STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>DEBRA PIMENTEL,<br><br>Complainant,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO. CU-10-256 (ON REMAND)<br><br>ORDER NO. 2519<br><br>ORDER GRANTING UPW'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT |

ORDER GRANTING UPW'S MOTION TO DISMISS
COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On July 30, 2007, the Hawaii Labor Relations Board (Board) issued Order No. 2460, Order Granting Respondent UPW's Motion to Dismiss and/or for Summary Judgment; Denying Complainant's Motion to Move Forward with Case and/or Summary Judgment; and Denying Complainant's Request to Strike or Dismiss Supplemental Submission (Order No. 2460). The Board, inter alia, granted the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO's (UPW or Union) motion to dismiss for failure to state a claim for relief with respect to alleged violations of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8), 89-16.5, and 89-16.6; and for mootness on all remaining claims due to the UPW's bringing closure to Complainant's pending arbitration matters.

Upon Complainant's appeal of Order No. 2460 in Civil No. 07-1-1616-08, Debra Pimentel v. United Public Workers, AFSCME, Local 646, AFL-CIO, et al., on January 3, 2008, the First Circuit Court, Honorable Sabrina S. McKenna presiding, filed an Order Remanding Case to Hawaii Labor Relations Board for Further Proceedings (Court Order). The Court Order states in part:

> The case is remanded to the Board (1) to consider whether the claim made by Debra Pimentel in her complaint filed on May 15, 2007 relating to UPW grievance case numbers ES-03-29 and ES-03-93 was rendered moot by the Union's decision dated July 9, 2007, (2) to determine whether the complaint relating the union's decision to withdraw UPW grievance case Numbers ES-03-29 and ES-03-93 from

arbitration on July 9, 2007 states a claim for relief under the applicable case law (See Poe v. Hawai`i Labor Relations Bd., 105 Hawai`i 97, 94 P.3d 652 (2004)), and/or (3) to take further action in connection with the claims relating to UPW grievance case numbers ES-03-29 and ES-03-93 as the Board deems appropriate.

On January 16, 2008, Respondent UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Union) filed a Motion to Dismiss Complaint and/or for Summary Judgment (UPW's Motion) with the Board. The UPW argued that the complaint should be dismissed for failure to state a claim for relief regarding the withdrawal of UPW grievance Nos. ES-03-29 and ES-03-93 on July 9, 2007 and alternatively, that there are no genuine issues of material fact in dispute over the Union's breach of the duty of fair representation and the employer's breach of the collective bargaining agreement, and the Union is entitled to judgment as a matter of law.

On January 28, 2008, DEBRA PIMENTEL (PIMENTEL or Complainant) filed a Motion in Opposition of Respondents Motion to Dismiss Complaint and/or for Summary Judgment (Complainant's Motion) with the Board. On February 5, 2008, the UPW filed a Reply Brief in support of its motion to dismiss complaint and/or for summary judgment. On February 6, 2008, Complainant filed a response to UPW's reply brief with the Board.

The Board held a hearing on the parties' motions on February 6, 2008, pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). After careful consideration of the record and argument presented, the Board grants, in part, and denies, in part, the UPW's motion to dismiss the complaint and/or for summary judgment for the following reasons.

## FINDINGS OF FACT

1. In Order No. 2460, Order Granting Respondent UPW's Motion to Dismiss and/or for Summary Judgment; Denying Complainant's Motion to Move Forward with Case and/or Summary Judgment; and Denying Complainant's Request to Strike or Dismiss Supplemental Submission, dated July 30, 2007, the Board found with respect to the two grievances at issue:

> 9. The Complaint alleges Respondent engaged in or is engaging in a prohibited practice or practices within the meaning of HRS § 89-13, and asserted violation of HRS §§ 89-13(a)(1), (5), (7), and (8); 89-13(b)(1), (4), and (5); 89-16.5; and 89-16.6. Complainant asserted that her complaints regarding certain grievances were

repeatedly bounced from union agent to union agent, to no avail.

10. Between October 5, 2004, and April 30, 2007, Complainant has repeatedly written to, and met with Respondent's agents, informing them that the assigned attorney has not moved the matters forward in arbitration. Complainant did not receive a response. Complainant later learned, from the attorney's secretary, that the attorney was routinely busy with other urgent/rushed matters, and recently had personal medical issues.

