

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

MATTHEW M. TAAMU,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
Local 646, AFL-CIO; DAYTON
NAKANELUA, State Director, United Public
Workers, AFSCME, Local 646, AFL-CIO;
and EDDIE AKAU, Business Agent, United
Public Workers, AFSCME, Local 646, AFL-
CIO,

Respondents.

CASE NO. CU-01-282

ORDER NO. 3029

FINAL ORDER ADOPTING THE
BOARD'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING
RESPONDENTS' MOTION TO
DISMISS COMPLAINT ISSUED ON
SEPTEMBER 29, 2014

FINAL ORDER ADOPTING THE BOARD'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS COMPLAINT ISSUED ON SEPTEMBER 29, 2014

On September 29, 2014, the Hawaii Labor Relations Board (Board) issued the attached Proposed Findings of Fact, Conclusions of Law, and Order Granting Respondents' Motion to Dismiss Complaint. No exceptions were filed by either party, pursuant to Hawaii Revised Statutes § 91-11, and the time limit for the filing of such exceptions has passed. Accordingly, the Board hereby adopts in its entirety the attached Proposed Findings of Fact, Conclusions of Law, and Order Granting Respondents' Motion to Dismiss Complaint issued on September 29, 2014, as its Final Order in this matter.

DATED: Honolulu, Hawaii, October 28, 2014.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

William M. Taamu
Herbert R. Takahashi, Esq.

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PROPOSED FINDINGS OF FACT, CONCLUSION OF LAW, AND
ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

On October 20, 2009, Complainant MATTHEW M. TAAMU (Complainant or Taamu) filed a prohibited practice complaint (Complaint) against Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union); DAYTON NAKANELUA (Nakanelua), State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and EDDIE AKAU (Akau), Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO (collectively, Respondents). The Complaint alleges that Respondents engaged in prohibited practices by violating Hawaii Revised Statutes (HRS) §§ 377-8, 378-51, 89-8, 89-13(b)(1), 89-13(b)(3), and 89-13(b)(4).ⁱ The Complaint alleges Respondents breached their duty of fair representation by (1) arbitrarily refusing to take the Complainant's meritorious case (#EA-09-01) to arbitration without reason; (2) failing to investigate/discuss the grievance and make an informed and timely decision regarding the arbitration process; (3) failing to notify the grievant of a decision not to arbitrate in time for the grievant to pursue other available remedies as requested by grievant; (4) not responding to the Complainant when Complainant attempted to contact Respondents by phone and certified mail before, during and after the grievance process, thereby exhibiting unreasonable negligence on the part of the Respondents; (5) acting in a perfunctory manner during the grievance procedure by not answering Complainant's phone calls, not keeping Complainant informed, not showing up and being late to a grievance hearing with no valid reason, not investigating the grievance and the lead provided by the Complainant therefore

preventing certain factual proofs of the grievant's position; (6) arbitrarily refusing to provide copies of forms or records pertaining to the grievance formally requested by Complainant verbally and in writing, or not providing valid reasons of actions as also requested by Complainant; (8) discriminating against Complainant for a previous complaint against Respondent for similar irrational behavior regarding Breach of Duty of Fair Representation; and (8) failing to perform ministerial acts on grievant's behalf and any other statute(s) violations found in the course of this investigation. On sheets attached to and referenced in the Complaint, Complainant added additional facts regarding his grievance and communications with Respondents.

On October 27, 2009, Respondents filed a Motion to Dismiss Complaint and/or for Summary Judgment, asserting lack of jurisdiction and failure to state a claim for relief under HRS § 89-13(a) and (b)(1) through (5). On November 13, 2009, Respondents filed a Motion to Dismiss for Lack of Prosecution, asserting that Complainant failed to file a response or opposition to Respondents' Motion to Dismiss Complaint and/or for Summary Judgment. Complainant thereafter appeared at the Board's prehearing/settlement conference held on November 24, 2009, and at the oral argument on the UPW's Motion to Dismiss Complaint and/or for Summary Judgment and Motion to Dismiss for Lack of Prosecution held on December 7, 2009.

