STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and SHARON L. AGNEW, Director, Office of Youth Services, Department of Human Services, State of Hawaii; MELVIN ANDO, Former Administrator, Hawaii Youth Correctional Facility, Department of Human Services, State of Hawaii; PHILLIP TUMINELLO, Acting Administrator, Hawaii Youth Correctional Facility, Department of Human Services, State of Hawaii; MARK J. BENNETT, Attorney General, Office of the Attorney General, State of Hawaii; and LINDA LINGLE, Governor, State of Hawaii, Respondents.	CASE NO. CE-10-541 ORDER NO. 2230 ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND NOTICE OF PREHEARING CONFERENCE

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT; AND NOTICE OF PREHEARING CONFERENCE

On September 4, 2003, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). The UPW alleges that SHARON L. AGNEW (AGNEW), Director, Office of Youth Services, Department of Human Services (DHS), State of Hawaii (SOH); MELVIN ANDO (ANDO), former Administrator, Hawaii Youth Correctional Facility (HYCF), DHS, SOH; PHILLIP TUMINELLO (TUMINELLO), Acting Administrator, HYCF, DHS, SOH; MARK J. BENNETT (BENNETT), Attorney General (AG), SOH, and LINDA LINGLE (LINGLE), Governor, SOH, (collectively EMPLOYER) violated the provisions of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (3), (4), (5), (7) and (8),[1] when they allowed

[1]HRS § 89-13(a) provides in part:

> It shall be a prohibited practice for a public employer or its designated representative wilfully to:

the American Civil Liberties Union (ACLU) to investigate, inter alia, Youth Corrections Officers (YCOs).

On October 3, 2003, Respondents filed Respondents' Motion to Dismiss Prohibited Practice Complaint Filed September 4, 2003. Respondents contend that the prohibited practice complaint should be dismissed because the circuit court, not the Board, is the appropriate forum to enforce the arbitration award rendered by Arbitrator Michael Nauyokas, and the UPW has failed to state a claim upon which relief can be granted.

On October 27, 2003, the Board held a hearing on the motion to dismiss. The parties were afforded full opportunity to be heard. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 10 composed of institutional, health and correctional workers.

2. AGNEW, ANDO, TUMINELLO, BENNETT and LINGLE are public employers or the representatives of a public employer as defined in HRS § 89-2.

3. The UPW and the EMPLOYER are parties to a collective bargaining agreement covering Unit 10 employees. The agreement contains a grievance procedure that culminates in final and binding arbitration.

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

* * *

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit petition or complaint or given any information and testimony under the chapter, or because the employee has informed, joined, or chosen to be represented by an employee organization;

(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;

* * *

(8) Violate the terms of a collective bargaining agreement;

. . . .

4. Arbitrators Peter Trask, Christine Kuriyama, and Michael Nauyokas, respectively, have rendered arbitration awards affecting the rights of YCOs at HYCF regarding, inter alia, disciplinary investigations, procedures, and requirements.

5. The Nauyokas Award was the result of a class grievance filed by the UPW against the DHS, Office of Youth Services and the HYCF. The UPW alleged that the Respondents violated the express and implied terms of the Unit 10 collective bargaining agreement by having an investigator of the Office of the AG with powers to conduct criminal investigations to become involved in disciplinary meetings and investigations of bargaining unit employees. Arbitrator Nauyokas affirmed the Union's grievance and issued the following order on March 1, 2003:

> The Arbitrator hereby issues a declaratory order that HYCF has committed multiple violations of Section 1.05 of the CBA by unilaterally changing "conditions of work" as provided in Sections 11 and 58 of the Unit 10 CBA. HYCF improperly retained and used an AG investigator which conflicted with, negated, denied, derogated, infringed, repudiated and/or otherwise negatively impacted on the Unit 10 members rights of (1) just cause; (2) destruction of records of unsubstantiated ward complaints under Section 58.05 and (3), the bill of rights of Unit 10 employees, including a right to be heard (w/o police intervention).
>
> The Arbitrator hereby also orders injunctive relief that HYCF officials cease and desist from (1) continuing violations of Section 1.05 as indicated above; (2) using law enforcement officers in disciplinary investigations; (3) commingling administrative and criminal investigations; (4) releasing records, documents and other information obtained in administrative investigations to law enforcement, and (5) imposing any discipline against YCO's who were subject to investigations by Fitchett [the AG investigator].
>
> Finally, as part of its make whole relief for employees, HYCF is ordered to retrieve from Fitchett, HPD, the Office of the Prosecutors, Wong, and the Office of the Attorney General and destroy (1) the original and all copies of investigative reports prepared by Fitchett of Unit 10 employees, and (2) all notes, records, letters, memos, and other items which were released to them by HYCF offices and Fitchett during the investigations he conducted on Unit 10 employees.

