STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of JEROME P. NAKACHI, JR., Complainant, and DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; CLAYTON FRANK, Director, Department of Public Safety, State of Hawaii; MICHAEL HOFFMAN, Institutions Division Administrator, Department of Public Safety, State of Hawaii; WANDA CRAIG, Adult Correctional Officer VI, Halawa Correctional Facility, Department of Public Safety, State of Hawaii; NOLAN ESPINDA, Warden, Halawa Correctional Facility, Department of Public Safety, State of Hawaii; CARRIE ANN TERAMOTO, Personnel Management Specialist, Employee Claims Division, Department of Human Resources Development, State of Hawaii; MARJORIE PENNEBACKER, Return to Work Priority Program Nurse, Employee Claims Division, Department of Human Resources Development, State of Hawaii; UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and JAMILYN MAKAEHU*, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NOS.: CE-10-768 CU-10-297 ORDER NO. 2790 ORDER GRANTING UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND DISMISSING PROHIBITED PRACTICE COMPLAINT

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

On September 8, 2010, Complainant JEROME P. NAKACHI, JR. (Complainant or Nakachi), filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant

*Complainant incorrectly spelled "Jamilyn Makaehu" as "Jaymilyn Makaehu" in his complaint.

alleged, inter alia, that on January 29, 2009, he fell at work severely injuring his back; upon his return to work on December 29, 2009, he was asked to submit to a urinalysis but was unable to complete the test due to back pain; he sought medical treatment and obtained medical clearance for the day; he was discharged on January 29, 2010; a Step 1 grievance was filed on February 16, 2010; and the grievance was withdrawn at Step 1 on June 10, 2010. Complainant contends that the employer and employee organization interfered with and restrained his rights guaranteed under Hawaii Revised Statutes (HRS) §§ 377-6(1), 377-7(1), 89-13(a)(1) or 89-13(b)(1); the employer dominated or interfered in the formation, existence or administration of an employee organization (HRS §§ 377-6 and 89-13(a)(2)); the employer discriminated in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in an employee organization (HRS §§ 89-13(a)(3) and 377-6(3)); the employer discharged and discriminated against employee because the employee has signed or filed a petition or complaint or given testimony under the respective chapter (HRS §§ 89-13(a)(4) and 377-6(8)); the employer and the union refused to bargain collectively in good faith (HRS §§ 89-13(a)(5) and 377-6(4)); the union violated the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination (HRS §§ 89-13(b)(4), 89-8(a), and 378-51)); the employer and the union violated the terms of the collective bargaining agreement (HRS §§ 89-13(a)(8), 89-13(b)(5), 377-6(6), and 377-7(3)); and the employer and union violated the employment rights of an injured employee (HRS § 386-142). The Complaint identified "Dennis W.S. Chang (To be retained)" as Complainant's representative.

On September 15, 2010, Complainant's counsel filed an Amended Attachment for Prohibited Practice Complaint filed on September 9, 2010, indicating, inter alia, that Nakachi's return-to-work date was January 7, 2010 and not December 29, 2009 as indicated in the attachment filed on September 9, 2010.

On September 16, 2010, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, by and through its counsel on behalf of the union and its agents, DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and JAMILYN MAKAEHU, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO (collectively Union or UPW) filed a Motion to Dismiss and/or for Summary Judgment. The UPW moved to dismiss the instant complaint for failure to state a claim for relief because the complaint does not allege a specific violation of the Unit 10 collective bargaining agreement or a breach of duty of fair representation by the Union. In addition, the UPW argues that there are no genuine disputes over material facts regarding compliance with all applicable provisions of the Unit 10 agreement by the employer and with the duty of fair representation by the UPW.

On September 21, 2010, Employer-Respondents filed their Answer to Prohibited Practice Complaint Filed September 8, 2010, with the Board.

On September 16, 2010, the Board issued a Notice of Prehearing/Settlement Conference and Hearing on UPW's Motion to Dismiss and/or Motion for Summary Judgment, Filed on September 16, 2010 with the Board.

On September 27, 2010, the UPW, by and through its counsel, filed a Pre-Hearing Statement with the Board.

On September 30, 2010, Complainant, by and through his counsel, filed a Pre-hearing Statement of Jerome P. Nakachi, Jr. with the Board.

On October 1, 2010, the UPW filed a Motion to Dismiss for Lack of Prosecution with the Board. Also on October 1, 2010, the Employer-Respondents filed a Prehearing Statement with the Board.

