

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of )  
BERT SAM FONG, )  
 )  
Complainant, )  
 )  
and )  
TED SAKAI, Director, Department of Public )  
Safety, State of Hawaii and ALBERT )  
MURASHIGE, Warden, Maui Community )  
Correctional Center, State of Hawaii, )  
 )  
Respondents. )

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CASE NO. CE-10-503  
ORDER NO. 2113  
ORDER GRANTING UPW'S MOTION  
FOR SUMMARY JUDGMENT AND  
EMPLOYER'S MOTION TO DISMISS  
PROHIBITED PRACTICE COMPLAINT

In the Matter of )  
BERT SAM FONG, )  
 )  
Complainant, )  
 )  
and )  
GARY RODRIGUES, Director, United Public )  
Workers, AFSCME, Local 646, AFL-CIO and )  
EDDIE ESPIRITU, Business Agent, United )  
Public Workers, AFSCME, Local 646, )  
AFL-CIO, )  
 )  
Respondents. )

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CASE NO. CU-10-201

ORDER GRANTING UPW'S MOTION FOR SUMMARY JUDGMENT AND  
EMPLOYER'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

On June 13, 2002, Complainant BERT SAM FONG (Complainant or SAM FONG), proceeding pro se, filed two prohibited practice complaints with the Hawaii Labor Relations Board (Board).

The first complaint, Case No. CE-10-503, filed against ALBERT MURASHIGE (MURASHIGE), Warden, Maui Community Correctional Center (MCCC), Department of Public Safety (PSD), State of Hawaii and TED SAKAI (SAKAI), Director, PSD, State of Hawaii (collectively Employer) alleges: 1) a violation of Hawaii Revised Statutes (HRS) § 89-13(a)(6) for refusing to participate in good faith in the mediation, fact-finding, and

arbitration procedures set forth in HRS §89-11; and 2) a violation of HRS § 89-13(a)(8) for allowing supervisory Adult Corrections Officers (ACOs) to perform overtime work in non-supervisory positions allegedly in violation of Section 21.01 of the Bargaining Unit (BU) 10 Collective Bargaining Agreement (Contract).

The second complaint, CU-10-201, filed against GARY RODRIGUES (RODRIGUES), State Director and EDDIE ESPIRITU (ESPIRITU), Business Agent, Maui District Office, of the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (collectively UPW or Union) specifically alleges violations of HRS § 89-13(b)(1) for failing to file a grievance; HRS § 89-13(b)(3) for refusing to meet and discuss the issue of overtime work assignments; and HRS § 89-13(b)(5) for not protecting the collective bargaining rights of Complainant.

On June 14, 2002, UPW filed Respondents' Motion to Dismiss and/or for Summary Judgment. The motion alleges a failure to state a claim for relief and/or summary judgment be entered in favor of the UPW because there are no genuine issues of material fact in dispute as to whether the UPW breached its duty of fair representation to SAM FONG for failing to pursue his grievance to arbitration. Therefore, the UPW asserts judgment should be entered as a matter of law.

On June 25, 2002, the Employer filed Respondents' Motion to Dismiss Prohibited Practice Complaint for failing to state a claim upon which relief can be granted; failing to exhaust contractual remedies; and lack of jurisdiction.

On June 27, 2002, the Board by Order No. 2097 consolidated the cases for disposition and set a hearing on the respective Respondents' Motions to Dismiss Complaints.

On July 1, 2002, UPW filed Respondents' Motion to Dismiss for Lack of Prosecution. The motion was based on SAM FONG's failure to timely file an answering affidavit, objection to, or responsive pleading in opposition to June 14, 2002 motion to dismiss and/or for summary judgment.

On July 16, 2002, the Board held a hearing on the respective Respondents' motions. The parties were afforded a full and fair opportunity to present evidence and arguments to the Board. Based on the entire record and arguments presented, the Board makes the following findings of fact, conclusions of law and order.

### **FINDINGS OF FACT**

1. SAM FONG is an ACO III employed by PSD and a public employee within the meaning of HRS § 89-2. SAM FONG is a member of BU 10.

