

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NOS.: | CE-10-179 |
| LINDA E. MOGA RIVERA, |) | | CU-10-87 |
| |) | ORDER NO. | 1071 |
| Complainant, |) | ORDER GRANTING RESPONDENTS | |
| |) | UPW'S AND EMPLOYER'S MOTIONS | |
| and |) | TO DISMISS | |
| |) | | |
| JOHN WAIHEE, Governor of the |) | | |
| State of Hawaii; DEPARTMENT OF |) | | |
| PUBLIC SAFETY, State of Hawaii; |) | | |
| GEORGE SUMNER, Director, |) | | |
| Department of Public Safety, |) | | |
| and UNITED PUBLIC WORKERS, |) | | |
| LOCAL 646, AFSCME, AFL-CIO, |) | | |
| |) | | |
| Respondents. |) | | |

ORDER GRANTING RESPONDENTS
UPW'S AND EMPLOYER'S MOTIONS TO DISMISS

On January 11, 1993, Complainant LINDA E. MOGA RIVERA (RIVERA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents JOHN WAIHEE, Governor of the State of Hawaii; DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; and GEORGE SUMNER, Director, Department of Public Safety (collectively Employer) and Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). RIVERA alleged that she was demoted from the position of Adult Corrections Officer (ACO) IV because of a settlement agreement between the Director of the Department of Public Safety and the UPW State Director. RIVERA also alleged that the UPW refused to represent her in a subsequent grievance.

On January 21, 1993, the Employer filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The Employer argued that RIVERA failed to allege any wrongdoing against the Employer for the UPW's apparent decision not to represent RIVERA in her grievance.

Similarly, on March 2, 1993, the UPW also filed a motion to dismiss. UPW asserted that RIVERA is not a bargaining unit 10 (BU-10) employee and has no standing to challenge a settlement affecting BU-10 employees; RIVERA failed to state a claim for relief since a non-bargaining unit employee may not challenge a grievance remedy sought by employees within the bargaining unit to whom the UPW owes a duty; and RIVERA failed to state a claim for relief against the UPW and the Employer whose conduct was within the wide range of reasonableness contemplated by the Legislature under Chapter 89, Hawaii Revised Statutes (HRS).

On March 16, 1993, the Employer filed a supplemental memorandum in support of its motion to dismiss. The Employer asserted that it has the authority to enter into a valid and binding settlement agreement with the exclusive representative to resolve a class action grievance.

Thereafter, on March 24, 1993, RIVERA filed a memorandum in opposition to the UPW's and the Employer's motions to dismiss. Subsequently, on March 25, 1993, the UPW filed a supplemental memorandum in support of its motion to dismiss.

On April 14, 1993, the Board heard oral arguments on the UPW's and the Employer's motions to dismiss. At the hearing, the UPW argued that RIVERA lacks standing to challenge the UPW's

actions because she is not an employee within an appropriate bargaining unit. In addition, the UPW argued that its actions fell within the wide range of reasonableness espoused in Air Line Pilots Ass'n. Int'l. v. O'Neill, 499 U.S. 65, 113 L. Ed. 2d 51, 111 S.Ct. 1127 (1991).

In O'Neill, the United States Supreme Court clarified the standard governing a claim that a union breached its duty of fair representation in its negotiation of a settlement agreement. Id. at 67. In that case, the Supreme Court held "that the rule announced in Vaca v. Sipes, 386 U.S. 171, 190 (1967)--that a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith'--applies to all union activity" Id. Moreover, the Supreme Court 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,' Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), as to be irrational." Id.

On July 7, 1993, the Employer filed a supplemental memorandum in support of its motion to dismiss. The Employer asserted that the State Civil Service Commission (Commission), in dismissing an appeal by RIVERA for lack of jurisdiction, recognized the Employer's authority to enter into a written settlement agreement with the UPW and held that the Employer and the UPW had entered into a valid settlement agreement. See Commission Decision and Order dated May 12, 1993. Therefore, the Employer argued that

the Commission's holding is final and binding on the Board and that RIVERA is estopped from relitigating the issue before the Board.

On July 15, 1993, RIVERA filed a memorandum in opposition to the Employer's supplemental memorandum. RIVERA argued that the Commission's decision and order applies purely to jurisdictional issues and does not address any of the merits of her complaint.

On January 13, 1994, the Employer filed a second supplemental memorandum in support of its motion to dismiss. The Employer asserts that RIVERA now lacks standing to seek a promotion from Clerk Stenographer II to ACO IV because she was promoted from her Clerk Stenographer II position to a permanent Inmate Grievance Specialist position effective October 5, 1993. The Employer further argues that RIVERA's complaint is now moot.

Thereafter, on May 9, 1994, the Employer filed a third supplemental memorandum in support of its motion to dismiss. The Employer argues that based on the Board's finding of a valid settlement agreement between the Employer and UPW in four previous orders: (1) Order No. 1025, Jon L. Kaiser v. UPW, et al., dated April 4, 1994; (2) Order No. 1026, Lot Kaluau v. UPW, et al., dated April 4, 1994; (3) Order No. 1027, John Baker v. UPW, et al., dated April 4, 1994; and (4) Order No. 1028, Ronald P. Lee, Jr. v. UPW, et al., dated April 4, 1994, the doctrine of stare decisis applies and dismissal of RIVERA's complaint is appropriate.