The Arbitrator declines at this time to order the Union reimbursement for it [sic] fees and costs.

6. Sometime in May 2003, the ACLU received complaints about conditions at HYCF. Brent White (White), then Legal Director at the ACLU called BENNETT about the complaints and later wrote a letter requesting an investigation and reply.

7. Shortly thereafter, White and BENNETT met on the result of BENNETT's investigation of the matter. During the meeting, White requested that he be allowed to conduct his own investigation of the facility including interviews with wards. BENNETT approved the request.

8. Beginning on or about June 3, 2003, White began an investigation of HYCF by interviewing some wards one-on-one. The result was a written report presented to BENNETT, AGNEW and LINGLE demanding, inter alia, the removal of a number of employees at the facility.

9. Subsequently, LINGLE held a press conference to announce that she was removing the two top administrators at HYCF and released a copy of WHITE's written report to the press with the names of the YCOs and youths redacted.

DISCUSSION

This prohibited practice complaint essentially involves three sets of allegations. First, the UPW alleges the EMPLOYER, by authorizing an investigation of HYCF, including the conduct of its YCOs by the ACLU, acted in derogation of and violation of a court confirmed arbitrator's award prohibiting the commingling of criminal and administrative investigations (Nauyokas award). The UPW argues that the Board's jurisdiction in this regard lies with the failure to afford the decision "final and binding" effect as required by HRS § 89-10.8(a),[2] allegedly a violation of HRS § 89-13(a)(7). Second, the UPW alleges multiple violations of the collective bargaining agreement, including union recognition (section 1), discipline (section 11), grievance arbitration (section 15), derogatory materials (section 17), and the bill of rights (section 58). The Board's jurisdiction is invoked pursuant to HRS § 89-13(a)(8). And, third, the UPW alleges that the wilful conduct of the EMPLOYER undermined the Union as exclusive representative, discriminated and retaliated against YCOs for the exercise of their contractual rights (by challenging the EMPLOYER's actions and prevailing in the Nauyokas award), and resulted in a unilateral change in working conditions and

[2]HRS § 89-10.8(a) provides, in part:

> A public employer shall enter into a written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, ...

a failure to bargain in good faith. Also alleged are violations of HRS §§ 89-13(a)(1), (3), (4), (5), and other violations of (7).[3]

In the instant motion to dismiss, the EMPLOYER argues that the Board must defer enforcement of the Nauyokas award to the circuit courts, the Board lacks jurisdiction over the AG's investigative authority, and the UPW's allegations fail to state a claim for which relief can be granted.

The Nauyokas Award

The Nauyokas Award was the result of a class grievance filed by the UPW against the DHS, Office of Youth Services and the HYCF. The UPW alleged that the Respondents violated the express and implied terms of the Unit 10 collective bargaining agreement by having an investigator of the Office of the Attorney General with powers to conduct criminal investigations to become involved in disciplinary meetings and investigations of bargaining unit employees. Arbitrator Nauyokas affirmed the Union's grievance and issued the following order on March 1, 2003:

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[3]According to the instant complaint, the UPW also alleges that Respondents contravened the provisions of HRS §§ 89-1 (requiring public employers to recognize the rights of public employees to organize and to negotiate over mandatory subjects with the duly designated representative), 89-3 (rights of employees), and 89-8 (the exclusive representational right of the union).

> Finally, as part of its make whole relief for employees, HYCF is ordered to retrieve from Fitchett, HPD, the Office of the Prosecutors, Wong, and the Office of the Attorney General and destroy (1) the original and all copies of investigative reports prepared by Fitchett of Unit 10 employees, and (2) all notes, records, letters, memos, and other items which were released to them by HYCF offices and Fitchett during the investigations he conducted on Unit 10 employees.
>
> The Arbitrator declines at this time to order the Union reimbursement for it [sic] fees and costs.

The UPW argues that the AG's permitting of the ACLU investigation, the ACLU's conduct of the investigation, and the Governor's publication and ratification of the ACLU report offends the finality of the Nauyokas award. The EMPLOYER argues that the court is the only proper forum to enforce the Nauyokas award and the Board should defer enforcement of the award to the circuit court.

The Board has recently adopted[4] the National Labor Relations Board test regarding deferral of jurisdiction in a case raising issues which had been arbitrated:

> Where the subject of an unfair labor practice has been decided in an arbitration proceeding, the Board continues to determine deference to the arbitration award under its *Spielberg*[5] [footnote omitted] doctrine. Under *Spielberg* and its progeny there are four standards which must be satisfied before the Board will defer to the decision of the arbitral tribunal: (1) the unfair labor practice issue must have been presented to and considered by the arbitral tribunal; [footnote omitted] (2) the arbitral proceedings must "appear to have been fair and regular"; (3) all parties to the arbitral proceedings must have "agreed to be bound"; and (4) the decision of the arbitral tribunal must not be "clearly repugnant to the purposes and policies of the Act." [footnote omitted.]
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> Charles J. Morris, The Developing Labor Law, Second Edition, Volume 1, p. 957 (footnotes omitted.)
>
> Spielberg principles are also applied to cases of deference to court enforcement of arbitration awards when " 'direct Court

[4]Order No. 2227, dated December 29, 2003, in Case Nos. CE-01-538, United Public Workers, AFSCME, Local 646, AFL-CIO.