At the Prehearing/Settlement Conference held on October 5, 2010, Complainant's counsel represented that he was recently retained by Complainant and orally requested an extension of the deadline to file written responses to the pending Motion to Dismiss and/or for Summary Judgment filed by Respondent UPW and a continuance of the hearing on the pending motions. Over the objection of Respondents, the Board granted the Complainant's request to extend the deadline to file a response and a continuance of the motion hearing in its Notice of Filing Deadline and Hearing on Motions, dated October 5, 2010. The Board set October 12, 2010 as the deadline for Complainant to file his response to pending motions to dismiss as well as for the filing of motions by any party and scheduled the hearing on motions on October 21, 2010.

On October 7, 2010, the UPW filed a Motion for Reconsideration of Board Order and Notice Granting Complainant's Request for Extension of Time Dated October 5, 2010. The UPW contended, *inter alia*, that the Board acted in excess of its authority by granting Complainant's counsel's oral request which did not comply with Hawaii Administrative Rules § 12-42-8(g)(3)(C)(i); the Board accepted Complainant's counsel's representation that he was only recently retained when he had in fact earlier made an appearance to amend the Complaint on September 15, 2010; and the Board's procedures adopted in this case are prejudicial to the UPW and violated HRS § 89-5.

On October 7, 2010, the UPW filed a Motion for Disclosure by Counsel with the Board.

On October 12, 2010, Complainant filed a Motion to Amend Complaint to include a breach of contract relating to drug testing and a breach of the duty of fair representation. Also, on October 12, 2010, Complainant filed a Memorandum in Opposition to UPW's Motion for Disclosure by Counsel Filed on October 7, 2010, UPW's Motion for Reconsideration of Board Order and Notice Granting Complainant's Request for Extension of Time Dated October 5, 2010 Filed on October 7, 2010, and Memorandum in Opposition for Motion to Dismiss for Lack of Prosecution Filed on

October 1, 2010. In addition, on October 12, 2010, Complainant filed a Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment Filed on September 16, 2010.

On October 14, 2010, Complainant filed a Motion to Amend Complaint to Include Additional Facts and Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment.

On October 14, 2010, the UPW filed a Reply Brief in Support of Motion for Disclosure By Counsel for Complainant Filed on October 7, 2010. The UPW stated, inter alia, that Complainant's counsel made the requisite disclosure requested in the motion.

On October 15, 2010, the UPW filed a Reply Brief in Support of Motion to Dismiss for Lack of Prosecution Filed October 1, 2010 and a Reply Brief in Support of Motion to Dismiss and/or for Summary Judgment Filed on September 16, 2010. On October 19, 2010, the UPW filed a Memorandum in Opposition to Complainant's Motion to Amend Complaint to Include Additional Facts Filed October 14, 2010 and Errata.

On October 19, 2010, Complainant's counsel filed a Notice of Dennis W.S. Chang's Immediate Withdrawal and Motion for an Extension of Time to Allow Jerome P. Nakachi, Jr. a Thirty-day Continuance to Obtain a New Legal Representative. Complainant's counsel gave notice to the Board and all parties that he would be withdrawing as Complainant's legal representative effective immediately since he had completed his limited engagement in the case. Complainant's counsel also moved that the Board grant a thirty-day continuance to Complainant to retain legal counsel.

On October 21, 2010, the UPW filed an Opposition (sic) Complainant's to (sic) Notice of Withdrawal of Counsel & Motion for Extension of Time Filed 10/19/10. The UPW argued that the motion was untimely because it was not filed by the October 12, 2010 motions deadline set by the Board; Complainant was granted a prior extension on October 5, 2010 and that granting a further continuance is prejudicial to Respondents; and Rule 1.16(b) and (c) of the Rules of Professional Conduct prohibit the withdrawal of counsel where such withdrawal materially causes adverse effect on the interests of the client.

On October 21, 2010, the Board conducted a hearing on the pending motions. Complainant appeared at the hearing without his counsel and Complainant's wife represented him. Respondents were represented by counsel. The Board afforded the parties the opportunity to present evidence and argument to the Board.

Based upon a review of the record and the arguments presented, the Board, after conferring, denied Complainant's counsel's motion to withdraw and granted the UPW's Motion to Dismiss and/or for Summary Judgment at the close of the hearing.

