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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>NATHAN MAKINO,<br><br>Complainant,<br><br>and<br><br>COUNTY OF HAWAII; and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondents. | CASE NOS. CE-01-856, CU-01-332<br><br>ORDER NO. 3073<br><br>ORDER DENYING COMPLAINANT'S MOTION TO TAKE DEPOSITIONS UPON ORAL EXAMINATION, AND DENYING UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT; NOTICE OF SECOND PREHEARING/ SETTLEMENT CONFERENCE |

# ORDER DENYING COMPLAINANT'S MOTION TO TAKE DEPOSITIONS UPON ORAL EXAMINATION, AND DENYING UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

As a preliminary matter, the Hawaii Labor Relations Board (Board) notes that certain exhibits filed with the Board contain confidential information that is not relevant to the Board's determination of the motions before it, such as individuals' social security numbers and home addresses. The Board requests that, in the future, the parties redact all confidential information that is not relevant to the proceedings prior to filing; if a party believes the confidential information is relevant to the proceedings, such party shall move the Board to accept the confidential information under seal or pursuant to a confidentiality agreement between the parties.

## I. THE COMPLAINT

On April 20, 2015, Complainant NATHAN MAKINO (Complainant) filed with the Board a Prohibited Practice Complaint (Complaint) against Respondents COUNTY OF HAWAII (County) and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). The Complaint's attachment alleges, *inter alia*, that Complainant was employed by the County as a Laborer II; that on or about January 24, 2014, a physical altercation occurred among other co-workers, and Complainant was attacked from behind by one of the co-workers and forced to defend himself from physical harm; and, as a result of the assault and defending

himself, he was terminated from employment by the County. Complainant further alleges that the UPW filed a grievance with the County on his behalf, and that from March 14, 2014, until March 19, 2015, Complainant believed the UPW and the County were processing his grievance and engaging in negotiations to resolve his grievance. Complainant alleges that on or about December 15, 2014, he was informed by the UPW's business agent that an agreement had been reached between the County and UPW, that the County had agreed to reinstate him, that he would not receive any back pay, and that his seniority would be reinstated. Complainant alleges that from December 15, 2014, through and including March 10, 2015, he was in contact with the UPW's business agent and was told on numerous occasions that the agreement had been finalized and was waiting for approval by Mayor Billy Kenoi (Mayor). Complainant also alleges that on or about March 20, 2015, he received a letter from the UPW's state director informing him that his grievance was withdrawn. Complainant alleges he was unfairly prejudiced in his employment and rights under the applicable collective bargaining agreement (CBA) and chapter 89, Hawaii Revised Statutes (HRS), by the UPW because the union failed in its duty to represent Complainant fairly or competently in his grievance, including but not limited to misrepresenting to Complainant that an agreement between the County and the UPW had been reached so that Complainant would be reinstated with seniority but no back pay, and informing Complainant that the UPW did not intend to pursue his grievance.

Complainant also alleges that the County was aware that Complainant was defending himself from physical attack by a co-worker who had previously tested positive for ingesting illegal drugs; that the County was aware, prior to the attack, that the co-worker behaved erratically and was potentially violent; and that the County lacked "just and proper cause" to terminate Complainant.

Complainant alleges that the County and the UPW conspired to suppress Complainant's exercise of his employment rights under the applicable CBA and HRS chapter 89, including but not limited to shielding the violent co-worker from discipline. Complainant further alleges that the UPW deliberately, intentionally, fraudulently, and/or negligently misled Complainant about the status of his grievance and the existence of an agreement that would result in Complainant's reinstatement.

The Complaint alleges a prohibited practice by the County pursuant to HRS § 89-13(a)(8), which provides in relevant part:

> 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[.]

The Complaint alleges prohibited practices by the UPW pursuant to HRS § 89-13(b)(1), (4), and (5), which provides in relevant part:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent willfully 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.

## II. COMPLAINANT'S MOTION TO TAKE DEPOSITIONS

On May 21, 2015, Complainant filed with the Board Complainant's Motion to Take Depositions Upon Oral Examination (Motion to Take Depositions), seeking to take the depositions of three individuals: Alton Nosaka (Nosaka), a business agent for the UPW; the authorized representative from the County, in the Human Resources Department or the Mayor's Office, with whom Nosaka communicated regarding any settlement involving Complainant (County employee); and Anson Young (Young), Complainant's co-worker who came forward on behalf of Complainant regarding Complainant's grievance and settlement of his case.

