STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MORRIS E. APANA and THOMAS J. LENCHANKO, Complainants, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; DEAN MAKIMOTO, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; KEVIN NAKATA, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; LEIOMALAMA DESHA, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and SANFORD CHUN, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, Respondents.	CASE NOS.: CU-02-236a CU-04-236b ORDER NO. 2326 ORDER GRANTING, IN PART, RESPONDENTS' MOTION TO DISMISS AND DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

ORDER GRANTING, IN PART, RESPONDENTS' MOTION TO DISMISS AND DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

On January 19, 2005, Complainants MORRIS E. APANA and THOMAS J. LENCHANKO filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), DEAN MAKIMOTO (MAKIMOTO), HGEA Union Agent; KEVIN NAKATA (NAKATA), HGEA Union Agent; LEIOMALAMA DESHA (DESHA), HGEA Union Agent; and SANFORD CHUN (CHUN), HGEA Union Agent (collectively Respondents or Union). Complainants allege that the Respondents violated the provisions of Hawaii Revised Statutes (HRS) §§ 89-10(c) and (d), 89-13(b)(1), (4) and (5), for breach of duty of fair representation by the untimely filing of their grievances.

On April 8, 2005, Respondents filed Respondents' Motion to Dismiss and/or for Summary Judgment. Respondents contend that the complaint should be dismissed for

(1) lack of jurisdiction, and (2) failure to state a claim for relief, and/or in the alternative, for summary judgment.[1]

On April 20, 2005, Complainants filed their Memorandum in Opposition to Respondents' Motion to Dismiss and/or Summary Judgment Filed April 8, 2008 and Complainants' Counter Motion for Summary Judgment.[2]

On April 25, 2005, Respondents filed their Memorandum in Opposition to Cross Motion for Summary Judgment.[3]

On April 29, 2005, the Board held a hearing on Respondents' motion. Both parties were represented by counsel. The parties were allowed full opportunity to present argument to the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. APANA is a public employee, as defined in HRS § 89-2 and has been employed by the City and County of Honolulu (City or Employer), Department of Facility Maintenance since August 24, 1974 in the Division of Road Maintenance. Currently he is the Road Construction and Maintenance Supervisor II at the Waianae Corporation Yard and included in bargaining unit (BU) 02.[4]

2. LENCHANKO is a public employee, as defined in HRS § 89-2 and has been employed by the City Department of Facility Maintenance, Division of Road Maintenance since August 1995. He is the District Road Maintenance Superintendent for the Waianae District, and included in BU 04.[5]

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[1]See Board Exhibit (Ex.) 12, Respondents' Motion to Dismiss and/or for Summary Judgment; Memorandum in Support of Motion; Declaration of Randolph P. Perreira; Exhibits 1-3.

[2]See, Board. Ex. 14, Complainants' Memorandum in Opposition to Respondents' Motion to Dismiss and/or Summary Judgment Filed April 8, 2005 and Complainants' Counter Motion for Summary Judgment, Affidavit of Thomas Lenchanko; Affidavit of Morris Apana; Exhibits 1-5.

[3]See, Board Ex. 15.

[4]Id., Affidavit of Morris Apana.

[5]Id., Affidavit of Thomas Lenchanko.

3. The HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in BUs 02 and 04. MAKIMOTO, NAKATA, DESHA, and CHUN are representatives of the HGEA.

4. As the exclusive representative for the employees in BUs 02 and 04, the HGEA has negotiated and is a party to respective BU 02 and 04 collective bargaining agreements (Contracts), which contain a grievance procedure culminating in final and binding arbitration. The respective grievance procedure requires that a "grievance be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved . . . or the grievance may not be considered."[6]

5. On July 1, 2001, the City removed the supervision of refuse collection workers on Saturdays and holidays from Complainants' job duties, for which they were paid overtime by the Refuse Division of the City's Department of Environmental Services. Complainants believed the City's action was disciplinary or retaliatory, and in violation of their respective Contracts.[7]

6. During the first week of July, 2001, when the City implemented the proposed changes to Complainants' supervisory duties over refuse workers that effectively eliminated their overtime pay, Complainants requested that their HGEA Union agent, MAKIMOTO, file a grievance. MAKIMOTO refused their request, because he said it was within management's right.[8] As of July 27, 2001, no grievance over the removal of Complainants' supervisory refuse collection duties had been filed by MAKIMOTO within the 20 working days time frame.[9]

7. On or about August 15, 2001, Complainants met with MAKIMOTO's supervisor, HGEA Union Agent DESHA to complain about MAKIMOTO's refusal to file a grievance and ask what could be done to grieve the City's action. To quell their disappointment, DESHA informed Complainants that there was no need to be concerned about missing the 20-day grievance time limit because the Union was

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[6]Pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(8)(G), the Board takes notice of the BU 02 and BU 04 Collective Bargaining Agreements in effect for the period July 1, 1999 - June 30, 2003.