[5]Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

enforcement of arbitrators' awards can provide more prompt and effective action' than can the various steps of the Board's unfair labor practices procedures." Id., at 983.

Based on a review of the record, the Board concludes that deferral to the court enforcement proceedings of the Nauyokas arbitration award is not appropriate under Spielberg. The issues addressed in the Nauyokas award are certainly distinguishable from those in the instant case. The Nauyokas award involved HYCF's retention of an AG investigator with criminal and administrative investigative authority. The instant case involves the AG permitting the ACLU to conduct its own investigation of the HYCF. While the alleged contractual violations are certainly identical, the factual differences would certainly lead to differing defenses and analysis. Therefore we cannot conclude that the issues underlying the instant prohibited practice were "presented and considered by the arbitral tribunal." And, deferral of the issues underlying this prohibited practice complaint to the court enforcement of the arbitration award is not appropriate.

For the same reason that deferral is not required, the Board also declines to exercise jurisdiction over the UPW's HRS § 89-13(a)(7) claims arising under the "final and binding" language of HRS § 89-10.8(a). Although the alleged contractual violations are the same, the absence of identical facts, issues and parties makes legal preclusion unlikely. Any inquiry into the identity of contractual violations will require a de novo review of the contractual violations alleged in the instant case. This would, in effect, give the UPW four "bites of the apple." It could pursue enforcement in circuit court for acts allegedly contrary to the confirmed Nauyokas award. It could pursue essentially the same enforcement claim before the Board. It could also, as it attempts to do, independently litigate the alleged contractual violations before the Board. And it could avail itself of the contractual grievance arbitration process.

This multiplicity of claims and venues ill serves administrative economy and is not consistent with the legislature's mandate "to provide a rational method of dealing with disputes . . . ." HRS § 89-1. Thus, the Board dismisses UPW's HRS § 89-13(a)(7) claims arising under HRS § 89-10.8 alleging that the EMPLOYER failed to enforce the Nauyokas award and accord it "final and binding" effect.

Contractual Claims

As discussed above, the UPW alleges numerous violations of the applicable collective bargaining contract independent of and in addition to the alleged violations related to the Nauyokas award.

Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in final and binding decision . . . ." (Emphasis added.) HRS § 89-10.8(a). 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 practice 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. ("It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, where 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)) (HSTA) Thus the Board has deferred to the contractual grievance process except where there exists countervailing policy considerations, or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant access to the grievance process. See, e.g., HSTA, supra, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); Hawaii Government Employees' Association, 1 HPERB 641 (1977) (subject not covered by contract).

In the instant case, the Board concludes that deferral to the contractual grievance procedure is appropriate. While parties and facts may differ, the alleged contractual violations are almost identical to three arbitration awards rendered by Arbitrators Peter Trask, Christine Kuriyama, and Michael Nauyokas affecting the rights of YCOs at HYCF. The sufficiency of the procedures utilized is not subject to question. As the procedure has demonstrated its merit, the Board can identify no compelling reason for deviation.

A simple deferral by the Board may have the effect however, of depriving the UPW of access to any forum for the adjudication of its contractual claims. This is because no grievances have been filed and the time may have elapsed under the contract to file any grievance arising out of the ACLU investigation. In Hawaii Nurses Association, 2 HPERB 218 (1979) (Hawaii Nurses), the Board was confronted by a similar circumstance of favoring deferral with the possible untimeliness of grievances subsequently filed. In its order disposing of the dilemma the Board ruled thusly:

> The prohibited practice charge alleging violation of Subsection 89-13(8) [sic], HRS, be conditionally dismissed, subject to a motion to reopen if the Employer is unwilling to settle this dispute through the grievance arbitration procedure in the Unit 9 contract based on the ground that the time limit for filing a grievance has expired. The Board notes that while there is a time limit for filing a grievance in the Unit 9 contract, it can be waived by the Employer.

Id., 2 HPERB at 228.

The Board in its order therefore expressed the preference for resolution through the contractual dispute resolution mechanism while both preserving the right of Employer to insist on applicable time limits without depriving the Complainant of a forum. The Board concludes that such a resolution is appropriate to the alleged contractual violations in the

instant case and conditionally dismisses the HRS § 89-13(a)(8) claims subject to the conditions identified in Hawaii Nurses, supra.

