STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of CLARENCE YAMAMOTO, BROOKS TAMAYE, HOWARD RODRIGUES, JOHN YAMAMOTO, JOHN DE JESUS, NATHAN HILLEN, GORDON YEN, JEFFREY KINORES, KIEF APO, WESLEY PURDY and MICHAEL COELHO, Complainants, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION; BRANDON LEE, Union Agent, Hawaii Government Employees Association; ALTON WATANABE, Division Chief, Maui Division, Hawaii Government Employees Association; and TEHANI NUNEZ, Union Agent, Maui Division, Hawaii Government Employees Association, Respondents.	CASE NO. CU-03-314 ORDER NO. 2888 ORDER DISMISSING AMENDED PROHIBITED PRACTICE COMPLAINT

ORDER DISMISSING AMENDED
PROHIBITED PRACTICE COMPLAINT

On April 16, 2012, Complainants, *pro se*, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainants alleged that Respondents violated Hawaii Revised Statutes (HRS) §§ 89-9(a) and 89-13(b)(4), by not providing Complainants with fair and equal representation.

On May 8, 2012, Respondents, by and through their counsel, filed a Motion to Dismiss Prohibited Practice Complaint Filed on April 16, 2012 (Motion to Dismiss) with the Board. Respondents argued, *inter alia*, that Complainants alleged in their Complaint they had "issues" with some of Respondent BRANDON LEE's (Lee) comments in the First Consultative Response to DOCARE's Proposed Directive Systems, and Special Purpose Vehicles - Personal Watercraft, Policies and Procedures dated August 5, 2011 which had direct negative impacts to their branch and its officers; that Complainants met with Respondents ALTON WATANABE (Watanabe) and TEHANI NUNEZ (Nunez) on August 26, 2011 to voice their displeasure; that by letter dated

August 29, 2011, Complainants requested HAWAII GOVERNMENT EMPLOYEES ASSOCIATION (HGEA or Union) retract Lee's demands in writing, with the expressed caution that "if the HGEA is not willing or is unable to fulfill this we will have no alternative and will file a complaint with a higher authority"; that Respondent Lee did not retract his comments; and that the instant Complaint was filed on April 16, 2012, more than ninety (90) days after the occurrence of any alleged prohibited practices.

On May 16, 2012, Complainants filed a "Request Motion for Leave to Amend the HLRB-4, Filed April 16, 2012 with the Attached Amended HLRB-4"[1] (Motion to Amend Complaint), with the Board. Complainants sought to add the names of three Complainants, i.e., KIEF APO (Apo), WESLEY PURDY (Purdy) and MICHAEL COELHO (Coelho), to the allegations in the Complaint and to correct the March 12, 2011 meeting date to March 12, 2012. On May 18, 2012, Complainants filed a "Certificate of Service Motion for Leave to Amend the HLRB-4, Filed April 16, 2012 with the Attached Amended HLRB-4", with the Board.

On May 23, 2012, the Board conducted a hearing on the foregoing motions and in Order No. 2850, dated June 1, 2012, the Board granted in part and denied in part Respondents' motion to dismiss the instant Complaint and granted Complainants' motion for leave to amend the Complaint. The Board dismissed the allegations in the Complaint which were barred by the Board's 90-day statute of limitations and stated as follows:

> 8. Respondents contend, *inter alia*, that the instant Complaint should be dismissed because the Board has a ninety (90) day statute of limitations pursuant to HRS § 377-9; that Complainants knew they disagreed with the HGEA's response to the employer's request to consult on August 5, 2011; that Complainants met with Respondents Watanabe and Nunez on August 26, 2011 regarding not being provided fair and equal representation; and the Complaint was filed on April 16, 2012, more than ninety (90) days after the Complainants knew they were aggrieved.
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> 9. In the instant case, Complainants also alleged that on March 12, 2012, they were not invited to attend a meeting conducted by HGEA business agents to discuss watercraft and other issues. Thus, the Complaint filed on April 16, 2012 was timely filed as to the March 12, 2012 meeting. All other allegations

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[1]HLRB-4 is the Board's Prohibited Practice Complaint form.

of prohibited practices occurring prior to January 17, 2012 are outside of the Board's ninety (90) day statute of limitations and are hereby dismissed as untimely.

The Board also granted Complainants' Motion to Amend the Complaint to include Apo, Purdy, and Coelho in the allegations and to correct the date of the meeting from March 12, 2011 to March 12, 2012 in Order No. 2850.

Thus, the only allegations remaining in the Amended Prohibited Practice Complaint pertain to unequal or unfair representation by Respondents Watanabe and Nunez who were present, knew about, or conducted a video conference meeting with Union agent Lee on March 12, 2012 where they discussed DLNR-DOCARE PWC (Personal Water Craft or jet ski) issues and to which only four Unit 03 employees from the branch were invited to attend.