[7]See, Board Ex. 14, Affidavits of Morris Apana and Thomas Lenchanko. Complainants allege violations of Articles 3, 4, 8, 13, 23 and 24, in their respective collective bargaining agreements.

[8]Id.

[9]See, Board Ex. 1, Prohibited Practice Complaint.

still investigating the matter and that the employer's violation was 'continuing' in nature, so the grievance could be filed at any time while the violation continued to occur. The discussion with DESHA calmed both Complainants' fears and concerns about missing the 20-day grievance time limit and they trusted her direction and knowledge.[10]

8. On September 20, 2001, HGEA Union Agent NAKATA and Complainants, met with the City's Refuse Division representatives John Lee and David Shiraishi, and Road Division representatives Larry Leopardi and Edmond Yoshida, and City Department representatives Evelyn Young and Ross Sasamura, to discuss the rescheduling of starting and ending times for Complainants, including a third person who was taking over Complainants' supervisory work of refuse workers. NAKATA informed the employers' representatives that the changes needed to be put in writing and submitted to the union for consultation, or possibly, negotiation.[11]

9. On May 13, 2002, MAKIMOTO filed Step 1 grievances on behalf of Complainants over the City's failure to consult with the Union before making permanent the changes to Complainants' work schedules that removed the supervisory work over refuse workers from Complainants' duties and eliminated their overtime pay.[12]

10. On October 17, 2002, a Step 2 Grievance Meeting was held and attended by Complainants, MAKIMOTO, and the Employer's representative, Lorrie Manassas-Liu, who asked the Union for an extension of time to submit the employer's response.[13]

11. By letter dated October 16, 2003, the City issued its Step 3 response to both grievances disputing arbitrability "due to the untimely filing of the grievance."[14]

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[10]Id., and Board Ex. 14, Affidavits of Apana and Lenchanko.

[11]Id.

[12]See Board Ex. 1, see also, Board Ex. 12, Respondents' Motion to Dismiss and/or Summary Judgment, attached Exs. 2-54 to 2-73.

[13]See, Board Ex. 14, Complainants' Memorandum in Opposition to Respondents' Motion to Dismiss and/or Summary Judgment Filed April 8, 2005 and Complainants Counter Motion for Summary Judgment, attached Ex. 5.

[14]See, Board Ex. 12, attached Exs. 2-68, 2-72.

12. The HGEA requested arbitration of the grievances and on September 30, 2004, Arbitrator Gail Kang returned the grievances without decision or recommendation finding the grievances were untimely filed, and therefore not arbitrable. The arbitrator stated in pertinent part as follows:

> The Grievants argue that the alleged violations were "continuing" wrongs, rather than single occurrences. The arbitrator finds that the change in duties, as described by the parties, constituted a single, isolated, and completed incident as of July 1, 2001. The alleged violations therefore were not "continuing" in nature in the same manner that a fractured leg is a discrete incident even though its *effects* may last for months.
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> Further, the Contract Agreements use "knew or should have known" as the benchmark date measuring the timeliness of a 'continuing violation'. See Article 11. Assuming for the sake of argument that the alleged violations did in fact constitute "continuing" wrongs, the Grievants nonetheless still failed to meet the time requirements established by Article 11:
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> First, Grievant Lenchanko stated by affidavit that he received oral notification that the change would be instituted on July 1st. He therefore had *actual* knowledge commencing from that date.
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> Second, by inference, the Grievants personally witnessed the change since they claim that they were relieved of their overtime responsibilities and no longer received the added income, effective July 1, 2001. For this added reason, it is clear that they both had *actual* knowledge of the alleged violations as of July 1, 2001, and the limitations period commenced from that date. Even as a continuing violation, therefore, their grievances were untimely.
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> In the absence of a sworn statement or other evidence from Grievant Apana, the arbitrator finds that his grievance was untimely for the same reasons.
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> The Grievants argue that the Employer lulled them into complacency by leading them to believe, until too late, that the change was merely temporary. The evidence does not bear this out. Both the Grievants and their Union were apprised of the change before it was instituted, both presumably lived through the change in duties, but claim that they finally realized the change

was not temporary from the Employer's (authored by Larry Leopardi) letter of June 13, 2003. Yet, however, they had already filed their grievances nearly one year *before* they claim that they realized the change was permanent.[15]

