

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of  
JOSEPH KUA, JR.,

Complainant,

and

CRYSTAL FUJIKAWA, Personnel Officer,  
Department of Public Works, County of  
Kauai and MALCOLM FERNANDEZ,  
Director, Department of Personnel Services,  
County of Kauai,

Respondents.

CASE NO. CE-01-745

ORDER NO. 2692

ORDER DISMISSING PROHIBITED  
PRACTICE COMPLAINTS

In the Matter of  
JOSEPH KUA, JR.,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO and TRINA  
HORNER, Business Agent, Kauai Division,  
United Public Workers, AFSCME,  
Local 646, AFL-CIO,

Respondents.

CASE NO. CU-01-289

ORDER DISMISSING PROHIBITED PRACTICE COMPLAINTS

On January 5, 2010, Complainant JOSEPH KUA, JR. (Complainant or Kua), *pro se*, filed a prohibited practice complaint (Complaint) in Case No. CE-01-745, against Respondents CRYSTAL FUJIKAWA, Personnel Officer, Department of Public Works, County of Kauai and MALCOLM FERNANDEZ (Fernandez), Director, Department of Personnel Services, County of Kauai (collectively Kauai Respondents) with the Hawaii Labor Relations Board (Board). Kua alleged, *inter alia*, that on December 1, 2009, a business agent from the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) came to the Kapaa baseyard to hold a meeting for UPW blue collar members and Kauai Respondents ordered that white collar employees attend the meeting to remedy any

concerns; the business agent questioned the white collar workers and made everyone uncomfortable and the white collar workers angry; that Kua is fighting for policies, contract, and guidelines; and that he filed a grievance on December 9, 2009 and an internal complaint. Kua contends that County Respondents violated Hawaii Revised Statutes (HRS) §§ 89-13(2) (sic) and (3).

On January 12, 2010, County Respondents, by and through their counsel, filed an answer to the Complaint.

On January 6, 2010, Kua, pro se, filed a Complaint against the UPW and TRINA HORNER (Horner), Business Agent, Kauai Division, UPW in Case No. CU-01-289, alleging inter alia, that Horner should not have brought white collar employees into the blue collar meeting; that he feels the Union does not represent him; that he experienced a work violence incident which created a hostile environment in 2009 which has not been resolved; that he went on stress leave on January 20, 2009; and that when he appeared at a hearing before the Board (in a separate matter) on November 30, 2009, the UPW did not represent him. Kua contends that the UPW violated HRS §§ 89-13(1) (sic), (2), (3), and (8).

On January 13, 2010, the UPW filed a Motion to Dismiss and/or for Summary Judgment with the Board. The UPW alleged, inter alia, that the complaint should be dismissed for failure to state a claim for relief and for lack of standing.

In addition on January 13, 2010, the UPW filed an answer to the Complaint.

On January 26, 2010, the Board ordered a consolidation of Case No. CE-01-745 and Case No. CU-01-289 on grounds that the complaints involve substantially the same parties and issues, and consolidation will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

On February 1, 2010, the UPW filed a motion to dismiss the complaint for lack of prosecution by Kua.

On February 5, 2010, the Kauai Respondents filed a motion for joinder in the UPW's motion to dismiss the complaint and/or summary judgment filed on January 13, 2010.

The Board conducted a hearing on all motions filed by the parties by conference call on February 16, 2010, pursuant to HRS §§ 89-5(i)(4) and (5) and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). UPW's counsel appeared in the Board's hearing room and Complainant and Kauai Respondents' counsel participated in the hearing by telephone.

After carefully considering the record and the argument presented, the Board hereby makes the following findings of fact, conclusions of law and order dismissing the instant complaints.<sup>1</sup>

### FINDINGS OF FACT

1. At all relevant times, the UPW was an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit or BU) 01, composed of non-supervisory employees in blue collar positions. See HRS § 89-6(1).
2. At all relevant times, Trina Horner was a business agent for the UPW, and its designated agent.
3. At all relevant times, Kauai Respondents represented the interest of the Mayor for the County of Kauai with respect to Complainant, and are therefore a public employer within the meaning of HRS § 89-2.
4. At all relevant times, Crystal Fujikawa was a personnel officer of the Department of Public Works, County of Kauai and is the designated agent of a public employer within the meaning of HRS § 89-2.
5. At all relevant times, Malcolm Fernandez was the director of the Department of Personnel Services, County of Kauai, and is the designated agent of a public employer within the meaning of HRS § 89-2.
6. There is no dispute that the Unit 01 collective bargaining agreement (CBA) at all relevant times included a grievance procedure culminating in final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of the collective bargaining agreement.
7. Complainant is a public employee in the roads division of the Department of Public Works, County of Kauai.