Complainant asserts that he seeks to take the three depositions because Complainant cannot afford the transportation costs of the three witnesses to attend the hearing on the merits of this case. The Motion to Take Depositions was made pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(a) and (g)(6).

In his Motion to Take Depositions, Complainant asserts that Complainant was attacked from behind by one of the co-workers, and that Young was standing right next to him at the time of the attack. Complainant also asserts that he believed the County and the UPW were processing his grievance and engaging in negotiations to resolve his grievance based on representation made by Nosaka. Complainant further asserts that on or about December 15, 2014, he was informed by Nosaka that an agreement had been reached between the County and the UPW concerning his termination; that the County had agreed to reinstate him; that he would

not receive any back pay; and that his seniority would be reinstated. Complainant asserts that from December 15, 2014, through and including March 20, 2015, he was in contact with Nosaka and told on numerous occasions that the agreement has been finalized and was only waiting for approval by the Mayor. Complainant claims that on approximately thirty occasions he called, talked to, and/or left messages for Nosaka. Complainant asserts that on or about March 20, 2015, he received a letter from the UPW Director informing him that his grievance was withdrawn. Complainant further asserts, *inter alia*, that the County conspired with the UPW to suppress Complainant's exercise of his rights under the CBA, including but not limited to shielding a violent co-worker from discipline; that the UPW deliberately, intentionally, fraudulently, and/or negligently misled Complainant regarding his grievance and reinstatement; that the County rejected Complainant's grievance because it failed to abide by the application deadlines in the Unit 1 CBA; and that Complainant detrimentally relied on the misrepresentations by the UPW.

On June 2, 2015, the County filed Respondent County of Hawaii's Memorandum in Opposition to Complainant's Motion to Take Depositions Upon Oral Examination Filed May 21, 2015 (County's Memorandum in Opposition). The County asserts that it cannot determine who from the County the Complainant is seeking to depose; Complainant already knows the County's reasons for why it believes it had just and proper cause for terminating Complainant; and depositions cannot substitute for live testimony.

On June 2, 2015, the UPW filed Union Respondent's Memorandum in Opposition to Motion to Take Depositions Upon Oral Examination Filed May 21, 2015. The UPW asserts that Complainant failed to show "good cause" to take depositions since no real, substantial, or compelling reasons have been shown to exist; Complainant did not specifically name Nosaka, the County employee, or Young as witnesses on the merits, and allowing depositions will not further the prospects of settlement as claimed by counsel for Complainant at the prehearing conference; allowing depositions based on considerations of costs to one party or another would result in a substantial change to the practice and procedure of the Board; and settlement discussions between Nosaka and representatives of the County are privileged under Rule 408 of the Hawaii Rules of Evidence and inadmissible and not subject to discovery.

On June 5, 2015, Complainant filed Complainant's Reply Memorandum in Support of Complainant's Motion to Take Depositions Upon Oral Examination Filed on May 21, 2015, asserting, *inter alia*, that he seeks to depose the witnesses to confirm or disprove the alleged lie by the UPW and the existence of the County's "just cause," and that if his theory is unconfirmed, then more likely than not Complainant would have to withdraw the present action. Complainant also proposed as an alternative that the Board order Respondents to produce the applicable witnesses at trial at Respondents' expense.

On June 16, 2015, the Board heard oral arguments on Complainant's Motion to Take Depositions.

HAR § 12-42-8(g)(6) provides:

> Discovery, depositions, and interrogatories:
>
> (A) Upon written application and for good cause shown, the board may permit the parties to take deposition upon oral examination or written interrogatories in the manner prescribed under the Hawaii Rules of Civil Procedure.

As Complainant argues, generally, the Board must conduct a balancing test when determining whether there is "good cause" to allow a party to conduct discovery. "[T]he court must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled." Brende v. Hara, 113 Hawaii 424, 431, 153 P.3d 1109, 1116 (2007). Further, that courts should take into consideration the cost of discovery (Complainant cites to Buzzeo v. Board of Education, Hempstead, 178 F.R.D. 390, 393 (E.D.N.Y. 1998)).

