STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

JOSEPH N. SOUZA III,

Complainant,

and

HONOLULU FIRE DEPARTMENT, City and County of Honolulu and HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463,

Respondents.

CASE NOS.: CE-11-759
CU-11-293

ORDER NO. 2759

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS OR IN THE ALTERNATIVE GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS; DENYING COMPLAINANT JOSEPH N. SOUZA, III'S MOTION FOR LEAVE TO FILE FIRST AMENDED PROHIBITED PRACTICE COMPLAINT; GRANTING RESPONDENTS' MOTION TO STRIKE JOSEPH N. SOUZA III WRITTEN ORAL ARGUMENT FOR THE SCHEDULING CONFERENCE, IN LIEU OF ANY VIOLATIVE ATTEMPT, SOLICITATION OR INCITEMENT TO IMPROPERLY CONVENE ANY HEARING TO DISMISS PROHIBITIVE (sic) PRACTICE COMPLAINT; THE SWORN AFFIDAVIT OF JOSEPH N. SOUZA III AND KRISTEN L. SOUZA; (PROHIBITIVE (sic) PRACTICE COMPLAINANT WITH RIGHTS AND REDRESS OF INJURY ENFORCEABLE; WORKERS' COMPENSATION CLAIMANT WITH RIGHTS AND REDRESS OF INJURY ENFORCEABLE

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS OR IN THE ALTERNATIVE GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS; DENYING COMPLAINANT JOSEPH N. SOUZA, III'S MOTION FOR LEAVE TO FILE FIRST AMENDED PROHIBITED PRACTICE COMPLAINT; GRANTING RESPONDENTS' MOTION TO STRIKE JOSEPH N. SOUZA III WRITTEN ORAL ARGUMENT FOR THE SCHEDULING CONFERENCE, IN LIEU OF ANY VIOLATIVE ATTEMPT, SOLICITATION OR INCITEMENT TO IMPROPERLY CONVENE ANY HEARING TO DISMISS PROHIBITIVE (sic) PRACTICE COMPLAINT; THE SWORN AFFIDAVIT OF JOSEPH N. SOUZA III AND KRISTEN L. SOUZA; (PROHIBITIVE (sic) PRACTICE COMPLAINANT WITH RIGHTS AND REDRESS OF INJURY ENFORCEABLE; WORKERS' COMPENSATION CLAIMANT WITH RIGHTS AND REDRESS OF INJURY ENFORCEABLE

On May 24, 2010, Complainant JOSEPH N. SOUZA III (Souza) filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that Respondent HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1563, IAFF (HFFA or HFFA/IAFF or Union) failed or refused to represent him on three occasions; on February 21, 2010, Complainant requested, and the Union declined, to represent him at a meeting to be conducted by the Honolulu Fire Department (HFD) administration on February 22, 2010 after being told that his position as a Fire Fighter II Chief Aide would be eliminated; the Union denied Complainant's second request for representation at an investigative meeting regarding his grievance against Kenneth Silva (Silva), Fire Chief; HFFA's President also sent a mass e-mail discrediting Souza; and the HFFA failed to file a Prohibited Practice Complaint on his behalf against the HFD because Fire Chief Silva held an investigative meeting and requested Complainant to provide information. Complainant also alleged, *inter alia*, the HFD denied his right to Union representation at a meeting where he felt would lead to disciplinary action and at a meeting on February 23, 2010, Chief Silva discredited and defamed Complainant and used him as a scapegoat for eliminating different programs. Complainant contends that Respondents violated Section 19 of the collective bargaining agreement and committed prohibited practices in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(8) and 89-13(b)(3), (4), and (5).

On June 2, 2010, Respondent HFFA/IAFF filed a Motion to Dismiss Prohibited Practice Complaint Filed on May 24, 2010, in Lieu of Answer to Prohibited Practice Complaint, contending that the Complaint fails to state a claim for relief.

On June 14, 2010, Complainant filed an Opposition to HFFA/IAFF's and HFD's Motion to Dismiss Prohibited Practice Complaint.

On June 21, 2010, Respondent HFD filed a Motion for Summary Judgment or, in the Alternative, Motion to Dismiss Prohibited Practice Complaint Filed by Joseph N. Souza III on May 24, 2010.

