STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MATTHEW M. TAAMU, Complainant, and UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO; DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and EDDIE AKAU, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NO. CU-01-282 ORDER NO. 2710 ORDER DENYING UPW'S MOTION FOR SUMMARY JUDGMENT, FILED ON MARCH 8, 2010; ORDER DENYING COMPLAINANT'S MOTION TO AMEND COMPLAINT DATED OCTOBER 20, 2009; AND NOTICE OF HEARING

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On February 3, 2010, the Hawaii Labor Relations Board (Board) issued a Notice of Filing Deadlines and Notice of Hearing on Prohibited Practice Complaint setting, inter alia, March 3, 2010, as the deadline for the parties to file and exchange witness and exhibit lists and March 8, 2010 as the deadline to file motions with the Board.

On March 8, 2010, Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and EDDIE AKAU, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO (collectively UPW or Union) filed a Motion for Summary Judgment with the Board. The UPW contends that it is entitled to summary judgment because the prohibited practice complaint (Complaint) fails to allege a violation of the Unit 01 collective bargaining agreement which is a necessary element in order to prevail against the Union, and since Complainant does not intend to call himself as a witness, there is no claim or evidence to be offered of a breach of the collective bargaining agreement. Thus, the UPW argues that as there are no disputed issues of material fact regarding a contract violation, the Complaint must be dismissed.

On March 11, 2010, Complainant filed a Response in Opposition to UPW's Motion for Summary Judgment Dated March 8, 2010 with the Board. Complainant contends, inter alia, that the instant Complaint is against the UPW and not against the

employer for a breach of contract; that the exhibits contain allegations of contract violations and appropriate remedies; Complainant was named as a witness by Respondent and can also be construed to be an additional witness which Complainant reserved the right to call; Complainant's exhibits prove the violations of contract by the employer; and that the October 27, 2009 motion filed by the UPW was addressed in Board Order No. 2677 and is therefore moot. In his March 11, 2010 filing, Complainant also included a Motion for Summary Judgment contending that Respondents lack any reasonable answer or defense to the instant Complaint and Complainant is entitled to judgment.

On March 15, 2010, the UPW filed Respondents' Opposition to Complainant's Motion for Summary Judgment Filed on March 11, 2010 with the Board. The UPW contends, inter alia, that the Complaint does not allege a violation of the collective bargaining agreement; and that Complainant's exhibits 4-2 to 5-1, and 5-2 establish beyond doubt that Complainant was properly suspended for fourteen days for "unsafe behavior endangering his fellow employees in their work zone" as Complainant was observed knocking over six to seven cones set up on a street while a three-person crew was engaged at work for the Board of Water Supply.

On March 17, 2010, the Board conducted a hearing on the cross-motions for summary judgment. After consideration of the record and the arguments presented, the Board denies both motions for summary judgment.

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.

With respect to the UPW's motion for summary judgment, the Board finds that the Complaint clearly alleges a claim solely against the UPW for a breach of duty of fair representation in the handling of the grievance challenging Complainant's suspension. In reviewing the Complaint, the Board finds that the Complaint includes allegations of unjust discipline by the employer. Thus, the Board concludes that Complainant's failure to specifically allege a violation of the collective bargaining agreement in the Complaint lodged against the Union does not warrant a grant of summary judgment in the Union's favor at this stage. The issue will be one of proof, not

pleading.[1] In addition, the Board finds that Complainant's failure to name himself as a witness does not in and of itself require the dismissal of the instant Complaint at this stage. The Board further finds that there are genuine issues of material fact regarding whether the employer violated the applicable collective bargaining agreement and disciplined Complainant without just cause, why the UPW decided not to pursue Complainant's grievance, and whether the UPW's actions constituted a breach of duty of fair representation. Therefore, the Board is precluded from awarding summary judgment in favor of the UPW on the record before the Board. In considering Complainant's motion for summary judgment, the Board finds that UPW has asserted its defenses to the instant Complaint and that Complainant is not entitled to judgment as a matter of law against the UPW.