In the present case, the Board agrees with Respondents' opposition to the motion, that the taking of depositions would not necessarily save the Complainant cost because absent stipulation by all the parties, depositions will not replace live testimony before the Board. Furthermore, the UPW would incur additional expense if it were to send its own counsel to attend the depositions on the Island of Hawaii, which it may feel necessary to protect its own rights in this proceeding. In balancing Complainant's need for information and the potential cost savings of taking the depositions, and including the additional costs that could be incurred by Complainant as well as the other parties in taking or attending the depositions, and the Board's usual procedure that disfavors the taking of depositions, the Board hereby DENIES Complainant's Motion to Take Depositions.

However, the Board is also concerned with minimizing the travel and expenses for parties who are not located on Oahu, and utilizing more cost efficient means when a case involves non-Oahu parties (see, e.g., Hawaii Revised Statutes (HRS) § 89-5(j)). For this reason, the Board favorably considers the alternative proposed by the UPW at oral argument, that Complainant be allowed to obtain the information he seeks by submitting written interrogatories in lieu of taking depositions. It is likely Complainant's costs, as well as Respondents' costs, would be less than if Complainant were to take oral depositions.

Therefore, the Board will permit Complainant, if he so desires, to submit written interrogatories to the three individuals identified in his Motion to Take Depositions. The following shall apply:

(1) The County shall, within **two weeks** from the issuance of this Order, identify its employee who was, or who would have been, primarily responsible for negotiating any settlement agreement or last chance agreement involving Complainant, so that Complainant may direct his written interrogatories to the most appropriate employee; and

(2) The written interrogatories shall be governed by the provisions of Rule 33 of the Hawaii Rules of Civil Procedure, except that the number permitted shall not exceed **twenty**, counting subparts or subquestions, rather than the sixty permitted by Rule 33.

Finally, the Board notes that one of the UPW's objections to the Motion to Take Depositions is that settlement discussions between Nosaka and representatives of the County are privileged under HRE Rule 408, and inadmissible and not subject to discovery. However, the Board agrees with Complainant's assertions that Rule 408 is inapplicable if the evidence is offered to show that a party made fraudulent statements to settle a litigation, or if the evidence of settlement is not offered to prove liability or damages, but for some other purpose. Furthermore, the Board has previously held that the process of grievance adjustment is part and parcel of the collective bargaining process, and that repudiation of a settlement agreement to resolve a grievance can form the basis of a prohibited practice complaint (see United Public Workers, AFSCME, Local 646, AFL-CIO and Bernard K. Akana, Board Case No. CE-01-121, Decision No. 337, 5 H.R.L.B. 177 (1993)), and therefore settlement of a grievance is not strictly identical to settlement discussions in general civil litigation.

## III. THE UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On June 9, 2015, the UPW filed a Motion to Dismiss and/or for Summary Judgment. The UPW asserts, *inter alia*, that on April 17, 2014, the UPW filed a grievance on Complainant's behalf (Grievance AN-14-02); that on April 17, 2014, the UPW commenced investigation of the grievance with a request for information; that on April 28, 2014, the director of public works for the County responded to the information request; that on June 13, 2014, the director of public works denied the grievance at Step 1; that on June 23, 2014, the UPW filed an appeal to Step 2 of the grievance procedure; that on July 31, 2014, the deputy director of human resources for the County denied the grievance at Step 2; that the UPW and the County mutually agreed to extend the time regarding Step 3 of the grievance process to November 14, 2014; and that on November 7, 2014, the UPW submitted its letter of intent to arbitrate the grievance.