13. On or about October 21, 2004, MAKIMOTO, transmitted a copy of Arbitrator Kang's decision to Complainants.[16]

14. On or about November 1, 2004 Complainant LENCHANKO wrote a letter of complaint to Respondents asking for an investigation into their "failure to provide fair representation" and their "failure to present this grievance to the appropriate supervisor within twenty working days after the occurrence of the alleged violation, their being 'duped' into believing that the changes effected on July 1, 2001 were part of a temporary pilot program and their failure to elicit a response from the employer to verify that change."[17]

15. On January 19, 2005, Complainants filed the instant prohibited practice complaint charging a breach of duty of fair representation against Respondents for failing to file timely grievances in wilful violation of HRS §§ 89-13(b)(1), (4) and (5).[18]

DISCUSSION

Complainants allege that Respondents breached their duty of fair representation: 1) when MAKIMOTO failed to file grievances by July 27, 2001, over the CITY's removal of their supervisory refuse collection duties on July 1, 2001; and 2) on or about August 15, 2001, and throughout the grievance process up to and including the arbitrator's decision, DESHA wilfully misled Complainants about the time limits set forth in the contractual grievance procedure, telling them it was not a problem because the Union was still investigating the grievance and could assert a "continuing violation."

In its motion, the Union moves for dismissal based on the applicable statute of limitations and Complainants' failure to state a claim for relief. Alternatively, the Union contends that summary judgment should be granted on the grounds there is no material issue of fact in dispute that the Union's failure to file timely grievances was not arbitrary, discriminatory or made in bad faith.

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[15]Board Ex. 1.

[16]Id.

[17]Id.

[18]Id.

Complainants counter that the applicable event giving rise to the Union's breach of duty of fair representation occurred on or about October 21, 2004 or November 1, 2004 when the Union transmitted, and they received, respectively, the arbitrator's decision denying arbitrability by finding the grievances were untimely. Complainants counter for summary judgment in their favor on the grounds that: 1) the HGEA arbitrarily refused to file Complainants' grievance of the change in supervisory duties by the July 27, 2001 deadline; and 2) on or about August 15, 2001, DESHA's explanation that there was no need to be concerned about missing the 20-day grievance time limit because the Union was still investigating the matter and that the employer's violation was "continuing" in nature, misled the Complainants and was deliberate and in bad faith.

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 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). 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).

Statute of Limitations

Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints pursuant to HRS § 89-13,[19] as follows:

> Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed . . . within ninety days of the alleged violation.

The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

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[19]The limitations period is also prescribed by statute. HRS § 89-14 requires controversies "concerning prohibited practices...be submitted . . . in the same manner and with the same effect as provided in sections 377-9; . . . ." HRS § 377-9(1), in turn, provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

In the instant complaint, the Board concludes that Complainants alleged violations for breach of duty of fair representation based on MAKIMOTO's failure to file grievances by July 27, 2001 challenging the City's removal of supervisory duties over refuse collection, would have been actionable, if brought before the Board within 90 days of July 27, 2001. Having failed to file the complaint against their Union, on or about October 24, 2001, the alleged violation against the Respondents is time-barred by the applicable statute of limitations. Accordingly, the Board lacks jurisdiction over the breach of duty of fair representation claim arising out of MAKIMOTO's alleged failure to file a grievance challenging the City's removal of supervisory duties.[20]

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[20]And, in a hybrid case, had a prohibited practice complaint against the City been brought alleging violations of contractual provisions arising out of the changes to Complainants' supervisory duties, affecting their overtime pay, the matter would have been actionable against their employer if filed within 90 days from July 1, 2001. Such a complaint would be subject to the doctrine of exhaustion of contractual remedies. See, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164, 76 L.Ed.2d 476, 103 S.Ct. 2281 (1983) (DelCostello). See also, Poe v. Hawai`i Labor Relations Board, (*Poe* II) 105 Hawai`i 97, 102, 94 P.3d 652 (2004). Moreover, in order to prevail against the employer *and/or* the Union in a hybrid case, the burden of proof is the same.

> Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation. *DelCostello*, 462 U.S. at 164, 103 S.Ct. 2281.
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> > [T]he two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. (Emphasis added).
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> *Id.* at 164-65, 103 S.Ct. 2281 (citation, brackets ,quotation marks, and ellipsis points omitted); see also *Diguilio v. Rhode Island Bhd. of Corr. Officers*, 819 A.2d 1271, 1273 (R.I.2003) (without a showing that the union breached its duty of fair representation, the employee does not have any standing to contest the merits of his contract claim against the employer in court).