On May 12, 2010, Complainant filed a Motion to Amend Complaint dated October 20, 2009 with the Board to clarify the issues and relief sought, and clarify that Complainant is a witness in these proceedings. Complainant included, inter alia, an allegation that on January 6, 2009, Complainant was wrongfully suspended and discriminated against by his employer in violation of various contract provisions and provisions of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (4), and (8), 278-621.a. and 377-6(6) and (8); clarified that the Complaint is against the UPW for breach of duty of fair representation; added claims for relief, i.e., restoring lost wages and benefits, liability for costs related to prosecute this case, attorneys fees to institute legal proceedings against the employer for lost wages, punitive damages of $50,000 plus 10% per month, and termination of allegedly inept business agents.

On May 17, 2010, Respondents filed a Memorandum in Opposition to Motion to Amend Complaint Dated October 20, 2009, Filed on May 12, 2010, with the Board. Respondents contend that Complainant's Motion to Amend the Complaint should be denied because the claims of contract violations by the Board of Water Supply are untimely and prejudicial to the UPW; and the claims for attorney's fees, costs, alleged breach of fiduciary duty and for punitive damages are frivolous, beyond the jurisdiction of the Board, and fail to state a claim for relief.

Hawaii Administrative Rules (HAR) § 12-42-43 refers to the amendment of prohibited practice complaints and provides that, "[a]ny complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon."

Respondents contend that Complainant's proposed amendment to include a contract violation by the Board of Water Supply is untimely because Complainant was

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[1]The Board notes that the Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 165, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) held, "[T]he 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."

suspended on or about January 6, 2009 and was advised by the Board's Executive Officer by letter dated February 23, 2009, to submit a prohibited practice complaint to the Board.

In Pastrana v. Local 9509, Communications Workers of America, 185 L.R.R.M 2606, 2611 (S.D.Cal. 2008), the court considered the statute of limitations issue in hybrid cases and concluded that the commencement of the statute of limitations on claims against the employer accrued at the same time as the claims against his union. The court stated:

> In Vadino v. A. Valey Engineers, 903 F.2d 253 (3rd Cir.1990), an employee filed suit against his former employer for breach of the collective bargaining agreement. Among the issues considered was "whether the statute of limitations may be tolled as to the employer not only on the basis of its own actions and statements but also on the basis of assurances given by the Union representatives." Id. at 261. In holding that the Union's conduct could toll the employee's claims against the employer, the Third Circuit explained:
>
> > A contrary holding would put the plaintiff in an untenable position because of the interconnection between the two claims. If Vadino's [i.e., the employee's] cause of action against A. Valey [i.e., the employer] were to accrue at the time of the alleged breach of the collective bargaining agreement and before the futility of further appeals to the Union became apparent, Vadino's ability to file a section 301 suit against A. Valey would be ephemeral because such a claim could not be maintained until he could fairly allege that the Union refused to process his grievance. [Citation omitted.] The unfair representation claim is the necessary "condition precedent" to the employee's suit. [Citation omitted.] Allowing the section 301 claim to be tolled until the unfair representation claim also accrues is consistent with the congressional goal of resolving labor disputes in the first instance through the collectively bargained grievance procedure, because the employee will be encouraged to persist in efforts to have the union act on his or her behalf. Therefore, the employee's claim on the employer's alleged

> breach of the collective bargaining agreement is tolled until it was or should have been clear to the employee the union would not pursue the grievance. [Citations omitted.]

Id.; see also Butler v. Local Union 823, 514 F.2d 442 (8th Cir.1972) (holding that claim against employer did not accrue until claim against union).

Although the Court has not found a Ninth Circuit decision evaluating the issue, Bliesner v. Communication Workers of America, 464 F.3d 910, 914 (9th Cir.2006) cited Vadino with approval, and acknowledged that a claim for "breach of a duty of fair representation by the union is a prerequisite to a successful suit against the employer for a breach of the CBA." Id. at 914. To the extent that the union's breach is a prerequisite to the claim against the employer, the limitations period on Pastrana's claim against PacBell did not accrue until Pastrana's claim against the Union accrued. See also Hill v. Georgia Power Co., 786 F.2d 1071, 1077 (11th Cir.1986) (holding that an employee's cause of action against the union and employer accrue simultaneously in a hybrid case). Accordingly, PacBell's request for summary judgment based on the statute of limitations is denied.