11. Complainant requested that Respondent "[bring] closure to all pending arbitration matters."

* * *

14. Grievance ES-03-29 involved overtime and compensation or credit for overtime worked. Complainant was ultimately granted credit for compensatory time off in lieu of compensation for overtime worked by the employer. The union considered the employer's action to be a substantial and good faith effort to remedy the grievance. Complainant also requested that the employer submit an amendment to her W-2 for the year 2002 to the Internal Revenue Service (IRS). It is Respondent's position, however, that the collective bargaining agreement does not expressly require the employer to submit W-2 changes or amendments to the IRS. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as there was insufficient proof the employer violated the collective bargaining agreement.

* * *

17. Grievance ES-03-93 involved Complainant's detachment from one facility to another. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as it appeared the employer acted within its lawful authority under HRS § 89-9(d).

2. In the instant motion, the UPW contends and the Board agrees that PIMENTEL's complaint alleging a breach of duty of fair representation arising from the Union's decisions to withdraw grievance Case Nos. ES-03-29 and ES-03-93 from arbitration on July 9, 2007 present a hybrid case which require proof of 1) a breach of the duty of fair representation and 2) a breach of the collective bargaining agreement in each instance. Poe v. Hawai`i Labor Relations Bd., 105 Hawai`i 97, 102, 94 P.3d 652, 657 (2004). The UPW also contends that PIMENTEL's complaint regarding the decision of the Union to withdraw the grievances from arbitration on July 9, 2007 fails to state a claim for relief and alternatively, the Union is entitled to summary judgment as a matter of law.

**Case No. ES-03-29**

3. The UPW filed a grievance ES-03-29 on Complainant's behalf alleging a violation of Section 26 of the Unit 10 collective bargaining agreement (CBA) because Complainant was paid for overtime work for work performed between October 1, 2002 and October 28, 2002 when she preferred compensatory time off. Exhibit (Ex.) 1-1 to UPW's Motion to Dismiss and/or for Summary Judgment (UPW's Motion).

4. By letter dated February 11, 2004, UPW Director of Field Services Clifford T. Uwaine informed PIMENTEL that the UPW was submitting her grievance ES-03-29 to arbitration, however, the decision to arbitrate the case was subject to further review which could result in the case being withdrawn from arbitration. Ex. 3 to UPW's Motion.

5. During the processing of the grievance, the employer credited Complainant with compensatory time off.

6. By letter dated July 9, 2007, UPW State Director Dayton Nakanelua (Nakanelua) informed Complainant that the Union had concluded its investigation and the UPW decided not to proceed further with the grievance. Nakanelua stated in relevant part:

> We do not believe there is sufficient proof of a violation of Section 26 of the unit 10 agreement or an adequate basis for the claim for relief being made. The following factors and consideration were relevant to our determination:
>
> 1. Section 26.05d requires the employee to notify the employer in writing of his or her desire for compensatory time off in lieu of compensation for overtime work. There is no evidence in the file to

indicate that you submitted your request to the employer in writing during October 2002.

2. In the memoranda dated April 1, 2003 and November 13, 2003 Tracy Kobashigawa indicates that credit for compensatory time off in lieu of compensation for overtime work was granted. There appears to be substantial and good faith effort by the employer to remedy the grievance.

3. The unit 10 agreement does not expressly require the employer to submit to the Internal Revenue Service changes or amendments in its W-2 filings as requested.

Ex. 5 to UPW's Motion.

7. Complainant disputes Nakanelua's finding that there was no evidence of her written requests for compensatory time off in lieu of overtime as the sign-in sheets in the file indicated that she elected compensatory time off for overtime hours worked. Ex. 4 to UPW's Motion. The Board, however, does not find this dispute to be material because during the grievance process, the Employer nevertheless credited Complainant with compensatory time off in lieu of wages.