Respondent UPW then requested the Board to assess attorney's fees against the Complainant and the Board took the matter under advisement.

Based upon the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Nakachi was for all times relevant an adult corrections officer employed by the Department of Public Safety, State of Hawaii, and an employee within the meaning of HRS § 89-2. Nakachi was for all times relevant a member of bargaining unit 10 and represented by the UPW.

2. CLAYTON FRANK (Frank) was for all times relevant the Director, Department of Public Safety, State of Hawaii, representing the interests of the Governor, State of Hawaii, in dealing with employees of the department and was therefore was an employer within the meaning of HRS § 89-2. The DEPARTMENT OF PUBLIC SAFETY, State of Hawaii is an administrative agency of the State of Hawaii and MICHAEL HOFFMAN, Institutions Division Administrator, Department of Public Safety, State of Hawaii; WANDA CRAIG, Adult Correctional Officer VI, Halawa Correctional Facility, Department of Public Safety, State of Hawaii; NOLAN ESPINDA, Warden, Halawa Correctional Facility, Department of Public Safety, State of Hawaii; CARRIE ANN TERAMOTO, Personnel Management Specialist, Employee Claims Division, Department of Human Resources Development, State of Hawaii; and MARJORIE PENNEBACKER, Return to Work Priority Program Nurse, Employee Claims Division, Department of Human Resources Development, State of Hawaii (collectively Employer or Employers), were for all times relevant representatives of the employer's interests and thus employers within the meaning of HRS § 89-2.

3. The UPW is an employee organization within the meaning of HRS § 89-2 and the duly elected exclusive representative of bargaining 10 employees. DAYTON NAKANELUA (Nakanelua), UPW State Director and JAMILYN MAKAEHU, Business Agent, UPW are representatives of the UPW.

4. The UPW and the Governor, State of Hawaii were for all times relevant, parties to a collective bargaining agreement for bargaining unit 10 which includes a grievance procedure.

5. On or about January 14, 2010, Frank notified Complainant of his discharge effective January 29, 2010. Frank stated:

On January 7, 2010, you were directed by Captain Wanda Craig to submit to a follow-up Uri analysis test and would be escorted by Captain Francis Hun.

At approximately 9:24 a.m., you provided a specimen, however there was no temperature and the sample was of an insufficient quantity. You were then informed that you have up to three (3) hours to provide a suitable urine sample. While waiting, you requested to step out to smoke a cigarette. At that time, you informed Captain Hun that you were experiencing back pain, was waiving the three (3) hours and refused to attempt a second collection. Further, upon returning to the facility at approximately 10:12 a.m., you left work without authorization and without submitting a report. Thereafter, you have been calling in sick to the sick call hotline.

In accordance with Section 65.03 b.5 of the Unit 10 Agreement, employees shall not refuse to submit to a required controlled substance test. Section 65.15 i.1. states: An Employee who refuses to submit to a required alcohol or controlled substance test in violation of Section 65.03 a.6. or Section 65. 03 b.5 shall be discharged.

Therefore, the effective date of your discharge will be the close of business Friday, January 29, 2010. You will be placed on leave with pay from January 14, 2010, through the date of your discharge.

* * *

(Emphasis in original).

6. A pre-discharge hearing was conducted on January 27, 2010 and by letter dated January 28, 2010, Frank notified Complainant that the evidence produced by Complainant was insufficient to overturn the discipline and that the discharge was sustained. On or about February 16, 2010, the UPW filed a grievance on Complainant's behalf in Case No. LM-10-03 against the State of Hawaii, Department of Public Safety. The UPW conducted an investigation and requested information from the employer which was provided. On May 24, 2010, Frank denied the Step 1 grievance stating:

> Grievant was well aware of the consequences for "refusal" under Section 65 of the Unit 10 Agreement. There are no exceptions, regardless of the time factor and his incontinence.

Grievant was even informed by a Union BA of the requirement to complete the test.
Upon returning to the facility, Grievant left without authorization and without submitting a report of the incident.

7. Nakanelua reviewed the information provided by the employer to determine whether to arbitrate the matter. On June 10, 2010, Nakanelua decided not to pursue the grievance to arbitration because there was insufficient evidence of a violation of the Unit 10 collective bargaining agreement because when an employee fails to provide an adequate specimen of urine needed for drug testing, it constitutes a refusal to test resulting in discharge.[1] By letter dated June 10, 2010, Nakanelua informed Marie Laderta, Director, Department of Human Resources Development that the Union withdrew the grievance. Also by letter dated June 10, 2010, Nakanelua advised Complainant that it would not pursue the grievance further "because there is insufficient proof that there is a violation of the CBA."