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<sup>1</sup>At the close of the hearing, the Board requested that the UPW's counsel prepare a proposed order for the Board. On February 22, 2010, the UPW filed Complainant's Proposed Findings of Fact, Conclusions of Law and Order Dismissing Prohibited Practice Complaints with the Board. On February 26, 2010, the Kauai Respondents, by and through their counsel, filed a Statement of No Opposition to Complainant's Proposed Findings of Fact, Conclusions of Law and Order Dismissing Prohibited Practice Complaints Filed February 22, 2010 with the Board.

The Board accepts and incorporates the UPW's proposed findings and conclusions which support the rationale of the instant order and rejects those findings and conclusions which do not support the Board's order.

8. On December 30, 2008, the UPW filed a formal class action grievance at step 1 of the grievance procedure under the Unit 01 collective bargaining agreement alleging that the County of Kauai failed to take appropriate measures to provide a safe place to work.
9. The aforementioned grievance arose from an alleged workplace violence incident at the Kapaa baseyard on or about June 18, 2008, and the Union alleged that the County violated sections 1, 14, and 46 of the Unit 01 collective bargaining agreement by failure to investigate and take appropriate corrective measures to ensure a safe workplace.
10. The grievance was processed through steps 1 and 2 of the grievance procedure on or about February 24, 2009 and April 13, 2009 under Section 15 of the Unit 01 collective bargaining agreement.
11. On July 1, 2009, Malcolm Fernandez rendered a step 2 decision on the grievance in which he determined as follows:

“Since the employer has ensured that appropriate administrative measures will be taken to ensure that this kind of behavior does not happen again and feel strongly that employees have the right to work in a safe and secure environment free of violence of threat of violence, the employer met the remedy sought by the union. Additionally, however, the undersigned is recommending that the Union, Employer and employees of the baseyard meet at least once a month to address concerns/problems/issues etc. to foster better working relations.”
12. On August 7, 2009, the Union accepted the step 2 decision and remedy to resolve the grievance filed by the UPW on December 30, 2008.
13. On December 1, 2009, a monthly meeting was held at the Kapaa baseyard to address safety and health concerns regarding cutting trees from the back of dump trucks.
14. The meeting was attended by the duly designated representatives of the Union and employer and by employees of Kapaa baseyard pursuant to the step 2 resolution (of July 1, 2009) of the December 30, 2008 grievance.
15. Representing the employer to address the safety and health concerns at the December 1, 2009 meeting were Patrick Shimamoto, district road overseer, and Nick Levinthol, highway construction maintenance supervisor of the Department of Public Works.

16. Complainant Kua contends in his complaint that Patrick Shimamoto and Nick Levinthol should not be allowed to attend a meeting of blue collar non-supervisory employees reserved for Kapaa baseyard employees in unit 01.
17. Unlike informational and educational meetings which are conducted quarterly for bargaining unit 01 employees under Section 8 of the unit 01 collective bargaining agreement, the Kapaa baseyard meeting was a joint undertaking of labor and management "to foster better working relations" between the employer, union and employees, particularly over safety and health concerns arising after an alleged workplace violence incident on June 18, 2008.
18. The complaints filed by Kua fail to state a claim for relief under HRS chapter 89, which is intended "to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government."
19. The December 1, 2009 meeting held at the Kapaa baseyard neither violates the unit 01 collective bargaining agreement nor contravenes the statutory right and responsibility of the union "to act for and negotiate agreements covering all employees in the unit" under HRS § 89-8(a).
20. Based on a review of the record, the Board finds beyond doubt that the complaint fails to state a claim for either a violation of the collective bargaining agreement by the employer or a breach of the duty of fair representation by the union under HRS chapter 89.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. Review of a motion to dismiss is based on the contents the complaint, the allegations which are accepted as true and construed in the light most favorable to 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 complaint to relief. See, Yamane v. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2f 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 fact 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. In Poe v. Hawaii Labor Relations Board, 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.
5. The Supreme Court in Airlines Pilots Ass'n, Int'l 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 reasonableness,' as to be irrational." Id., at 67. The Court's holding in O'Neill reflects that a deferential standard is employed as to a union's actions. They may be challenged only if "wholly irrational." Id. at 78. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. Id. at 78.
6. The Board concludes that Kua can prove no set of facts to support his claim of a violation of chapter 89 by the employer or a breach of the duty of fair representation by the union.
7. Accordingly, the complaints are dismissed for failure to state a claim for relief.<sup>2</sup>

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<sup>2</sup>The Board denies the union's motion to dismiss for lack of prosecution based on Complainant Kua's participation in the prehearing conference and his appearance at the hearing on the motions filed by Respondents held on February 16, 2010.


JOSEPH KUA, JR. v. CRYSTAL FUJIKAWA, et al.  
CASE NO. CE-01-745  
JOSEPH KUA, JR. v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, et al.  
CASE NO. CU-01-289  
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ORDER DISMISSING PROHIBITED PRACTICE COMPLAINTS

DATED: Honolulu, Hawaii, March 10, 2010.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



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SARAH R. HIRAKAMI, Member

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