On June 21, 2010, Respondent HFD filed a Statement of No Opposition to HFFA/IAFF's Motion to Dismiss Prohibited Practice Complaint Filed June 2, 2010.

On June 28, 2010, Respondent HFFA/IAFF filed a Statement of No Opposition to Respondent HFD's Motion for Summary Judgment or, in the Alternative, Motion to Dismiss Prohibited Practice Complaint Filed by Joseph N. Souza III on May 24, 2010.

On June 30, 2010, Complainant filed an Opposition to Respondent HFD's Motion for Summary Judgment or Motion to Dismiss Prohibited Practice Complaint.

On July 9, 2010, Margery S. Bronster, Esq., Jeannette H. Castagnetti, Esq., and Sunny S. Lee, Esq. of Bronster Hoshibata filed a Notice of Appearance of Counsel, entering their appearance as counsel for Complainant.

On July 22, 2010, Complainant filed a Motion for Leave to File First Amended Prohibited Practice Complaint; Memorandum in Support of Motion for Leave to File First Amended Prohibited Practice Complaint.

On July 27, 2010, Respondent HFFA/IAFF filed a Memorandum in Opposition to Complainant's Motion for Leave to File First Amended Prohibited Practice Complaint.

On July 27, 2010, Respondent HFD filed an Opposition to Complainant Joseph N. Souza III's Motion for Leave to File First Amended Prohibited Practice Complaint, Filed on July 22, 2010.

On July 30, 2010, the Board conducted a hearing on the motions. The parties had full opportunity to present argument to the Board.

On November 12, 2010, Complainant filed Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibitive (sic) Practice Complaint.[1]

On November 12, 2010, Complainant also filed Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibitive (sic) Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza; (Prohibitive (sic) Practice Complainant with Rights and Redress of Injury Enforceable; Workers' Compensation Claimant with Rights and Redress of Injury Enforceable.[2]

On November 22, 2010, Respondent HFFA/IAFF filed an Objection to and Motion to Strike Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibited Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza; (Prohibitive (sic) Practice Complaint with

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[1]The Board notes that Complainant filed this motion *pro se*, and only in Case No. CE-11-759, and did not include Case No. CU-11-293.

[2]The Board notes that Complainant also filed this sworn affidavit *pro se*, and only in Case No. CE-11-759, and did not include Case No. CU-11-293.

Rights and Redress of Injury Enforceable; Workers' Compensation Claimant with Rights and Redress of Injury Enforceable Filed by Complainant on November 12, 2010.[3]

On November 22, 2010, Respondent HFD filed a Motion to Strike Late Filings of Joseph N. Souza III Written Oral Argument, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibited Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza Filed on November 12, 2010.[4]

After a review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law and order granting Respondents' motion to dismiss the instant complaints.

FINDINGS OF FACT

1. Complainant was for all relevant times a Fire Fighter II Chief Aide assigned to Battalion Chief (BC) Paul Loughran. For all relevant times, Complainant was an employee[5] of HFD, City and County of Honolulu, and a member of bargaining unit (Unit) 11 as set forth in HRS § 89-6(a)(11).[6]

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[3]The Board notes that Respondent HFFA/IAFF filed its objection and motion in both Case Nos.: CE-11-759 and CU-11-293.

[4]The Board notes that Respondent HRD filed its motion in both Case Nos.: CE-11-759 and CU-11-293.

[5]HRS 89-2 provides in part as follows:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

[6]HRS § 89-6(a)(11) provides as follows:

> All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> * * *
>
> (11) Firefighters; ....

2. Respondent HFFA/IAFF is an employee organization[7] and the exclusive representative[8] certified by the Board to represent the interests of Unit 11.

3. Respondent HFD is an employer within the meaning of HRS § 89-2.[9]

4. Respondent HFD and Respondent HFFA/IAFF are parties to a collective bargaining agreement (Contract) dated July 1, 2007 to June 30, 2011.

5. On or about February 19, 2010, Complainant, along with all other BC Aides, received two e-mails from Chief David Takehara (Chief Takehara), notifying them of a mandatory meeting for BC Aides only on February 22, 2010 at 08:30 a.m., at Respondent HFD's Headquarters.

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[7]HRS 89-2 provides in part as follows:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[8]HRS 89-2 provides in part as follows:

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[9]HRS 89-2 provides in part as follows:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education; the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid contact.