8. On April 1, 2008, Complainant and the Employer entered into Exhibit 65.15 d, Controlled Substance Last Chance Agreement, which provides in part:

> 1. The Employee has tested positive for controlled substance as provided in Section 65 for the first time.
>
> 2. The Employee agrees to sign Exhibit 65.15 d. Controlled Substance last Chance Agreement instead of being discharged and where by the Employee agrees to resign from employment on a no-fault basis in the event of a second positive controlled substance test occurring within two (2) years of the first positive test exclusive of time from the date the Employee has been removed from performing safety sensitive functions, including time spent in evaluation and treatment, until the date the Employee has returned to performing

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[1]Section 65.15 i.l of the Unit 10 collective bargaining agreement, effective July 1, 2007 to June 30, 2009, provides as follows:

> 65.15 i. REFUSAL TO TEST.
>
> 65.15 i.l. An Employee who refuses to submit to a required alcohol or controlled substance test in violation of Section 65.03 a.6. or Section 65.03 b.5 shall be discharged.

safety sensitive functions following a negative return to work test(s).

3. The Employee agrees that when the Employee signs Exhibit 65.15 d Controlled Substance Last Chance Agreement the Employee shall be suspended for twenty (20) workdays instead of being discharged.

* * *

5. The Employee agrees that a resignation from employment deprives the Employee of the right to grieve as provided in Section 15 of the Unit 10 Agreement or challenge the resignation.

9. The UPW previously represented Complainant in a grievance challenging a termination effective August 12, 2002 for failing to call in. Complainant's termination was reduced to a four-day suspension, subject to a mental and physical evaluation and reinstatement without back pay.

10. On October 12, 2010, Complainant sought to amend his Complaint by adding additional allegations that there was a violation of the drug testing provisions in the contract since no one gave him advice as to what could or could not be done. Complainant also added that he was misled into believing that the UPW was representing him, in particular when he was told not to appear at the step 1 grievance meeting.

11. In UPW's Memorandum in Opposition to Complainant's Motion to Amend Complaint Filed October 12, 2010, filed on October 14, 2010, the UPW argued that allowing Complainant to amend his Complaint would be prejudicial because Complainant is attempting to reconstruct the allegations in his Complaint to defeat the arguments in the UPW's Motion to Dismiss and/or for Summary Judgment filed on September 16, 2010 which was not timely responded to. In addition, the UPW contends that Complainant's allegation that the UPW told Complainant and his wife not to attend the Step 1 meeting on May 21, 2010 occurred more than 90 days before the Complaint was filed and is time-barred. The UPW also argues that it would be futile to permit the amendment because the Complaint on its face fails to state a claim for relief. The UPW contends that Complainant's proposed amendment does not specifically allege a violation of the Unit 10 agreement. In addition, the UPW contends that Complainant admits that he was told by the UPW on June 7, 2010 that he could not leave and had to give a second sample or face a discharge, and Complainant was in fact discharged after disobeying the advice given to him.

12. On October 14, 2010, Complainant filed a Motion to Amend Complaint to Include Additional Facts and Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment. Complainant states that the parties have no dispute that Complainant failed to provide a sufficient amount of urine sample and he was terminated for just cause but that there was noncompliance with the Department of Transportation drug testing rules as required by the collective bargaining agreement. Complainant asserts that he had a medical explanation for the failure to provide a sufficient amount of urine when directed and that the Employer and the UPW violated his contractual rights, acted in bad faith and terminated him without just cause. Complainant requested that he be made whole without having to go through an arbitration because of its conflict with the Union.

13. On October 15, 2010, the UPW filed its Reply Brief in Support of Motion to Dismiss for Lack of Prosecution Filed October 1, 2010. The UPW contended that in a September 13, 2010 letter, Complainant's counsel confirmed that he would not represent him in a complaint with the Hawaii Civil Rights Commission but would handle the instant matter to make "a deal" with the Hawaii Labor Relations Board complaint to allow him to file a disability application with the Employees Retirement System; that on September 15, 2010, Complainant's counsel sent a letter to the Board Chair to amend the allegations and chronology of specific facts in the instant Complaint; Complainant's counsel was served with the Motion to Dismiss and/or for Summary Judgment on September 16, 2010 and failed to file a motion to extend the date and failed to file any opposition to the motion to dismiss and/or for summary judgment; Complainant's counsel filed a prehearing statement but failed to request a continuance of any deadlines; and thus Complainant waived his right to oppose the UPW's motion to dismiss and/or for summary judgment.