On January 12, 2010, the Board issued Order No. 2677, which granted in part and denied in part, the UPW's Motion to Dismiss Complaint and/or for Summary Judgment, and denied UPW's Motion to Dismiss for Lack of Prosecution. The Board concluded that Complainant's claim of breach of duty of fair representation may only lie against the UPW as an entity, and liability, if any, rests solely with the UPW and not Nakanelua or Akau personally.

On March 8, 2010, the UPW filed a Motion for Summary Judgment, asserting that Complainant's claim of breach of duty of fair representation is a "hybrid" claim that also requires a claim of breach of the collective bargaining agreement, which Complainant did not allege.

On March 11, 2010, Complainant filed his Response to UPW's Motion for Summary Judgment, and Complainant's Motion for Summary Judgment, asserting that exhibits filed in this matter contain the allegations of the contract violations, and that Respondents have presented no reasonable answer or defense to the Complaint.

On March 15, 2010, Respondents filed their Opposition to Complainant's Motion for Summary Judgment Filed on March 11, 2010, asserting that Complainant has misconstrued which party has the burden of proof in prohibited practice proceedings.

On May 12, 2010, Complainant filed a Motion to Amend Complaint Filed on October 20, 2009, seeking an amendment to clarify any confusion and/or issues presented by the Respondents as to the alleged failure to state a claim for which relief can be granted; to clarify the claim; to identify and clarify relief in these proceedings; and to clarify that Complainant is a witness in these proceedings.

On May 17, 2010, Respondents filed their Memorandum in Opposition to Motion to

Amend Complaint Dated October 20, 2009, Filed on May 12, 2010, asserting that the proposed amendment would be time-barred and futile.

On June 15, 2010, the Board issued Order No. 2710, Order Denying UPW's Motion for Summary Judgment, Filed on March 8, 2010, and Order Denying Complainant's Motion to Amend Complaint, Dated October 20, 2009.

On July 13, 2010, the Board held a hearing on the merits in this matter. Complainant began his case by calling Gay Matsuzawa-Ahloy, from his employer Board of Water Supply's Department of Human Resources. Ms. Matsuzawa-Ahloy testified as to the processing of Complainant's grievance. Complainant then called John Loa, Jr., an employee of the Board of Water Supply. Mr. Loa testified as to Complainant's interview by the Board of Water Supply during the employer's investigation. Complainant then called Jordan Kurahara, an employee of the Board of Water Supply, who testified that he did not know anyone was put in danger at the scene of the incident, and did not recall Complainant running over any cones with his truck. Complainant then called William Iaela, an employee with the Board of Water Supply, who testified that he was elected as a steward three times, but did not handle Complainant's grievance. Respondents moved for a directed verdict, asserting Complainant failed to satisfy his burden of proof of establishing any breach of duty of fair representation. Following a recess and Board conference, the Board Chair permitted Complainant to take the stand, subject to cross examination. After taking the stand, Complainant testified as to the events of the incident involving the traffic cones allegedly being knocked down; that there was nobody near the cone area, nobody was in danger, and no credible eye-witness saw the cones knocked down; that the Union ceased to contact him after the Step 1 decision of his grievance, or attempt to interview anyone to support his position; that the investigation was incomplete and Complainant did not get to finish his testimony. At the conclusion of Complainant's testimony, Respondents renewed their motion to dismiss, asserting that no foundation had been established, and Complainant had not met his burden of proof regarding a breach of duty of fair representation. Following a recess and Board conference, the Board granted Respondents' oral Motion to Dismiss.

On May 16, 2014, Respondents filed their Motion to Dismiss Complaint, requesting a written order dismissing the Complaint consistent with the July 13, 2010, ruling made following a hearing before the Board. Pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii), answering affidavits, if any, to motions "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." No opposition to Respondent's Motion to Dismiss Complaint, filed on May 16, 2014, was filed by Complainant.