Similarly the Eleventh Court of Appeals stated in Coppage v. U.S. Postal Service, 281 F.3d 1200, 1203-1204 (C.A.11 2002), as follows:

> Coppage's complaint alleges that the Postal Service breached its obligations under the employment agreement and that the Union violated its duty of fair representation. The Supreme Court of the United States describes such a lawsuit as a hybrid § 301/ fair representation claim. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 165, 103 S.Ct. 2281, 2291, 76 L.Ed.2d 476 (1983). Coppage's claim is a hybrid claim because it "comprises two causes of action." DelCostello, 462 U.S. at 164, 103 S.Ct. at 2290. The first cause of action involved is against the employer for breach of the collective bargaining agreement. This claim rests on section 301 of the Labor Management Relations Act. See 29 U.S.C. § 185(a) (1994). The second claim is against the union for breach of the union's duty of fair representation. DelCostello, 462 U.S. at 164, 103 S.Ct. at 2290 (explaining

that the union's duty of fair representation is implied under the National Labor Relations Act). "Yet the two claims are inextricably interdependent." DelCostello, 462 U.S. at 164, 103 S.Ct. at 2291 (quoting United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66-67, 101 S.Ct. 1559, 1565-1566, 67 L.Ed.2d 732 (1981)).

In DelCostello, the Supreme Court adopted the six-month statute of limitations found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), for all such hybrid cases. DelCostello, 462 U.S. at 169-171, 103 S.Ct. at 2293-2294. Thus, Coppage had six months to file her hybrid suit against the Union and the Postal Service from "the date [she] knew or should have known of the Union's final action or the [Postal Service's] final action, whichever is later." Adams v. United Paperworkers Int'l, 189 F.3d 1321, 1322 (11th Cir.1999). The "final action" is the point at which "the grievance procedure was exhausted or otherwise [broken] down to the employee's disadvantage." Proudfoot v. Seafarer's Int'l Union, 779 F.2d 1558, 1559 (11th Cir.1986) (citing Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir.1984)).

Based upon a review of the record, the Board finds that Complainant's grievance was being processed through the contractual grievance procedure and the Step 2 decision was rendered by the employer by letter, dated June 12, 2009. By letter dated July 21, 2009, the UPW notified Complainant that it had accepted the resolution of the grievance and would not proceed further. Thus, under these facts and the foregoing cases, the Board's 90-day statute of limitations for claims alleging a contract violation against the employer began to run when UPW notified Complainant that it was not pursuing his grievance to arbitration and the Board finds that the proposed amendment of contract violations by the employer are not time-barred.

However, Complainant's proposed amendment appears to be an attempt to cure his Complaint in response to UPW's Motion for Summary Judgment, filed on March 8, 2010, inter alia, to add claims of contract violation against the employer and to add himself as a witness. As the Board has determined, supra, that the proposed amendments are not grounds to grant summary judgment in favor of the UPW, the Board, in its discretion, hereby denies the Complainant's Motion to Amend the Complaint as the proposed amendments are unnecessary and do not materially alter the allegations against the UPW and would cause undue delay in this proceedings. In addition, the Board also denies the Complainant's Motion to Amend the Complaint which seeks to add additional remedies of attorney's fees, costs, and punitive damages against the UPW, as the Board is

governed by HRS § 377-9 in fashioning an appropriate remedy based upon the facts presented and these claims may be argued at the appropriate stage.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that pursuant to HRS §§ 89-5(b)(4) and 89-14, and HAR § 12-42-49, the Board will conduct a hearing on the instant prohibited practice on **July 13-14, 2010 at 8:30 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. Subpoenas for witnesses may be issued upon written application pursuant to HAR § 12-42-8(g)(7). Unless otherwise approved by the Board, the subpoenas shall be served upon witnesses by **July 1, 2010** to permit the resolution of any motions challenging the subpoenas prior to the scheduled hearing.

DATED: Honolulu, Hawaii, June 15, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

NORMAN K. KATO II, Member

Copies sent to:

William M. Taamu
Herbert R. Takahashi, Esq.