14. Also on October 15, 2010, the UPW filed a Reply Brief in Support of Motion to Dismiss and/or for Summary Judgment Filed on September 16, 2010. The UPW contends that Complainant's declaration establishes there are no material facts in dispute regarding his decision to leave the testing site after he was advised that it was prohibited by Section 65.03b.5 and constitutes grounds for discharge under Section 65.15.i.1 of the Unit 10 agreement; that he was advised by the UPW not to leave even though he felt it was a medical emergency; that he was asked by his superior whether he was waiving the time given to provide a second sample and Complainant replied in the affirmative; that Complainant does not allege the violation of any specific provision of the Unit 10 collective bargaining agreement; there is no evidence that the UPW's conduct was arbitrary, discriminatory, or in bad faith so as to constitute a breach of the duty of fair representation over the decision not to arbitrate his discharge; that Complainant's decision to

not follow the UPW's advice resulted in a violation of Section 65.03b.5 of the Unit 10 agreement; and that the decision not to arbitrate was based solely on the merits of the case.

15. On October 19, 2010, the UPW filed its Memorandum in Opposition to Complainant's Motion to Amend Complaint to Include Additional Facts Filed October 14, 2010. The UPW contended that there was no merit to the Complainant's motion because it was untimely filed beyond the October 14, 2010 deadline; that amending the Complaint would be futile because Complainant admits that his refusal to submit to a second test is grounds for dismissal and the UPW agent stated in a declaration that he fully informed Complainant of the consequences of his actions; and the request to add additional facts is beyond the deadline set by the Board and Nakachi's reliance on DOT rules is misplaced. The UPW contends that the declarations of business agents Michael Nitta (Nitta) and Jamilyn Makaehu (Makaehu) state that Nitta provided advice to Complainant before he left the testing site and that Makaehu represented Complainant at the predischarge hearing when the Employer provided her with Complainant's Last Chance Agreement, dated April 1, 2008.

16. Based upon a review of the record, the Board finds that approving Complainant's counsel's notice of withdrawal filed the day prior to the October 21, 2010 hearing on motions and granting an additional 30-day continuance for Complainant to retain substitute counsel would prejudice the rights of the Respondents in this case because Complainant's counsel initially requested an extension of the deadline to file responses to the pending motions and a continuance of the scheduled hearing on pending motions which were permitted by the Board without any disclosure that Complainant's counsel was only performing services of a limited nature for Complainant. Allowing Complainant's counsel to withdraw based upon his understanding of a limited engagement in this case thus would result in further delays to allow Complainant to retain substitute counsel for argument on the pending motions which have been substantially briefed. Accordingly, the Board agrees with the objections by Respondents that it was improper for Complainant's counsel not to appear at the Board hearing and denies the Complainant's counsel's notice of withdrawal and request for a continuance to retain substitute counsel. The Board finds that Complainant's counsel remains Complainant's attorney of record. As the motions have already been fully briefed, the Board denies Complainant's motion for a 30-day continuance to retain substitute counsel for argument in this matter.

17. With respect to the UPW's October 7, 2010 Motion for Disclosure by Counsel for Complainant, the UPW stated in its October 14, 2010 Reply

Brief in Support of Motion for Disclosure By Counsel for Complainant Filed on October 7, 2010, that Complainant's counsel made the requisite disclosure requested in the motion. Thus, the Board finds the issues are moot and denies the UPW's motion for disclosure.