2. Respondents SAKAI and MURASHIGE are representatives of the public employer within the meaning of HRS § 89-2.
3. Respondents RODRIGUES and ESPIRITU are representatives of the UPW, the exclusive representative of BU 10 members within the meaning of HRS § 89-2.
4. The Employer and Union are parties to a BU 10 Contract covering institutional, health and correctional workers for the period of July 1, 1999 to June 20, 2003.
5. Prior to March 22, 2002 SAM FONG questioned ESPIRITU about the assignment of overtime to ACO IV's and V's. ESPIRITU advised SAM FONG that arbitrators have ruled that Section 26.12 of the BU 10 Contract requires the Employer to assign overtime on a fair and equitable basis to all ACOs including ACO IV's and V's who are considered supervisors.
6. Section 26.12 of the BU 10 Contract covering Distribution of Overtime states:

The Employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation. An Employee shall complete Exhibit 26.12 in order to be considered for overtime work.
7. On February 17, 1998, Arbitrator Keith W. Hunter issued a Decision and Award in a Class Grievance regarding Overtime, Section 26.12 of the BU 10 Contract.
8. On March 22, 2002, SAM FONG filed an informal grievance alleging that MCCC violated the provision in the BU 10 Contract entitled Supervisors Working in Non-Supervisory Positions, by assigning overtime under Section 26.02A for an ACO III position to Sergeant Thalia Napeahi.
9. On April 3, 2002, SAM FONG asked for a grievance form and received one from ESPIRITU by letter dated April 4, 2002. Using such form, SAM FONG filed a formal grievance with the Employer.
10. On April 30, 2002, SAM FONG wrote to ESPIRITU requesting his grievance be taken to arbitration.
11. On May 24, 2002, SAM FONG's attorney wrote to ESPIRITU on behalf of SAM FONG requiring the UPW to "clarify its position regarding this conflict of interest and that it forthwith proceed with his grievance."
12. On May 28, 2002, ESPIRITU responded to SAM FONG. ESPIRITU, again explained that the UPW's position regarding the "occasional use of ACO IV's

and V's to perform overtime work in positions that are normally assigned to ACO II's and III's" is based on the Arbitration Decision and Award by Arbitrator Hunter, who made no distinction between the applicability of Section 26.12 to ACO II's, III's, IV's and V's. Therefore, under Section 26.12 the Employer was required to assign overtime on a fair and equitable basis to all ACOs in the bargaining unit including ACO IV's and V's.<sup>1</sup>

13. The Employer and the UPW agree on the application of Section 26.12 of the BU 10 the Contract to assign overtime to all ACOs including ACO IV's and V's who are also supervisors.
14. Based on ESPIRITU's understanding of Section 26.12 and the Arbitration Award and Decision by Hunter, the UPW determined that SAM FONG'S assignment of overtime grievance lacked merit. Under the circumstances, the Board finds ESPIRITU's assessment that SAM FONG'S grievance lacked merit, to be wholly reasonable.

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<sup>1</sup>ESPIRITU's May 28, 2002 letter states in part:

As I have stated to you previously, the occasional use of ACO IV's and V's for overtime is the result of an Arbitrator's decision. ACO IV's and V's, by law are part of Bargaining Unit 10, thus they cannot be discriminated against. Section 26. of the Unit 1 and 10 Collective Bargaining Agreement states that, "The Employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation. An Employee shall complete Exhibit 26.12 in order to be considered for overtime work."

In his decision dated February 17, 1998, Arbitrator Keith W. Hunter writes; "The language of Section 26.12 is clear and unambiguous. The Arbitrator finds that the contractual terms and intent of Section 26.12 are clear and are intended to cover all members of the Unit 10 Bargaining Unit, not selected ranks of members within that Unit. No distinction between the applicability of Section 26.12 to ACO II's, III's, IV's and V's is made. Thus, I conclude that the intent is to cover all members of the Bargaining Unit."

\* \* \*

Since 1998, the Union has followed Arbitrator Hunter's ruling regarding the fair and equitable distribution of overtime.

