modify that belief (as indicated by Rodrigues' failure to inform Kaauwai or Santos of the proper procedure for reinstatement into the union). Rodrigues' initiation of the February, or March, 1976 investigation of Santos, and his disposition of the incorrectly-filed grievance form in March, 1976, have probably reinforced Santos' belief that the UPW would be unwilling to help him, particularly in the area of grievances. Furthermore, the union's position on the E.O. IV promotion may not reflect Santos' position. This factor is especially important because the union, and not the individual employee, is the only party

who can invoke arbitration under the Unit 1 contract. Accordingly, the Board takes jurisdiction of this prohibited practice charge and proceeds to the merits of the dispute.

Our decision here is dependent upon resolution of two issues: (1) whether the State made reasonable efforts to ascertain the relative qualifications of Santos and Duarte, and (2) whether the State's selection of Duarte, the junior employee, over Santos was reasonable under the circumstances. In examining these issues, we are guided by arbitration decisions which have dealt with promotions of a junior employee over a senior employee under "relative ability" seniority provisions similar to Section 16.06(c) of the Unit 1 contract herein. Our reliance on such decisions is based on the fact that under the National Labor Relations Act, there is no provision comparable to §89-13(a)(8), HRS. As such, to the extent that principles derived from contractual grievance-arbitration procedures would further the purposes of Chapter 89, we have applied their rationale to the facts of the instant case.

In International Nickel Co., 45 LA 743 (1965), the promotion of a junior employee to a First Class Machinist position was vacated because the employer had acted unreasonably in both its investigation and its evaluation of the qualifications of the junior and senior applicants. This conclusion was supported by the following rationale:

In making its determination on relative ability, management of course is obligated to take into account all of the relevant factors which enter into an evaluation of this kind and then to make a judgment which is reasonable, that is to say a judgment which, if questioned, can be supported by concrete[,] tangible, objective proof and a judgment which would meet the standard of what a qualified, reasonable and objective minded executive would probably decide under

the same or similar circumstances
(emphasis added).

In the present case the evidence demonstrates, I believe, that the Shop Superintendent based his judgment on inadequately investigated qualifications in reaching a decision to award the job to the bidder of much lesser seniority, and gave manifestly inadequate weight to the senior bidder's many more years of experience in the very same job (Second Class Machinist) than the junior bidder, which job the evidence indicated would be in the normal line of progression to that of First Class Machinist. 45 LA at 748.

In verifying the applicants' qualifications, the Machine Shop Superintendent merely sought opinions about their work from various supervisors. He failed to solicit an opinion from the senior employee's supervisor, and relied upon general opinions that lacked adequate supporting detail. Other factors (such as the junior applicant's prior technical training, his outside work experience, his numerous bids for promotions, etc.) were apparently accorded too much weight without a sufficient showing of their relevance to the position.

In International Harvester Co., 54 LA 264 (1970), a similar failure to properly investigate and evaluate applicants' qualifications resulted in the vacating of a junior employee's promotion. There the employer maintained that "prior supervisory experience" was one of the two qualifications by which it had determined that the junior employee's qualifications were superior. However, during the arbitration hearings, it was established that the factual basis for the prior experience was derived solely from the employee's application form. No attempt had been made to check out the information on the application; and the employer was unable to demonstrate how the supervisory experience (the nature and extent of which were unknown) was relevant to the Design Engineer II position in question.

We believe that the State is guilty of the same kind of failure to objectively investigate and evaluate the applicants' qualifications here. "Experience," defined variously as "information, knowledge and ability obtained through actual work or job performance," Roberts, Roberts' Dictionary of Industrial Relations, 104 (1966), and "the extent to which an employee has engaged in a particular job, type of work, or occupation," Elkouri & Elkouri, How Arbitration Works, 582 (3rd ed. 1973), was supposedly the most important factor in determining who would receive the E.O. IV promotion; however, the Board has been unable to find, throughout the different levels of the selection process, evidence of adequate investigation and evaluation of this factor.

Although DOT procedures call for a preliminary check of the applicant's qualifications by the Department's Personnel Officer, and a final check by the Department of Personnel Services, such checks seem to be confined to determining whether, on the basis of the information on the application form, the applicant meets the minimum qualifications of the position being sought. No one questions the information on the applications at the Evaluation Board, Branch Head or Division Head levels of review, where discrepancies should be more apparent because the reviewers are familiar with Equipment Operator functions.

In the instant case, one of the major discrepancies which should have been investigated at one of the preceding three levels was how Duarte could have spent all of his time with the DLNR operating heavy equipment representative of E.O. II and IV classes, and yet be employed as an E.O. II (and initially as a Laborer II). Such an investigation would have revealed the following inaccuracies: Although Duarte's

application stated that he had been employed as an E.O. II by the DLNR, Parks Division, between August, 1962, and April, 1971, he was actually employed as an E.O. II between 1965-1971. The Parks Superintendent disagreed with Duarte's estimation of the amount of time spent in operating heavy equipment; instead of the 100% Duarte claimed, he estimated that it was less than 50% of the time between 1965-1968, and less than 30% between 1968-1971. The Parks Superintendent also discounted the amount of time Duarte spent in operating various types of heavy equipment. A verification of the information in Duarte's application would further have revealed that Duarte did not have a Type 6 driver's license in September, 1975, as he had represented. These types of discrepancies seriously undermine the credibility of Duarte's assertions regarding his work experiences. They also lead the Board to conclude that no investigation into the accuracy of the information in the applications relating to minimum qualifications, or length and type of experience, ever took place.