18. Based on the record in this case, the Board finds that Complainant alleges a hybrid claim that the employer improperly terminated him in violation of the collective bargaining agreement (HRS § 89-13(a)(8) and the UPW breached its duty of fair representation (HRS §§ 89-13(b)(4) and 89-8(a)). The Board finds that there are no genuine issues of material fact presented, and that Complainant was subjected to a urinalysis upon his return to work; that he was incontinent and urinated on himself prior to the test; that during the test, he produced an insufficient sample; Complainant was directed to provide another sample within three hours; Complainant requested to leave because of back pain and was told by Captain Hun that he could not leave; that he called the Union and was told by UPW business agent Nitta not to leave the facility notwithstanding his discomfort because Complainant's failure to produce a specimen would be treated as a refusal to test and he would be discharged; that Complainant left the testing site without producing a sufficient specimen; Complainant was discharged effective January 29, 2010 because of a failure to test; that the UPW represented Complainant at the pre-discharge hearing where Complainant was present and the Employer produced Complainant's Last Chance Agreement arising from a positive result for controlled substances in 2008; that the Last Chance Agreement provides, in part, that in lieu of being discharged, the employee agreed to a 20-day suspension and would resign from employment in the event of a second positive controlled substance test occurring within two years of the first positive; that the employer denied Complainant's grievance because Complainant was well aware of the consequences for "refusal" under Section 65 of the Unit 10 Agreement and there were no exceptions regardless of the time factor and his incontinence, the Union business agent informed Complainant of the requirement to complete the test and Complainant left without authorization; that Nakanelua reviewed the merits of the grievance and concluded that there was insufficient evidence to overturn Complainant's discharge; that there is no evidence of discrimination against Complainant because the UPW previously represented him in a prior discharge grievance which was overturned; and there is no evidence to support a finding that the UPW's decision not to arbitrate Complainant's grievance was discriminatory, arbitrary, or in bad faith.

19. Based upon the record, the Board finds that Complainant failed to present any evidence to support Complainant's allegations of prohibited practices committed by the UPW. In addition, Complainant's multiple motions to

amend his complaint are unsuccessful in stating a claim for relief. Therefore, the Board finds that the amendments would be futile and the Board denies Complainant's motions to amend the complaint. Moreover, the Board grants the UPW's request to strike Complainant's October 14, 2010 Motion to Amend Complaint to Include Additional Facts and Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment as untimely in view of the October 12, 2010 deadline for the filing of motions.

20. At the close of the hearing, the Board indicated its inclination to grant the UPW's motion to dismiss and/or for summary judgment and the UPW requested attorneys' fees and costs as set forth in HRS § 377-9(d).

CONCLUSIONS OF LAW

1. Complainant contends that the employer and employee organization interfered with and restrained his rights guaranteed under HRS §§ 377-6(1), 377-7(1), 89-13(a)(1) or 89-13(b)(1); the employer dominated or interfered in the formation, existence or administration of an employee organization (HRS §§ 377-6 and 89-13(a)(2)); the employer discriminated in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in an employee organization (HRS §§ 89-13(a)(3) and 377-6(3)); the employer discharged and discriminated against employee because the employee has signed or filed a petition or complaint or given testimony under the respective chapter (HRS §§ 89-13(a)(4) and 377-6(8)); the employer and the union refused to bargain collectively in good faith (HRS §§ 89-13(a)(5) and 377-6(4)); the union violated the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination (HRS §§ 89-13(b)(4), 89-8(a), and 378-51)); the employer and the union violated the terms of the collective bargaining agreement (HRS §§ 89-13(a)(8), 89-13(b)(5), 377-6(6), and 377-7(3)); and the employer and union violated the employment rights of an injured employee (HRS § 386-142).

2. With respect to the powers of the Board, HRS § 89-5(i) provides in part:

> In addition to the powers and functions provided in other sections of this chapter, the board shall:
>
> * * *
>
> (3) Resolve controversies under this chapter;

* * *

3. HRS § 89-13, Prohibited practices; evidence of bad faith, provides in pertinent part as follows:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
> (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
> (3) Discriminate in regard to hiring, tenure, or any term or condition or employment to encourage or discourage membership in any employee organization;
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement;
>
> * * *
>
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *

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

(5) Violate the terms of a collective bargaining agreement.

4. HRS § 89-14 provides as follows:

> Any controversy concerning prohibited practice may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

5. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

6. On October 7, 2010, the UPW filed a Motion for Reconsideration of Board Order and Notice Granting Complainant's Request for Extension of Time Dated October 5, 2010. The UPW argued that the Board acted in excess of its authority by granting Complainant's counsel's oral request which did not comply with Hawaii Administrative Rules § 12-42-8(g)(3)(C)(i); the Board accepted Complainant's counsel's representation that he was only recently retained when he had in fact earlier made an appearance to amend the Complaint on September 15, 2010, and the Board's procedures adopted in this case are prejudicial to the UPW and violated HRS § 89-5. After considering the arguments presented, the Board in its discretion denies the UPW's motion for reconsideration given the short delay requested by Complainant as well as the recognition that the Board would have allowed Complainant the opportunity to present oral argument on the motion to dismiss.