On July 19, 2012 and August 2, 2012, the Board conducted a hearing on the Amended Prohibited Practice Complaint. Complainants presented the testimony of HAROLD HUBERT (Hubert), and Complainants JEFFREY KINORES (Kinores), JOHN B. YAMAMOTO (J. Yamamoto), and HOWARD RODRIGUES (Rodrigues). After Complainants rested their case, Respondents called Complainant CLARENCE YAMAMOTO (C. Yamamoto), as a witness and after receipt of C. Yamamoto's testimony, made an oral motion for summary judgment or to dismiss the Amended Prohibited Practice Complaint. Respondents contended that based on the evidence in the record, Complainants failed to carry their burden of proof by a preponderance of evidence that the Union breached its duty of fair representation. After hearing arguments, the Board took Respondents' motion under advisement.

Based upon a review of the evidence and Respondents' motion for summary judgment or to dismiss the Amended Prohibited Practice Complaint, the Board hereby issues the following findings of fact, conclusions of law, and order dismissing the Amended Prohibited Practice Complaint.

FINDINGS OF FACT

To the extent that any of these Findings of Fact are better characterized as Conclusions of Law, they are to be so construed.

1. C. Yamamoto, BROOKS TAMAYE, Rodrigues, J. Yamamoto, JOHN DE JESUS, NATHAN HILLEN (Hillen), GORDON YEN, Kinores, Apo, Purdy, and Coelho (collectively Complainants) were for all times relevant, officers with the Maui Branch of the Division of Conservation and Resources Enforcement, Department of Land and Natural Resources

(DOCARE), State of Hawaii and public employees[2] within the meaning of HRS § 89-2. Complainants are included in bargaining unit 03.[3]

3. The HGEA was for all times relevant, an employee organization[4] and the exclusive representative[5] of Unit 03 employees. Lee, Watanabe and Nunez were for all times relevant, HGEA business agents with Watanabe and Nunez serving HGEA members in Maui and Lee serving HGEA members on Oahu.

4. The parties agreed that the remaining issues for hearing consisted of whether Respondents breached the union's duty of fair representation in conducting a meeting on March 12, 2012 and if so, whether Respondents' conduct resulted in a wilful violation of HRS § 89-13(b)(4). Transcript of hearing (Tr.) pp. 8-9.

5. Complainants allege they were not fairly or equally treated because they were not invited to a meeting held by HGEA agents on March 12, 2012

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[2]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(f)].

[3]Pursuant to HRS § 89-6(a), bargaining unit 03 is composed of nonsupervisory employees in white collar positions.

[4]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, and other terms and conditions of employment of public employees.

[5]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.

where the PWC policy was allegedly discussed and four other conservation and resource officers were invited to attend.

6. Harold Hubert (Hubert), a DOCARE officer for 15 years, was invited by Nunez and Lee to attend the March 12, 2012 meeting with the Union agents regarding grievances or suits Lee was filing. Tr. p. 25. Hubert remembers Lee spoke about an upcoming lawsuit (Tr. pp. 32, 48) and referred to the jet ski policy, but Hubert could not remember anything else (Tr. p. 37) and said some of the things went over his head (Tr. p. 48). Hubert could not testify as to any facts to show how Respondents violated the duty of fair representation. Tr. pp. 56-57.

7. Kinores worked for DOCARE for four years and learned about the March 12, 2012 meeting through Officers Hubert and Ron Cahill. Tr. p. 74, 190. Kinores stated that he was not aware of the purpose of the March 12, 2012 meeting (Tr. p. 87) and a topic of concern was the PWC operation on Maui (Tr. p. 75). Kinores stated that the only fact regarding how Nunez violated the Union's duty of fair representation is that he was not aware of the (March 12, 2012) meeting when the PWC topic came up, but he could not say whether Nunez knew about it because he was not there. Tr. p. 106. As to what facts support the allegation that Watanabe violated the duty of fair representation, Kinores stated that he did not know who set up the meeting but he was not apprised of the meeting. Tr. p. 106. With regard to Lee, Kinores could only say what Hubert said, i.e., that Hubert was contacted by Lee regarding the meeting. Id.

8. J. Yamamoto has worked for DOCARE for seven years and spoke to people who attended the meeting, i.e. Cahill, Hubert and Chad Kahoopii. Tr. p 140. J. Yamamoto wanted to be consulted about the jet ski policy because of his concerns about working overtime, but he was not invited to the meeting. Tr. p. 143. J. Yamamoto felt he was not treated fairly by HGEA because he was not invited to the meeting where they talked about jet skis. Tr. pp. 149, 150, 159. J. Yamamoto testified that Cahill was at the meeting but told him the discussion was above his pay grade. Tr. p. 175. Although Cahill told him other topics were discussed at the meeting, J. Yamamoto was only concerned about the jet ski matters. Tr. p. 176.