8. Although Complainant was credited with compensatory time off as she requested, Complainant contends that the grievance is not completely resolved because she has not yet reimbursed the Employer for the overtime wages she received. Complainant contends that she already paid taxes on the overtime wages earned in 2002 and if the employer bills her for the overpayment of the overtime wages, she arguably will have to pay taxes on the same monies earned twice. Complainant thus seeks to have the Employer file an amended wage statement for 2002 and requested the UPW to negotiate the matter with the employer as it pertains to wages.

9. The Unit 10 CBA does not require the Employer to submit changes or amendments in its W-2 filings to the Internal Revenue Service (IRS) as requested in overpayment cases.

10. Viewing the facts in the light most favorable to the Complainant, it appears beyond doubt that the Complainant can prove no set of facts in support of her claim that would entitle her to relief against the Employer for a violation of the CBA. In addition, Nakanelua's July 9, 2007 letter indicates that the Union considered that the actions of the employer in providing Complainant with relief and that the CBA does not require the Employer to

submit amendments to W-2 filings in its decision not to pursue grievance ES-03-29 to arbitration.

**ES-03-93**

11. On October 23, 2003, there was an incident involving Complainant and the movement of prisoners at Oahu Community Correctional Center (OCCC). By memorandum dated October 23, 2003, Lt. Tui Isaia informed John Manumaleuna regarding ACO D. Pimentel unprofessional Conduct, as follows:

> On the above date a fight broke off in module # 20. This happened right after the briefing. A back up called from the module's ACOS. Lieutenant Hansbery and myself responded to the called (sic). Several ACOS were there to show support.
>
> There were two separate fights. ACO Pimentel was attending to one of the inmate (sic) already handcuffed behind her back. We did a lot of moves, the same time we tried to defuse the problem. ACO Pimentel was of no help at all. When I instructed her to walk the inmate to the locked up room, she started by saying which room. I told her just walk the inmate toward ACO R. Silva she's in front of the cell. From then on she started to yell at the inmate using the phone.
>
> I instructed ACO Pimentel to put the phone down and help ACO Silva with the move. ACO Pimentel refused my order, but wanted to take her ten minutes break. She left her radio on the desk and disappeared into the ACO office. When she came out she stated (sic) to yell at the inmates again on the phone. At that point inmate (sic) were calling her names and asked her to come into the dorm so they can kick her [___].
>
> The inmates were beginning to calm down but Pimentel started to yell again using the phone. She went into the bath room to check on the inmates, when she came out she do (sic) the same thing all over again. I called the captain if can move Pimentel away from the module she was provoking a lot of problems. The captain told me he'd think about it.
>
> Base (sic) on my observation of ACO Pimentel, she cannot work with people. She needs to refer to a doctor for evaluation. I charge ACO Pimentel with the followings (sic),

> insubordination, Disobeying orders, Cowardice, Endangering others lives. (expletive omitted.)

Exhibit 9 to Complainant's Motion in Opposition of Respondents Motion to Dismiss Complaint and/or for Summary Judgment, filed on January 28, 2008 (Complainant's Motion).

12. By memorandum dated October 24, 2003, Time Lea'e informed Complainant as follows:

> Effective immediately and until further notice you are re-assigned from Post #391-Module 20 to Special Assignment (SA)/Security. Furthermore, you are to have no contact with inmates. This action is being taken for your personal safety as threats were made be (sic) female inmates in Module 20 towards you. In addition, allegations were made against you in that your continued presence in Module 20 results in the agitation of Module 20 inmates. You will remain on the First Watch with the same days off (Saturdays/Sundays).

Exhibit 9 to Complainant's Motion.

13. By memorandum dated October 27, 2003, Francis Sequeira informed Complainant that she would be detached to the Women's Community Correctional Center (WCCC) effective October 30, 2003. The memorandum provided, in part, as follows:

> The detachment is due to a volatile incident that occurred in Module 20 during the evening of Thursday, 10/23/03. The inmates in the female living unit have threatened to hurt you. The allegation made against you by staff, that you made and already volatile situation worse by continuing to yell at the agitated female inmate population after you were directed to cease, will be investigated during your detachment period.
>
> You are being detached for your safety and for investigative purposes. Your detachment will be for the duration of the investigative process. If you have further inquiry, feel free to speak with ACOS Time Lea`e.

Exhibit 8 to Complainant's Motion.