6. The purpose of the meeting was to gather information from all Fire Fighter IIs, like Complainant, functioning as BC Aides, on what would likely result from the reassignment of the BC Aides to other jobs with the Fire Fighter II classification.

7. On or about February 21, 2010, Complainant sent an e-mail to Chief Takehara, and other BC Aides, expressing Complainant's concerns about the February 22, 2010 meeting, specifically: 1) whether arrangements were made for union representation at the meeting; 2) whether BC Aides would be granted time to present their budgetary options to be explored that will allow for position preservation; and 3) whether the decision had already been made and the meeting was just a formality.

8. On or about February 21, 2010, Complainant requested Union representation during a telephone conversation with HFFA Union representative Aaron Lanchenko (Lanchenko), after being notified of a mandatory meeting being held at HFD Headquarters on February 22, 2010, which Complainant believed was to be disciplinary in nature.

9. The Union informed Complainant in advance that the meeting of February 22, 2010, was not disciplinary in nature. Complainant stated in his Complaint that on February 21, 2010, during his telephone conversation with Lanchenko, Lanchenko denied Complainant's request for Union representation at the February 22, 2010 meeting, and stated, "there is no disciplinary action taking place at this meeting," they are not getting rid of your job, just go to the meeting, cooperate and keep an open mind.[10]

10. On or about February 22, 2010, Complainant was approached by Chief Takehara at the meeting, and was told that Complainant should not have sent the e-mail, but should have just called Chief Takehara.

11. On or about February 22, 2010, during the meeting, Respondent HFD gave the BC Aides two tasks to address, viz.: 1) How can the Battalion Chiefs do their job without their aides; and 2) Come up with budgetary ideas for the HFD to assist with the budget shortfall. Complainant and the other BC Aides cooperated and provided the information Respondent HFD requested, and submitted the written minutes with their task answers in detail.

12. On or about February 23, 2010, Complainant attended a Drug and Alcohol Awareness meeting. Fire Chief Kenneth Silva (Chief Silva) was in

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[10]Complaint, Attachment "A", page 2, First Offense Against HFFA.

attendance. Complainant alleges that Chief Silva told the attendees that Complainant wanted HFD to take away a 5% raise to save Complainant's job as a Fire Fighter II.

13. Complainant alleges that HFFA President Robert Lee (Lee) sent an e-mail to HFFA members falsely stating that Complainant and other Fire Fighter IIs had suggested HFFA members forego a 5% raise and that an overtime program known as "Rank for Rank" should be eliminated so that Complainant and other BC Aides could keep their assignments. Complainant further alleges that Lee falsely suggested that Complainant was attempting to act as the exclusive bargaining agent for HFFA members.

14. Complainant filed a grievance against Chief Silva and Respondent HFD for what Complainant believed to be discriminatory and retaliatory conduct by Chief Silva against Complainant for Complainant's participation in the February 22, 2010 meeting, and for Complainant's request for Union representation.

15. Complainant made a second request for Union representation to Union representative Bill Thornack (Thornack), when Complainant notified Thornack of Complainant's grievance against Chief Silva for conducting the February 22, 2010 meeting in question, which Complainant felt was an investigative meeting. Thornack informed Complainant that Complainant only had a "gripe," not a grievance.

16. Complainant made a third request for Union representation, requesting that the Union file a Complaint on Complainant's behalf with the Board against Respondent HFD regarding the "investigative" meeting in question of February 22, 2010. The Union declined to file the Complaint, as there was no evidence that the February 22, 2010 meeting was disciplinary in nature, and that the Due Process provisions in Section 19 of the Contract protects the Weingarten Rights of HFFA/IAFF members in investigative meetings where discipline can be reasonably expected.

17. On May 24, 2010, Complainant filed his respective prohibited practice complaints with the Board in Case Nos. CE-11-759 alleging violations of

HRS § 89-13(a)(8)[11], and CU-11-293 alleging violation of HRS §§ 89-13(a)(8)[12] and 89-13(b)(3), (4) and (5)[13],

18. The Board finds that there are no material facts in dispute that would render summary judgment inappropriate.

19. Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

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[11]HRS § 89-13(a)(8) provides as follows:

§ 89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

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

[12]Id.