At the outset, the Board finds that RIVERA has standing to bring her claim before the Board. Although the UPW asserts that RIVERA was not a BU-10 employee when she applied for the ACO IV position and was no longer a BU-10 employee when she filed her

complaint with the Board, the Board considers significant RIVERA's union membership status when both the adverse action occurred and the basis of her claim arose. The Board finds that RIVERA is entitled to challenge the UPW's actions which affect BU-10 employees, because the evidence indicates that RIVERA was a dues-paying BU-10 employee at the time she was notified that she would be returned to her previous position.

With regard to the basis of RIVERA's claim, the Board finds that RIVERA's complaint arises from a similar set of facts and circumstances as in Kaiser v. UPW, et al., Case No. CU-10-89, filed with the Board. In that case, the Board granted the UPW's and Employer's motions to dismiss by Order No. 1025 issued on April 4, 1994. Specifically in Order No. 1025, the Board found:

The evidence indicates that KAISER's complaint arises from a series of promotions that began in 1991 when the Employer attempted to fill twenty-six (26) ACO IV vacancies at the Halawa Correctional Facility. After the initial promotions were announced, nine employees filed grievances, which prompted the UPW to challenge the Employer's use of subjective oral interviews as part of the selection criteria. Thereafter, the Employer settled the grievances by redoing the selection in 1992, but the new promotions were again challenged by the UPW in a class action grievance based on the improper use of sick leave and attendance records in the selection process.

Eventually, the dispute was resolved through a settlement agreement between the UPW and the Employer, which provided for the award of promotions based on seniority and temporary assignments. In the instant complaint, KAISER challenges the UPW and Employer's decision to base the promotions on this new criteria.

Specifically, KAISER contends that the UPW arbitrarily chose to represent senior applicants for the ACO IV positions. However, the weight of the evidence supports the UPW's decision to advocate the seniority-based

promotions, which resulted in certainty and avoided a third selection process. The evidence suggests that the UPW's intent was to arrive at a prompt and fair settlement of the promotion dispute and to prevent further delay and violation of the contract.

The Board finds that the UPW, in its efforts, balanced the interests of the affected employees with the collective interests of the bargaining unit. In reaching this conclusion, the Board is persuaded by evidence that indicates that the majority of the ACOs selected for promotion pursuant to the settlement agreement were also selected in the two previous rounds. In addition, the Board finds persuasive the fact that the promotions based on seniority and temporary assignments were consistent with prior arbitration awards and in accordance with Section 16 of the Bargaining Unit 10 (BU-10) agreement.

Although KAISER notes that the BU-10 Agreement provides for promotions based on seniority only when "other factors [are] relatively equal" and contemplates the situation where senior employees may not receive promotions, the evidence indicates that the minimum qualifications for ACOs at levels III and IV are basically the same. Moreover, the evidence indicates that this case involves a non-competitive selection procedure in which examinations are not required. Therefore, the Board accords deference to the UPW and Employer's decision to select the employees for promotion rather than redo the selection process.

While the Board expresses reservations concerning the decision to disregard test scores, the Board finds that the actions of the UPW in this regard were not so far outside the wide range of reasonableness as to be irrational. Therefore, the Board finds that the UPW's actions in this case were within the "wide range of reasonableness" contemplated by the Supreme Court in O'Neill. Accordingly, the Board hereby grants UPW's motion to dismiss for failure to state a claim.

With respect to the Employer's motion to dismiss for failure to state a claim, the Board finds that the Employer did not conspire with the UPW to deprive KAISER of a promotion and deny him of his rights under Chapter 89, HRS. The Board reaches this conclusion based on its finding that the UPW did not breach its

duty of fair representation. In addition, the Board finds that the Employer entered into a valid settlement agreement with the UPW and that KAISER failed to present sufficient evidence to support a contrary conclusion. Therefore, the Board hereby grants the Employer's motion to dismiss for failure to state a claim. (citations omitted)

For purposes of this order, the Board pursuant to Administrative Rules § 12-42-8(g)(8) hereby takes official notice of the foregoing findings in Order No. 1025, as they are equally applicable and pertinent to the instant case. In this regard, the Board, based on the doctrine of stare decisis, reaffirms its finding that the actions of the UPW were within the "wide range of reasonableness" contemplated by the U.S. Supreme Court in O'Neill. Accordingly, the Board hereby grants the UPW's motion to dismiss in the instant case.

Furthermore, based on the Board's finding that the UPW did not breach its duty of fair representation, the Board also reaffirms its finding that the Employer and the UPW entered into a valid and binding settlement agreement. Therefore, the Board hereby grants the Employer's motion to dismiss in the instant case.

In view of the Board's foregoing ruling with respect to the Employer's motion to dismiss, the Board refrains from ruling on the Employer's estoppel and mootness claims.

ORDER

The Board hereby dismisses the instant prohibited practice complaint.

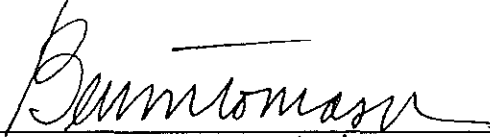
LINDA E. MOGA RIVERA and JOHN WAIHEE, Governor of the State of Hawaii; DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; GEORGE SUMNER, Director, Department of Public Safety, and UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO; CASE NOS.: CE-10-179, CU-10-87

ORDER NO. 1071

ORDER GRANTING RESPONDENTS UPW'S AND EMPLOYER'S MOTIONS TO DISMISS

DATED: Honolulu, Hawaii, May 23, 1994.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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