14. On November 12, 2003, the UPW filed grievance ES-03-93 on Complainant's behalf alleging violations of Sections 11, 46 and 58 of the

CBA by detaching her to the WCCC effective October 30, 2003. Ex. 6 attached to UPW's Motion. The UPW contended, inter alia, that the transfer was an improper disciplinary action. Id.

15. By letter dated February 11, 2004, Uwaine informed Complainant that the UPW was submitting her grievance to arbitration. Ex. 8 to UPW's Motion.

16. By letter dated May 19, 2004, OCCC Warden Nolan Espinda (Espinda) informed PIMENTEL as follows:

> You will be assigned back to Oahu Community Correctional Center (OCCC) effective Tuesday, June 1, 2004. Your (sic) are assigned to the 3rd Shift (2200-0600 hours) with Saturday and Sundays off. The Watch Commander will assign you accordingly as you are assigned to a S/A Post. Please be advised that you are still pending a pre-disciplinary hearing and you will be assigned to a non-inmate contact post upon your return to OCCC.

Ex. 9 to Complainant's Motion.

17. By memorandum dated August 10, 2004, Complainant wrote to Espinda regarding Unit 10 Agreement 61.04.a.4.c, 61.04.a.6.c., and 61.04.a.6, asking about her post assignments. Ex. 5 to Complainant's Motion.

18. By memorandum dated August 11, 2004, Espinda informed Complainant as follows:

> My review of the matter indicates that there appears to be varying thoughts amongst the Captains and Lieutenants regarding any limitation(s) you may be subject to when it comes to daily posting. The confusion appears to be based on the fact that any limitation memorandums issued on you while under investigation (i.e. "Module 20" or "*no inmate contact*") were never rescinded.
>
> In order to immediately rectify the matter, an order clearing you for any/all posts has been issued today, August 11, 2004.
>
> In the future, please feel free to bring these work-related matters of concern to me promptly, as I would appreciate being able to provide answers if not immediately, then as efficiently as possible.

Exhibit 6 to Complainant's Motion.

19. By memorandum dated August 11, 2004, John Manumaleuna, COS, informed Captains and Lieutenants regarding the Re-instatement of ACO Pimentel to Post, in part, as follows:

> Effective immediately, ACO Debra Pimentel is cleared to work in any post within the facility. Therefore she is able to work in any female gender specific posts as well as being placed in Temporary Assigned Sergeant positions if the need arises.

Exhibit 6-1 to Complainant's Motion.

20. By letter dated July 9, 2007, Nakanelua informed Complainant that the Union concluded its investigation of the grievance. Nakanelua stated in part:

> Based on a careful examination of the entire investigative record and grievance file the UPW has decided not to proceed further with the grievance. We do not believe there is sufficient proof of a violation of the unit 10 agreement. The following factors and considerations entered into our determination:
>
> 1. Your detachment from Oahu Community Correctional Center to the Women's Community Correctional Center was not taken for disciplinary reasons or due to a complaint from a member of the public. Neither section 11 nor section 58 rights are applicable.
>
> 2. The detachment was undertaken because of a volatile incident in Module 20. It appears from the documentary evidence that safety was a relevant and appropriate consideration in the decision and action taken by the employer.
>
> 3. The employer appears to have acted within the scope of lawful authority under Section 89-9(d), HRS.

Ex. 12 attached to UPW's motion.

21. The UPW contends based on its review that the documentary evidence indicated that Complainant's detachment from OCCC to WCCC was not

disciplinary in nature and was undertaken because of a disruptive incident in Module 20 at OCCC. The UPW found that there was insufficient proof of a violation of the Unit 10 agreement and under arbitral and court precedent, the Union was not likely to prevail in an arbitration of the instant grievance. The UPW relied upon a prior arbitration decision where Arbitrator Walter Ikeda held that the transfer of an ACO did not violate the Unit 10 agreement where there was a factual reason for the action, i.e., a pending complaint of harassment. In addition, the UPW cited to the Hawaii Supreme Court's decision in United Public Workers, AFSCME v. Hannemann, 106 Hawai`i 359, 105 P.3d 236 (2005) (Hannemann), where the Court held that management has a right to transfer employees between baseyards under Section 89-9(d), HRS. Ex. 11 to UPW's motion.