[13]HRS § 89-13(b)(3), (4), and (5) provide as follows:

§ 89-13 Prohibited practices; evidence of bad faith.

* * *

(b) It shall be a prohibited practice for any public employee or for an employee organization or its designated agent wilfully to:

* * *

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement. [L 1970, c 171, pt of §2; gen ch 1985; am L 1992, c 214, §3; am L 2003, c 3, §2]

CONCLUSIONS OF LAW

1. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (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 Hawaii 516, 521, 904 P.2d 530, 535 (Haw.App. 1995), *aff'd* 80 Hawaii 118, 905 P.2d 624.

2. 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.

3. 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.

4. With regard to the dispositive motions filed, the Board finds that the instant complaint is considered a "hybrid" action where the employee generally sues the employer for unfair labor practices and the union for breach of the duty of fair representation, though not necessarily both. Conley v. Int'l Bhd. of Elec. Workers, Local 639, 810 F.2d 913, 915 (9th Cir.1987). Because the claims against the employer and the union are "inextricably interdependent," the hybrid determination does not require that the suit be brought against both the employer and the union. Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-165 (1983). In order to prevail in a hybrid claim, complainant must establish both (1) a breach of the duty of fair representation by the union, and (2) a breach of the collective bargaining agreement by the employer. Poe v. Hawaii Labor Relations Bd., 105 Hawai`i 97, 102, 94 P.3d 652, 657 (2004).

5. A union may be held liable for a breach of its duty of fair representation. See Del Costello, 462 U.S. at 164. The duty of fair representation imposed upon a union stems from its role as the exclusive bargaining representative of the employees. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Consequently, courts must extend great deference to the union so as to support the "effective performance of their bargaining responsibilities." Air Line Pilots Ass'n. Int'l. v. O'Neill, 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). In granting such deference, courts require a plaintiff to prove that the union's conduct toward a member of the collective bargaining agreement had been "arbitrary, discriminatory or in bad faith." Vaca, 386 U.S. at 190. Mere negligence on the part of the

union is insufficient to satisfy this demand. United Steelworkers of America v. Rawson, 495 U.S. 362, 376, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir.1970).

6. In cases where an alleged breach is predicated on a union's failure to file a grievance, the Supreme Court has allowed unions broad discretion in determining whether or not a termination warrants a grievance. Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-568, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (citing Vaca, 386 U.S. at 185). This broad discretion allows a union to determine whether a grievance has merit, but with the caveat that "[an] individual employee has no absolute right to have his grievance arbitrated." Vaca, 386 U.S. at 195.

7. In determining arbitrariness, the Ninth Circuit Court of Appeals has required a finding that the act in question not involve the exercise of judgment, and that the union had no rational reason for its conduct. See Richard Hunt, 6 HLRB 222 (2001) citing Moore v. Bechtel Power Corp., 840 F.2d 634, 636, 127 LRRM 3023 (9th Cir. 1988). Courts have established high thresholds for arbitrary conduct, holding 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." Air Line Pilots Ass'n. Int'l. v. O'Neill, 499 U.S. 65, 67 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991), (citing Ford Motor Co.v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953)). Arbitrariness has been further characterized as being so unreasonable as to be "without rational basis or explanation." See Raczkowski v. Empire Kosher Poultry, 185 Fed.Appx. 117, 118, 179 L.R.R.M. 3017 (3d Cir. 2006) (Citations omitted).

8. Based upon a review of the record, the Board finds that on or about February 21, 2010, Complainant was informed by Union representative Lanchenko of Union's denial of Complainant's request for Union representation and stated, "there is no disciplinary action taking place at this meeting," they are not getting rid of your job, just go to the meeting, cooperate and keep an open mind.

9. Pursuant to, *inter alia*, Section 19 of the HFFA/IAFF Agreement, Complainant was not entitled to Union representation at the meeting; thus,

the Board found that Union did not violate any provisions of the HFFA/IAFF Agreement.[14]

10. The Union informed Complainant in advance that the meeting of February 22, 2010, was not disciplinary in nature.

11. Complainant did not have any reasonable basis to believe that attending the meeting could be reasonably calculated to lead to discipline. Complainant was not under investigation, nor was he subjected to interrogation at the meeting.

12. Complainant has failed to show any evidence that his attendance at the meeting resulted in any discipline whatsoever.