The UPW further asserts that on March 10, 2015, Complainant wrote a letter to the UPW withdrawing its authority to resolve the grievance in case number AN-14-02. The letter stated the following:

> I want to thank you for all your help in my case. But I have been out of work since January 24, 2014. You offered me and my family some hope by telling me that the County agreed that I could go back to work if I did not request back pay. I agreed because of our financial hardship and that we have just been blessed with a newborn. I need to take care of my family.
>
> But you told me that over three months ago. I called you last week and you told me the same thing you've been telling me over the past few months, that the agreement is sitting on the Mayor's desk. And there is no end in sight. I have worked for the County for sixteen years and I am very frustrated by how I am being treated. The needs of my family force me to do something.
>
> At this point, I simply don't have any other choice and I request that my case be sent to arbitration. If the union is not willing to support my request, I need to see that in writing. My understanding is that at the most I should have been suspended, not terminated and I have been treated unfairly. I am asking for the union's help to take this matter to arbitration as soon as possible because of union's duty of fair representation.
>
> The only settlement that I will consider is that I be reinstated immediately and given full back pay with interest, from January 24, 2014 to the present. You can tell the County that I am taking this position because of the way I've been treated by the County. I hope and request that you and my union support me on this.
>
> I've had a very good record with the County. I was the one who was attacked. I was defending myself. What the County is telling me is that I should have been beaten up and filed a workers' compensation claim, which the County would deny anyway.
>
> I am desperate and frustrated and I need the union to help me as it would any other member. Please contact me as soon as possible about this. If the union is going to deny my arbitration request, I need to see that in writing to explain it to my wife. I cannot believe I've been forced into this position.

On March 19, 2015, the state director of the UPW made a decision not to arbitrate the grievance regarding Complainant's discharge. The UPW sent to Complainant a letter that contained the following:

> As the affected employee, the Union is informing you that it processed the above-cited grievance through the grievance procedure of the [CBA].
>
> Based on a review of the entire matter, including but not limited to the applicable provisions of the CBA and the evidence presented, the Union has decided not to pursue the above-cited grievance because there is insufficient proof that there is a violation of the CBA.

In his Declaration attached to the Motion to Dismiss and/or for Summary Judgment, the UPW's state director provided reasons for his decision not to proceed to arbitration, including the fact that employees in bargaining unit 1 have been informed of the seriousness of workplace violence by the County through its policies and posted notices on employee bulletin boards, and training; that employees have also been informed of the seriousness of workplace violence and the view of arbitrators in Hawaii through the Malama Pono and the Section 8 meetings conducted by the UPW; that according to the documents and records provided to the union during the grievance process, the investigation of the employer appeared to be fair and objective; that the statements of a witness supported the employer's findings that Complainant used excessive force causing the witness to black out; and that the UPW had previously arbitrated work place violence discipline and discharge cases and had not prevailed in numerous instances.

The UPW argues that the employer did not breach the collective bargaining agreement by dismissing Complainant for workplace violence, and therefore Complainant cannot establish a "hybrid" claim. The UPW also argues that the UPW did not breach its duty of fair representation when it decided not to arbitrate Complainant's grievance, for a breach occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith.

On June 16, 2015, Complainant filed Complainant's Memorandum in Opposition to Respondent UPW's Motion to Dismiss and/or for Summary Judgment Filed on June 9, 2015. Complainant asserts that a union violates the duty of fair representation when it lies and makes fundamental, material and fraudulent representations to its dues paying members; further, that lying about or failing to file a request for arbitration in a timely manner is also a breach of the duty of fair representation. Complainant also asserts that he has a constitutional, due process, interest in having the Board hear his Complaint of whether or not the UPW lied and misrepresented to him about having an agreement with the County.

On June 16, 2015, the County filed Respondent County of Hawaii's Joinder to United Public Workers, AFSCME, Local 646, AFL-CIO's Motion to Dismiss and/or for Summary Judgment, incorporating by reference the arguments and legal authorities set forth in the Memorandum in Support of Motion filed contemporaneously therewith.

On June 18, 2015, Complainant filed Complainant's Supplemental Memorandum in Opposition to Respondent UPW's Motion to Dismiss and/or for Summary Judgment Filed on June 9, 2015, asserting that Complainant alleges and seeks to prove that the UPW lied to Complainant because (1) no "Last Chance" agreement was ever given to the County; or (2) the County never agreed to the "Last Chance" agreement; and (3) the UPW's business agent lied to Complainant that the County agreed to a "Last Chance" agreement. Complainant asserts he is not inquiring into the substance of settlement discussions; inquiring into the terms and conditions of the "Last Chance" agreement; or inquiring into negotiations related to any settlement agreement.