22. Complainant contends that the Employer violated contractual provisions by the detachment to OCCC since she was not afforded a 48-hour notice for change of work schedule and the employer failed to substantiate its justification for the unsafe claim via its investigation. Complainant also alleges that she notified her Union agent that from June 4, 2004 to August 14, 2004, she was denied temporary promotions from ACO III to ACO IV. In addition, Complainant alleges that Espinda's removal of the "no inmate contact" order was delinquent.

23. Grievance ES-03-93 alleges violation of Section 11, Discipline, of the CBA[1] contending that the Employer's actions in temporarily transferring Complainant to WCCC is considered a disciplinary action without just and

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[1]Section 11 Discipline, of the CBA provides in part, as follows:

11.01 PROCESS.

11.01 a. A regular Employee shall be subject to discipline by the Employer for just and proper cause.

11.01 b. An Employee who is disciplined, and the Union shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. However, if the oral warning or reprimand is documented of recorded for future use by the Employer to determine future discipline the Employee who is disciplined shall be furnished the specific reason(s) for the oral warning or reprimand in writing.

* * *

proper cause; a violation of Section 46, Working Conditions and Safety,[2]

[2]Section 46 Working Conditions and Safety, of the CBA provides in part, as follows:

46.01 WORKPLACE SAFETY - EMPLOYEES.

46.01 a. Workplace safety is of mutual concern to the Employer and the Union. The Employer and the Union shall encourage Employees to observe applicable safety rules and regulations and will support appropriate efforts to provide a violence free workplace.

* * *

46.06 UNSAFE WORKING CONDITIONS.

46.06 a. Employees shall make every effort to promptly report unsafe conditions and unsafe behavior including acts or threats of violence to their supervisors so that appropriate corrective action can be taken.

46.06 b. If the supervisor does not take appropriate corrective action within a reasonable period, Employees may report unsafe conditions to officials other than their supervisors and shall not be disciplined.

46.06 c. An Employee shall not be subject to disciplinary action for:

46.06 c.1. Failure or refusal to operate or handle any machine, device, apparatus, or equipment which is in an unsafe condition, or

46.06 c.2. Failure or refusal to engage in unsafe practices in violation of applicable Federal, State, or Local safety laws or regulations or,

46.06 c.3. Failure or refusal to operate or handle any machine, device, apparatus, or equipment in violation of applicable Federal, State, or Local safety laws or regulations.

46.07 INVESTIGATION.

46.07 a. The supervisor shall promptly investigate and correct the working conditions if warranted.

46.07 b. If the supervisor is unable to evaluate the condition or take corrective action, the supervisor shall refer the matter to the department head or designee who has the authority to make a

contending that the Employer failed to properly investigate and prosecute inmates for threatening an ACO; and a violation of Section 58, Bill of Rights.[3] Exs. 6 and 7, UPW's Motion.

24. The UPW reviewed the documentary evidence supporting PIMENTEL's detachment to WCCC and found that the movement was justified by the Employer's concern for PIMENTEL's safety and was within the Employer's rights under HRS § 89-9(d). In its arguments before the Board, the UPW cited cases supporting the Employer's right to transfer its employees. Moreover, notwithstanding Espinda's reference to a pending predisciplinary hearing in his May 19, 2004 letter to PIMENTEL (Exhibit 9

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determination.

[3]Section 58 Bill of Rights, provides, in part, as follows:

58.01 STATEMENT.

No Employee shall be required to sign a statement of complaint filed against the Employee.

58.02 INVESTIGATION.

58.02 a. If the employer pursues an investigation based on a complaint, the Employee shall be advised of the seriousness of the complaint.

58.02 b. The Employee will be informed of the complaint, and will be afforded an opportunity to respond and/or refute the complaint.

58.03 When investigating complaints against Employees by patients, inmates, and residents, weight shall be given to the mitigating circumstances, including the difficulties of working with some types of patients, inmates and residents.

58.04 Before making a final decision, the Employer shall review and consider all available evidence, data, and factors supporting the Employee, whether or not the Employee provides factors in defense of the complaint.