Discrimination, Retaliation and Failure to Bargain

The Nauyokas award forbade the HYCF from using the AG's investigators to conduct commingled administrative and criminal investigations of YCOs. It also forbade the retention or use of any derogatory information obtained during such an investigation, including any unsubstantiated allegations of wards. The UPW now alleges that the AG-sanctioned ACLU investigation, together with the Governor's ratification and publication of the resultant ACLU report, was a ruse to avoid the scope of the Nauyokas award and discriminate and retaliate against the Union and its members for prevailing in the class grievance from which the award resulted. HRS §§ 89-13(a)(1), (3), (4), and (7). In the process of the alleged discrimination, the failure of the employers to negotiate in good faith regarding the unilateral imposition of changes in the conditions of employment is also alleged. HRS § 89-13(a)(5).

The EMPLOYER argues for dismissal on the grounds that these allegations fail to state a claim. "The purpose of [Hawaii Rules of Civil Procedure] Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). A dismissal is clearly warranted under Rule 12(b)(6), Hawaii Rules of Civil Procedure (HRCP), if the claim is clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citations omitted). Such a dismissal is generally disfavored but warranted "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief." Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987). While the allegations in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175 (1985).

As the Board has considered matters outside the pleadings, i.e., the affidavit, declarations, and exhibits submitted by the Complainant and Respondents, the Board will treat the instant motion as a motion for summary judgment. See, Rule 12(b)(6), HRCP; Hall v. State, 7 Haw.App. 274, 756 P.2d 1048 (1988) (When matters outside the pleadings are considered, an order of dismissal is reviewed as one of granting summary judgment.) Summary judgment is proper where the moving party demonstrates that there are no issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists-University of Hawaii 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 Hawaii, 85 Hawai'i 61, 937 P.2d 397 (1997). Accordingly, the controlling inquiry is whether there is no genuine

issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

The Board concludes that the UPW here makes a colorable claim for relief and that there remain material issues of fact so that neither dismissal nor summary judgment is appropriate. An alleged EMPLOYER-sanctioned investigation was conducted which resulted in the retention, use and publication of derogatory allegations and conclusions. The EMPLOYER may have thus accomplished by private artifice what would arguably have been prohibited under the collective bargaining agreement. The UPW herein claims that the resultant public derogation of its members was discriminatory and the EMPLOYER was motivated by anti-Union animus. Despite the denials of the EMPLOYER, both discrimination and motive present issues of fact material to the resolution of these claims.

The EMPLOYER's motion to dismiss with respect to claims arising under HRS §§ 89-13(a)(1), (3), (4) and (5) and remaining HRS § 89-13(a)(7) claims (see footnote 3) is accordingly denied.

CONCLUSIONS OF LAW

1. Based on a review of the record, the Board concludes that deferral to the court enforcement proceedings of the Nauyokas arbitration award is not appropriate under Spielberg. The issues addressed in the Nauyokas decision are certainly distinguishable from those in the instant case. Nauyokas involved HYCF's retention of an AG investigator with criminal and administrative investigative authority. The instant case involves the AG permitting the ACLU to conduct its own investigation. While the alleged contractual violations are certainly identical, the factual differences would certainly lead to differing defenses and analysis. Therefore it cannot be concluded that the issues underlying this prohibited practice complaint were "presented and considered by the arbitral tribunal." And, therefore deferral of the issues underlying this prohibited practice complaint to the court enforcement of the arbitration award is not appropriate.

2. The Board declines to exercise jurisdiction over the UPW's HRS § 89-13(a)(7) claims arising under the "final and binding" language of HRS § 89-10.8(a). Accordingly, the UPW's allegations that the EMPLOYER failed to enforce the Nauyokas decision and accord it "final and binding" effect are dismissed.

3. The Board defers the UPW's allegations of HRS § 89-13(a)(8) violations to the contractual grievance process. The charges are conditionally dismissed, subject to a motion to reopen if the EMPLOYER is unwilling to resolve the dispute through the grievance arbitration procedure in the Unit 10 contract based on the grounds that the time limit for filing a grievance has expired. While there is a

time limit for filing a grievance in the Unit 10 contract, the Board notes that it can be waived by the EMPLOYER.

4. The EMPLOYER failed to establish that the UPW fails to state a claim upon which relief can be granted in this complaint. Based on the record and arguments submitted, the Board concludes that the UPW makes a colorable claim for relief and there remain issues of material fact to be determined by a hearing in this matter. Thus, the EMPLOYER's motion to dismiss claims arising under HRS §§ 89-13(a)(1), (3), (4), and (5) and remaining HRS § 89-13(a)(7) claims is denied.

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4) and (i)(5) and Hawaii Administrative Rules (HAR) § 12-42-47, will conduct a prehearing conference on the above-entitled prohibited practice complaint on February 3, 2004 at 9:00 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

DATED: Honolulu, Hawaii, January 20, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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