## DISCUSSION

Complainant seeks relief for alleged violations of the applicable collective bargaining agreement. Recently, in Decision No. 436, John Mussack, 6 HLRB \_\_\_\_ (August 23, 2002) (Mussack), the Board addressed its jurisdiction over prohibited practice complaints by employees against both the employer and the union for violating a term of the collective bargaining agreement as follows:

Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an Employer or exclusive representatives via its authority to adjudicate prohibited practices complaints. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process.<sup>2</sup> Thus the Board has deferred to the contractual grievance process<sup>3</sup> except where there exists countervailing policy considerations<sup>4</sup> or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.<sup>5</sup>

Such voluntary declination of jurisdiction is akin to the requirement that parties exhaust contractual remedies before access is afforded by the Board. The Hawaii Supreme Court in Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 655, 646 P.2d 962 (1982) has stated that "It is the general rule that before an individual can maintain an action against his Employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his Employer and the [union]. (citation omitted) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." (citations omitted.) Application of this rule permits a voluntary

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<sup>2</sup>"It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HPERB 253, 261 (1972).

<sup>3</sup>See, e.g., State of Hawaii Organization of Police Officers, 6 HLRB 25 (1998).

<sup>4</sup>See, e.g., Hawaii State Teachers Association, *supra*, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); and Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).

<sup>5</sup>Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See, e.g., Hawaii State Teachers Association, 1 HPERB 253 (1972) (HSTA).

In the instant cases, the Board finds no countervailing policy considerations which mitigate in favor of assuming jurisdiction. Accordingly, unless the Complainant can demonstrate that the Union failed its duty of fair representation, the Board will defer to the grievance process and decline jurisdiction with respect to the Complainant's complaint against the Employer.

### **Duty of Fair Representation**

The Board discussed the union's duty of fair representation in Order No. 2105, dated August 8, 2002, in Helen L. Gabriel, Case Nos. CU-01-189, CE-01-493, stating:

The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

In the instant complaint, the burden of proof is on GABRIEL to show by a preponderance of evidence that: 1) the decision not to proceed to arbitration was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "[A] union's conduct is 'arbitrary' if it is 'without rational basis,' ...or is 'egregious, unfair and unrelated to legitimate union interests.'" Peterson v. Kennedy, 771 F.2d 1244, 1254 (9<sup>th</sup> Cir. 1985).

The U.S. Supreme Court in Airlines Pilots Ass'n. Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) (O'Neill), held that "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." Id., at 67. The Court's holding in O'Neill reflects that a deferential standard is employed as to a union's actions. They may be challenged only if "wholly

irrational.” Id., at 78. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. Id.

Simple negligence or mere errors in judgment will not suffice to make out a claim for a breach of the duty of fair representation. Farmer v. ARA Services, Inc., 660 F.2d 1096, 108 LRRM 2145 (6<sup>th</sup> Cir 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6<sup>th</sup> Cir. 1975).

A union does not breach its duty of fair representation when it exercises its “judgment” in good faith not to pursue a grievance further, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9<sup>th</sup> Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9<sup>th</sup> Cir. 1997). As explained in Stevens:

... A union’s decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment. (Citations omitted.) “We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union’s judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances.” (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

And where a union’s judgment is in question, complainant “may prevail only if the union’s conduct was discriminatory or in bad faith.” Moore v. Bechtel Power Corp., 840 F.2d 634, 127 LRRM 3023 (9<sup>th</sup> Cir. 1988).

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawai`i Organization of Police Officers (SHOPO). v. Society of Professional Journalists - University of Hawai`i Chapter, 83 Hawai`i 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing

or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai'i, 85 Hawai'i 61, 937 P.2d 397 (1997).

In the instant case, the parties to the BU 10 Contract agree that a proper application of Section 26.12 requires the Employer to assign overtime to ACOs including ACO IV's and V's who are supervisors. ESPIRITU attempted, on more than one occasion, to explain that there was no misapplication of the Contract based on his understanding of Arbitrator Hunter's award and decision dated February 17, 1998. Nevertheless, Complainant filed a grievance under the Contract's grievance procedure. The Board finds that ESPIRITU's assessment that Complainant's overtime assignment grievance lacked merit was reasonable. Accordingly, the Board finds on these undisputed facts that the Union did not breach its duty of fair representation by refusing to pursue an overtime assignment grievance on behalf of Complainant or proceed to arbitrate SAM FONG's grievance. After having viewed this complaint in a light most favorable to Complainant, the Board concludes that there are no genuine material issues of fact in dispute and the Union is entitled to summary judgment in its favor; i.e., that it did not breach its duty of fair representation to SAM FONG in its refusal to file a grievance on Complainant's behalf or to arbitrate the grievance.