58.05 In the event the complaint is not substantiated or the Employee is not disciplined, the complaint and all relevant information shall be destroyed, provided that the Employer may retain a summary of such information outside of the official personnel file whenever such complaint may result in future liability to the Employer, including but not limited to, discrimination complaints.

to Complainant's Motion), there is no dispute that PIMENTEL was not disciplined as a result of the Module 20 incident.

25. Complainant's allegations regarding the lack of 48-hour notice for the scheduling changes, interference with her religious practices, the denial of temporary promotions from ACO III to ACO IV for the period June 4, 2004 to August 14, 2004, she was denied temporary promotions, and Espinda's delinquent removal of the "no inmate contact" order are matters outside the Complainant's grievance filed on November 12, 2003.

## DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint on remand pursuant to HRS §§ 89-5 and 89-14.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

3. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id., (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

4. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

5. In Poe v. Hawai`i Labor Relations Bd., 105 Hawai`i 97, 102, 94 P.3d 652, 657 (2004), supra, the Hawaii Supreme court adopted "federal precedent" which recognizes that a complaint of this nature involves two separate claims which are inextricably interdependent requiring proof of both elements to be sustained against either the union or the employer. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Court specifically held that to prevail against the union (or employer) plaintiff must establish proof that the union breached its duty of fair representation and that the action of the employer was contrary to the collective bargaining agreement. Whether the defendant is the union or the employer, the required proof is the same: The plaintiff must show that there has been both a breach of the duty of fair representation and a breach of the CBA. Id. Both elements must be alleged because a union has no obligation to prosecute a grievance that has no merit. Blount v. Local Union 25, 984 F.2d 244, 248 n. 6 (8th Cir. 1993). In Bliesner v. Communication Workers of America, 464 F.3d 910, 914 (9th Cir. 2006), the court of appeals held that the district court did not err by resolving the contract claim first and then granting summary judgment without addressing the fair representation claim against the union.

6. 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 regarding to employee organization membership."

7. The burden of proof is on Complainant to show by a preponderance of evidence that UPW's July 9, 2007 refusal to pursue her arbitration was arbitrary, discriminatory or in bad faith. Sheldon H. Varney, 5 HLRB 369 (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 (9th Cir. 1985).

8. Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978). Simple negligence or mere errors in judgment will not suffice to make out a claim for breach of duty of fair representation. Farmer v. ARA Servs. 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).

9. The Supreme Court in Airline Pilots Ass'n, Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 136 LRRM 2721 (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 reasonable,' as to be irrational." Id. at 1130. 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 1136. 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. at 1136.

10. In Order No. 1071, dated May 23, 1994, Case Nos.: CE-10-179, CU-10-87, Linda E. Moga Rivera, this Board found that a union did not breach its duty of fair representation when it refused to overturn a settlement agreement entered into to resolve a class grievance which resulted in the demotion of its union member initially selected for the promotion. The Board applied the O'Neill test, to find that the union acted within the range of reasonableness where the promotions were awarded to other employees.

11. Similarly, in Benson v. Communications Workers, 150 LRRM 2143 (E.D. Va. 1994), the court held that the union did not breach its duty of fair representation to an employee who was demoted as a result of a promotion grievance pursued by the union for another member that resulted in an arbitration award favoring the grievant. In that case the union failed to provide the employee with notice of, or opportunity to be heard at any stage. The union's pursuit of the promotion grievance was found to be reasonable, despite the union's indifference to the employee who was ultimately demoted. The court reasoned that the union had the right and obligation to advance collective interests even though it must choose between opposing interests. "Specifically, the union's duty of fair representation did not require it to do more than articulate and pursue a non-arbitrary interpretation of the Agreement although the successful pursuit of its interpretation would detrimentally affect one of its members." Id. at 2145.

12. After reviewing the record, the Board finds with respect to grievance ES-03-29, that it appears beyond doubt that the Complainant cannot prove that the Employer violated the CBA in this instance as there is no contract provision which requires the Employer to submit a corrected wage statement to the IRS for a salary overpayment. Moreover, according to the record, the Employer has not sought to recover the salary overpayments from PIMENTEL. Thus, the Board concludes that PIMENTEL would not prevail against the Employer in establishing a violation of the CBA in the hybrid case and Complainant fails to state a claim for relief against the

UPW for the withdrawal of grievance ES-03-29 from arbitration. Accordingly, PIMENTEL's complaint as to grievance ES-03-29 is dismissed.