On June 23, 2015, the Board heard oral arguments on the UPW's Motion to Dismiss and/or for Summary Judgment.

A. Motions to Dismiss

The Board adheres to the legal standards used by the courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. In considering a motion to dismiss for lack of subject matter jurisdiction, a court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "[d]ismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) *(citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008).

B. Motions for Summary Judgment

Under HRCP Rule 56 (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any 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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court has adopted the burden shifting paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to

carry his or her proof at trial. Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 472, 99 P.3d at 1056.

However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

C. Claims of Breach of Duty of Fair Representation and Breach of CBA

In Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 94 P.3d 652 (2004), the Hawaii Supreme Court reviewed a circuit court decision affirming the Board's dismissals of five prohibited practice complaints filed by the same employee against his employer based on the same collective bargaining agreement violations. The Board's dismissals were based on a failure to exhaust contractual remedies because of an inability to establish that the union breached its duty of fair representation. In considering whether the circuit court's decision affirming the Board's dismissals was proper on this ground, the Court, relying on federal precedent and its prior decisions, articulated the principles and analysis applicable to these "hybrid" cases that allege a breach of the collective bargaining agreement claim against the employer and a breach of fair representation claim against the union:

> This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." "The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means."
>
> The final stages of the grievance procedure in the instant case requires the union to advance the employee's claim. "A labor union is charged with the duty of protecting the interests of its members as a group, and a union's interests are therefore broader than those of any one of its members." "When the interests of members of the bargaining unit are not identical, a union may be unable to achieve complete satisfaction of everyone. It is granted a 'wide range of reasonableness'

so long as it acts with 'complete good faith and honesty of purpose.'" Thus an employee does not have an absolute right to have the union pursue his or her claim. As the Supreme Court observed:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his [or her] grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas on the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.
>
> If the individual employee could compel arbitration of his [or her] grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.
>
> However, when the union wrongfully refuses to pursue an individual grievance, the employee is not left without recourse. Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. In Vaca[i], the Supreme Court noted:

> [A] situation when the employee may seek judicial enforcement of his [or her] contractual rights arises, if, as is true here, the union has the sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his [or her] contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which [it] agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstance would, in our opinion, be a great injustice. . . .
>
> For these reasons, we think the wrongfully discharged employee may bring an action against his [or her] employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation.

The two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but also carry the burden of demonstrating breach of duty by the Union. The employee may, if he [or she] chooses, sue one defendant

and not the other; but the case he [or she] must prove is the same whether he [or she] sues one, the other, or both.

Poe, 105 Hawaii at 101-102, 94 P.3d at 656-657 (citations omitted).

The duty of fair representation is to be narrowly construed because unions must retain discretion to act in what they perceive to be their members' best interests. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953); Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985). Any substantive examination of a union's performance must be highly deferential. Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991) (O'Neill).

More specifically, a breach of the duty of fair representation occurs only when a union's conduct toward a collective bargaining unit member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). Poe, 105 Hawaii at 104, 94 P.3d at 659.

1. The Arbitrary Element

A union's actions are arbitrary 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. O'Neill, 499 U.S. at 78. "Arbitrary conduct" has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests.'" Johnson, 756 F.2d at 1465, *citing* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978).

In Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), the Ninth Circuit stated that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his [or her] claim." The Ninth Circuit noted as examples of a union acting arbitrarily where the union failed to: disclose to an employee its decision not to submit a grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from the employer; file a timely grievance after it decided that the grievance was meritorious and should be filed; consider individually the grievances of particular employees where the factual and legal differences among them were significant; or permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration.

A union's decision is arbitrary only if it lacks a rational basis; further, a union's conduct may not be deemed arbitrary "simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the

grievance at an arbitration hearing." Patterson v. Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997). Rather, if it is determined that the union's refusal to pursue the appellants' grievance was an act involving its judgment, the appellants must provide some evidence of the union's bad faith or discrimination in order to prevail. Stevens v. Moore Business Forms, 18 F.3d 1443, 1448 (9th Cir. 1994).

2. The Discriminatory Element

Whereas the arbitrariness analysis looks to the objective adequacy of a union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the union's officials. Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2002). Discriminatory conduct may be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301 (1971).