13. Moreover, Complainant was not the only BC Aide that Respondent HFD required to attend the meeting. In fact, it appears Respondent HFD required all of the BC Aides to attend the meeting.

14. 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

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[14]Section 19 -- DUE PROCESS of the Unit 11 Agreement provides as follows:

> Whenever an employee is **under investigation** and **subject to interrogation** by the Employer or its authorized representatives **which could lead to disciplinary action**, the employee shall be so informed before the investigatory interview begins; provided such employee shall likewise be informed when required to submit to a written statement or report in connection with such investigation. When the employee **reasonably feels** that disciplinary action against him or her may result from such interview, the employee shall be entitled to have a Union representative or steward present during the interview. Where the employee chooses not to be represented by the Union, the Union shall have the right to be present at such investigatory interview. Employees shall not be required or requested to submit to polygraph examinations. (Emphases added.)

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 the processing of grievances." (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

15. Based on a review of the record, the Board finds that Union representative Thornack informed Complainant that Complainant only had a "gripe," and not a grievance against Chief Silva for conducting what Complainant believed to be an "investigative meeting" on February 22, 2010.

16. Based on a review of the record, it appears that Complainant filed his own grievance against Chief Silva and Respondent HFD, which was within his rights to do, pursuant to Section 18 of the HFFA/IAFF Agreement.[15]

17. Based upon a review of the record, the Board finds that there are no genuine issues of material fact presented and that Respondent HFFA/IAFF is entitled to judgment as a matter of law. Respondent HFFA/IAFF reviewed the merits of the Complainant's allegations and concluded that under Section 19 of the Unit 11 collective bargaining agreement, no grievance may be arbitrated unless it involves an alleged violation, misrepresentation or misapplication of a specific term or provision of the Contract. Thus, Complainant failed to establish that Respondent HFFA/IAFF's actions in not representing Complainant at the February 22, 2010 meeting; in not filing a grievance on Complainant's belief that the February 22, 2010, meeting was an "investigative meeting"; and in not filing a Complaint on Complainant's behalf with the Board against Respondent HFD regarding the "investigative" meeting in question of February 22, 2010, were arbitrary or discriminatory or otherwise breached its duty of fair representation to Complainant. The contract provision clearly states, in pertinent part, that no grievance may be arbitrated, much less filed, unless it involves an alleged violation, misrepresentation or misapplication of a specific term or provision of the Contract.

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[15]Section 18 -- GRIEVANCE PROCEDURE, provides, in pertinent part:

> Any individual employee may process his or her grievance and have the grievance heard without intervention by the Union, provided that the Union shall be informed of the time and place of such grievance meeting in order that the Union may be present.

18. The Board concludes based on the record that Respondent HFFA/IAFF's decision not to grieve Complainant's allegations regarding the February 22, 2010 meeting was well within the wide range of reasonableness because in the Union's opinion, there was no merit to a "gripe," and would not prevail.

19. As the Board finds that Complainant failed to establish the elements of a breach of duty of fair representation claim against Respondent HFFA/IAFF, Complainant's claim against Respondent HFD must also fail. See Felice v. Sever, 985 F.2d 1221, 1226 (3d Cir. 1993) (In a hybrid action, "the plaintiff will have to prove that the employer breached the collective bargaining agreement in order to prevail on the breach of duty of fair representation claim against the union, and vice versa." [cites omitted.] Thus, the claims are "inextricably interdependent."). Therefore, the Respondent HFD are also entitled to judgment as a matter of law that they did not commit a prohibited practice and violate HRS Chapter 89.

20. As Complainant is unable to prevail against the HFFA/IAFF on the breach of duty of fair representation charges, since this is a hybrid case, the Board also dismisses the Complaint against Respondent HFD.

21. The Board concludes that there was no prohibited practice under HRS § 89-13(b)(3), because HRS § 89-11 governs interest arbitration proceedings, not grievances; therefore, the Board concludes that HRS § 89-11 is inapplicable in this case.

22. The Board concludes that there was no prohibited practice under HRS § 89-13(b)(4), because Complainant failed to specify any additional violations of Chapter 89 other than what the Board has already addressed in this Order.