13. With respect to grievance ES-03-93, according to the record, the Employer detached PIMENTEL to WCCC for her safety because of threats from inmates and to investigate the incident at Module 20. Nakanelua reviewed the file and found that the detachment was not disciplinary and in PIMENTEL's interest given the incident at OCCC where threats were made against her by the inmates. Nakanelua agreed that the Employer was within its rights to move PIMENTEL to another facility pursuant to HRS § 89-9(d). Although Espinda referred to a predisciplinary hearing upon PIMENTEL's return to OCCC in a May 19, 2004 letter, there is no evidence in the record to suggest any discipline, i.e., a reprimand, oral or written, suspension, or discharge, was imposed on Complainant.

14. PIMENTEL here complains that the Employer violated contractual provisions by her detachment to OCCC since she was not afforded a 48-hour notice for the change in her work schedule and the Employer failed to substantiate the safety claim via its investigation. Complainant also alleges that her work schedule interfered with her religious practices. Complainant also alleges that she notified her Union agent that from June 4, 2004 to August 14, 2004, she was denied temporary promotions from ACO III to ACO IV. In addition, Complainant alleges that Espinda's removal of the "no inmate contact" order was delinquent.

15. The Board concludes that Complainant's claims that she did not receive a 48-hour notice for the change in her work schedule when she was detached, that her schedule interfered with her religious practices, that she was denied temporary promotions from June to August 2004, and Espinda delayed the removal of the "no inmate contact" order are not encompassed within the scope of grievance ES-03-93.

16. Based on the foregoing, the Board concludes that Complainant failed to state a claim for relief that her detachment to WCCC in 2003 was disciplinary and that the UPW wrongly withdrew her grievance from arbitration. There is no dispute that no discipline was imposed on PIMENTEL as a result of the Module 20 incident and no dispute of material fact that her detachment was for safety reasons as well as to investigate the workplace incident. Relying on arbitral and case authority, Nakanelua believed the Employer acted within its rights under HRS § 89-9(d). The Board concludes construing Complainant's allegations in the light most favorable to Complainant that it appears beyond doubt that PIMENTEL can prove no set of facts to support her claim that the Employer violated the

CBA as alleged in grievance ES-03-93. The Board finds that there are no material facts in dispute and concludes that the UPW is entitled to judgment as a matter of law that the UPW did not treat Complainant's grievance arbitrarily or discriminatorily when it decided to withdraw her grievance from arbitration. Based upon its investigation, the Union in the exercise of its judgment determined that the grievance should not be arbitrated. Complainant failed to establish that the UPW's conduct was arbitrary, discriminatory or in bad faith. Accordingly, Complainant's allegations are dismissed for failure to state a claim for relief and/or the Board finds that there are no disputes of material fact, and the UPW is entitled to summary judgment that it did not breach its duty of fair representation by withdrawing Complainant's grievance from arbitration.

17. In response to the Court's inquiry "1) to consider whether the claim made by Debra Pimentel in her complaint filed on May 15, 2007 relating to UPW grievance case numbers ES-03-29 and ES-03-93 was rendered moot by the Union's decision dated July 9, 2007," the Board concludes that the instant complaint is not moot as the Court ordered the Board to consider whether the Union's decision not to arbitrate grievances constituted a prohibited practice. In response to the Court's interrogatories 2 and 3, the Board found that the instant complaint relating to the Union's decision to withdraw grievance nos. ES-03-29 and ES-03-93 from arbitration fails to state a claim for relief under the applicable case law or alternatively, that the UPW is entitled to summary judgment that as a matter of law it did not breach its duty of fair representation by withdrawing the grievances from arbitration. Accordingly, the Board deems that no further action is appropriate.

ORDER

The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, June 25, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

DEBRA PIMENTEL v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO
CASE NO. CU-10-256 (ON REMAND)
ORDER NO. 2519
ORDER GRANTING UPW'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT

SARAH R. HIRAKAMI, Member

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