The Board hereby finds that Complainant failed to present sufficient evidence of breach of duty of fair representation to support his claim against Respondents. Complainant's witnesses did not establish arbitrary, capricious, discriminatory, or otherwise wrongful conduct by Respondents. Complainant did not submit the record of the employer's investigation into evidence. Ms. Matsuzawa-Ahloy testified at the hearing on the merits that based on a review of all the records, she believed there was a basis for the discipline, and that following review, the workplace violence component of the discipline was dropped.

Pursuant to HRS § 91-10, which governs “[r]ules of evidence; official notice” in contested case proceedings, “the party initiating the 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 the evidence.” Similarly, pursuant to HAR § 12-42-8(g)(16) of the Board’s Rules of Practice and Procedure, 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 Board has previously relied upon the Hawaii Rules of Civil Procedure (HRCP) to assist in resolving ambiguities in its rules or procedures. See, e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428 (applicability of HRCP Rule 30(a) requiring unusual circumstances to obtain leave to take depositions prior to the expiration of 30-day waiting period); United Public Workers, 5 HLRB 177 (1993) (Board considered the respondent’s motion to dismiss after the presentation of the Complainant’s case as a motion filed under HRCP Rule 41(b)); Order No. 1903, July 21, 2000, Hawaii Government Employees Association, (HRCP Rule 6(b) “excusable neglect” standard utilized to interpret the “extraordinary circumstances” language of HAR § 12-42-45); and Order No. 1937, September 29, 2000, Luis Ballera, (HRCP Rule 15(c) regarding relation back of amendments to pleadings when HAR is silent).

Pursuant to HRCP Rule 41(b), a defendant may move for dismissal of an action or of any claim against it for failure of the plaintiff to prosecute or comply with the rules or order of the court. Additionally, pursuant to HRCP 50(a), if during a trial a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issues, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Accordingly, based upon the Board’s finding that Complainant failed to present sufficient evidence of breach of duty of fair representation to support his claim against Respondents, the Board grants Respondents’ Motion to Dismiss, filed May 14, 2014.

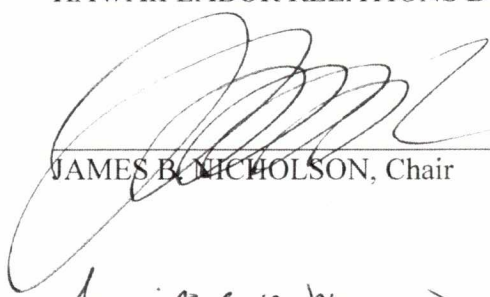
Pursuant to HRS § 91-11, whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.ⁱⁱ

Accordingly, NOTICE IS HEREBY GIVEN that any party adversely affected by the above proposed findings of fact, conclusions of law, and order granting Respondents’ Motion to Dismiss Complaint, may file exceptions with the Board within ten days after service of this document. The exceptions shall specify which findings or conclusions are being excepted to,

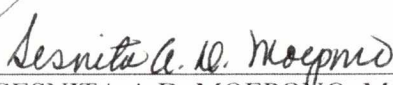
with citations and legal arguments presented in support of the party's position. A hearing for the presentation of arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

DATED: Honolulu, Hawaii, September 29, 2014.

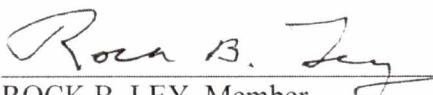
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

William M. Taamu
Herbert R. Takahashi, Esq.

ⁱ HRS § 377-8, governing unfair labor practices of any person, provides:

It shall be an unfair labor practice for any person to do, or cause to be done, on behalf or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by section 377-6 and 377-7.

HRS § 378-58, governing action against labor organization, limitation, provides:

Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.

Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed.

ⁱⁱ Current Board Members Sesnita A.D. Moepono and Rock B. Ley did not participate in the hearing held on July 13, 2010; however, they have reviewed the entire record, including the pleadings and exhibits filed or entered in this matter, and the recording of the proceedings of July 13, 2010.