In Simo, the Ninth Circuit acknowledged that the United States Supreme Court and the Ninth Circuit have provided little guidance regarding what constitutes discrimination in the duty of a fair representation context. The Simo court noted that the O'Neill decision suggested that only "invidious" discrimination is prohibited by the duty of fair representation. After citing the Tenth Circuit's explanation that "discrimination is invidious if based upon impermissible or immutable classifications such as race or other constitutionally protected categories, or arises from prejudice or animus," the Ninth Circuit deemed these grounds too restrictive, noting that they have held for example, that a union may not "discriminate on the basis of union membership." 322 F.3d at 618. The Ninth Circuit then concluded that there was no evidence of discriminatory intent in that case.

3. The Bad Faith Element

Whether or not a union's actions are in bad faith call for a subjective inquiry and requires proof that the union acted, or failed to act, due to an improper motive; assertions of bad faith must be supported with subsidiary facts. Yeftich v. Navistar, 722 F.3d 911, 916 (7th Cir. 2013). For a bad faith claim to be established, there must be evidence of fraud, deceitful action, or dishonest conduct. Humphrey v. Moore, 375 U.S. 335, 348 (1964).

D. The Assertions of Respondents and Complainant

The UPW's memorandum in support of its Motion to Dismiss and/or for Summary Judgment, along with its accompanying documents, makes a very plausible argument regarding the UPW's efforts to fairly investigate and process a grievance on Complainant's behalf, as well as the County's reasons for Complainant's termination. However, in his Memorandum in Opposition and Declaration attached thereto, Complainant raises material facts in dispute that

preclude the Board from granting dismissal or summary judgment. Specifically, Complainant asserts, *inter alia*, in his Declaration that he was attacked from behind by one of his co-workers and forced to defend himself from physical harm; that he was led to believe that the County and the UPW were engaging in negotiations to resolve his grievance, and that an agreement had been reached whereby he would be reinstated without back pay but with seniority restored; that Complainant had been told on numerous occasions that the agreement had been finalized and was only awaiting approval by the Mayor; that Complainant called Nosaka on approximately thirty occasions and talked to him and/or left messages for him to call back; that Complainant was shocked to receive a letter from the UPW informing him the grievance was withdrawn because he "had been waiting all this time, had no income and was not looking for another job because of Mr. Nosaka's representations"; and that Complainant feels misled and betrayed because of "lies and falsehood told to [him] about the existence of an agreement to get [him] back to work."

Additionally, Complainant asserted in his Complaint that he was defending himself from physical attack by a co-worker who had previously tested positive for ingesting illegal drugs, and that the County was aware, prior to the attack, that the co-worker behaved erratically and was potentially violent. Complainant further alleges that the County and the UPW conspired to suppress Complainant's exercise of his employment rights under the applicable CBA and HRS chapter 89, including but not limited to shielding the violent co-worker from discipline. The County's investigation report, attached as Exhibit 6 to the UPW's motion, indicates that the investigator listed previous "Disciplinary Actions" taken against Complainant, including the date of the action and a brief description of the basis for the action; however, when listing the prior disciplinary actions of the other employee involved in the January 24, 2014, incident, the investigator listed a "20 working day suspension" and a "10 working day suspension" with the only description for each being, "BU 01 CBA, 63A Supplemental Agreement dated 03/17/08."

In summary, the Board must view the allegations of the Complaint and the evidence submitted thus far in a light most favorable to Complainant, who is the non-moving party. Complainant raises sufficient material facts in dispute to avoid both dismissal of his prohibited practice claims and summary judgment against him.

## NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-47, the Board will conduct a prehearing/settlement conference in this matter on **October 8, 2015,** at **9:00 a.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 343, Honolulu, Hawaii. All parties have the right to appear in person and to be represented by counsel or a representative.

Any party not residing on the island of Oahu may appear telephonically at the prehearing/settlement conference by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten days prior to the prehearing/settlement conference.

Auxiliary aids and services are available upon request by calling Ms. Ebata at the above-listed telephone numbers. A request for reasonable accommodations shall be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, July 7, 2015.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

HAWAII LABOR RELATIONS BOARD * STATE OF HAWAII *

Copies sent to:
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[i] Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967).