Rather than pursue grievances on their own without the assistance of the Union as is their right under their respective Contracts and HRS § 89-8(b),[21] Complainants appealed to MAKIMOTO's supervisor, DESHA. On or about August 15, 2001, Complainants met with DESHA, to complain about MAKIMOTO's refusal to file a grievance and ask what could be done to grieve the City's action. To quell their disappointment, DESHA informed Complainants that there was no need to be concerned about missing the 20-day grievance time limit because the Union was still investigating the matter and the employer's violation was "continuing" in nature, so the grievance could be filed at any time while the violation continued to occur. The discussion with DESHA calmed both Complainants' fears and concerns about missing the 20-day grievance time limit and they trusted her direction and knowledge.

From then on, the Union represented Complainants in a meeting held with the City on September 20, 2002, up to and including the filing of a Step 1 grievance on Complainants' behalf on May 13, 2002 and proceeding to arbitration. At Step 3 of the grievance procedure, the City finally raised the issue of arbitrability based on the untimely filing of the grievances on May 13, 2002.

Complainants alternatively contend a prohibited practice violation occurred upon their receipt of Arbitrator Kang's decision on or about October 21, 2004 when they knew that DESHA wilfully misled them in August of 2001 into believing that missing the 20-day time period set for filing grievances would not be a problem. Having viewed the facts in the light most favorable to Complainants, there is no dispute that up to and including the arbitration of the dispute, the HGEA continued to insist it could engage the City in Complainants' grievances. Complainants relied on the Union's expertise, and had to see it through to exhaust the process afforded them through the grievance procedure. On this basis, the Board finds that the arbitrator's adverse decision received by Complainants on or about October 21, 2004 thus triggered the breach of duty of fair representation claim against the Union and falls within the 90-day time period of the instant complaint filed on January 19, 2005. Accordingly, the Board has jurisdiction to determine whether DESHA's allegedly misleading statements constitute a breach of duty or fair representation.

Id., at 102.

[21]HRS § 89-8(b) provides:

> An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

Duty of Fair Representation

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."

The burden of proof is on the complainant-employee to show by a preponderance of evidence that: "[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 (9th Cir. 1985).

The U.S. Supreme Court in Air Line 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 rational." 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 (6th Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th 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 (9th Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9th 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 processing of grievances." (Citations omitted). 18 F.3d at 1447.

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 (9th Cir. 1988).

Having reviewed the pleadings, declarations and exhibits submitted by the parties, the Board concludes material issues of fact are in dispute as to whether DESHA's allegedly misleading statements that led to the late filings of Complainants' grievances were deliberate or wilful and made in bad faith as Complainants contend to constitute a breach of duty of fair representation. Therefore, Respondents' motion for summary judgment and Complainants' counter motion for summary judgment are denied.

CONCLUSIONS OF LAW

1. The Board concludes that Complainants' claims of alleged violations of the breach of duty of fair representation based on MAKIMOTO's failure to file grievances challenging the City's removal of supervisory duties over refuse collection by July 27, 2001, are barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a). Accordingly, the Board lacks jurisdiction over said claims.

2. The Board concludes that Complainants knew they were misled by DESHA's statements regarding the timeliness of the grievance when they received the arbitrator's adverse decision on or about October 21, 2004 which falls within the 90-day time period of the instant complaint filed on January 19, 2005. Accordingly, the Board has jurisdiction to determine whether DESHA's allegedly misleading statements that led to the late filings of Complainants' grievances were deliberate or wilful and made in bad faith as Complainants contend to constitute a breach of duty of fair representation.

3. Summary judgment is appropriate where the moving party demonstrates there are no issues of material fact in dispute and, therefore is entitled to judgment as a matter of law. 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 by the parties.

4. The Board concludes that there are material issues of fact in dispute as to whether the Union's handling of Complainants' grievances, i.e., DESHA's allegedly misleading statements that the 20-day time period for filing grievances would not pose a problem was arbitrary, discriminatory or made in bad faith.

MORRIS E. APANA and THOMAS J. LENCHANKO and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, et al.
CASE NOS.: CU-02-236a, CU-04-236b
ORDER NO. 2326
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ORDER

Based on the foregoing, the Board hereby dismisses in part, the instant complaint for lack of jurisdiction and denies the cross motions for summary judgment.

DATED: Honolulu, Hawaii, May 16, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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