9. Rodrigues worked for DOCARE for seven years and learned about the March meeting through a casual conversation with Hubert. Tr. pp. 186, 189. Hubert mentioned that he called C. Yamamoto to say that he was invited to a meeting and felt uncomfortable because some policies were discussed, specifically personal water craft. Tr. p. 189. During a briefing, Cahill mentioned that he attended the meeting which he likened to an

interview rather than a meeting. Tr. p. 192. Rodrigues asked Hubert what was discussed, and he said things were said which went over his head. Tr. p. 193. When he learned that PWC was discussed, Rodrigues thought it was wrong and everybody should have been there. Id. Ken Bode told him that he was invited but could not attend. Tr. pp. 190, 196, 197. Rodrigues does not know what happened and what was discussed regarding the PWC policy at the meeting. Tr. p. 193. Rodrigues said it was not so much the contents of what was discussed because they had all the information, but Rodrigues would have wanted to be there or at least be asked to have been there. Tr. p. 195. Rodrigues stated J. Yamamoto, Cahill, Hillen, Kinores, DeCambra and Rodrigues are all certified to operate the PWC. Tr. p. 200.

10. C. Yamamoto worked with DOCARE for 18 years and is temporarily assigned to the branch chief position of the Maui Branch. Tr. p. 215. C. Yamamoto drafted and circulated a letter addressed, "To Whom It May Concern", dated March 21, 2012, and signed by 11 officers, regarding the "secretive meeting" where Lee wanted input on PWC operations along with other issues. Tr. pp. 224, 225. The letter was copied to Randy Awo, Enforcement Chief, DLNR DOCARE, HGEA, AFSCME, HLRB and attached to the Complaint.

11. After reviewing the record and the testimony presented, the Board finds that DOCARE Officers Hubert, Cahill, Kahoopii and Bode were invited to participate in a videoconference with HGEA agents, Nunez, Watanabe and Lee on March 12, 2012. Hubert was the only witness to testify regarding who attended the March 12, 2012 meeting. He indicated that Lee referred to an upcoming lawsuit, that the jet ski policy was mentioned, but he was unable to recall exactly what was said and the context of the discussion. The other officers relied upon conversations with Hubert and Cahill who attended the meeting. While the evidence in the record does not indicate that negative comments were made about the Maui jet ski operation in DOCARE, the officers testified that they nevertheless felt unfairly treated because they were not invited to the meeting. There is no evidence in the record as to what Watanabe and Nunez previously agreed to regarding the inclusion of all DOCARE officers in all PWC discussions; what the purpose of the March 12, 2012 meeting was; or what was actually discussed at the meeting. On this record, the Board finds no evidence of a breach of duty of fair representation by Respondents.

11. Based on the foregoing, the Board finds that Complainants failed to prove a prima facie case that the HGEA treated Complainants unfairly or unequally.

CONCLUSIONS OF LAW

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

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

2. A union breaches its duty of fair representation when its conduct toward a member of the designated unit is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967). The union's breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a). Kathleen M. Langtad, 6 HLRB 423 (2001).

3. In the instant case, Complainants have the burden to prove by a preponderance of evidence that Respondents' conduct in refusing to pursue a grievance was arbitrary, discriminatory or in bad faith. HRS § 91-10 regarding Rules of evidence; official notice, provides as follows:

> In contested cases:
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> (5) Except as otherwise provided by law, the party initiating the burden of proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of evidence.

4. Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) provides as follows:

> (16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

5. The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such

employees without discrimination and without regarding to employee organization membership."

6. The burden of proof is on Complainants to show by a preponderance of evidence that Respondents wilfully excluded Complainants from a meeting intended to discuss the PWC policy and that HGEA's actions were arbitrary, discriminatory or in bad faith. Sheldon H. Varney, 5 HLRB 369 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "A union's conduct is 'arbitrary' if it is 'without rational basis,'... or is 'egregious, unfair and unrelated to legitimate union interests,'" Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985).

7. Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978). Simple negligence or mere errors in judgment will not suffice to make out a claim for breach of duty of fair representation. Farmer v. ARA Servs. Inc., 660 F.2d 1096, 108 LRRM 2145 (6th Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th Cir. 1975).

8. The Supreme Court in Airline Pilots Ass'n, Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 136 LRRM 2721 (1991), held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the Union's actions, the union's behavior is so far outside a 'wide range of reasonable,' as to be irrational." Id. at 1130. The Court's holding in O'Neill reflects that a deferential standard is employed as to a union's actions. They may be challenged only if "wholly irrational." Id. at 1136. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. Id. at 1136.

9. Based on the record, the Board concludes that Complainants failed to prove by a preponderance of evidence that Respondents acted in an arbitrary or discriminatory manner or in bad faith and thereby breached the duty of fair representation regarding the March 12, 2012 video conference with Union agent Lee.

ORDER

For the reasons given above, the Board hereby grants Respondents' motion to dismiss the instant prohibited practice complaint.

CLARENCE YAMAMOTO, et al. v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, et al.
CASE NO. CU-03-314
ORDER NO. 2888
ORDER DISMISSING AMENDED PROHIBITED PRACTICE COMPLAINT

DATED: Honolulu, Hawaii, February 22, 2013.

HAWAII LABOR RELATIONS BOARD

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Peter Liholiho Trask, Esq.
Clarence Yamamoto