7. 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)).

8. 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)).

9. 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.

10. 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.

11. 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.

12. The evidentiary standard required of a moving party in meeting its burden on a summary judgment motion depends on whether the moving party will have the burden of proof on the issue at trial. Where the moving party is the defendant, who does not bear the ultimate burden of proof at trial, summary judgment is proper when the nonmoving party-plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of [his or] her case with respect to which [he or] she has the burden of proof. Miyashiro v. Roehrig, Roehrig, Wilson & Hara, 122 Hawai`i 461, 474-75, 228 P.3d 341, 354-55 (Hawai`i App. 2010), citing Exotics Hawai`i-Kona, Inc. v. E.I. Du Pont de Nemours & Co., 116 Hawai`i 277, 302, 172 P.3d 1021, 1046 (2007).

13. With regard to the dispositive motion 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).

14. 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).

15. 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.

16. 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 (l991), (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (l953)). 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 LRRM 3017 (3d Cir. 2006) (Citations omitted).

17. A union does not breach its duty of fair representation when it exercises its "judgment" in good faith not to pursue a grievance further. Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9th Cir. 1994) (Stevens), or by acting negligently, Patterson v International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9th Cir. 1997). As explained in Stevens:

> ...A Union's decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment. (Citations omitted). "We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances." (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

18. Complainant alleged that the UPW violated the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination in HRS §§ 89-13(b)(4) and 89-8(a).[2] Based upon a

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[2]HRS § 89-8(a) provides in part:

> (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. [Emphasis added.]

review of the record, the Board finds that once the UPW established that there were no facts in dispute and that it was entitled to summary judgment, Complainant failed to provide by affidavit or proof of facts of any showing of wilfulness or bad faith on the part of Nakanelua in refusing to proceed to arbitration on Complainant's grievance. Nakanelua stated in his affidavit that based upon his review of the facts of the case and the controlled substance testing provisions of the collective bargaining agreement, he concluded that there was insufficient evidence that the Employer had violated the collective bargaining agreement. Complainant does not dispute these facts. The Board concludes that the UPW's decision not to arbitrate Complainant's grievance was within the wide range of reasonableness because in the Union's opinion it could not prove the Employer violated the collective bargaining agreement. The Board further concludes that Complainant failed to show a genuine dispute of material facts and failed to bring forth sufficient facts to establish that the UPW's conduct was arbitrary, discriminatory, or in bad faith. Even if the Complainant was able to raise a dispute of facts warranting a hearing in this case and prove that the UPW's actions were arbitrary and discriminatory, the Board concludes that Complainant failed to bring forth sufficient facts in response to the instant motion to persuade the Board to conclude that the UPW's allegedly violative actions were wilful. Accordingly, the Board concludes that the UPW is entitled to summary judgment in this case that the UPW did not violate HRS §§ 89-13(b)(4) and 89-8 and dismisses the claim that the UPW breached its duty of fair representation.

19. As the Board finds that Complainant failed to establish the elements of a breach of duty of fair representation claim against the UPW, his claim against the Employer 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 Employer Respondent is also entitled to judgment as a matter of law that they did not commit a prohibited practice by violating the collective bargaining agreement in HRS § 89-13(a)(5) and dismisses that claim.

20. Complainant was for all relevant times employed by the Department of Public Safety and was an employee within the meaning of HRS § 89-2 and is not an employee under HRS Chapter 377 which specifically excludes the State of Hawaii and its political subdivisions as an "employer."[3] Thus, the

[3]The definition of employer in HRS § 377-1(2) is as follows:

Board dismisses Complainant's allegations of HRS Chapter 377 violations for lack of jurisdiction.

21. Complainant alleges the Employer and Union violated the employment rights of an injured employee under HRS § 386-142 which provides as follows:

> § 386-142 Employment rights of injured employees. It shall be unlawful for any employer to suspend or discharge any employee solely because the employee suffers any work injury which is compensable under this chapter and which arises out of and in the course of employment with the employer unless it is shown to the satisfaction of the director that the employee will no longer be capable of performing the employee's work as a result of the work injury and that the employer has no other available work which the employee is capable of performing. Any employee who is suspended or discharged because of such work injury shall be given first preference of reemployment by the employer in any position which the employee is capable of performing and which becomes available after the suspension or discharge and during the period thereafter until the employee secures new employment. This section shall not apply to the United States or to employers subject to part III of chapter 378.