23. Accordingly, the Board alternatively grants summary judgment in favor of Respondent HFFA/IAFF and Respondent HFD.

Complainant Joseph N. Souza, III's Motion for Leave to File First Amended Prohibited Practice Complaint

24. Pursuant to, *inter alia,* Hawaii Administrative Rules (HAR) §§ 12-42-10(A)[16] and 12-42-43[17], the Board may in its discretion allow any

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[16]HAR § 12-42-10(A) provides as follows:

> Any document filed in a proceeding may be amended, in the discretion of the board, at any time prior to the issuance of a final

document or complaint to be amended at any time prior the issuance of a final order.

25. Pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 15(a)[18], a "grant or denial of an opportunity to amend is within the discretion of the District Court." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

26. While Rule 15(a)[19] provides, *inter alia*, that leave to amend "shall be freely given when justice so requires[,]" other factors must be taken into consideration, ". . . such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, etc. [.]" Id.

27. In the instant case, the Board finds that Complainant's Motion for Leave to File First Amended Complaint is futile, as it does not add any substantive new claims, nor does it present any additional facts that would influence the Board's decision in this matter. Moreover, counsel for Complainant plainly admits this fact in Complainant's Memorandum in Support of Motion for

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order thereon.

[17]HAR § 12-42-43 provides as follows:

> Any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order.

[18]HRCP Rule 15(a) provides, in pertinent part:

> Rule 15. Amended and supplemental pleadings.
>
> (a) Amendments. A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

[19]Id.

Leave to File First Amended Prohibited Practice Complaint, to wit: "**No new claims or legal theories have been added.**"[20] (Emphasis added.)

28. Thus, in light of the foregoing, the Board denies Complainant Joseph N. Souza, III's Motion for Leave to File First Amended Prohibited Practice Complaint on the grounds of futility of amendment and mootness.

Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibitive (sic) Practice Complaint; the Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza; (Prohibitive (sic) Practice Complainant with Rights and Redress of Injury Enforceable; Workers' Compensation Claimant with Rights and Redress of Injury Enforceable

29. Pursuant to, *inter alia*, HAR §§ 12-42-8(g)(C)(ii)[21] and 12-42-8(g)(C)(iii)[22], the Board finds that Complainant's *pro se* motion in question is untimely. The Board held a hearing on Respondents' respective motions to dismiss and/or for summary judgment on July 30, 2010, and Complainant was represented by counsel at the hearing. Complainant filed the document and affidavits in question *pro se* on November 12, 2010, more than three months after the hearing, which is clearly untimely.

30. Accordingly, the Board grants Respondent HFFA/IAFF's Objection to and Motion to Strike Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibitive (sic) Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and

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[20]Complainant's Memorandum in Support of Motion for Leave to File First Amended Prohibited Practice Complaint at 1.

[21]HAR § 12-42-8(g)(C)(ii) provides:

> The moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties.

[22]HAR § 12-42-8(g)(C)(iii) provides:

> Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

Kristen L. Souza; (Prohibitive (sic) Practice Complainant with Rights and Redress of Injury Enforceable; Workers' Compensation Claimant with Rights and Redress of Injury Enforceable Filed by Complainant on November 12, 2010 and Respondent Honolulu Fire Department, City and County of Honolulu's Motion to Strike Late Filings of Joseph N. Souza III Written Oral Argument, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibited Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza Filed on November 12, 2010.

ORDER

Based on the foregoing, the Board hereby grants Respondents' Motions to Dismiss or in the Alternative Granting Summary Judgment in Favor of Respondents; denies Complainant Joseph N. Souza, III's Motion for Leave to File First Amended Prohibited Practice Complaint; grants Respondents' Motion to Strike Joseph N. Souza III Written Oral Argument for the Scheduling Conference, in Lieu of Any Violative Attempt, Solicitation or Incitement to Improperly Convene Any Hearing to Dismiss Prohibitive (sic) Practice Complaint; The Sworn Affidavit of Joseph N. Souza III and Kristen L. Souza; (Prohibitive (sic) Practice Complainant with Rights and Redress of Injury Enforceable; Workers' Compensation Claimant with Rights and Redress of Injury Enforceable.

DATED: Honolulu, Hawaii, January 7, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

NORMAN K. KATO II, Member

Copies sent to:
Sunny S. Lee, Esq.
Peter Liholiho Trask, Esq.
Duane W. H. Pang, Deputy Corporation Counsel