The record demonstrates that there is likewise no uniform, objective standard for evaluating and comparing applicants' work experience. At the Evaluation Board level, there was no written comparison of the applicants' equipment operating experience, and the Board noted merely that its evaluation was based on applicants' "experiences as a heavy equipment operator." There was no standard for the weight to be given to the oral interview rating, and the weight to be given to equipment experience. Despite testimony that equipment experience is a more important factor, we note that it was Ernest Duarte's high oral interview rating for his brother which initially elevated Jacintho Duarte above Santos and Kaauwai.

At the next level of review, Nakano attempted to quantitatively measure and compare the length of applicants' equipment experience representative of the E.O. IV class. Nevertheless, his method of measurement was inaccurate for Santos and Duarte because what he actually measured was the number of years during which Santos had been employed as an E.O. III, and the number of years during which Duarte had been employed as an E.O. III (by the DOT), and the total number of years employed by the DLNR. Nakano's measurement would have been appropriate for Kaauwai only if Kaauwai's experience with the grader and the truck tractor had been for consecutive rather than concurrent periods of time. Thus, Nakano's measurement of equipment operating experience was not the kind of concrete and objective criteria which could justify a determination that Duarte possessed the lengthier equipment experience.

We observe that the quantitative measurement of equipment operating experience which Nakano sought to achieve differs from the type of measurement made by the DOT during the UPW's grievance over the 1974 promotion of Jacintho Duarte to an E.O. III (Pet. Ex. 11, see October 1, 1974 letter from Laurence Chun, for the DOT, to Gary Rodrigues of the UPW). There the DOT compared the applicants' length and types of equipment experience acquired in employment as E.O. II's, before considering whether applicants also had equipment operating experience representative of the E.O. III class. While this 1974 grievance is not otherwise relevant to this case, we think that it does reveal the lack of uniform criteria for evaluating equipment operating experience here.

Finally, at the Division Head level of review, Fujiyama concurred with the Branch Head's recommendations because he agreed that Jacintho Duarte was the most qualified,

based on the types of equipment operated. Consequently, at every stage of the review process, it appears that there was no uniform measurement for evaluating applicants' work experiences.

This Board finds that the foregoing events clearly establish the State's lack of objective investigation and evaluation of qualifications of the applicants for the E.O. IV position. As pointed out during the Board's hearings, the State did not have accurate information upon which to base its determination, and it did not utilize uniform and objective methods of evaluating that information:

MR. MILLIGAN: The whole point, then, is no one ever goes beyond the piece of paper? The application?

* * * *

If I can write well, I come up good?

(STANLEY FUJIYAMA) A: I beg your pardon?

MR. MILLIGAN: If I can write well on my application, I come up looking good?

A: Yes, sir. Yes, sir. (Tr. 822, 886)

The State did not even consider making an exception to the DOT's policy of requiring the immediate supervisor of the vacant position to sit on the Evaluation Board. Such a move would certainly have been wiser and more reasonable than allowing the brother of an applicant to participate in that candidate's selection.

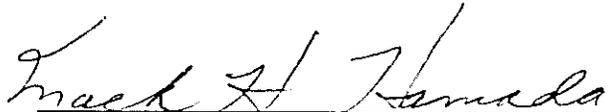
In light of these circumstances, we must conclude that the State did not make reasonable efforts to ascertain the relative qualifications of Santos and Duarte; and its selection of Duarte over Santos was therefore unjustified. Accordingly, this Board holds that the State violated Section 16.06 of the Unit 1 collective bargaining agreement, thereby committing a prohibited practice under §89-13(a)(8), HRS.

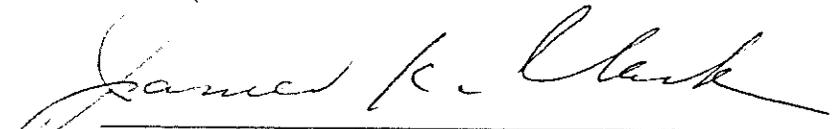
ORDER

Case No. CU-01-14 against the UPW is hereby dismissed.

Because of the numerous discrepancies as to applicant Jacintho Duarte's qualifications, and inadequate information as to the other applicants, the Board cannot determine which of the three applicants is best qualified for the E.O. IV position. The State, through its Department of Transportation, is therefore ordered to redo its selection for the E.O. IV promotion. The State shall also objectively investigate and evaluate each candidate's qualifications as of September 15, 1975, in a manner consistent with the Board's findings in this decision.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: April 4, 1977

Honolulu, Hawaii