HRS Chapter 386, Hawaii's Workers Compensation Law, is not within the Board's jurisdiction and accordingly, Complainant's allegations that HRS § 386-142 was violated are dismissed.

22. The Board concludes that Complainant failed to bring forth facts to establish his claims of prohibited practice in violation of: HRS §§ 89-13(a)(1) and (b)(1) - that the employer and the union interfered, restrained, or coerced Complainant in the exercise of any right guaranteed under this chapter; HRS § 89-13(a)(2) - that the employer dominated or interfered in the formation, existence, or administration of an employee organization; HRS § 89-13(a)(3) - that the employer discriminated in regard to hiring,

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"Employer" means a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

tenure, or any term or condition or employment to encourage or discourage membership in any employee organization; HRS § 89-13(a)(4) - that the employer discharged or otherwise discriminated against Complainant because the employee signed or filed an affidavit, petition, or complaint or gave any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization; HRS § 89-13(a)(5) - that the employer refused to bargain collectively in good faith; and HRS § 89-13(b)(5) - that the union violated the terms of the collective bargaining agreement. Accordingly, the Board dismisses the foregoing claims for failure to state a claim for relief.

23. At the close of the hearing on October 21, 2010, the Board stated its inclination, *inter alia*, to grant the UPW's motion for summary judgment. The UPW's counsel requested an award of attorney's fees. The Board took the matter under advisement. HRS 377-9(d) provides the Board with authority to award attorney's fees in prohibited practice cases. The applicable statute provides as follows:

> After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the determination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay with interest, costs, and attorneys' fees. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order. Furthermore, an employer or employee who wilfully or repeatedly commits unfair or prohibited practices that interfere with the statutory rights of an employer or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a civil penalty not to exceed $10,000 for each violation. In determining the amount of any penalty under this section, the board shall consider the gravity of the unfair or prohibited practice and the impact of the practice on

> the charging party, on other persons seeking to exercise rights guaranteed by this section, or on public interest. [Emphasis added.]

24. In Paul's Elec. Service, Inc. v. Befitel, 104 Hawai`i 412, 417, 92 P.2d 494, 499 (2004), the court stated:

> Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority. See Morgan v. Planning Dept., County of Kauai, 104 Hawai`i 173, 184, 86 P.3d 982, 993 (2004) (" 'An administrative agency can only wield powers expressly or implicitly granted to it by statute.' " (Quoting TIG Ins. Co. v. Kauhane, 101 Hawai`i 311, 327, 67 P.3d 810, 826 (App.2003).)).

25. It is clear from a plain reading of the HRS § 377-9(d), that in prohibited practice cases, the Board's final order may dismiss the complaint or require a Respondent to cease and desist, from the unfair labor practice and require affirmative action and award make whole remedies in favor of employees, including attorney's fees. However, where as here the Board dismisses a prohibited practice complaint, the Board concludes that it lacks the authority under the foregoing statute to award attorney's fees to a Respondent against a Complainant. Accordingly, the Board denies the UPW's request for attorney's fees.

ORDER

In summary, based on the foregoing, the Board hereby denies UPW's October 1, 2010 Motion to Dismiss for Lack of Prosecution as Complainant actively participated in the proceedings before the Board by filing documents and appearing before the Board; denies the UPW's October 7, 2010 Motion for Reconsideration of Board Order and Notice Granting Complainant's Request for Extension of Time Dated October 5, 2010; denies UPW's October 7, 2010, Motion for Disclosure by Counsel as moot; denies Complainant's October 14, 2010 Motion to Amend Complaint to Include Additional Facts and Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment. as untimely filed beyond the October 12, 2010 deadline set forth in the Board's October 5, 2010 Notice of Filing Deadline and Hearing on Motions; grants summary judgment in favor of the UPW and Employer Respondents and dismisses this Complaint; and denies UPW's request for attorney's fees.

JEROME P. NAKACHI, JR. v. DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; et al.
CASE NOS.: CE-10-768, CU-10-297
ORDER NO. 2790
ORDER GRANTING UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND DISMISSING PROHIBITED PRACTICE COMPLAINT

DATED: Honolulu, Hawaii, May 18, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

NORMAN K. KATO II, Member

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