Furthermore, given the fact that the Complainant did in fact file a formal grievance on his own over the Employer's assignment of overtime to supervisory ACO IV's and V's, the Board concludes that ESPIRITU did not interfere with the Complainant's right to pursue a grievance in wilful violation of HRS § 89-13(b)(1).

#### **Case No. CE-10-503**

Complainant's complaint against the Employer seeks to have the Board adjudicate the substance of Complainant's grievances. As noted above, the Board will decline jurisdiction over alleged violations of the collective bargaining agreements by the Employer under HRS § 89-13(a)(8), in deference to the contractual grievance process absent some countervailing policy consideration or breach of the duty of fair representation. There being no such policy consideration or a finding of a breach of the Union's duty of fair representation in the instant case, the complaints must be dismissed in deference to the contractual grievance process.

#### **HRS §§ 89-13(a)(6) and 89-13(b)(3)**

Finally, Complainant seeks relief for alleged violations of HRS § 89-13(a)(6) by the Employer and HRS § 89-13(b)(3) by the Union for refusing to participate in the mediation, fact-finding and arbitration procedures set forth in HRS § 89-11. HRS § 89-11 relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of

an initial or renewed collective bargaining agreement. The Board finds that the provision is not applicable to the instant complaint.

Accordingly, Complainant's allegations against the Employer and Union asserting a prohibited practice in violation of HRS §§ 89-13(a)(6) and 89-13(b)(3), are dismissed.

In view of the Board's ruling, the Board need not address the Employer's alternative grounds for dismissing the complaint, including the failure to exhaust contractual remedies; and the Union's motion to Dismiss for lack of prosecution.

### CONCLUSIONS OF LAW

1. Allegations of the Employer's violation of the collective bargaining agreement are generally adjudicated through the bargaining agreement's grievance process. Thus the Board has deferred to the contractual grievance process except where there are countervailing policy considerations or the union's failure to satisfy its duty of fair representation effectively deprives the employee of access to the grievance process. See, Mussack, supra.
2. In the instant complaints, the Board finds no countervailing policy considerations which mitigate in favor of assuming jurisdiction and therefore will defer to the grievance process and decline jurisdiction over Complainant's contract claims against the Employer unless the Complainant can demonstrate that the Union breached its duty of fair representation.
3. Based on the entire record, the Board concludes there are no genuine material issues of fact in dispute and the Union is entitled to summary judgment in its favor; i.e., that it did not breach its duty of fair representation to SAM FONG by deciding that his grievance lacked merit because the Employer's occasional use of ACO IV's and V's to perform overtime work in positions that are normally assigned to ACO II's and III's was consistent with Section 26.12 of the BU 10 Contract and an arbitrator's decision and award. As the Union's conduct was nonarbitrary, the Board concludes that the Union did not breach its duty of fair representation when it refused to represent Complainant in his overtime assignment grievance or proceed to take the grievance to arbitration.
4. Finding no breach of the Union's duty of fair representation, the Board declines jurisdiction over the alleged violations of the collective bargaining agreement in Case No. CE-10-503 against the Employer in deference to the contractual grievance process.

5. HRS § 89-11 relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement. The Board finds that the provision is not applicable to Complainant's allegations against the Employer charging a violation of HRS § 89-13(a)(6) and against the Union charging a violation of HRS § 89-13(b)(3).

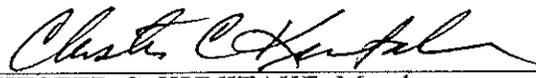
**ORDER**

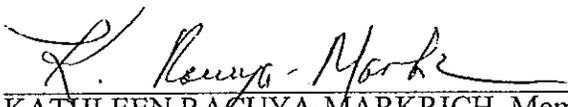
The instant complaints are hereby dismissed.

DATED: Honolulu, Hawaii, September 12, 2002.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
CHESTER C. KUNITAKE, Member

  
KATHLEEN RACUYA-MARKRICH, Member

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